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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1894

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
HOWELL EDMONDS JACKSON, Associate Justice.[1]
EDWARD DOUGLASS WHITE, Associate Justice.

RICHARD OLNEY, Attorney General.
HOLMES CONRAD, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Justice Jackson, by reason of illness, heard argument in no case after October 23, 1894, here reported, except *Pollock* v. *Farmers' Loan & Trust Company*, (Rehearing).

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1894.

ROBERTS *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 124. Argued December 17, 18, 1894. — Decided April 22, 1895.

Where a railroad company, having the power of eminent domain, has entered into actual possession of lands necessary for its corporate purposes, whether with or without the consent of their owner, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages if the entry was unauthorized, belongs to the owner at the time the railroad company took possession.

If a land owner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

So far as it was within the power of the State of Wisconsin, through and by its legislature, to authorize the county of Douglas, in that State, to contract with the Northern Pacific Railroad Company for the construction of its road within that county on a designated line, and to estab-

Statement of the Case.

lish a lake terminus within the same, and upon the fulfilment of those conditions to convey to it certain of its unsettled public lands, that power was conferred and the contract between the county and the railroad company in respect thereof was ratified by the act of March 23, 1883; and, if there was any want of regularity in the proceedings of the county, it was thereby waived and corrected.

Said grant was made on a valuable consideration, which was fully performed when the railroad company had constructed its road and had established the lake terminus in the county as it had contracted to do; and the company then became entitled to a conveyance of the lands, and so far as the Supreme Court of Wisconsin can be regarded as having held to the contrary, the courts of the United States are not bound to follow its decision when applied to a corporation created by an act of Congress, for National purposes, and for interstate commerce.

Error cannot be imputed to a court for refusing to allow an amendment or supplement to an answer, after the case had progressed to a final hearing, nor to its judgment in disregarding the allegations of such proposed amendment.

Applying to this case the rules in regard to estoppel laid down in *Cromwell* v. *Sac County*, 94 U. S. 352, it is *Held*, that the question or point actually litigated in the state court in *Ellis* v. *Northern Pacific Railroad*, 77 Wisconsin, 114, was not the same with those before the Federal court in this case, and hence, as the causes of action in the two courts were not the same, the judgment in the state court, while it might determine the controversy between the parties to it as respects the pieces of land there in question, would not be conclusive in another action upon a different claim or demand.

This was a bill in equity filed in the Circuit Court of the United States for the Western District of Wisconsin in December, 1889, by the Northern Pacific Railroad Company, a corporation organized under and by virtue of an act of Congress approved July 2, 1864, against David E. Roberts, J. F. Ellis, and Euclid L. Johnson, wherein the complainant sought to quiet its title to certain lands in Douglas County, Wisconsin.

The railroad company claimed title to the lands in question under an agreement of purchase and a deed of conveyance from the county of Douglas. The defendants set up a title under a subsequent deed of conveyance from the same county. After certain pleas and demurrers on behalf of the defendants, Roberts and Ellis, were overruled, the case was disposed of on bill and answer, and a final decree was rendered in favor

of the complainant against Roberts and Ellis, and dismissing the bill without prejudice as to Johnson. From which decree an appeal was taken by Roberts and Ellis to this court.

The record discloses that an agreement was made on December 16, 1880, between the Northern Pacific Railroad Company and the county supervisors of Douglas County, whereby the former undertook to construct, complete, and equip its line of railroad through Douglas County by a route proposed by the county, and to erect certain wharves and docks to make a connection between the railroad and Lake Superior, and in consideration of this the county agreed to sell and convey certain parcels of land of which the county had become possessed by sales for unpaid taxes.

On January 16, 1882, the county board, by resolution, after reciting that the railroad company had complied with the terms of the agreement, authorized a deed of conveyance of the lands to be executed and delivered to the company. In the deed there was an acknowledgment of the receipt of one dollar in hand paid, and of the performance by the company of its part of the agreement. This deed, dated January 20, 1882, was duly recorded in the office of the register of deeds of Douglas County.

The bill alleged that the company had expended in the construction of the main line from the Northern Pacific junction through Douglas County to Superior, and in the construction of proper depots, side tracks, and connections, the sum of $542,098.78; in the construction of the bay front line to Conner's Point, the terminus called for in the agreement, the sum of $93,423.91; and in the construction of a dock or pier in the bay of the town of Superior the sum of $116,249.73. It was also alleged in the bill, and not denied in the answer, that at the time when the county proposed to dispose of said lands to the company said lands were non-taxable and yielded no income whatever to the county, and that ever since they were conveyed to the company the latter had in each and every year paid the taxes levied thereon, and had expended large sums of money in the payment of such taxes, to wit, more than five thousand dollars; that its title to said lands

remained undisputed by any one during all the time from said January 20, 1882, until the month of July, 1888; and that, in the meantime, the company had sold and conveyed various parcels of said lands to many different persons, and whose titles are based upon said deed of the county to the company.

On the 6th day of July, 1888, and on the 7th day of March, 1889, the county clerk of said county, in pursuance of a resolution of the board of supervisors, made deeds of those dates to the plaintiff in error, Roberts, for an alleged consideration of $385.

The other facts of the case are sufficiently stated in the opinion.

Mr. William F. Vilas for appellants.

I. The Supreme Court of Wisconsin, interpreting and enforcing the constitution of the State, has authoritatively adjudged that no municipal corporation, county, town, or city can bestow public property upon a railroad company as an aid or inducement to its building any line of road. Long before the transaction in question, repeated decisions of the court declaring and recognizing this law had been made and published, and the constitutional limitation so settled was notorious.

This proposition will not be questioned.

In 1869, at its June term, the Supreme Court of the State rendered its judgment in the locally famous case of *Whiting* v. *Sheboygan and Fond du Lac Railroad Company*, 25 Wisconsin, 167, by which it was decided that the state constitution denied all power or right in municipal corporations to give public property for private purposes, or even for such quasi-public purposes as railroads, and prohibited the legislature from conferring such power by any act; that stock subscriptions to railroads, although a breach of the rule, had by so many decisions been so long tolerated as to have secured place as an exception; but beyond that exception the constitutional limitation must be imperatively observed and maintained. After review of it, with elaborate arguments, upon a

motion for rehearing, the court adhered to this interpretation, and filed an additional opinion at the January term, 1870.

In 1871, at its June term, in *Phillips* v. *Albany*, 28 Wisconsin, 340, the court, affirming the exception in favor of a stock subscription, under the rule *stare decisis*, reiterated its determination to adhere to the limitation declared in the *Whiting case.*

Again, in 1872, in *Rogan* v. *Watertown*, 30 Wisconsin, 259, the *Whiting case* was referred to with approbation.

In 1878, in *Bound* v. *Wisconsin Central Railroad*, 45 Wisconsin, 543, there was renewed expression by the court of its adherence to the prescribed limitation.

From the decision in the *Whiting case* to this day, there has never been the least qualification of or variation from that interpretation, nor want of complete understanding or acceptance of it by the profession and the public. Much additional notoriety was given to that construction because this court, in *Olcott* v. *The Supervisors*, 16 Wall. 678, disagreed with the state court in opinion, and, having the basis that the county orders in question had been issued before the interpretation was declared and while a different one had received colorable support at least, sustained and enforced the same obligations the Supreme Court of the State had adjudged invalid in the *Whiting case.*

It cannot, therefore, be open to question that under the state constitution, as authoritatively construed by the highest state tribunal, the transaction between the county board of Douglas county and the appellee, and as well the act of the legislature subsequently procured in the attempt to validate it, were without legal force and effect; nor could it be doubtful beforehand that such would be the judgment of the state Supreme Court, adhering to its line of decisions. No hope of a different result in that tribunal could be entertained, except by its complete reversal of former judgments and the overthrow of the constitutional limitation as theretofore adjudged to exist; and, in point of fact, that was the exact and only effort of the railroad company, in argument on the subject in the state court.

When, therefore, the Supreme Court of Wisconsin was presented by the company's appeal with the action first brought by the appellant Ellis, as before stated, it naturally inevitably said, *Ellis* v. *Northern Pacific Railroad*, 77 Wisconsin, 118, 119: "There is nothing to distinguish this case, or to take it out of the decision in the *Whiting case;* for if the county could not donate money or securities to a railroad corporation, it could not give it its lands, which are the property of the county."

And in response to the attempt to reverse the interpretation given the constitution in former years, it said: "And while the distinction between a stock subscription and a donation or other appropriation of public money or corporate property to a railroad corporation is not very distinct and obvious, yet we are unwilling to extend a bad rule of law a particle beyond where the courts had carried it, and shall, therefore, adhere to the doctrine of the *Whiting case.* Besides, that case has been fully approved in subsequent cases in this court;" and reference is thereupon made to those already above referred to. The invalidity of the act of the legislature of 1883 inevitably follows, the court saying, of course: "But if the legislature could not authorize the county in the first instance to donate its lands to the railroad company, it could not cure or make valid such a donation after it had been made."

II. The general principle that the Federal courts are bound to accept the construction of a state constitution or state statute, and to follow the rule of decision in matters of local, intra-state concern, settled and maintained by the Supreme Court of the State, has been too long established by the decisions of this court to require argument or recall of cases.

Undeniably, that rule must govern the decision now unless this case falls within some just and recognized exception. Here rises the first contention, and its consideration requires not only careful attention to the exceptions established by the judgments of this court, but justifies close review of the reasons which support the general doctrine as well as particular exceptions.

Argument for Appellants.

The foundation of all the reasons for the general principle, and as well for the just exceptions, lies in the nature of the relations between the Federal and state governments. In all judicial controversies involving the powers and dignity of the Federal government, the interpretation of its laws and treaties, the authority or responsibility of its officers, as in all involving the rights of different States in a particular subject, and some between a State and persons, citizen or alien, the final supremacy of this court is as natural and necessary as it is indubitably given by the constitution. In its own learning, wisdom, and fidelity, lie the springs of all such judgments. All extraneous aids are advisory, carrying no authority but in the strength of good counsel. It is the judicial law-giver of the Federal nation, and its doctrines command the rightful reverence due its lofty jurisdiction quite as well as its particular judgments enjoy the power of the Federal government for their enforcement.

But within the State the Supreme Court thereof is equally entitled to a like supremacy in all judicial controversies involving the interpretation of the state constitution and laws, the powers and limits of all its inferior political divisions, corporations, and agencies, the responsibility and authority of all its public officers, and all subjects of local intra-state concern, save only when these affect Federal relations or touch somewhere a line of the Federal constitution. Within the confines of the State its Supreme Court is as justly the judicial law-giver as this court in the nation, and its doctrines, in their application to every subject there confined, are entitled to the respect due the highest jurisdiction of human society.

To such intra-state subjects the jurisdiction of the Federal court can but occasionally and fortuitously extend, resting mainly on the accident or circumstance of the citizenship of one of the parties. The honest mind is thus coerced to recognize that, while the power to render as to enforce its judgment still flows to the Federal court from the Federal government, the law of the State must determine that judgment and its judicial law-giver guide to knowledge of that law.

The obligation to respect the law of a State as settled by

its Supreme Court is not matter of judicial comity; it stands on the duty to adjudge the law as it is, the duty of respect and obedience justly owing to human government in its best possible form and estate. It is peculiarly incumbent on this great tribunal because, albeit from necessity, the Federal constitution has entrusted to its supreme protection and care the novel and delicate principles of the Federal system, with power to trample on it, not less than the duty to observe it.

III. The state court of Wisconsin first acquired a complete jurisdiction over this entire controversy; it was adequate to its full determination; the opinion of the highest court of the State, invoked by the appellee, and conclusive against the deed by which it claims, was rendered before the hearing of this cause in the lower court; and it ought to have been respected as an estoppel.

That the decision of the state Supreme Court in the action of Ellis against this appellee is in law of itself a complete estoppel, seems too obvious for discussion. Assume, for a clear view, that this suit was not brought until after the final judgment on the last appeal in that case.

It would then stand that Ellis in privity of estate with Roberts by virtue of the latter's grant, had obtained final judgment that the deed of the county of Douglas to the appellee was null and void and passed no title to the seven lots or parcels to which that suit extended. So far it assuredly now is an absolute bar. But equally absolute it must be as an estoppel against the appellee in favor of Ellis and Roberts in at least any *subsequent* action or suit, because the invalidity of the entire deed of conveyance, to all lands described in it, not less than the seven pieces, was the exact and essential point in judgment.

In *Cromwell* v. *Sac County*, 94 U. S. 351, the distinction between the force of a judgment as a bar and as an estoppel is clearly presented, and the conclusiveness of the estoppel shown.

Not less certain is it that when once upon a writ of error or intermediate appeal the judgment of the highest court has been rendered upon any point in controversy, the resolution

reached is *res judicata*, not to be reversed even by the same court on any subsequent presentation of the same case. The rule has been often enforced by this court, as by others, and in Wisconsin such has been the force of an intermediate judgment since the earliest cases.

The Supreme Court of Wisconsin, in the judgment which this appellee had invoked by its appeal from the order of the state circuit court overruling its demurrer to the complaint of Ellis, had, therefore, conclusively adjudicated as between these parties that the deed from Douglas County to the appellee passed no title, and that the attempted cure of its invalidity by the act of the legislature was futile because the legislature possessed no constitutional power to pass it. *Ellis* v. *Northern Pacific Railroad*, 77 Wisconsin, 114. This decision controlled and substantially ended the litigation, for nothing else remained to be litigated; although by the practice prevailing in the State the defendant had leave formally to answer over; so that when again the defendant appealed, the complete response of the Supreme Court was that the case had been already adjudicated. There remained nothing to consider. *Ellis* v. *Northern Pacific Railroad*, 80 Wisconsin, 459.

And this judgment was rendered *before* the hearing of this case in the court below. Irrespective of the doctrine requiring acceptance of the law from the rule of decision in the State, this judgment ought to have been respected as an estoppel of the point in litigation.

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

Mr. John C. Spooner filed a brief for same.

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

So far as those portions of the lands, described in the bill of complaint, consist of parcels held and used by the railway company for the necessary and useful purposes of their road as a public highway, it is obvious that the title and possession thereof cannot be successfully assailed by the appellants. The

latter became purchasers long after the railroad company had entered into visible and notorious possession of these portions of the lands, and had constructed the roads, wharves, and other improvements called for by their contract with the county.

It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession.

In *Schuylkill Nav. Co.* v. *Decker*, 2 Watts, 343, where there was a claim for damages caused to land by the construction of a canal, and where the land had been subsequently conveyed to a third person, it was held by the Supreme Court of Pennsylvania that such purchaser was not entitled to recover. The court said, per Chief Justice Gibson to this claim: "It is a decisive objection that the plaintiff has not a title to the damages, which, being in compensation of an injury in the nature of a trespass, could not pass by mere conveyance of the land. In like manner the conveyance of a party wall does not entitle the grantee to contribution from the adjoining owner, it being held in *Hart* v. *Kucher*, 5 Serg. & Rawle, 1, that the claim is satisfied by payment to the first builder, though the purchaser had not notice of it; and, on the same principle, it was held in *Commonwealth* v. *Shepard*, 3 Penn. 509, that the claim to compensation under the act adjusting the titles to land in . . . Luzerne and Lycoming counties is personal, and does not pass by a conveyance of the land. Granting the compensation here to be, what it certainly is, the price of a perpetual easement, it is impossible to imagine a title to it in a subsequent grantee of the land subject to the easement."

And in *McFadden* v. *Johnson*, 72 Penn. St. 335, the same court held that the damages to land, occasioned by the construction of a railroad, were a personal claim by the owner

when the injury occurred — that they did not run with the land, nor pass by a deed, though not reserved.

Numerous authorities to the same effect may be found collected in Wood on Railroads, vol. 2, p. 994; and the conclusion established by the decisions is there said to be that the damages belong to the owner at the time of the taking, and do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein.

So, too, it has been frequently held that if a land owner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages. *Lexington & Ohio Railroad* v. *Ormsby*, 7 Dana, 276; *Harlow* v. *Marquette, &c. Railroad*, 41 Michigan, 336; *Cairo & Fulton Railroad* v. *Turner*, 31 Arkansas, 494; *Pettibone* v. *La Crosse and Milwaukee Railroad*, 14 Wisconsin, 443; *Chicago & Alton Railroad* v. *Goodwin*, 111 Illinois, 273.

It is not pretended that Roberts, the subsequent purchaser, acted in ignorance of the railroad company's title. On the contrary, in the answer it is alleged that "the defendant, Roberts, purchased said lands from said county in good faith and for the consideration named, which was the actual value of the title to said lands, the value of such title having been greatly impaired and rendered almost valueless by the cloud upon the same created by said resolutions of the county board and such conveyance by the county clerk and such legislative act." So far, then, from being a purchaser for a valuable consideration without notice, Roberts actually avows that he bought lands worth over two hundred thousand dollars, and upon which, as alleged in the bill and not denied in the answer, the railroad company has expended, in the construction of its road and the erection of depots and docks and piers, several hundred thousand dollars, for the nominal sum of three hundred and

eighty-five dollars, and that he secured this bargain because the outstanding and well-known title of the railroad company, originating in the county's contract and deed, confirmed by the act of the legislature, "greatly impaired and rendered almost valueless" the title so purchased by Roberts.

The conclusion, therefore, seems warranted that, as to those portions of the lands in question which are occupied and used by the railroad company, the county having stood by for years, and permitted the company to proceed in the construction of its road and appurtenances at a vast expense, and having accepted large sums as taxes, would be estopped from interfering with the possession of the railroad company. *A fortiori*, it follows that Roberts, buying with notice, could not maintain either trespass or ejectment *for such portions*, nor would he, as such purchaser, be entitled to recover damages for the occupation thereof.

The foregoing observations apply only to those portions of the lands in question which have been actually occupied and used by the railroad company for corporate purposes, or, in other words, to such lands as the railroad company could have condemned by the exercise of its right of eminent domain.

But, as it appears in the bill and answer, that considerable portions of the land in dispute are not held or occupied by the railroad company for its necessary public purposes, but for sale to others, and presumably could not have been procured by the company under its power of condemnation, other questions are raised for our consideration.

And, first, it is claimed that the county, in granting such lands to the company, made a donation of them, or, in other words, that the company became possessed of them without having given any legal consideration therefor, and that the county was disabled by law from so parting with its property.

A natural observation, when this proposition is presented, is, that the county does not appear to have ever attempted to rescind or withdraw from the transaction. As already said, the railroad company proceeded to construct its road and expend its money on the faith of the grant, during a period of several years, the county not objecting, and, indeed, contin-

uing to recognize the company's title by accepting the annual taxes. Nor is the county now a party to the attempt to deprive the company of its property. Should these appellants succeed in appropriating to themselves the lands in question, their success would not inure to the benefit of the county. The only pretence of authority from the county to assail the company's title is found in the quitclaim deeds executed to the defendant Roberts by the county clerk, pursuant to a resolution of the board of supervisors of the county, in 1888, for an alleged consideration of three hundred and eighty-five dollars. Whatever might be the result in a court of law of a contest between these respective grantees of the county, it may well be doubted whether a court of equity could be successfully appealed to by a purchaser from the county of property worth upwards of two hundred thousand dollars for a nominal consideration of less than four hundred dollars. If the county had found that it had been overreached in its bargain with the railroad company, or had learned that its grant of these lands was invalid for want of power, and had come into a court of equity, offering to do equity by an offer to return or account for the consideration received, the condition of things would have been different from what it now is. In such a proceeding the rescission would have inured to the benefit of the taxpayers of the county ; but, under the present claim, the benefit would go to a private party, who bought with knowledge of the county's previous sale, and who admits in his answer that he secured his own grant for a grossly inadequate consideration because of the fact of such previous sale.

Nor can it be said that these observations do not apply to Roberts and Ellis, who, as defendants in the equity proceedings, may claim to be regarded as involuntary parties, for, in their answer, they do not content themselves with denying the complainants' title, but offer to do equity, to an insignificant extent, by offering to return the amount of the taxes paid, and themselves pray for the decree that their title may be established, and for such other and further relief as may be proper and agreeable to equity.

So far, at least, as the claim of Roberts and Ellis to affirmative equitable relief is concerned, we think that they cannot, in the circumstances disclosed, be permitted to assert the supposed invalidity of the county's grant to the railroad company.

Our argument has heretofore proceeded on the assumption that the grant by the county to the railroad company was a donation, a mere gift, and, therefore, in view of cited decisions of the Supreme Court of Wisconsin, beyond the power of the county, and invalid; and our conclusions, upon that assumption, and as respects those portions of the lands which have been subjected to use as a public highway, are that the county, much less its subsequent grantees with notice, cannot, in the state of facts disclosed by this record, disturb the possession of the railroad company; and that, as respects those other portions of the lands, which the railroad company could not have taken by the exercise of its power of eminent domain, and as to which the company must depend upon the validity of the county's grant, the defendants, as purchasers with notice and upon an inadequate consideration, are in no position to invoke the assistance of a court of equity.

But it is contended on behalf of the railroad company that the assumption that the county's grant was a mere gift, a donation without consideration, and therefore void as against the county and its subsequent grantees, is unfounded; that the transaction was really a sale within the legitimate powers of the county and the railroad company, and that the company, having performed its part of such sale by the payment of the consideration, is entitled to the protection of a court of equity against such a claim as is set up by Roberts and Ellis.

Our next inquiry, therefore, is whether the railroad company was entitled to that part of the decree of the court below which confirmed their title to such portions of the lands as they could not have appropriated under their power of eminent domain. Was it within the power of the county to sell, and of the company to buy, such lands; and, if such powers were possessed, were they validly exercised?

There is no room for doubt that the railroad company was

legally competent to receive a grant of lands, to enable it to construct and maintain its road. The Northern Pacific Railroad Company was organized under and by virtue of the act of Congress, approved July 2, 1864, c. 217, 13 Stat. 365, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," in which act it was, among other things, provided that "the said company is authorized to accept to its own use any grant, donation, power, franchise, aid, or assistance which may be granted to or conferred upon said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid." And by an act of the legislature of the State of Wisconsin, approved April 10, 1865, the company was, for the purposes set forth in said act of Congress, and to carry the same into full effect, vested with all the rights, powers, privileges, and immunities, within the limits of the said State of Wisconsin, which were given by said act of Congress within the territorial jurisdiction of the United States.

In September, 1880, the railroad company, having theretofore constructed its railroad and telegraph line to a point in the State of Minnesota, was about to select the point or points on Lake Superior to which their said line should be extended. In this condition of affairs the authorities of the county of Douglas, desiring to secure the extension of the railroad through their territory, and the establishment of a lake terminus within the same, made a proposal to the company to transfer by sufficient deed or deeds to the company all the alienable lands or lots belonging to the county which had been acquired by deed, to which the county had held undisputed title for more than two years, if the company would construct their road upon a route desired by the county and establish a terminus, with sufficient docks, and piers suitable for the transfer of passengers and freight from the railroad cars to and from lakegoing craft, within the limits of the county.

This proposal was accepted by the railroad company, and a contract to that effect was entered into between the parties, and, in pursuance thereof, the railroad company, during the year 1881, constructed and equipped its line of railroad upon the route selected by the county, and built the docks and piers and other structures called for by the contract, expending in so doing the sum of about $740,000. On January 16, 1882, the county board by a resolution, reciting that the railroad company had complied with the terms of the contract and had performed its part thereof, authorized the execution of the proper deeds; and thereupon a deed was executed and delivered to the railroad company, conveying, among other lands, those in dispute. This deed was, on the same day, duly recorded in the office of the register of deeds of Douglas County. Ever since the company has maintained and operated its road and wharves, and has paid and the county has received annual taxes, amounting to about five thousand dollars.

By an act, approved March 23, 1883, c. 150, Sess. Laws 1883, 113, the legislature of the State of Wisconsin enacted as follows: "Any conveyance heretofore made by the county of Douglas to the Northern Pacific Railroad, under and in pursuance and satisfaction of resolutions of the county board of said county, dated September 7, 1880, is hereby declared to be valid and effectual to vest in the Northern Pacific Railroad Company the title to the lands conveyed or attempted to be conveyed by such conveyance; and any assignment of tax certificates heretofore made to the said railroad company, upon the property, or any part thereof, embraced in or conveyed by said conveyance, pursuant to and in satisfaction of and in compliance with said resolutions, is hereby declared to be valid."

Thereafter the railroad company sold and conveyed, for value, portions of these lands to third parties.

So far then, as it was within the power of the State of Wisconsin, through and by its legislature, to authorize the county of Douglas to make the contract in question, it must be regarded as granted by or, at any rate, ratified by, said statute, and, if there was any want of regularity in the pro-

ceedings of the county in making the same, such irregularity must be deemed to have been waived and corrected.

But it is contended that, despite the making of the contract between the county and the company, the fulfilment by the latter of the condition and terms prescribed, the execution and delivery of a deed of conveyance, and the ratification and confirmation of the transaction by an act of the legislature, the contract and conveyance were nevertheless void, because the grant was a mere donation, without consideration, and hence forbidden by the constitution of the State of Wisconsin, as construed and interpreted by the Supreme Court of that State.

To maintain this position the appellants cite the case of *Whiting* v. *Sheboygan & Fond du Lac Railroad*, 25 Wisconsin, 167, in which it was held, by a divided court, that the erection and maintenance of a railroad, as a public highway, by a company endowed with the right of eminent domain, was not such a public use or purpose as will support taxation for raising money to be donated to such a corporation.

In so holding, that court reached a conclusion different from that established in a long and almost unbroken line of judicial decisions in the courts of most of the States. As is stated in Dillon's Municipal Corporations, vol. 1, sec. 158, "the Supreme Court of the United States, following repeated intimations of its judges in previous cases, have directly sustained the validity of legislative acts authorizing municipal aid to railways. In view of the prior adjudications of that tribunal in the municipal bond cases, and of the almost uniform holding of the state courts, no other result could have been anticipated. This ends judicial discussion if it does not terminate doubts. The Supreme Court, in reaching this result, places its judgment upon the ground that highways, turnpikes, canals, and railways, although owned by individuals under public grants, or by private corporations, are *publici juris;* that they have always been regarded as governmental affairs, and their establishment and maintenance recognized as among the most important duties of the State, in order to facilitate transportation and easy communication among its

different parts; and hence the State may put forth, in favor of such improvements, both its power of eminent domain, as it constantly does, and its power to tax."

It is contended, on behalf of the plaintiffs in error, that where the question involves the powers of a state corporation, and the meaning and effect of the constitution and laws of a State, it is the duty of this court to adopt the decisions of the courts of such State. But we do not perceive that the doctrine of *Whiting* v. *Sheboygan & Fond du Lac Railroad* and of the cognate Wisconsin cases, is fairly applicable to the case before us. There are two very important particulars in which the present case differs from those adjudicated by the Wisconsin courts, and which, we think, warrant an opposite conclusion. In the first place, the transaction between the county of Douglas and the Northern Pacific Railroad Company did not involve the exercise of the taxing power of the county. The county did not issue bonds, or seek to subject itself to any obligation to raise money by taxation. The case, as already stated, was that of a sale. The county authorities had ample powers to sell and convey such of its lands as were not used or dedicated to municipal purposes. The ratifying act of the legislature of Wisconsin, alone considered, avails to remove any doubt upon that point. Nor can the plaintiffs in error consistently deny such a power in the county, as their only title is based on its exercise. It is, indeed, urged that the county authorities could only sell its lands for money. We do not accede to this proposition. If they possessed the power to sell for money, we are pointed to no express provision of law that restricts them from selling for money's worth. Even upon such a narrow view, it may well be contended that the consideration received by the county included a money payment. The deed recites the payment of money by the company to the county at the time of the conveyance, and it is a conceded fact that the lands since they came into the possession of the company have yielded considerable sums as taxes to the county. It is straining no principle of law or of good sense to regard the payment of an annual tax as equivalent, for the purpose of our present inquiry, to the payment of

a rent. The amount, as well as the nature of the consideration received by the county in exchange for its lands, if it had the power to sell them, was a matter that concerned the county only. The State, as we have seen, did not only not complain, but fully ratified the sale.

The courts of Wisconsin have, in a series of decisions never overruled, held that it is competent for municipal corporations, if authorized so to do by the legislature, to aid the construction of railroads by subscribing to the stock of companies formed for that purpose, and paying therefor by bonds, and, of course, to raise the means of paying the latter by taxation. The task of reconciling this class of decisions with that holding that municipalities, even with legislative sanction, cannot promote railroads by donating money or credit to them, is not ours. It may, perhaps, be said that what is forbidden is a resort to the taxing power where the muncipality has received no consideration. But, as we have shown, the county in the present case paid no money and issued no bonds requiring any exercise of the taxing power. It was the case of a sale, in consideration of money paid down and to be paid in the form of taxes, in addition to the great advantages to inure to the public.

There is a second important feature that distinguishes this case from those relied upon now by the appellants, and that is the character of the railroad company, as a corporation created for public and national purposes. The Wisconsin courts were dealing with corporations of their own State, and they went upon the proposition that the construction and maintenance of railroads did not constitute a public purpose, because the corporations created to build and run railroads were strictly private corporations formed for the purpose of private gain. If the making and maintaining a railroad in Wisconsin by a state corporation was not a public use, it was thought to follow that such an enterprise could not receive municipal aid. And it may be conceded that, when we are called upon to pass upon the legal rights of a Wisconsin railroad company, we should follow the law laid down by the state courts. But the question now arises whether such a

proposition is applicable to the case of a corporation created by a law of the United States, and subjected by its charter to important public duties. The Northern Pacific Railroad Company was incorporated by the act of Congress approved July 2, 1864, already referred to. It was authorized to lay out, construct, and maintain a continuous railroad and telegraph line, with the appurtenances, from a point in the State of Minnesota or Wisconsin on Lake Superior to some point on Puget's Sound, and "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, munitions of war, and public stores over the route of the said line of railway," there was granted a large amount of public lands and a free right of way through the Territories of the United States. It was made the duty of the company to permit any other railroad which should be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it on fair and equitable terms. The company is authorized to enter upon, purchase, or condemn by legal proceedings any lands or premises that may be necessary and proper for the construction and working of said road. It is enacted that all people of the United States shall have the right to subscribe to the stock of the company until the whole capital is taken up; that no mortgage or construction bonds shall ever be issued by said company on said road, except by the consent of the Congress of the United States; that said railroad, and any part thereof, shall be a post route and a military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation, and that said company shall obtain the consent of the legislature of any State through which any portion of said railroad line may pass previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

By an act approved April 10, 1865, c. 485, the legislature

of the State of Wisconsin declared that, for the purposes set forth in said act of Congress, and to carry the same into full effect, the Northern Pacific Railroad Company was vested with all the rights, powers, privileges, and immunities within the limits of the State of Wisconsin which were given by said act of Congress.

It is obvious that the effect of this legislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, and subject, in important respects, to the control of Congress. That portion of its road that lies within the State of Wisconsin is of the same public character as the portions lying in other States or Territories. Whatever respect may be due to decisions of the courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisions cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company. All of the great transcontinental railroads were constructed, under Federal authority, through Territories which have since become States. Such States are possessed of the same powers of sovereignty as belong to the older States. Hence, if the contention were true that the State of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders of its national character, and declare the Northern Pacific Railroad Company to be a private corporation not engaged in promoting a public purpose, the same would be true of the other States through which the road passes. Such a contention, we think, cannot be successfully maintained.

Congress has power "to regulate commerce with foreign nations and among the several States," and to "establish post offices and post roads." Const. art. 1, sec. 8, par. 3 and 7. As was said in *Pensacola Tel. Co.* v. *West. Union Tel. Co.*, 96 U. S. 110: "The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by an-

other upon the national rights which belong to all;" and it was held, that a law of the State of Florida which attempted to confer, upon a single corporation of its own, the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory, was inoperative against a corporation of another State, where Congress had enacted "that any telegraph organized under the laws of any State should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States," and where such other corporation had secured a right of way by private arrangements with the owners of the lands. This principle has been repeatedly recognized by this court in numerous decisions. *Telegraph Co.* v. *Texas*, 105 U. S. 460.

In *Osborn* v. *United States Bank*, 9 Wheat. 738, 823, it was held that a suit by or against a corporation of the United States is a suit arising under the laws of the United States, and that, on jurisdiction thus attaching in the Federal courts, the judicial power is extended to the whole case. In the course of the opinion Chief Justice Marshall observed: "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not itself the mere creature of a law, but all its actions and all its rights are dependent on the same law."

In *Pacific Railroad Removal Cases*, 115 U. S. 1, 18, *Osborn* v. *United States* was followed, and it was held that corporations of the United States created by and organized under acts of Congress are entitled as such to remove into the Circuit Courts of the United States suits brought against them in the state courts, on the ground that such suits are suits "arising under the laws of the United States." In that

case one of the subjects of contention was as to the legal character of the Union Pacific Railway Company. It appeared that the original company was authorized by the act of Congress of July 1, 1862, to extend its road into the State of Missouri — that is, "to construct a railroad and telegraph line *from* the Missouri River at the mouth of Kansas River, on the south side thereof [which is in the State of Missouri], so as to connect with the Pacific Railroad of Missouri, *to* the aforesaid point on the one-hundredth meridian of longitude," namely, the point where the Union Pacific was to commence. This provision looked to the establishment of a continuous line of railroad from the Mississippi River (the eastern terminus of the Pacific Railroad of Missouri) to the Pacific Ocean; and this court said, by Mr. Justice Bradley: "The power assumed by Congress in giving this authority to the Kansas company was, undoubtedly, assumed to be within the power 'to regulate commerce among the several States;' and, although by an act of the legislature of Missouri, passed in February, 1865, the consent of that State was also given to the extension of the road into its territory and to its connection with the Missouri road, the fact remains that the company claimed and assumed to exercise its powers under the act of Congress, as well as by the consent of the legislature of Missouri. So that the right of appropriating the property in question in this case was claimed under authority of an act of Congress. This circumstance adds strength to the claim of the plaintiff in error that the case was one arising under the laws of the United States."

We think, therefore, that when the Circuit Court of the United States for the District of Wisconsin was called upon, in the present case, to pass upon the character, powers, and rights of the Northern Pacific Railroad Company, it was bound to regard that company as a corporation of the United States, created for national purposes and as a means of interstate commerce, and not to apply to it the views of the Wisconsin courts pertaining to their local railroads.

Upon the principle of these cases it is obvious that the State of Wisconsin, at least after it had given its consent to

the Northern Pacific Railroad Company to enter into its territory and construct its road, and such consent had been acted on, could not, by hostile legislation, hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national legislation for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations.

The doctrine, then, of the courts of Wisconsin, that it is not competent for municipalities to donate money or lands or pledge their credit to promote the construction and maintenance of railroads, because the latter are not public in their character, is not applicable to the present case, for the reason that the transaction in question was not the case of a donation or of a pledge of credit requiring the exercise of the taxing power, but was the case of a sale for a valuable and adequate consideration, and for the further reason that the Northern Pacific Railroad Company is a corporation of a public character whose road is a highway and post road for national uses and to subserve interstate commerce, and, therefore, not within the scope and reason of the decisions relied on by the plaintiffs in error.

But it is further contended, on behalf of the plaintiffs in error, that whether the transaction between the county and the company was that of a sale for a sufficient consideration, or whether the Northern Pacific Railroad Company is a corporation invested with powers of a national origin and subjected to duties of a national character, were not questions open for consideration in the court below, because of the case of *Ellis* v. *Northern Pacific Railroad*, 77 Wisconsin, 114, 118.

That was a case wherein J. F. Ellis, one of the plaintiffs in error in the present case, had filed a bill of complaint against the Northern Pacific Railroad Company in a Circuit Court of the State of Wisconsin, seeking to quiet his title to certain lots of land. These lots had been conveyed to Ellis by Roberts, who claimed to have purchased them from the county

of Douglas, and were some of the lots sold and conveyed by that county to the Northern Pacific Railroad Company, but were not lots included in the present controversy. The railroad company demurred to the complaint; the Circuit Court overruled the demurrer; from the order so overruling the demurrer an appeal was taken to the Supreme Court of Wisconsin; and that court on May 20, 1890, affirmed the order of the Circuit Court, and remanded the cause for further proceedings. In its opinion the court said: "There is nothing to distinguish this case, or to take it out of the decision in the *Whiting case;* for if the county could not donate money or securities to a railroad corporation it could not give its lands, which are the property of the county."

It is observable that the court's attention does not seem to have been drawn to those facts which are calculated to justify a finding that the transaction was a sale on consideration, and not a donation, nor to the real character of the Northern Pacific Railroad Company as a national organization, and thus distinguished from a local railroad company, which was dealt with by the Wisconsin courts in the *Whiting case.* This inattention by the Supreme Court of Wisconsin to such important particulars was probably occasioned by the fact that the case was before them on a demurrer by the company to the complaint of Ellis. It is further to be observed that no final judgment was entered by the Supreme Court of the State, but the cause was remanded to the court below for further proceedings.

Afterwards, and before the final hearing in the state circuit court, the present suit of the Northern Pacific Railroad Company against Roberts and Ellis came to a hearing, and resulted in the decree complained of in this appeal.

The record discloses that in their answer to the company's bill Roberts and Ellis alleged that Ellis had brought an action in the circuit court of Douglas County against the railroad company, which was then pending and undetermined in the Supreme Court of Wisconsin, but they did not pray for any delay or withholding of decision to await the result of such case. The cause was put down for hearing upon the bill

and answer on November 18, 1890; on February 11, 1891, a final decree was ordered to be entered in favor of the complainant, according to the prayer of the bill.

The record also discloses that, at a date not distinctly disclosed, Roberts and Ellis filed with the clerk a supplemental answer, setting up the decision of the Supreme Court of Wisconsin, affirming the order of the circuit court overruling the demurrer to Ellis's complaint as a judgment in bar of the right of the Northern Pacific Railroad Company to proceed in its suit in the Circuit Court of the United States, and claiming that as to the questions so decided by the state courts they became and were by said judgment *res judicata*. The right to file this supplemental answer was not granted by the court, nor was it adverted to in its opinion.

Error could scarcely be imputed to a court for refusing to allow an amendment or supplement to an answer after the case had progressed to a final hearing, nor to its judgment in disregarding the allegations of such proposed amendment. But, waiving that suggestion, and regarding the matter set up in the supplementary as if it had been alleged in the original answer, we are unable to see that the decree of the court below ought to have been affected by anything so alleged.

The suit in the Circuit Court of the State was brought by Ellis to quiet title to lots of land which were not in controversy in the Federal courts, nor was Roberts a party therein. While it may be conceded that the decision rendered in the state court was decisive as between Ellis and the railroad company as to the title to the lots there in question, yet the Circuit Court of the United States, whose jurisdiction had been invoked as to other pieces of land, and with other parties involved, could not be expected to suspend its action, or to adopt a conclusion of the state court reached after the case had been submitted on final hearing in the former court.

Nor do we feel bound to accede to the contention that this court ought now to test the correctness of the decree of the court below by applying to it the views of law upon which the state court proceeded in the case before it. As we have seen, the state Supreme Court did not seem to have before it

the question whether the transaction was not really a sale and not a donation. This is shown by the statement made in its opinion. (77 Wisconsin, 118.) "The lands were conveyed by the county in pursuance of this agreement, and *it is said that the transaction was, in effect, but a donation of its property to the company*, to secure the building of the branch of the railroad designated; and the question is, could the board of supervisors of the county dispose of the property of the county in this way by donating it to the railroad company?" Nor, as we have further seen, do the character and functions of the Northern Pacific Railroad Company, as a national highway and instrument of interstate commerce, appear to have been considered. The conclusion in the Supreme Court of Wisconsin seems to have been reached upon the assumption that the county had donated its lands without consideration to a railroad company organized solely under the laws of Wisconsin. It is apparent, therefore, that the question or point actually litigated in the state court was not the same with those before the Federal court, and hence, as the causes of action in the two courts were not the same, the judgment in the state court, while it might determine the controversy between the parties to it as respects the pieces of land there in question, could not be conclusive in another action upon a different claim or demand. This distinction was clearly recognized in the case of *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. That was a case where there was brought into question the effect, as between the same parties, of a former judgment holding invalid coupons taken from the same bond with those in a second suit, and it was there said: "In considering the operation of this judgment it should be borne in mind that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to

every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and of the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not as to what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of judgments mentioned is seen through all the leading adjudications upon the doctrine of estoppel. . . . The cases usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the

same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. . . . It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

It was accordingly held in that case that a party plaintiff who had been defeated in one action upon coupons cut from county bonds because he failed to show that he was a *bona fide* holder for value, was not precluded from showing, in a subsequent action brought to recover on other coupons cut from the same bonds, that he was such *bona fide* holder for value of such other coupons. Under this contention the plaintiffs in error cite *Johnson Co.* v. *Wharton*, 152 U. S. 252, but it is not inconsistent with *Cromwell* v. *County of Sac*, which, indeed, is approved and cited at length.

Error is likewise assigned to the decree because the bill of complaint was multifarious. This assignment is sufficiently disposed of by a reference to *Gaines* v. *Chew*, 2 How. 619, 642, and the cases therein cited.

It is further argued that the court below erred in sustaining a bill in equity for the title to land of which the complainant

was not in possession. The bill avers that the railroad company was in possession of the lots and tracts of land described in the bill. The pleas of Roberts and of Ellis deny respectively that the company was in possession of the several pieces of land claimed by them, but they do not deny that the company was in possession of the lots claimed by Johnson, the co-defendant, and they made the following averment in their answer: "That none of the lots or tracts of land mentioned and described in said bill of complaint were at the time of the commencement of this action or at any time prior or subsequent thereto occupied by, or in the possession of, the complainant, except that the roadbed of its said railroad crosses the following-described tracts, that is to say, lots 217, 339, etc., [Here follows an enumeration of some twenty-five tracts] — that part of said tracts so crossed by said road, as well as the whole of the other tracts of land mentioned and described in complainant's bill, are vacant and unoccupied, and have so remained for more than ten years last past."

It was therefore conceded that the complainant was in actual possession of a portion of the lands, and that the defendants were not in possession of the balance, which are stated to be vacant and unoccupied. An actual possession of a part and a constructive possession of the rest would clearly bring the complainant's case within the remedy provided by the statute of Wisconsin, (§ 3186 Rev. Stat. 1878,) that any person having possession and legal title to lands may institute an action against another person setting up a claim thereto to quiet the title thereto. And in *Chapman* v. *Brewer*, 114 U. S. 170, we held, following previous cases, that, in such a case, a Circuit Court of the United States, having otherwise jurisdiction in the case, will administer the same relief in equity which the state courts can grant. Nor would the complainant, in the present case, have any remedy at law, on the defendants' admission that the lands are vacant and that they are not in possession of them. *Holland* v. *Challen*, 110 U. S. 15; *Whitehead* v. *Shattuck*, 138 U. S. 146.

Upon the whole we are of opinion that the court below committed no error, and its decree is accordingly *Affirmed.*

In re BUCHANAN, Petitioner.

ORIGINAL.

No. 12. Original. Argued April 16, 1895. — Decided April 17, 1895.

A question in relation to the physical and mental condition of a juror and his competency to return a verdict is a question of fact, and this court upon a writ of error to the highest court of a State in an action at law cannot review its judgment upon such a question.

THE case is stated in the opinion.

Mr. J. J. Noah and *Mr. Dennis A. Spellisey* for petitioner.

Mr. John D. Lindsay opposing. *Mr. John R. Fellows* was on the brief.

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

Petitioner was tried in the Court of General Sessions of the city and county of New York upon an indictment charging him with the murder of his wife, by poison, April 22, 1892. The trial was commenced March 20, 1893, and was concluded April 26 following by the rendition of a verdict of guilty. A motion for a new trial was denied, and petitioner was sentenced August 14, 1893, to the punishment of death upon a day within the week commencing October 2, 1893, and on the seventeenth of August he appealed to the Court of Appeals. The appeal was argued before that court January 21, 1895, and the judgment affirmed February 26, 1895. The execution of petitioner was again appointed for the week commencing April 22. Application is made for a writ of error to this court upon the ground that petitioner's trial, conviction, and sentence are in contravention of the Constitution of the United States in that "petitioner is sought to be deprived of life without due process of law," and in "that he was not tried by an impartial jury of the State and dis-

trict wherein the crime was committed." In the sixty-sixth specification of his motion for a new trial defendant alleged that "the verdict of the jury is not such a verdict as is contemplated by the Constitution of the United States or the constitution of the State of New York. The only verdict recognized thereunder is that of a jury of twelve men of sound mind and memory, which this verdict is not." This seems to have been the only claim of a Federal question made in the state courts, and falls far short of that specific assertion of a right, privilege, or immunity under the Constitution, at the proper time and in the proper way, upon the denial of which this court is entitled to reëxamine the judgment of a state court on writ of error.

Assuming it as sufficient, however, the contention of petitioner is thus set forth in his petition:

"Your petitioner further alleges in support of his averments that, upon the trial of said case, one Paradise, one of the petit jurors empanelled therein, became mentally incapacitated, and was not in condition, mental and physical, to be consulted and was not consulted by his fellow-jurors while deliberating thereon; that by reason of his said mental and physical incapacity he was absent from the jury room for nearly three hours, separate and apart therefrom, and in company with a physician and another person then and there attending him; that others of the jury were allowed to separate and communicate with outside parties pending deliberations upon the verdict; that when finally called into court for the purpose of delivering the verdict of said jury, Paradise's mental and physical incapacity had not ceased, and he was still mentally and physically incapacitated from participating in and rendering his assent to the verdict of said jury; and that therefore said verdict was not rendered by a competent and impartial jury, all of which petitioner avers will be shown by the record.

"And your petitioner further represents that, notwithstanding the evident mental and physical incapacity on the part of said juror, Paradise, the court refused to recognize the same and ordered that the said incapacitated juror be embraced with

his fellow-jurymen in considering and rendering their verdict, and thereby the jury was rendered partial and, in fact, the verdict emanated from only eleven jurors, of which the record duly attests, and whereof your petitioner is ready to submit record proof."

In respect of these matters the Court of Appeals, *People* v. *Buchanan*, 145 N. Y. 1, 29, said:

"After the jury had retired, an incident occurred, which has been made much of and which constituted the basis, in part, of a motion for a new trial. The jury retired in the afternoon of April 25th. In the evening of the day following, they were taken over to a hotel for their dinner. Paradise, one of their number, was taken suddenly ill and fainted. A physician was called in, who found him first unconscious and then delirious. He had him removed to another room, where he treated him professionally. A report of the occurrence was made to the recorder; who sent for and examined the attending physician, in the presence of the district attorney and of the defendant's counsel. He gave a description of what had taken place and of what he had done. He gave his opinion that the attack had been caused by the mental strain and he thought the juror might be able to come to the court after a while. Later in the evening, the juror, having improved, was brought over and took his seat, with his associates, in the jury box. It appeared that they had agreed upon a verdict before the illness; but the recorder thought it inadvisable, under the circumstances, to then receive their verdict; advising them to again retire and confer. They did so and shortly returned with their verdict. Upon the facts, as they were made to appear, there was nothing to warrant the trial judge in refusing to receive the verdict.

"Subsequently, however, upon the hearing of the motion for a new trial, certain other facts were made to appear, which we have considered carefully, with the view of ascertaining whether they furnish any sufficient reason for believing that the verdict of the jury was not properly or fairly reached. One branch of the motion was based on the ground that there had been an illegal separation of the jurors. Affidavits were

read, showing that upon the removal of the sick juror from the room, in which he and his fellow-jurors were dining together, the other jurors separated; some running to and from the sick man's room and others going in other directions and alone. In opposition were read the affidavits of the jurors and of the court officers; to the effect that the jurors were always in charge of the officers; that none of them were ever alone and that no communication was had with them by any person in reference to the case. Upon these proofs, it was discretionary with the trial court to order a new trial, or not, and with the exercise of its discretion we will not interfere. Code Crim. Proc. sec. 465, subd. 3. It was a question of fact and I think the judicial discretion of the learned recorder was well exercised, in having regarded the involuntary separation of the jurors as working no possible prejudice to the defendant. The second branch of the motion for a new trial was based on the ground that the attack, which the juror, Paradise, suffered from, was an expression of a generally deranged judgment, and that his mind could not have been clear and sound, or capable of judgment, for some hours before and after. In support of that ground, the affidavits of several distinguished physicians and alienists were produced and read. It was their opinion, upon the statement of the physician, who attended the said juror, of the juror's son and of others, detailing what had occurred, that the attack was epileptic in character. They, in substance, thought it evidenced a confirmed epileptic condition and indicated a mental disturbance, which must have existed for several hours and must have rendered his mental action unreliable and valueless. In opposition to these opinions, were read affidavits by several other physicians, expert in mental diseases, who had made a personal examination of the juror and who gave it as their opinion that there was no perceptible indication of epilepsy, or of paresis, and that he was in full possession of his faculties. Upon Paradise's statements as to his past life, they were of the opinion that he had never suffered from epilepsy or insanity. They thought the symptoms of his attack were those of nervous exhaustion and of hysteria, induced by the close confinement and the

long-continued strain upon him in the performance of his duties of a juror. His own affidavit was read, denying ever having suffered from epileptic attacks. He narrated the occurrences in the jury room and stated that after the first ballot, when he had voted 'not guilty,' he had upon each subsequent ballot voted 'guilty,' and that the jury had agreed upon their verdict before they went to the hotel for their meal. He stated that he felt well when he came back to court and was able to deliberate. He gave the facts about his past life and he showed that the day after the conclusion of the trial he had gone away on business and remained away until June, being in the full possession of his health and faculties. The affidavits of physicians, who had known and attended him in the past, stated that he had never manifested any epileptic symptoms, or any form of nervous disease. Other affidavits, by his employer and by his fellow-jurors, were read to show his mental competency.

"The recorder, in denying a new trial, had before him the conflicting opinions of the experts, the facts stated in the affidavits and those within his own observation. It cannot be said that the defendant made out a case of mental incompetency in the juror. While the opinions of the physicians, secured by him, seemed to give support to his theory of a mental or nervous disease in the juror, which incapacitated him to deliberate or confer upon his case, they were not based upon any personal examination, but were premised upon the statements given them. In view of the evidence as to his physical and mental condition upon actual examination, as to the facts of his past life and of his condition for weeks after the trial, the learned recorder could not well have decided otherwise than he did and I think we must agree with him that the opinions of the experts for the people were warranted by the evidence and that those of the defendant's experts were not.

"The elaborate opinion, which he delivered upon the denial of the motion for a new trial, contains a conscientious and able review of the question and is perfectly satisfactory."

It will be seen from this statement, which sufficiently sum-

marizes the circumstances disclosed by the record, that the question in relation to the physical and mental condition of the juror and his competency to return a verdict was a question of fact, and this court upon a writ of error to the highest court of a State in an action at law cannot review its judgment upon such a question. *Dower* v. *Richards*, 151 U. S. 658, 664, and cases cited. We are unable, therefore, to discover any ground justifying the granting of the writ applied for. *Andrews* v. *Swartz*, 156 U. S. 272; *Lambert* v. *Barrett*, 157 U. S. 697; *In re Kemmler*, 136 U. S. 436; *Caldwell* v. *Texas*, 137 U. S. 692; *McNulty* v. *California*, 149 U. S. 645; *McKane* v. *Durston*, 153 U. S. 684, 687.

Application denied.

NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY *v.* PACE.

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

No. 223. Argued January 31, 1895. — Decided April 22, 1895.

The fact that objections are made to the admission or exclusion of evidence and overruled is not sufficient, in the absence of exceptions, to bring them before the court.

It is the duty of counsel excepting to propositions submitted to a jury, to except to them distinctly and severally, and where they are excepted to in mass the exception will be overruled if any of the propositions are correct.

There is nothing in this case to take it out of the operation of these well-settled rules.

This was an action for damages instituted by Pace, a citizen of Tennessee, against the Newport News and Mississippi Valley Company and the Chesapeake, Ohio and Southwestern Railroad Company, in the circuit court of Dyer County, Tennessee, and subsequently removed into the Circuit Court of the United States for the eastern division of the Western District of Tennessee by the Newport News and Mississippi

Valley Company, under the fourth paragraph of section 2 of the act of August 13, 1888, (25 Stat. 433, c. 866,) on the ground of prejudice or local influence. Soon after the removal the case was discontinued as to the Chesapeake, Ohio and Southwestern Railroad Company. The trial resulted in a verdict and judgment in favor of Pace, whereupon a writ of error was brought.

Mr. Maxwell Evarts for plaintiff in error. *Mr. Holmes Cummins* was with him on the brief.

Mr. Hamilton Parks for defendant in error. *Mr. Henry W. McCorry* was with him on the brief.

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

Errors are assigned to the admission of evidence "against defendant's objection," and "notwithstanding objection by the defendant," but the bill of exceptions does not show any exception taken to the overruling of these objections. It is also claimed that in a particular instance evidence offered by defendant was improperly excluded, "on plaintiff's objection," but no exception to the action of the court appears to have been preserved.

The questions sought to be raised cannot, therefore, be considered, as the settled rule is, as stated by Mr. Chief Justice Taney in *United States* v. *Breitling*, 20 How. 252, 254, that the fact that objections are made and overruled is not sufficient, in the absence of exceptions, to bring them before the court.

Errors are also assigned to parts of the charge, and here, again, it was long ago determined that it is the duty of counsel excepting to propositions submitted to a jury to except to them distinctly and severally, and that where they are excepted to in mass the exception will be overruled, provided any of the propositions be correct; *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 Wall. 328; *Block* v. *Darling*, 140 U. S. 234, 238; *Jones* v. *East Tennessee &c. Railroad*, 157 U. S. 684;

while a general exception taken to the refusal of a series of instructions will not be considered if any one of the propositions be unsound. *Bogk* v. *Gassert*, 149 U. S. 17, 26, and cases cited.

Pace was a cattle drover and dealer in live stock. September 19, 1890, he shipped at Obion, Tennessee, a station on the line of the Newport News and Mississippi Valley Company, a carload of cattle to be carried to Louisville, Kentucky. He entered into a contract with the company to pay it forty dollars as the cost of the transportation of the stock, which included his own carriage on the train to attend and care for the cattle. The following night, while the train was passing over the road, it became uncoupled, and the rear end, where Pace was in the caboose, stopped, while the engine and forward cars ran ahead. Evidence was given tending to show that at the time the train broke in two, Pace was warned by the conductor and the brakeman of the danger of another train following them, which might not be signalled in time to prevent a collision, and that safety required him to get off, but all this was denied by Pace. The proper signals were not given, and shortly thereafter a train also going toward Louisville ran into the train on which Pace was travelling, and he was injured.

The bill of exceptions states:

"The defendant requested the court to instruct the jury as follows: 'If you find from the proof that just previous to the collision plaintiff was warned by the conductor and brakeman of the danger of going to sleep or remaining in the car in which he had been riding while it was standing on the track, and if you further find that plaintiff, after being so warned, then could have escaped, such negligence then will bar him from such recovery; or, if you find from the proof that the plaintiff was told by the conductor and brakeman of the danger, and that he had time after such warning to avoid the danger and neglected to do so, that would prevent his recovery from the company;' which requests were granted. However, the court qualified the defendant's request as follows: 'But if you find that after the train broke loose the conductor came

back and told the brakeman to go back and flag, and then told Pace the train was following, and for fear of accident he had better watch out for it, and if he saw it to get out of the way, this would not be such warning as would make plaintiff's negligence contributory unless he knew of the danger in time to get out and avoid the injury; and in considering this you will consider that plaintiff had a right to rely upon the rules being obeyed and all proper precautions being taken to warn the approaching train of the obstruction and delay, such as prudence required the management to adopt, and he must have been warned about the necessity for leaving the caboose before negligence contributing to the injury can be attributed to him. You must find not only the fact that plaintiff was warned, but that the warning came to him in such words and under such circumstances that a reasonable man, using ordinary care for his own safety, could have avoided the danger; if so, he cannot recover.' To which defendant excepted; and defendant further excepted to the charge as given as follows: 'You cannot have any very satisfactory scale of measurement to fix it (plaintiff's damage) by. It is of such a character that no intelligent mind can find anywhere any satisfactory fixed standard of judgment.' . . . 'You look into the character and extent of the injury, to its duration in point of time, and in every way you can conceive from this proof that Mr. Pace can be physically affected by the injury received by him.' . . . 'On the other hand, the defendant is not going to produce any doctor with an opinion that Pace's injuries are serious and so they bring up another class of doctors. That is natural for the defendant to do, and there is nothing wrong about it; but . . . you, gentlemen of the jury, are to take the testimony of the doctors on both sides and weigh it in view of the fact that they are such witnesses as we call experts, and are produced to you under the circumstances I have mentioned.' 'In consideration of this question of damages according to Mr. Pace's character, it is quite easy for a jury, or for anybody to be misled. A railroad company has no more right to kill a worthless vagabond, when accepted as a passenger, than to kill the President of the United States.

Its obligation is just the same to carry him safely, and his right to compensation just the same; but you will see that, when you go to determine the amount of damages that has been inflicted upon one by such an injury, his character is a very important element in it. A man who is worthless and never earns a dollar, but is a burden upon his family — a vagabond and a trifling, worthless fellow — certainly is not worth as much as some man who is the opposite of all that — a worthy citizen, a good man, and a blessing to his family, a blessing to the community; and you have a right, in determining the question of the amount of damages, to look to the quality of the thing that has been injured, and for that reason proof has been admitted before you so that you may know just what manner of man Mr. Pace is, and so that you may say how much his character and qualities as a man may be regarded in measuring these damages against the railroad company for its negligence, if he has not contributed to it.'"

As to the qualification of the instructions in respect of the alleged warning, the exception was too general. There was a conflict of evidence on the point, and if what was said to Pace, if anything, did not apprise him of the danger and the necessity for leaving the caboose in order to avoid it, his right to recover would not be defeated on the ground of contributory negligence in that regard. Nor was the exception to the other instructions well taken, tested by the rule that if one proposition of several is correct, and all are excepted to *en masse*, the exception cannot be sustained.

The jury were properly told to look into the character of the evidence on the question of damages, the extent of the injury, its duration in point of time, and the proof showing how Pace was physically affected by it, yet that was as much excepted to as the other observations of the court.

We see no reason for declining to apply the settled rule upon this subject.

Judgment affirmed.

Counsel for Plaintiff in Error.

KOENIGSBERGER *v.* RICHMOND SILVER MINING COMPANY.

RICHMOND SILVER MINING COMPANY *v.* KOENIGSBERGER.

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

Nos. 260, 220. Argued April 4, 5, 1895.—Decided April 22, 1895.

Under the act of February 22, 1889, c. 180, for the division of the Territory of Dakota into two States, and for the admission of those and other States into the Union, and providing that the Circuit and District Courts of the United States shall be the successors of the Supreme and District Courts of each Territory, as to all cases pending at the admission of the State into the Union, "whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases," the Circuit Court of the United States for the District of South Dakota has jurisdiction, at the written request of either party, of an action brought in a District Court of that part of the Territory of Dakota which afterwards became the State of South Dakota, by a citizen of that part of the Territory, since a citizen of the State, against a citizen of another State, and pending on appeal in the Supreme Court of the Territory at the time of the admission of the State into the Union.

In an action against a corporation for the breach of a contract to transfer a certain number of its shares to the plaintiff, he testified to their value; and the defendant's president, being a witness in its behalf, testified that they were worth half as much; the jury returned a verdict for the larger sum; exceptions taken by the defendant to the competency of the plaintiff's testimony on the question of damages were sustained; and the court ordered that a new trial be had, unless the plaintiff would file a remittitur of half the damages, and, upon his filing a remittitur accordingly, and upon his motion, rendered judgment for him for the remaining half. *Held:* no error of which either party could complain.

THE case is stated in the opinion.

Mr. G. C. Moody and *Mr. S. S. Burdett* for Koenigsberger. *Mr. Eben W. Martin* was on their brief.

Mr. Wager Swayne for the Richmond Silver Mining Company. *Mr. Edwin Van Cise* was on his brief.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action at law, commenced October 17, 1883, in the district court of the first judicial district of the Territory of Dakota, in and for Lawrence County, by Victor Dorne against the Richmond Silver Mining Company. The complaint alleged that the plaintiff, on December 11, 1882, sold and conveyed to the defendant a certain interest in mining claims in that county; that the defendant, in consideration thereof, agreed to transfer and deliver to the plaintiff, within three weeks, 14,285$\frac{5}{7}$ shares of its corporate stock; and that the defendant transferred and delivered to the plaintiff 3500 shares of its stock, and neglected and refused to deliver him any more; to the damage of the plaintiff in the sum of $15,000. The answer was a general denial.

Upon a trial by jury in that court, in April, 1889, the plaintiff introduced evidence tending substantially to prove the contract and breach alleged; and no objection of variance was interposed. The plaintiff testified that the shares which the defendant had not transferred to him were worth, at the time of the breach, from one to two dollars a share. The defendant's president, being called and examined as a witness in its behalf, testified that he was one of the original incorporators, and owned 19,000 or 20,000 shares; that he bought them at fifty cents a share, and that the stock had been sold in the market at that price. Part of the plaintiff's testimony as to the value of the shares was to matters of opinion, and to a contract of sale between himself and a third person, which the plaintiff had not carried out; and was admitted by the court against the objection and exception of the defendant. Other exceptions taken by the defendant to the rulings and instructions of the court were immaterial or groundless, and require no particular notice. The court, in accordance with a request of the defendant, instructed the jury that, if they were satisfied that the plaintiff was entitled to recover, the measure of his damages would be the value of the 10,785$\frac{5}{7}$ shares of the defendant's stock which he had not received, being the price at which he might with reasonable diligence have purchased an

equivalent amount of the stock in the nearest market, together with interest thereon at the rate of seven per cent per annum.

The jury returned a verdict for the plaintiff in the sum of $15,315.70. The defendant filed a motion for a new trial, for newly discovered evidence, as shown by affidavits, tending to impeach the plaintiff's testimony as to the value of the shares; as well as for excessive damages, and for insufficiency of the evidence to sustain the verdict, and for errors in law occurring at the trial and excepted to by the defendant. The court overruled the motion, and rendered judgment on the verdict for the sum found due by the jury, and interest; and on September 28, 1889, allowed a bill of exceptions tendered by the defendant.

On October 8, 1889, the defendant appealed to the Supreme Court of the Territory of Dakota, and gave bond to prosecute the appeal, and on the same day entered the appeal in that court; and it was there pending on November 2, 1889, when the southern part of the Territory of Dakota, including Lawrence County, was admitted into the Union as the State of South Dakota, under the act of Congress of February 22, 1889, c. 180, for the division of Dakota into two States, and for the admission of the States of North Dakota, South Dakota, Montana and Washington into the Union, the material provisions of which are copied in the margin.[1]

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[1] SEC. 21. That each of said States, when admitted as aforesaid, shall constitute one judicial district, the names thereof to be the same as the names of the States, respectively; and the Circuit and District Courts therefor shall be held at the capital of such State for the time being, and each of said districts shall, for judicial purposes, until otherwise provided, be attached to the eighth judicial circuit, except Washington and Montana, which shall be attached to the ninth judicial circuit. . . . The Circuit and District Courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations.

SEC. 22. That all cases of appeal or writ of error, heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of either of the Territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any records

The case was thereupon entered in the Supreme Court of the State of South Dakota. On February 4, 1890, the defend-

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

SEC. 23. That in respect to all cases, proceedings and matters, now pending in the supreme or district courts of either of the Territories mentioned in this act, at the time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings and matters, pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments and proceedings relating to any such cases shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding, now pending, or that prior to the admission of any of the States mentioned in this act shall be pending, in

ant filed in that court a petition, verified by oath, to transfer the case to the Circuit Court of the United States for the District of South Dakota, because the defendant was, at the time of bringing the action, and still was, a corporation and citizen of the State of New York, and the plaintiff was then a citizen of that portion of the Territory of Dakota which was now the State of South Dakota, and still was a citizen of South Dakota. On March 1, 1890, after notice and hearing, that petition was granted, and the case was transferred accordingly. 1 So. Dak. 20.

The Circuit Court of the United States for the District of South Dakota, afterwards, upon notice and hearing, denied a motion of the plaintiff to remand the case to the Supreme Court of the State of South Dakota; 43 Fed. Rep. 690; and then heard the case upon the record from that court, "except that the court declined to consider the affidavits used in support of the motion for new trial, and limited its consideration of the appeal from the judgment, and from the order overruling the motion for a new trial, to the assignments of errors of law occurring during the trial — to which action of the court, in declining to consider such affidavits and limiting its consideration aforesaid, counsel for defendant and appellant at the time duly excepted — and, after taking this cause under advisement, and upon due consideration, this court, being of the opinion that reversible error had been committed in the trial court upon the question of damages, but that the judgment of the trial court could be affirmed for one half the amount

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any territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or state court, as the case may be: Provided, however, that in all civil actions, causes and proceedings, in which the United States is not a party, transfers shall not be made to the Circuit and District courts of the United States, except upon written request of one of the parties to such action or proceeding, filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts.

SEC. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed. 25 Stat. 682–684.

thereof, provided the plaintiff would consent to remit the balance," ordered that the judgment be reversed and a new trial granted, unless the plaintiff should file, within ten days, a consent in writing to remit one half of that judgment, in which event a judgment of affirmance might be entered for one half of such original judgment, with interest thereon from the date of its entry, and without costs to either party.

In accordance with that order, the plaintiff filed a remittitur of one half of the judgment; and, on his motion, the court ordered the judgment to be affirmed to the extent of one half thereof, amounting, with interest, to the sum of $8823.96. Each party tendered and was allowed a bill of exceptions, and sued out a writ of error; and the original plaintiff, Dorne, having died since the entry of the case in this court, his writ of error was prosecuted by Sebastian Koenigsberger, as his administrator.

The most important question in this case is whether the Circuit Court of the United States for the District of South Dakota had jurisdiction of it. This question has been fully argued at the bar, but would be noticed by this court, had it not been suggested by either party.

The facts upon which the decision of this question depends are not in dispute. The action was brought in a district court of that part of the Territory of Dakota which afterwards became the State of South Dakota. The plaintiff, at the time of bringing the action, was a citizen of that part of the Territory, and, upon the admission of the State of South Dakota into the Union, became a citizen of that State. The defendant, at the time of the bringing of the action, and ever since, was a corporation of the State of New York. The merits of the case did not involve any question under the Constitution and laws of the United States. The case, after trial and judgment in the district court of the Territory, was pending on appeal in the Supreme Court of the Territory, at the time of the admission of the State into the Union; and, upon such admission, was entered in the Supreme Court of the State, and was thence transferred, on petition of the defendant, to the Circuit Court of the United States, which after-

wards denied a motion of the plaintiff to remand it to the Supreme Court of the State.

The defendant's petition to transfer the case to the Circuit Court of the United States having been filed in the Supreme Court of the State before it had taken any action in the case, there has been no waiver of any right which the defendant had to have the case heard and determined in the Circuit Court of the United States. *Carr* v. *Fife*, 156 U. S. 494; *Ames* v. *Colorado Railroad*, 4 Dillon, 251.

The plaintiff relies on the provisions of section 23 of the act of Congress of February 22, 1889, c. 180, for the admission of South Dakota and other States into the Union, by which, in respect to all cases, pending in the supreme or in a district court of either of the Territories therein mentioned, at the time of the admission of either of the States named into the Union, and arising within the limits of the State, "whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases," those circuit and district courts shall be the successors of the supreme and district courts of the Territory; and, in respect to all other cases so pending and arising, the courts established by the State shall be the successors of such territorial courts. 25 Stat. 683.

The plaintiff's contention is that, as the Circuit and District Courts of the United States are declared to be the successors of the territorial courts in respect of those cases only, of which such circuit and district courts "might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases," the Circuit Court could not acquire jurisdiction of this case by reason of the diversity of citizenship between the parties, because at the time of the commencement of the case, although the defendant was a citizen of a State, yet the plaintiff was a citizen of a Territory, and the Circuit Courts of the United States have no jurisdiction, by reason of diversity of citizenship, of a suit between a citizen of a Territory and a citizen of a State. *New Orleans* v. *Winter*, 1 Wheat. 90; *Barney* v. *Baltimore*, 6 Wall. 280, 287.

But this contention appears to us to rest upon too strict and literal a construction of a single clause of the act in question, inconsistent with the other provisions and the general purposes of the act, as well as with the course of previous legislation and judicial decision upon the subject.

So long as a Territory of the United States remains in the territorial condition, and the United States have entire dominion and sovereignty over it, national and municipal, there is ordinarily no occasion to distinguish how far the subjects, committed by Congress to the decision of the courts of the Territory, are or are not of a Federal character. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546; *Benner* v. *Porter*, 9 How. 235, 242, 243. But when a Territory is admitted into the Union as a State, upon the same footing as all the other States, the territorial government and courts cease to exist, and matters of national cognizance remain within the power and jurisdiction of the nation, but other matters come under the power and jurisdiction of the State; and then it becomes important to distinguish, as to pending suits, whether they are of a Federal or of a municipal character, and to provide by law that those of the first class should proceed in the courts of the United States, and those of the second class in the courts of the new State. The courts of the United States, inferior to this court, having no jurisdiction except as conferred by Congress, congressional legislation is necessary to enable those courts, after the admission of the State into the Union, to take jurisdiction of cases previously commenced in the courts of the Territory, and not yet finally adjudged. And such legislation has been so construed and expounded by this court as to give effect, as far as possible, consistently with its terms and with the Constitution of the United States, to the apparent intention of Congress to vest in the courts of the United States the jurisdiction of such cases, so far as they are of a Federal character, either because of their arising under the Constitution and laws of the United States, or because of their being between citizens of different States. *Freeborn* v. *Smith*, 2 Wall. 160; *Express Co.* v. *Kountze*, 8 Wall. 342, 350, 351; *Baker* v. *Morton*, 12 Wall. 150, 153.

The Circuit Court and the District Court of the United States for the District of South Dakota, described, in the clause in section 23 of the act of February 22, 1889, on which the plaintiff relies, as "the Circuit or District Courts by this act established," are parts of the general judicial system of the United States; and, by the express terms of section 21 of the act, are respectively to have the same powers and jurisdiction, and to be governed by the same laws and regulations, as the other circuit and district courts of the United States.

By section 22, in all cases pending in this court, on appeal or writ of error, from the Supreme Court of the Territory, at the time of the admission of the State into the Union, and afterwards decided and a mandate therein sent down by this court, the Circuit or District Court of the United States, or the Supreme Court of the State, "as the nature of the case may require," is declared to be the successor of the Supreme Court of the Territory. This phrase, "as the nature of the case may require," would seem to treat the Circuit or District Court of the United States as the successor of the Supreme Court of the Territory in all cases of Federal jurisdiction, whether by reason of the subject-matter, or of the parties.

Then comes section 23, enacting that the Circuit and District Courts of the United States established by this act shall be the successors, both of the supreme and of the district courts of the Territory, as to all cases pending at the time of the admission of the State into the Union, of which such circuit or district court might have had jurisdiction under the laws of the United States, had it existed at the time of the commencement of the action; provided, however, that all civil actions, to which the United States are not a party, shall be proceeded with in the proper court of the State, unless transferred to the Circuit Court or District Court of the United States upon the written request of one of the parties.

It is to be remembered that, generally speaking, the jurisdiction of the Circuit Court of the United States neither fails nor attaches by reason of a change in the citizenship of a party pending the suit, and that, when that court takes jurisdiction of a suit already pending, the requisite citizenship must have

existed at the time of its commencement. *Morgan* v. *Morgan*, 2 Wheat. 290; *Clarke* v. *Mathewson*, 12 Pet. 164; *Gibson* v. *Bruce*, 108 U. S. 561; *Kellam* v. *Keith*, 144 U. S. 568. The reference, in the clause in controversy, to the time of the commencement of the action, may well have been inserted to prevent a case, in which there was at that time no diversity of citizenship, from being transferred to the Circuit Court of the United States by reason of the parties afterwards becoming citizens of different States.

Upon the whole matter, the reasonable conclusion appears to us to be that Congress, by the description "whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases," intended to designate cases of which those courts might have had jurisdiction under the laws of the United States, had those courts, like the other circuit and district courts of the United States generally, existed, at the time in question, in a State of the Union, whose inhabitants consequently were citizens of that State. According to that hypothesis, the plaintiff would have been a citizen of the State of South Dakota, and the defendant a citizen of the State of New York, at the time of the commencement of the action, and the Circuit Court of the United States would have had jurisdiction by reason of such diversity of citizenship. The case was therefore rightly transferred, at the written request of the defendant, upon the admission of the State of South Dakota into the Union, to the Circuit Court of the United States.

This construction of the act is in accord with all the reported decisions in the courts, Federal or state, held within the Eighth Circuit. *Dorne* v. *Richmond Co.*, 1 So. Dak. 20, and 43 Fed. Rep. 690; *Herman* v. *McKinney*, 43 Fed. Rep. 689; *Miller* v. *Sunde*, 1 No. Dak. 1. It is supported by the judgment of the Circuit Court of Appeals of the Ninth Circuit, in *Blackburn* v. *Wooding*, 15 U. S. App. 84, overruling the decisions of single judges in that circuit, cited in behalf of the plaintiff. *Strasburger* v. *Beecher*, 44 Fed. Rep. 209; *Dunton* v. *Muth*, 45 Fed. Rep. 390; *Nickerson* v. *Crook*, 45 Fed. Rep.

658; *Carson* v. *Donaldson*, 45 Fed. Rep. 821; *Johnson* v. *Bunker Hill Co.*, 46 Fed. Rep. 417. And the like construction appears to have been assumed by Mr. Justice Miller and Judge Dillon to be the true one of the similar clause in the act of June 26, 1876, c. 147, § 8, relating to Colorado. 19 Stat. 62; *Ames* v. *Colorado Railroad*, 4 Dillon, 250, 258, 260.

The suggestion, made in behalf of the plaintiff, that the Circuit Court of the United States could not take jurisdiction, because, at the time of the admission of the State into the Union, the case was pending, not in a court of original jurisdiction, but on appeal in the Supreme Court of the Territory, is inconsistent with the terms and the intent of the act of Congress. Section 23 of that act provides that as to all cases, coming within the definition already considered, pending at that time either "in the supreme or district courts of the Territory," the Circuit and District Courts of the United States "shall be the successors of said supreme and district courts of said Territory;" that all the files and records relating to such cases shall be transferred to those courts; and that "the same shall be proceeded with therein in due course of law." At the time of the admission of the State into the Union, this case, after trial and verdict in the district court of the Territory, and motion for a new trial made and overruled, and exceptions allowed, in that court, was pending on appeal in the Supreme Court of the Territory, which, by the laws of the Territory, was empowered, upon an appeal from a judgment, to "review any verdict, decision, or intermediate order, involving the merits and necessarily affecting the judgment," and "to reverse, affirm or modify the judgment." Dakota Code of Civil Procedure, §§ 411, 412. After the admission of the State into the Union, and the transfer of the case by the Supreme Court of the State to the Circuit Court of the United States, the Circuit Court, as said by Mr. Justice Miller, in a like case in Colorado, might do all that was left undone in the Supreme Court of the Territory; the case was pending in that court for review, and the Circuit Court might proceed as that court would have proceeded if it had retained the case; and, whether the judgment should be affirmed or reversed, could

enter the proper judgment, and, if necessary, could itself try the case again. *Bates* v. *Payson*, 4 Dillon, 265.

The remaining question in the case concerns the proceeding by which the Circuit Court, being of opinion "that reversible error had been committed in the trial court upon the question of damages," ordered the judgment to be reversed and a new trial granted, unless the plaintiff should file a remittitur of one half of the judgment; and, upon his filing such a remittitur, affirmed the judgment as to the other half thereof.

Both parties excepted to this proceeding. But there was no error therein, of which either party has a right to complain.

The plaintiff, by not insisting on the alternative, allowed him by the court, of having a new trial of the whole case, but electing the other alternative allowed, of filing a remittitur of half the amount of the original judgment, and thereupon moving for and obtaining an affirmance of that judgment as to the other half, waived all right to object to the order of the court, of the benefit of which he had availed himself. *Kennon* v. *Gilmer*, 131 U. S. 22, 30; *New York Elevated Railroad* v. *Fifth National Bank*, 135 U. S. 432.

As to the defendant, the matter stands upon different grounds. The plaintiff at the trial had testified that the shares of the defendant's stock, which the defendant had not transferred to him as agreed, were worth from one to two dollars a share. The defendant's president, called and examined as a witness in its behalf, testified that their market value was half a dollar a share. The amount of the verdict and the original judgment thereon, as may readily be seen by computation, was for no more than a dollar a share, with interest from the time of the breach to the time of the trial. The final judgment of the Circuit Court was for half that amount, or no more than the testimony of the defendant's president showed that the shares were worth, with interest. As the only error found by the Circuit Court, or appearing on the record, was in the measure of damages, no injustice was done to the defendant by accepting the testimony which it had introduced as to the value of the shares. The bill of exceptions affording the

means of distinguishing so much of the plaintiff's claim as was in dispute from that part which was practically not disputed, the court, without invading the province of the jury, might permit the plaintiff, in lieu of a new trial, to take judgment for the latter part only. *Bank of Kentucky* v. *Ashley*, 2 Pet. 327; *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Hopkins* v. *Orr*, 124 U. S. 510; *Arkansas Co.* v. *Mann*, 130 U. S. 69; *Kennon* v. *Gilmer*, 131 U. S. 22, 29; *Washington & Georgetown Railroad* v. *Harmon*, 147 U. S. 571, 590.

This being so, the question whether the Circuit Court erred, in excluding from its consideration the affidavits filed in support of the defendant's motion for a new trial, becomes unimportant; for their whole effect, if admitted, could only be to impeach the plaintiff's testimony as to the amount of his damages, whereas the court gave no effect to that testimony, and proceeded wholly upon the testimony introduced by the defendant.

Judgment affirmed.

MATTINGLY *v.* NORTHWESTERN VIRGINIA RAILROAD COMPANY.

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

No. 140. Submitted March 14, 1895. — Decided April 15, 1895.

The petition for removal in this case was insufficient because it did not show of what State the plaintiff was a citizen at the time of the commencement of the action.

The appeal in this case having been taken prior to the passage of the act of March 3, 1891, c. 517, 26 Stat. 826, is not governed by that act, although the citation was not signed till April 14, 1891, and not served until April 17.

Neither signing nor service of citation is jurisdictional.

When the record fails to affirmatively show jurisdiction, this court must take notice of the defect.

As this case was improperly removed from the state court, this court reverses the decree, remands the cause with direction to remand it to the state court, and subjects the party on whose petition the case was removed to costs in this and the Circuit Court.

Statement of the Case.

This was a bill in equity filed by the decedent, William H. Mattingly, against the Northwestern Virginia Railroad Company, the Parkersburg Branch Railroad Company and the Baltimore and Ohio Railroad Company, in the Circuit Court for the county of Wood, State of West Virginia. The bill alleged the execution of two deeds of trust or mortgages by the Northwestern Virginia Railroad Company on all its property, present and after acquired, bearing date March 21, 1853, the first running to the city of Baltimore to secure the payment of $1,500,000 of twenty-year bonds, guaranteed by the city; and the second to the Baltimore and Ohio Railroad Company to secure the payment of $1,000,000 twenty-year bonds, guaranteed by the last-named company; and that, after the execution of a third mortgage, the mayor and city council of Baltimore conveyed and assigned all the rights of the city in the first mortgage to the Baltimore and Ohio Railroad Company. The bill further averred that a third mortgage was given by the Northwestern Virginia Railroad Company January 1, 1855, to one James Cook to secure certificates of loan and indebtedness with coupons attached, not exceeding two million dollars, and that the complainant was the owner and had in his possession ten of said third mortgage bonds which were for the sum of $500 each, with coupons attached of $15 each, payable semi-annually; that there was then due and unpaid on each of the bonds eighteen coupons of $15 each, making due on each bond $270 and a total sum of $2700. It was further alleged that on February 15, 1865, the property of every kind and description belonging to the Northwestern Virginia Railroad Company was sold by the mayor and city council of Baltimore at auction under the first mortgage, and conveyed, April 3, 1865, to the Baltimore and Ohio Railroad Company by the name of the Parkersburg Branch Railroad Company, and that, for reasons assigned, said sale was null and void, and the conveyance passed no title, and should be cancelled and annulled. It was also averred that December 21, 1857, the Northwestern Virginia Railroad Company gave to James Cook a deed of trust conveying certain debts due to it, and also certain specified parcels of real estate in Wood and other counties, to secure

Statement of the Case.

a certain indebtedness, with power of sale in the trustee for payment of the indebtedness; and that on March 24, 1865, James Cook, trustee, conveyed the lots of land specified in this deed to the Baltimore and Ohio Railroad Company as purchaser at a sale thereunder, which transaction complainant charged was void, and, if valid, that the vendee took the real estate subject to the prior mortgage. The bill prayed that the conveyance by Cook to the Baltimore and Ohio Railroad Company of March 24, 1865, and the conveyance by the mayor and city council of Baltimore to the company of April 3, 1865, might both be set aside, and that the foreclosure of the third mortgage might be decreed and a sale of all the property of the Northwestern Virginia Railroad Company and the distribution of the proceeds of the sale as equity might require.

The answer of the Baltimore and Ohio Railroad Company was filed September 7, 1870, and insisted upon the validity of all the mortgages and deeds of trust and sales thereunder, and denied that complainant was entitled to any relief. On January 23, 1879, the Baltimore and Ohio Railroad Company filed its petition in the state court for the removal of the cause to the Circuit Court of the United States, and therein alleged that petitioner, "the Baltimore and Ohio Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Maryland, respectfully shows that it is one of the defendants and the principal one in the foregoing suit, and that the same was commenced in the year 186– by said plaintiff in the said court; that your petitioner was at the time of bringing the said suit and still is such corporation and, as such, a citizen of the State of Maryland and a resident thereof. Your petitioner further shows that there is and was at the time said suit was brought a controversy therein between your petitioner and the said plaintiff, William H. Mattingly, who is a citizen of the State of West Virginia and resident thereof."

The state court accepted the bond tendered on removal and ordered that all further proceedings in the cause be stayed, and that the court should proceed no further therein, where-

upon a transcript of the record was filed in the Circuit Court of the United States for the District of West Virginia, at Parkersburg, on February 11, 1879. The cause was there heard and decree was rendered July 10, 1889, dismissing the bill for want of equity, with costs, whereupon, on January 2, 1891, the complainant prayed an appeal to this court, which was allowed on complainant giving bond, which appeal bond was filed January 7, 1891, and duly approved on January 13, 1891. Citation was signed April 14, and service accepted April 17, 1891. A motion was made by the Baltimore and Ohio Railroad Company in this court to dismiss the appeal for want of jurisdiction, because the value of the matter in dispute did not exceed five thousand dollars exclusive of costs, and the cause was submitted on that motion and on briefs on both sides.

Mr. W. L. Cole for appellant.

Mr. John A. Hutchinson for appellee.

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

The petition for removal was insufficient, as has been repeatedly determined, because it does not show of what State the plaintiff was a citizen at the time of the commencement of the action. *Stevens* v. *Nichols*, 130 U. S. 230; *Jackson* v. *Allen*, 132 U. S. 27; *La Confiance Compagnie* v. *Hall*, 137 U. S. 61; *Kellam* v. *Keith*, 144 U. S. 568.

The final decree was entered July 10, 1889, and the appeal allowed January 2, 1891, and bond was given and filed in accordance with the order of allowance and approved January 13, 1891. The appeal having thus been taken prior to the passage of the act of March 3, 1891, is not governed by that act. It is true that the citation was not signed until April 14, 1891, and not served until the seventeenth of the month, but neither the signing nor the service of the citation was jurisdictional, its only office being to give notice to the appellees. *Jacobs* v. *George*, 150 U. S. 415.

Opinion of the Court.

By the act of February 25, 1889, c. 236, 25 Stat. 693, it was provided "that in all cases where a final judgment or decree shall be rendered in the Circuit Court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review said judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction." Although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet as the record failed to affirmatively show jurisdiction, this court must take notice of the defect. *Chapman* v. *Barney*, 129 U. S. 677; *Denny* v. *Pironi*, 141 U. S. 121; *Roberts* v. *Lewis*, 144 U. S. 653; *Northern Pacific R. R. Co.* v. *Walker*, 148 U. S. 391.

If the question of jurisdiction had been raised, the cause might have been brought to this court under the act of February 25, 1889, without reference to the amount in controversy, and as it is apparent upon the record that jurisdiction was lacking we cannot dismiss the case upon the ground that the amount involved was less than the jurisdictional sum, even if we were of opinion that such were the fact, for although the question was not raised, it was necessarily involved.

The result is that the decree must be

Reversed and the cause remanded to the Circuit Court with a direction to remand it to the state court, the costs in this and the Circuit Court to be paid by the Baltimore and Ohio Railroad Company, upon whose petition the case was removed.

DU BOIS *v.* KIRK.

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

No. 240. Argued April 1, 2, 1895. — Decided April 22, 1895.

Arthur Kirk was the original inventor of the invention patented to him by letters patent No. 268,411, issued December 5, 1882, for a new and useful improvement in movable dams; and that invention was the application of an old device to meet a novel exigency and to subserve a new purpose, and was a useful improvement and patentable, and was not anticipated by other patents or inventions, and was infringed by the dams constructed by the plaintiff in error.

The fact that the defendant is able to accomplish the same result as the plaintiff by another and different method does not affect the plaintiff's right to his injunction.

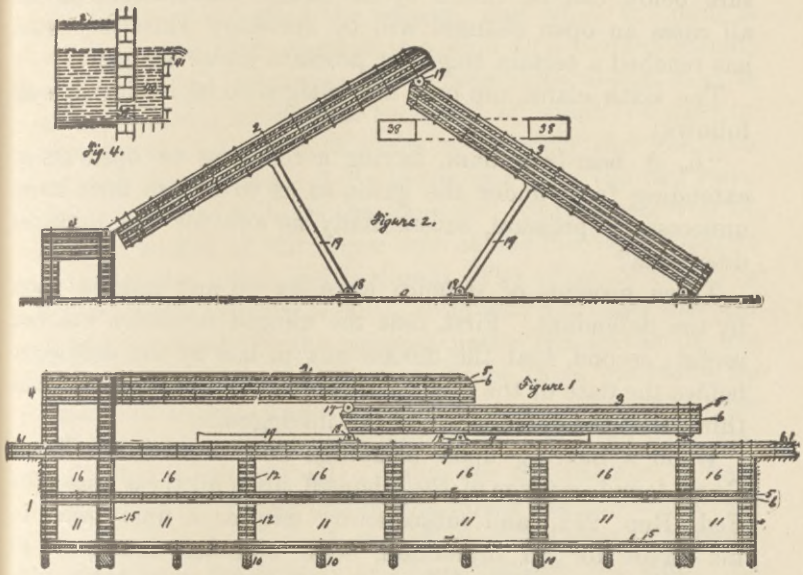
An appeal does not lie from a decree for costs; and if an appeal on the merits be affirmed, it will not be reversed on the question of costs.

This was a bill in equity for the infringement of letters patent No. 268,411, issued December 5, 1882, to Arthur Kirk for a new and useful improvement in movable dams.

As stated in his specification, the invention "relates to improvements in the construction of movable dams and locks, whereby they are stronger, safer, more durable, and more easily operated than those heretofore in use." The specification sets forth an improvement in the style of dam known as the bear-trap dam, in several different particulars, the fifth one of which consisted of "an open sluice, waterway, or tail race, so arranged relatively to the dam that the water which is not required to support the leaves will escape, and so relieve the dam of all unnecessary pressure."

The following drawings exhibit the device:

Statement of the Case.



In relation to this portion of the patent the patentee states: "In the end wall of the dam I make an open sluice, waterway, or tail race, 38, Fig. 2, at such height as will permit all water which is not required to sustain the gates to escape from under them. When the gates are down, as in the position shown in Fig. 1, the water is admitted by the wickets under them. This raises and floats them up until they reach the position shown by Fig. 2. By that time the water, having reached the sluice 38, which passes through the wall around the end of the gate, will flow freely through, sustaining the gates at that level.

"A modified construction of the sluice 38 is shown by Fig. 4, where the outlet 39 in the wall is below the level of the water, the latter passing through the outlet 39 into a forebay or well, 40, and thence over the bridge 41. If desired, the discharge opening may be controlled by a valve operated by a float.

"It is apparent that the form, place, and details of construction of the sluice for relieving the gates from excessive pres-

sure below can be varied by the skilled constructor; but in all cases an open channel will be necessary when the water has reached a certain height or pressure under the gates."

The sixth claim, the only one alleged to be infringed, is as follows:

"6. A bear-trap dam, having a relieving or open sluice extending from under the gates, so as to relieve them from unnecessary pressure, substantially as and for the purposes described."

Three grounds of defence were set up and insisted upon by the defendant. First, that the alleged invention was not useful; second, that the device was in use by the defendant before the date of the alleged invention by the patentee; and third, that the defendant had not infringed.

Upon a hearing upon pleadings and proofs, the Circuit Court found in favor of the plaintiff upon all these issues, (33 Fed. Rep. 252,) and subsequently entered a final decree in his favor for an injunction, with nominal damages. 46 Fed. Rep. 486. The defendant thereupon appealed to this court.

Mr. G. A. Jenks for appellant. *Mr. W. P. Jenks* and *Mr. T. H. Baird Patterson* were with him on the brief.

Mr. Thomas W. Bakewell and *Mr. William Bakewell* for appellee. *Mr. James K. Bakewell* was with them on the brief.

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

Bear-trap dams are used in small streams for the purpose of creating a reservoir of water, in which logs may be collected, and over which they may be floated down the river when the dam is opened. These dams are movable, and consist of two leaves of heavy timbers, bolted together, rising and falling between two vertical sidewalls of masonry or

timber work. These leaves are hinged at their outer edges to timbers in the bed of the stream, and when the dam is down, the upper leaf overlaps the other to a certain extent. Parallel with the stream, at one or both sides of the dam, is a sluice, termed a forebay, at each end of which is a gate or wicket, for the admission of water at its upper end from the pond, and its discharge at its lower end into the tail race. When it is desired to raise the dam, and create a reservoir of water, the wicket at the upper end of the forebay is opened and that at the lower end is closed. The effect of this is to admit the water into the forebay, from which it flows through openings provided for the purpose under the leaves of the dam, and, by hydrostatic pressure, raises them gradually up to their full height, when they assume somewhat the shape of the letter A. When it is desired to lower the dam, and create what is known as a chute for the passage of logs, the wicket at the upper end of the forebay is closed and that at the lower end is opened, the effect of which is to exhaust the water from the forebay and from beneath the dam. As the water runs out the leaves of the dam fall to a horizontal position, and the water from the reservoir pours out through the chute thus formed. If, however, the volume of water be so great as to raise the water in the forebay above the height of the dam, the pressure underneath the leaves may become so great as to tear the lower leaf from under the upper one, and thus wreck the dam, and, perhaps, create a serious flood below it. It is said that an average difference of three feet between the level of the water in the forebay and the level in the chamber under the dam would exert upon leaves — each of which is 450 square feet in area — an upward pressure of 97,200 pounds. To resist this hydrostatic pressure the common practice was to limit the upward motion of the lower leaf by stops, cleats, or chains, or have a man constantly on watch to relieve the pressure by opening or closing the wickets in the forebay, as required.

The object of the invention in question was to do this automatically, by opening an overflow underneath the apex of the leaves of the dam, so that, when they reached their

full height, any further pressure upon them would be relieved by the surplus of water running out through this overflow or waste weir into the tail race. An alternative device is shown in figure 4, by which, instead of permitting the water to run off through a waste way, located near the apex of the dam, it is allowed to run over the lower end wall of the forebay, which for that purpose is made a few inches lower than the apex of the dam. Under the laws of hydrostatic action, lowering the water in the forebay also lowers it in the chamber beneath the dam to precisely the same level, this chamber being connected with the forebay at the bottom.

Waste ways were a common and well-known method of relieving the pressure of water, but had, before the Kirk invention, been generally if not universally used to draw off the water from the pond above the dam, when it reached a certain height, and thereby the pressure upon the dam was relieved. Indeed, the dam itself becomes a waste way, as soon as the water in the pond reaches a higher level than the apex of the dam, and flows over it. It would appear that, at the time of the Kirk invention, there was no recognized method of relieving the pressure of the water underneath the leaves of a bear-trap dam, and that the dam was prevented from being carried away only by cleats or chains to brace the structure, and enable it to resist the pressure from beneath.

The invention seems to have occurred to Kirk upon the occasion of a visit of a delegation of the Pittsburgh Chamber of Commerce, on Christmas day of 1879, to a bear-trap dam erected by John DuBois, an uncle of the defendant, who had recently patented an overlapping third leaf, designed to hold down the other leaves. This improvement, as stated by one of the witnesses, "consisted in adding a third leaf, which was hinged to the down-stream end of the up-stream leaf in such a way that when the dam was raised, the down-stream leaf was supported and held in place by a third leaf." Kirk was not satisfied with this method of resisting, instead of relieving, the pressure, and as he states: "It occurred to me next day to provide an overflow at the height desired to maintain the gates, above which all water should flow away, because I

observed that the rising power of the dam was the water under it." And revolving the matter further in his mind, the thought occurred to him of making an overflow at the desired height from a point under the gates, and discharging the water into the tail race, and also of making the lower end of the forebay lower than the upper end. He explained this invention to his family on his return from the dam, and in the early part of 1880 explained it to DuBois himself, and urged him to adopt it upon some dams which he was then building. It seems that DuBois disapproved of it, and stated that it was not necessary, as his third leaf answered every purpose; but, on April 19, 1881, surreptitiously made application himself for a similar method of relieving the pressure of the water beneath the dam. Upon learning of this, Kirk filed a caveat, and applied for the patent in suit. An interference was declared by the Patent Office, and Kirk was subsequently adjudged to be the first inventor, and the patent was issued to him, with a claim for a bear-trap dam, having a relieving or open sluice extending from under the gates. In the meantime, however, upon an application filed November 11, 1881, a patent was issued to DuBois, January 3, 1882, for a similar device, wherein the claim was restricted to "an overflow or discharge to limit the head of the water located at a point in advance of the gate, whereby the surplus water is permitted to escape before reaching the gate."

The Kirk invention is undoubtedly a very simple one, and it may seem strange that a similar method of relieving the pressure had never occurred to the builders of bear-trap dams before; but the fact is that it did not, and that it was not one of those obvious improvements upon what had gone before, which would suggest itself to an ordinary workman, or fall within the definition of mere mechanical skill. It was in fact the application of an old device to meet a novel exigency, and to subserve a new purpose. That it is a useful improvement can scarcely be doubted. Indeed, in view of the fact that John DuBois made application for a similar patent himself, and that he and the defendant, since his death, have constantly made use of a device which differs from that

of Kirk's only in the fact that he relieves the pressure by lowering the end of the forebay to a level beneath the apex of the dam, it does not lie in defendant's mouth to deny its utility. The presumptions, at least, are against him. *Lehnbeuter* v. *Holthaus*, 105 U. S. 94; *Western Electric Co.* v. *LaRue*, 139 U. S. 601, 608; *Gandy* v. *Main Belting Co.*, 143 U. S. 587, 595.

There are claimed as anticipations of this patent —

1. Patent No. 251,771 to John DuBois. This is the patent already referred to, application for which was made November 11, 1881, nearly six months after application was made for the patent in this suit. It is, therefore, a subsequent patent, and of course cannot be claimed as an anticipation.

2. Patent No. 229,682 to John DuBois, issued July 6, 1880, upon an application filed February 10, 1879, the fifth claim of which patent is as follows: "The combination of a jointed or flexible dam or lock gate adapted to rise and fall beneath the water, a chamber or passage beneath the gate to admit water for elevating the same, a secondary gate connected with said chamber and controlling the escape of water there from below the gate, and a float located above the dam and arranged to operate the second gate." In relation to this the patentee states that for the purpose of securing the elevation and depression of the dam, a flume is arranged to conduct water beneath it from the higher elevation of the stream above, and a second flume arranged to conduct the water from beneath the gate into the stream below. A small gate or valve located in the second flume serves to control the escape of the water from beneath the dam, and thereby controls the height of the dam, in the same manner that the height of the lock gate is controlled. In order to control this small gate or valve and the height of the dam automatically, the patentee makes use of a float, mounted in the stream above the dam, and connected with the gate. The rise and fall of the water causes the float to rise and fall accordingly, and the float, in turn, opens and closes the gate, so as to render the escape of the water from under the dam sections proportionate to the height of water in the stream. The pur-

pose of this opening is to control the height of the leaves of the dam, and not the water under the dam. If the dam is intended to be set at half the elevation of the full height of the leaves, this device properly adjusted would only allow enough upward pressure under the leaves to raise them to that height. To do this he places a float, not in the forebay, but in the stream above the dam, and connects it with the gate by a rack and pinion. Its operation seems to be to vary automatically the *height of the dam* in accordance with the variations of the height of the water in the pond above. He lowers the dam and thus draws off the water from the pond above when needed. Kirk does not vary the height of his dam at all, but merely relieves it of pressure, the dam, when raised, being always at the same elevation.

The device, the operation of which is not very clearly shown in the patent, seems to have a different object from that of the Kirk patent, and employs quite a different means. In relation to this device, which appears to have been introduced on an accounting before the master, the master found "as to the use of floats as a means of regulating the wickets and controlling the pressure of water under the leaves, the evidence as to their practical use and operation was so indefinite that the master will submit the subject without further comment." This patent does not seem to have been suggested to the court below as an anticipation, and it is not noticed by it in its opinion. Nor does defendant's expert make any reference to it. There is nothing in his testimony to indicate that the device which this patent describes accomplishes the same result or works in the same way as Kirk's invention; and the fact that DuBois himself subsequently made application for the patent, which, upon Kirk's interference, was awarded to the latter, indicates quite clearly that DuBois did not consider it as accomplishing the purpose sought by his subsequent application. We do not find it to have been an anticipation of the Kirk patent.

Defendant made use, in his alleged infringing device, of a forebay, the lower wall of which was eight inches lower than the apex of the dam, when the dam was raised. The water in

the forebay as well as that under the leaves of the dam is thus kept at a lower level than that in the pool above the dam. This, in its practical effect, is an exact equivalent of the aperture shown in the Kirk patent, and inasmuch as this device is stated in that patent as an alternative and equivalent device, accomplishing the same result as the aperture first described, it required no invention on the part of DuBois to make the change. He had only to adopt the suggestion made by Kirk in his specification, and use a forebay with a short lower wall instead of the aperture. It is true the Patent Office attempted to divide the invention by limiting Kirk to a relieving or open sluice extending from under the gates, and allowing to DuBois a claim for an overflow or discharge, to limit the height of the water, located at a point in advance of the gate. But if the inventions were practically one and the same, the Patent Office was in error in so dividing the invention, and as it adjudged that Kirk was the prior inventor, he was the one entitled to the patent. The defendant practically admits that his device accomplished the same result as the other, but argues that it makes no practical difference whether the water be discharged from the forebay by a wicket located near the bottom, or by lowering the lower wall of the forebay and discharging the water over such wall; and that, by the use of the lower wicket, the water in the forebay may be held at any level which may be desired. This argument derives some support from the fact that the Circuit Court, in its final decree, found that the defendant realized no profits or saving whatever from the use of the patented device, and, therefore, awarded only nominal damages. But if this argument be sound, defendant will not suffer by the injunction, as the method of relieving the water in the forebay by the manipulation of the upper and lower wickets, known as cocking the wickets, is undoubtedly open to him. Plaintiff, however, is none the less entitled to his injunction by the fact that defendant is able to accomplish the same result by another and different method.

Plaintiff was awarded full costs in the court below, notwithstanding that, in the report of the master and in the final

decree, he was awarded only nominal damages. It is insisted that this was an error, and we are cited to the cases of *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439, and *Dobson* v. *Dornan*, 118 U. S. 10, in support of the contention that defendant should have been allowed costs after the interlocutory decree. In these cases, however, the court below awarded substantial damages, and this court, while sustaining the interlocutory decree, reversed the final decree so far as the awarding of damages, and remanded the cases with instructions to allow the defendant a recovery of his costs after interlocutory decree, and to the plaintiff his costs to, and including the interlocutory decree. In this case we sustain the action of the court below both as to the interlocutory and final decree, and, as costs in equity and admiralty cases are within the sound discretion of the court, we do not feel inclined to disturb this decree in awarding full costs to the plaintiff. *Canter* v. *American Insurance Co.*, 3 Pet. 307; *The Malek Adhel*, 2 How. 210, 237; *The Sapphire*, 18 Wall. 51; *Kittredge* v. *Race*, 92 U. S. 116, 120. This court has held in several cases that an appeal does not lie from a decree for costs; and if an appeal be taken from a decree upon the merits, and such decree be affirmed with respect to the merits, it will not be reversed upon the question of costs. *Elastic Fabrics Co.* v. *Smith*, 100 U. S. 110, 112; *Paper Bag Machine Cases*, 105 U. S. 766, 772; *Wood* v. *Weimar*, 104 U. S. 786, 792; *Russell* v. *Farley*, 105 U. S. 433, 437.

The decree of the court below is, therefore,

Affirmed.

Mr. Justice Field dissented.

Mr. Justice Shiras took no part in the decision of this case.

RISDON IRON AND LOCOMOTIVE WORKS *v.* MEDART.

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

No. 164. Submitted January 21, 1895. — Decided April 22, 1895.

Processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of the process, while those which consist solely in the operation of a machine are not; and where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon his mechanism does not impair his right to a patent for the process.

A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, that is to say, for the function of a machine.

A patent only for superior workmanship is invalid.

If it appears, upon demurrer to a bill to restrain infringement of letters patent, that the patent is invalid, the bill should be sustained.

Letters patent No. 248,599, granted October 25, 1881, to Philip Medart for the manufacture of belt pulleys, and letters patent No. 248,598, granted October 25, 1881, to him for a belt pulley, and letters patent No. 238,702, granted to him March 8, 1881, for a belt pulley, are all invalid.

This was a suit in equity instituted by Philip and William Medart against the appellant, for the infringement of three letters patent granted to Philip Medart, viz.: Patent No. 248,599, dated October 25, 1881, for the manufacture of belt pulleys; patent No. 248,598, also dated October 25, 1881, for a belt pulley; and patent No. 238,702, granted March 8, 1881, also for a belt pulley.

In the first patent, No. 248,599, the patentee stated in his specification that his invention "relates to that class of belt pulleys formed of a wrought-metal rim and a separate centre, usually a spider, and usually made of cast metal. Heretofore considerable difficulty has been encountered in the manufacture of such pulleys, much time, skilled labor, and large and elaborate machinery have been required, and

their production has been correspondingly expensive. The object of my invention is to cheapen and simplify their construction, overcome the objections above mentioned, and produce strong and perfect pulleys in a quick and efficient manner. My invention, therefore, consists in an improved process of manufacture, whereby the above results are obtained."

The drawings accompanying the specification represent the machinery for carrying out the invention, and the pulley at various stages of its manufacture. The specification sets forth in detail the manner in which the machinery is operated, and winds up with the following statement: "Pulleys thus manufactured are perfectly balanced, faultless in shape, strong and durable, and can be produced more rapidly and at less expense than the imperfect pulleys heretofore made. The machinery herein shown and referred to has not been described more in detail, as its operation will be clear to those skilled in such matters; and no claim to it is herein made, it being my purpose to secure protection for such apparatus by other applications hereafter to be made."

The claims, which are four in number, are all for the described improvement in the art of manufacturing belt pulleys, which consist in centering the pulley centre or spider and then grinding the same concentrically with the axis of the pulley, the several claims stating with more or less detail the principal steps in the manufacture.

In his specification to patent No. 248,598 the patentee states that his "improved pulley belongs to that class of pulleys composed of a separate spider, usually of cast metal, and a wrought-metal rim, which is secured to the spider;" and that his invention "consists in a pulley which is perfectly true and accurately balanced, that is, a pulley in which the centre of gravity and geometrical centre or axis coincide."

In his specification to patent No. 238,702, which was granted about seven months before the other patents, the patentee states that his invention "relates to certain improvements in belt pulleys and had for its object, first, the production of a cheap, light, and durable pulley; and, secondly, the production of irregular sizes of pulleys without the necessity

of a separate pattern for each size of pulley required; and this invention consists, first, in constructing the usual crown or dish on the rim of wrought-metal rimmed pulleys by bending said rim transversely during the process of manufacture; secondly, the belt pulley having arms formed of wood, preferably of a cylindical shape, which at their inner ends rest in sockets cast on the hub, and at their outer ends are provided with bracket lugs, to which the pin is secured by rivets or other equivalent means."

Figure 1 of the following drawings exhibits a perspective view, and figure 2 a vertical section of the patented pulley.

FIG. 2.

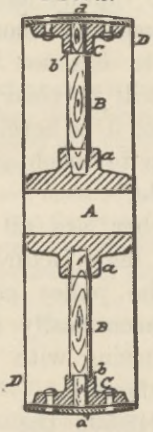
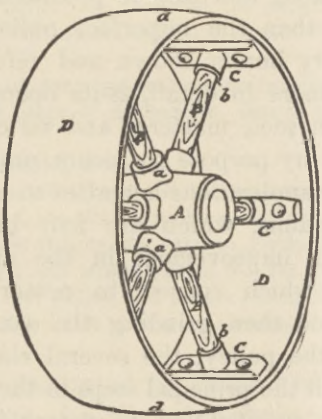


FIG. 1.



The defendant appeared and demurred to the bill upon the ground that the patents did not show invention upon their faces. The demurrer was argued and overruled and leave given to answer, and upon a subsequent hearing upon pleadings and proofs it was adjudged that all of the patents were valid; that the defendant had infringed the first, second, and third claims of patent No. 248,599, the two claims of patent No. 248,598, and the first claim of patent No. 238,702, and defendant was enjoined from further infringing. A final decree was subsequently entered, upon the report of the master, for $1811.25, from which decree the defendant appealed.

Opinion of the Court.

Mr. M. A. Wheaton, *Mr. F. J. Kierce*, and *Mr. E. R. Taylor* for appellant.

Mr. William M. Eccles for appellees.

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

The three patents involved in this suit are for an improved belt pulley, and for the manufacture of the same. Each of them requires a separate consideration.

1. Patent No. 248,599 is for an improved process of manufacturing that class of belt pulleys formed of a wrought-metal rim and a separate centre, usually a spider, and usually made of cast metal. The drawings represent the machinery for carrying out the invention, and the pulley at the various stages of its manufacture. The process of manufacture is set forth in detail in the specification, and consists of the following steps: (1) centering the pulley centre or spider; (2) grinding the ends of the arms concentrically with the axis of the pulley; (3) boring the centre; (4) securing the rim to the spider; (5) grinding the face of the rim concentric with the axis of the pulley; (6) grinding or squaring the edges of the rim. This process, it may be observed, is purely a mechanical one.

Does it disclose a patentable invention? That the patent is for a process in manufacture, and not for the mechanism employed, nor for the finished product of such manufacture, is undeniable, and is so expressed upon the face of the specification.

The four claims of the patent make no reference to the mechanism exhibited in the drawings, and described in the specification. All claim an improvement in the art of manufacturing, and set forth in more or less detail the various steps in that process. That certain processes of manufacture are patentable is as clear as that certain others are not, but nowhere is the distinction between them accurately defined. There is somewhat of the same obscurity in the line of demarcation as in that between mechanical skill and invention, or in that between a

new article of manufacture, which is universally held to be patentable, and the function of a machine, which it is equally clear is not. It may be said in general that processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of such process, while those which consist solely in the operation of a machine are not. Most processes which have been held to be patentable require the aid of mechanism in their practical application, but where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon his mechanism does not impair his right to a patent for the process; since he would lose the benefit of his real discovery, which might be applied in a dozen different ways, if he were not entitled to such patent. But, if the operation of his device be purely mechanical, no such considerations apply, since the function of the machine is entirely independent of any chemical or other similar action.

A review of some of the principal cases upon the subject of patents for processes may not be out of place in this connection, and will serve to illustrate the distinction between such as are and such as are not patentable.

The leading English cases are those which arose from the patent of September 11, 1828, to Neilson, for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus were required. The patent, like many of the early English patents, contained no specific claims, but described a blast or current of air to be passed from the bellows into an air vessel or receptacle, made sufficiently strong to endure the blast, and artificially heated to a red heat, or very nearly so.

It was said that the air vessel or receptacle might be conveniently made of iron or other metals, and that its form was immaterial to its effect, and might be adapted to the local circumstances or situation. In *Neilson* v. *Harford*, 1 Webst. Pat. Cas. 331, this patent was construed by the Court of Exchequer, in which the claim was made that the patent was for a principle, and was, therefore, void. Great difficulty was felt in its proper

construction, but after full consideration it was held that the patent did not merely claim a principle, but a machine embodying a principle; and in delivering the opinion Baron Parke observed: "We think the case must be considered as if the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention then consists in this by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle and thus he accomplishes the object of applying the blast, which was before of cold air, in a heated state in the furnace." In citing this case in support of his opinion in *O'Reilly* v. *Morse*, 15 How. 62, 115, Mr. Chief Justice Taney treated it as an invention of a mechanical apparatus by which a current of hot air, instead of cold, could be thrown in. "The interposition of a heated receptacle, in any form, was the novelty he invented."

The Neilson patent, however, subsequently came before the House of Lords on appeal from the Scottish Court of Session in the *Househill Coal and Iron Co.* v. *Neilson*, 1 Webst. Pat. Cas. 673. The case went off upon other questions, but in delivering his opinion Lord Campbell thought the patent should be taken as extending to all machines, of whatever construction, whereby the air was heated intermediately between the blowing apparatus and the blast furnace. "That being so, the learned judge was perfectly justified in telling the jury that it was unnecessary for them to compare one apparatus with another, because, confessedly, that system of conduit pipes was a mode of heating air by an intermediate vessel between the blowing apparatus and the blast furnace, and, therefore, it was an infraction of the patent." *S. C.* 2 Bell Scotch H. L. App. Cas. 1; 9 Cl. & Fin. 788.

So in delivering the opinion of this court in *Tilghman* v. *Proctor*, 102 U. S. 707, 724, Mr. Justice Bradley treated the Neilson patent as a patent for a process, although the patentee did not distinctly point out all the forms of apparatus by which the process might be applied. But, notwithstanding

the vast amount of litigation to which this patent gave rise, it can hardly be said that its proper construction has ever been definitely settled. Probably it was of no particular importance, as the air would have to be heated in a receptacle of some form before it was introduced into the furnace; and, therefore, if the patentee was not entitled to his patent as one for a process, he was clearly entitled to it as one for the only method of heating the air which was practicable — his patent not claiming any particular form of receptacle or any particular material of which it should be made.

The first case in this court in which a claim for a process received attentive consideration was the great case of *O'Reilly* v. *Morse*, 15 How. 62, 119, involving the validity of the patent to Morse for an electric telegraph. This patent contained eight claims, all of which, except the last, were for the machinery by which the electricity was transmitted and the message recorded. The eighth claim was for the use of the electric current as a motive power, however developed, for marking or printing intelligible characters at any distance. This claim was held to be too broad and not warranted by law, the court being of opinion that the allowance of such a claim would shut the door against the inventions of other persons, and enable the patentee to avail himself of any new discoveries in the properties and powers of electricity which scientific men might bring to light. In delivering the opinion of the court Mr. Chief Justice Taney observed: "Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it; provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to, or subtraction from them, produce precisely the result he describes. And if this cannot be done by the means he describes the patent is void. And if it can he done, then the patent confers on him the exclusive right to use the means he specifies to produce the result or effect he describes and nothing more. And it makes no difference, in this respect, whether the effect is produced by

chemical agency or combination; or by the application of discoveries or principles in natural philosophy known or unknown before his invention; or by machinery acting altogether upon mechanical principles. In either case he must describe the manner and process as above mentioned, and the end it accomplishes. And any one may lawfully accomplish the same end without infringing the patent, if he uses means substantially different from those described."

In view of some of our later decisions it may be questioned whether the language used by the Chief Justice in some portions of this paragraph may not be broader than these cases would justify, since patents for processes involving chemical effects or combinations have been repeatedly held to be valid. Thus in *Mowry* v. *Whitney*, 14 Wall. 620, a patent was sustained for an improved process for manufacturing cast-iron railroad wheels, by retarding their cooling by a second application of heat, until all parts of the wheel were raised to the same temperature, and then permitting the heat to subside gradually. So in *Cochrane* v. *Deener*, 94 U. S. 780, 787, 788, a patent to Cochrane for a process in manufacturing flour, which consisted in passing the ground meal through a series of bolting reels composed of cloth of progressively finer meshes, and at the same time subjecting the meal to blasts or currents of air, by which the superfine flour was separated and the impurities were so eliminated as to be capable of being reground and rebolted, so as to produce superfine flour, was held to be valid, and the patentee not limited to any special arrangement of machinery. In delivering the opinion of the court, Mr. Justice Bradley observed: "That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed. . . . A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed, and reduced to a different state or thing. If new and useful, it is just as patentable as a piece of machinery. In the language of patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new

and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." It will be observed in this case that the process for which the patent was sustained was not chemical in its nature, but, as stated in the opinion of the court, was a series of acts performed upon the subject-matter to be transformed and reduced to a different state or thing.

In *Tilghman* v. *Proctor*, 102 U. S. 707, a patent for a process for separating the component parts of fats and oils, so as to render them better adapted to the uses of the arts, or, as stated in the claim, "the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure," was sustained. The case of *O'Reilly* v. *Morse* was distinguished as not a patent for a process, but for a mere principle. "If the mode of doing it," said Mr. Justice Bradley, "or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough, in the patent, to point out the process to be performed, without giving superogatory directions as to the apparatus or the method to be employed."

In *New Process Fermentation Company* v. *Maus*, 122 U. S. 413, a patent was sustained for preparing and preserving beer for the market, which consisted in holding it under controllable pressure of carbonic acid gas from the beginning of the kraeusen stage until such time as it is transferred to kegs and bunged. The process was strictly a chemical one, and was patentable within all the authorities upon the subject, although the mechanism by which the process was applied was also set forth in the patent.

Undoubtedly, the most important case in which a patent for process was considered was that of the *Bell Telephone*, 126 U. S. 1, 534, in which a claim was sustained for "the method of, and apparatus for, transmitting vocal and other sounds telegraphically . . . by causing electrical undulations, similar in form to the vibrations of the air accompanying the

said vocal or other sounds, substantially as set forth." The case of *O'Reilly* v. *Morse* was again commented on and distinguished, Mr. Chief Justice Waite remarking: "In the present case the claim is not for the use of a current of electricity in its natural state as it comes from the battery, but for putting a continuous current in a closed circuit into a certain specified condition suited to the transmission of vocal and other sounds, and using it in that condition for that purpose. . . . We see nothing in Morse's case to defeat Bell's claim; on the contrary, it is in all respects sustained by that authority. It may be that electricity cannot be used at all for the transmission of speech except in the way Bell has discovered, and that therefore, practically, his patent gives him its exclusive use for that purpose, but that does not make his claim one for the use of electricity distinct from the particular process with which it is connected in his patent." See also *Am. Bell Telephone Co.* v. *Dolbear*, 15 Fed. Rep. 448. It will be observed that, in all these cases, the process was either a chemical one, or consisted in the use of one of the agencies of nature for a practical purpose.

It is equally clear, however, that a valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, for the function of a machine. The distinction between the two classes of cases nowhere better appears than in the earliest reported case upon that subject, viz., *Wyeth* v. *Stone*, 1 Story, 273, in which the patentee claimed as his invention the cutting of ice of a uniform size by means of an apparatus worked by any other power than human. This was said to be a claim for an art or principle in the abstract, and not for any particular method or machinery by which ice was to be cut, and to be unmaintainable in point of law, although the patent was held to be good for the machinery described in the specification.

The leading case in this court is that of *Corning* v. *Burden*, 15 How. 252, 267, decided at the same term with that of *O'Reilly* v. *Morse*. The patent was for a new and useful machine for rolling puddler's balls and other masses of iron,

in the manufacture of iron. Upon the trial the court below charged the jury that the patent was for a new process, mode, or method for converting puddler's balls into blooms by continuous pressure and rotation of the balls between converging surfaces. Upon appeal to this court, however, the patent was held to be one for a machine, and, in delivering the opinion of the court, Mr. Justice Grier stated with great clearness the difference between such processes as were patentable and such as involved merely mechanical operation. "A process *eo nomine* is not made the subject of a patent in our act of Congress. It is included under the general term 'useful art.' An art may require one or more processes or machines in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing india rubber, smelting ores, and numerous others are usually carried on by processes, as distinguished from machines. One may discover a new and useful improvement in the process of tanning, dyeing, etc., irrespective of any particular form of machinery or mechanical device. And another may invent a labor-saving machine, by which this operation or process may be performed, and each may be entitled to his patent. . . . It is when the term process is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations. But the term process is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of

producing that operation, which is by mechanical means, and the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

Although the cases are not numerous, this distinction between a process and a function has never been departed from by this court, and has been accepted and applied in a large number of cases in the Circuit Courts. The following processes have been held not to be patentable: An improvement in sewing machines, by which the soles and uppers of boots and shoes could be sewed together without any welt by a certain kind of stitches, *McKay* v. *Jackman*, 12 Fed. Rep. 615. A process for washing shavings in breweries, *Brainard* v. *Cramme*, 12 Fed. Rep. 621. For an improved method of treating seed by steam, *Gage* v. *Kellogg*, 23 Fed. Rep. 891. A process for crimping heel stiffenings of boots and shoes, *Hatch* v. *Moffitt*, 15 Fed. Rep. 252. See also *Sickels* v. *Falls Company*, 4 Blatchford, 508; *Excelsior Needle Co.* v. *Union Needle Co.*, 32 Fed. Rep. 221.

The patent in question clearly falls within this category. As already shown, it is upon its face "for an improved process of manufacture," and mechanism is shown and described simply for the purpose of exhibiting its operation, which is described in detail. The result is a pulley more perfectly balanced, more faultless in shape, stronger and more durable, perhaps, than any before produced; but this was not because the patentee had discovered anything new in the result produced, but because the mechanism was better adapted to produce that result than anything that had before been known. As pulleys of that description had been produced before, doubtless, with greater care in the manufacture of them, a pulley as perfect as his might have been made. So that all that he invented in fact was a machine for the more perfect manufacture of such pulleys. The operation or function of such machine, however, is not patentable as a process.

2. Patent No. 248,598, granted upon the same day, is obviously, though not in so many words, for the product of the mechanical process described in the patent just disposed of — in other words, for a belt pulley made substantially in the manner detailed in that patent. In his specification the patentee states that his invention "consists in a pulley which is perfectly true and accurately balanced — that is, a pulley in which the centre of gravity and geometrical centre or axis coincide." He further states that all the prior belt pulleys had been open to the objection of not having been accurately balanced, a defect inherent in their structure. "Thus, while cast pulleys are of accurate shape, they cannot be practically produced of perfect balance, owing to the irregularity of the weight of the metal at different portions of the rim, and to contraction in cooling; and where pulleys of similar character to that herein shown have been made, the spiders have not been properly prepared — that is, the spiders have not been operated upon so as to make the ends of their arms exactly concentric with the true centre or axis of the pulley. . . . The spider, however made, will be slightly imperfect in shape, and unless the irregularities are cured before applying the rim, the completed pulley will not be accurately balanced."

After detailing the advantages of having the pulleys perfectly balanced and shaped with absolute accuracy, and setting forth in general terms the manner of securing this by grinding the rim concentrically with the axis, he claims, first, "the improved belt pulley, herein described, having the ends of the spider arms ground off concentrically with the axis of the pulley;" and second, the same pulley with the rim and the ends of the spider arm ground off concentrically.

Obviously the patent in question is not for a new device, nor for a new combination of old devices. It contains precisely the elements of every other belt pulley, and operates in substantially the same way. It is in reality a patent for a belt pulley which differs from other belt pulleys only in the fact that the rim and ends of the spider arms are ground off concentrically with the axis. Obviously this is not a patentable feature. The claims state in substance that the belt

pulley must be made in a peculiar way, which is equivalent to saying that it must be made by a peculiar process; in other words, that it is a product of a mechanical process, which we have already held not to be patentable. The only object in having the ends of the spider arms ground off concentrically with the axis of the pulley is that the rim may be concentric with such axis. This, however, is necessary in every pulley, and if the patented pulley be superior to others in this particular, it is because its workmanship is superior, and because it is made so by a superior process of manufacture. The specification states in substance that this belt pulley is superior to every other because it is better made, more perfectly balanced, and is one in which the centre of gravity and geometrical centre, or axis, coincide. It is said that such perfection of balance can only be obtained by the process described in the prior patent, viz., by grinding off the ends of the spider arms; but it does not follow that some other person may not, by another process, or by greater care or superior skill or deftness in the handling of tools, manufacture a pulley which shall be equal to this. But if this patent be valid, he would be an infringer in so doing, though he employed no mechanism whatever in the manufacture of such pulley, and did the work entirely with his own hands, if only he ground off the ends of the spider arms.

In short, this is a patent only for superior workmanship, and within all the authorities is invalid. This court has repeatedly stated that all improvement is not invention. If a certain device differs from what precedes it only in superiority of finish, or in greater accuracy of detail, it is but the carrying forward of an old idea, and does not amount to invention. Thus, if it had been customary to make an article of unpolished metal, it does not involve invention to polish it. If a telescope had been made with a certain degree of power, it involves no invention to make one which differs from the other only in its having greater power. If boards had heretofore been planed by hand, a board better planed by machinery would not be patentable, although in all these cases the machinery itself may be patentable.

Thus in *Smith* v. *Nichols*, 21 Wall. 112, 119, the subject-matter of the patent was an elastic woven fabric, and it appeared that, owing to the excellent manner of weaving, and perhaps from other causes, the fabric had gone into extensive use, and, for the especial purpose of elastic gores in gaiter-boots, had supplanted every other similar fabric. It appeared, however, that a fabric substantially the same in construction and possessing virtually the same properties had been previously known and used, and that the superiority of the fabric patented was due solely to improved machinery or to greater mechanical skill in the formation of the fabric, by which an excellence in degree was obtained, but not one in kind. In delivering the opinion Mr. Justice Swayne observed: "All the particulars claimed by the complainant, if conceded to be his, are within the category of *degree*. Many textile fabrics, especially those of cotton and wool, are constantly improved. Sometimes the improvement is due to the skill of the workmen, and sometimes to the perfection of the machinery employed. The results are higher finish, greater beauty of surface, and increased commercial value. A patent for the better fabric in such cases would, we apprehend, be unprecedented."

In *Pickering* v. *McCullough*, 104 U. S. 310, the patent was for an improvement in the manufacture of moulding crucibles and pots, made of a plastic material composed of black lead and fire clay. It appeared that difficulty had been experienced in removing the crucibles from the mould, in consequence of the adhesive nature of the black-lead mixture employed in the manufacture. The invention obviated this difficulty, and by an improved mode of manufacture much labor and expense were saved, and crucibles were produced which were superior to those made by any particular mode known prior to the device in question. It was held that this did not involve invention.

So in *Burt* v. *Evory*, 133 U. S. 349, the invention consisted in a novel mode of constructing shoes and gaiters, whereby the ordinary elastic goring at the sides and lacing at the front were both dispensed with. The claim was treated as one for

a manufactured article and not for a mode of producing it. It was held that the changes made "were changes of degree only, and did not involve any new principle. Their shoe performed no new function. In the construction of the vamp, the quarters and the expansible gore flap were cut somewhat differently, it is true, from like parts of the shoe constructed under the earlier patents referred to, but they subserved the same purposes." See also *Wooster* v. *Calhoun*, 11 Blatchford, 215.

3. Patent No. 238,702, also for belt pulley, antedated the other patents by seven months, and as stated by the patentee has for its object, first, the production of a cheap, light, and durable pulley; and secondly, the production of irregular sizes of pulleys without the necessity of a separate pattern for each size of pulley required. This invention consists, first, in constructing the usual crown or dish on the rim of wrought-metal rimmed pulleys by bending said rim transversely during the process of manufacture; secondly, the belt pulley having arms formed of wood, preferably of a cylindrical shape, which at their inner ends rest in sockets cast on the hub, and at their outer ends are provided with bracket lugs, to which the pin is secured by rivets or other equivalent means.

"The rim D may be of any suitable material — either wrought iron, steel, or wood — with the bracket lugs C arranged transversely, as shown, in order to brace and support the edges of the rim and prevent the same from working loose from its attachment, which is liable to occur when the bracket lugs are not arranged as above set forth.

"The crown or dish *d*, usual to belt pulleys, is formed on the rim D by bending or dishing the rim during the process of manufacture, preferably at the same time and by means of the same rolls that bend the rim into the required circular shape. By the use of wood for forming the arms of the pulley, as above set forth, a much lighter and cheaper pulley can be produced than where iron is used for said arms and yet possess as great strength."

The claims are as follows:

"1. A wrought-metal rimmed pulley having a crown, *d*,

formed on its rim during the process of manufacture, as described, and for the purpose set forth.

"2. A belt pulley provided with wooden arms B, a cast-metal hub A, having radial sockets *a* and bracket lugs C, for the attachment of the rim D, as described, and for the purpose set forth."

If, as stated in the specification, it had been "usual" heretofore to form the rim with a crown or dish it makes no difference, so far as the completed article is concerned, whether it be formed during the process of manufacture by bending the rim transversely, or in any other way. Indeed, it is difficult to see how the crown could be made except during the process of manufacture, as it is part of such process. We are dealing with a belt pulley as a new article of manufacture, and the question how the pulley is made, or how the crown is made upon the rim, is entirely immaterial. As the first claim does not describe a pulley which differs at all in its completed state from prior pulleys, it is clearly invalid.

The second claim is for a belt pulley provided with wooden arms and a cast-iron hub with sockets and bracket lugs, for the attachment of the rim. But as this claim was not found by the court below to have been infringed, it is not necessary to consider it.

For the reasons above given we think all these patents are invalid, and that the demurrer to the bill should have been sustained, except perhaps so far as the second claim of the last patent is concerned.

Medart may or may not have been entitled to a patent for the machinery employed in the manufacture of the belt pulleys in question; but he certainly was not entitled to a patent for the function of such machine, nor to the completed pulley, which differed from the prior ones only in its superior workmanship.

The decree of the court below must, therefore, be

Reversed, and the case remanded to the Circuit Court with directions to dismiss the bill.

WHITNEY *v.* TAYLOR.

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

No. 278. Argued April 10, 1895. — Decided April 29, 1895.

In May, 1854, J. settled on a quarter section of public land in California, which had not been then offered for public sale, and improved it. Before May, 1857, the government survey had been made and filed, showing the tract to be agricultural land, not swamp or mineral, and not embraced within any reservation. In May, 1857, J. duly declared his intention to claim it as a preëmption right under the act of March 3, 1853, c. 145, 10 Stat. 244, and paid the fees required by law, and the filing of this statement was duly noted in the proper government record. J. occupied the tract until about 1859, when he left for England, and never returned. The land was found to be within the granted limits of the grant to the Central Pacific Railroad Company, by the act of July 1, 1862, c. 120, 12 Stat. 489. That company filed its map of definite location March 26, 1864, and fully constructed its road by July 10, 1868. It demanded this tract and the Land Office denied the claim. In 1885 the preëmption entry of J. was cancelled. On August 28, 1888, T. made entry of the premises under the homestead laws of the United States, and subsequently commuted such entry, made his final proofs, paid the sum of $400, took the government receipt therefor, and entered into possession. *Held:*

(1) That the tract being subject to the preëmption claim of J. at the time when the grant to the railroad company took effect, was excepted from the operation of that grant;

(2) That after the cancellation of that entry it remained part of the public domain, and, at the time of the homestead entry of T. was subject to such entry.

THE controversy in this case is in respect to the title to the southeast quarter of section 33, township 12 north, range 7 east, Mount Diablo meridian, in the State of California. The land is within the granted limits of the Central Pacific Railroad Company, Act of July 1, 1862, c. 120, 12 Stat. 489, and the plaintiff claims under and by virtue of mesne conveyances from that company. The company filed its map of definite location on March 26, 1864, and fully constructed its road by

the 10th of July, 1868. It demanded, but never received a patent.

The title of the defendant rests on the following facts: On May 28, 1857, one Henry H. Jones, having paid the fees required by law in such cases, filed his preëmption declaratory statement in the land office having jurisdiction over the premises, which declaratory statement was in the words and figures following:

"I, Henry H. Jones, of Placer County, being an American citizen, over the age of twenty-one years, and a single man, have, on the 16th day of January, 1854, settled and improved the southeast quarter of section No. thirty-three, 33, of township No. twelve north, 12 N., of range No. seven east, 7 E., Mt. Diablo meridian, in the district of lands subject to sale at the land office at Marysville, California, containing one hundred and sixty acres, which land has not yet been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a preëmption right under the provisions of an act of Congress of 3d day of March, 1853.

"Witness my hand this 22d day of May, A.D. 1857.

"HENRY H. JONES.

"In presence of V. E. REMINGTON."

The filing of this statement was duly noted in the proper volume of tract books in the land office, and was the only record claim to the premises prior to the time when the line of the Central Pacific Railroad was definitely fixed. The government survey was made intermediate the settlement by Jones in 1854 and the filing of this statement. On April 18, 1856, a return of the official plat of such survey was made by the surveyor-general for the State of California to the General Land Office at Washington, and during the same year a duplicate copy thereof was filed in the local land office. By such survey and return all the land in the township, including the premises in question, was ascertained and returned as agricultural and not mineral or swamp land, and not embraced in any government reservation. On June 30, 1858, the President

issued his proclamation for the sale of lands in that land district, this tract included, naming February 14, 1859, as the time for the opening of the sale, and notifying all preëmption claimants that their rights would be forfeited unless prior to such date they should establish their claims and pay for the lands they had given notice of their intention to preëmpt. The proclamation further declared that "no mineral lands or tracts containing mineral deposits are to be offered at the public sales, such mineral lands being hereby expressly excepted from sale or other disposal pursuant to the requirements of the act of Congress, approved March 3, 1853." The land officers under this authority withheld from offer and sale all of section 33, stating in their report, dated March 13, 1859, that the land was reserved as mineral land.

Some time after the filing of the map of definite location the railroad company commenced proceedings against Jones to have his declaratory statement cancelled. The decision of the local land officers, adverse to Jones, was transmitted to the Commissioner of the General Land Office, who, on December 23, 1886, affirming their decision, held that "at the date when the route of the C. P. R. R. Co. was definitely fixed a preëmption claim had attached thereto, that of Jones, and as the grant to said company expressly provided that lands to which a preëmption claim had not attached were granted, it follows that lands to which such a claim had then attached were not granted. *K. P. R. R. Co.* v. *Dunmeyer*, 113 U. S. 629, and *U. S.* v. *U. P. R. R. Co.*, 12 Copp, 161. That Jones's claim has been found to have been abandoned or invalid cannot operate to the railroad company's advantage, for the granting act did not provide that lands to which an unabandoned or valid preëmption claim may not have attached were granted, but only that lands to which a preemption claim may not have attached were granted. The claim of Jones had attached when the railroad was definitely located, and, whether valid or invalid, excepted the land from the grant. The tract in question is, therefore, held to be subject to disposal as public land."

This decision was affirmed by the Secretary of the Interior

on July 17, 1888. On August 28, 1888, the defendant made entry of the premises under the homestead laws of the United States. Subsequently, he commuted such homestead entry under section 2301, Rev. Stat., made his final proofs, paid the sum of $400, and obtained the government receipt therefor. With reference to the occupation and improvement of the premises by Jones this is the finding of the trial court:

"That Jones, from the time that he alleged settlement, in 1854, up to about 1859, cut some hay off from about four acres of the land in controversy, which he had enclosed with a brush fence. Jones cut off the brush on the ground in controversy to enable him to make the fence. At that time the country was open and Jones pastured his cattle and sheep on the land in controversy, as well as over the surrounding country, but he never settled upon the land in controversy. He lived on section 4 adjoining. At the time of Jones's settlement the lines of survey were not generally known. Jones subsequently left the country to visit England about 1859, the exact date not being fixed, and never returned. His record filing remained intact on the records of the land office until cancelled [in 1885], as hereinbefore stated."

Upon the foregoing facts the Circuit Court held that the land in controversy was at the time of defendant's homestead entry part of the public domain of the United States and subject to disposal as public land, and, upon such conclusion, entered judgment in favor of the defendant. 45 Fed. Rep. 616.

Mr. B. E. Valentine for plaintiff in error.

Mr. C. W. Holcomb for defendant in error. *Mr. W. J. Johnston* was on his brief.

Mr. Justice Brewer delivered the opinion of the court.

This case turns upon the question whether on March 26, 1864, at the time of the filing by the railroad company of its map of definite location, the tract in controversy was public

land of the United States, and therefore passing under the grant to the company, or was excepted therefrom by reason of the previous declaratory statement of Jones. In *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, 644, one Miller had made a homestead entry on the land in controversy prior to the filing of the map of definite location. Thereafter he abandoned his homestead claim, and the contention was that such abandonment inured to the benefit of the company, and subjected the land to the operation of the grant, but this contention was denied, the court, holding that the condition of the title at the date of the definite location determined the question as to whether the land passed to the railroad company or not, and, distinguishing *Water and Mining Company* v. *Bugbey*, 96 U. S. 165, said in reference to a homestead claim:

"In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant.

"Of all the words in the English language this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds."

In *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, 361, these facts appeared: At the time of the filing by the plaintiff railroad company of its map of definite location there stood upon the records of the local land office a homestead entry of

Bently S. Turner. This entry was based upon an affidavit made by Turner, a soldier in the army of the United States, and actually with his regiment in the State of Virginia, which affidavit stated that Turner was the head of a family, a citizen of the United States and a resident of Franklin County, New York. It did not state that Turner's family, or any member thereof, was residing on the land, or that there was any improvement made thereon, and as a matter of fact no member of his family was then residing, or ever did reside, on the land, and no improvement whatever of any kind had ever been made thereon by any one. The application for the entry was made through one Conwell, whom Turner had constituted his attorney for that purpose. At the time of making this entry section 1 of the act of March 21, 1864, c. 38, 13 Stat. 35, Rev. Stat. § 2293, was in force, which authorized one, in the military or naval service of the United States, and, therefore, unable to do personally the preliminary acts required at the land office, whose family or some member thereof was residing on the land, and upon which a *bona fide* improvement and settlement had been made, to make the customary affidavit before his commanding officer, and upon that, the other provisions of the statute being complied with, to enter a tract of land as a homestead. It was held that notwithstanding the defects in the affidavit the tract was excepted from the scope of the grant, although the language of the granting act only excepted therefrom lands to which "the right of preemption or homestead settlement has attached," while the language of the granting act in the present case is "to which a preëmption or homestead claim may not have attached."

We quote from the opinion by Mr. Justice Lamar as follows: "In *Witherspoon* v. *Duncan*, 4 Wall. 210, this court decided, in accordance with the decision in *Carroll* v. *Safford*, 3 How. 441, that 'lands originally public cease to be public after they have been entered at the land office and a certificate of entry has been obtained.' And the court further held that this applies as well to homestead and preëmption as to cash entries. In either case, the entry being made and the certificate being executed and delivered, the particular land entered

thereby becomes segregated from the mass of public lands and takes the character of private property. The fact that such an entry may not be confirmed by the land office on account of any alleged defect therein, or may be cancelled or declared forfeited on account of non-compliance with the law, or even declared void, after a patent has issued on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands." And, after referring to the *Dunmeyer case*, in which it was said that the entry when made was valid, "counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference being that in that case the entry existing at the time of the location of the road was an entry valid in all respects, while the entry in this case was invalid on its face and in its inception; and that this entry having been made by an agent of the applicant and based upon an affidavit which failed to show the settlement and improvement required by law, was, on its face, not such a proceeding in the proper land office as could attach even an inchoate right to the land. . . . But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road, an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money — an entry, the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allow-

ing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based. As was said in the *Dunmeyer case*, *supra:* 'It is not conceivable that Congress intended to place these parties (homestead and preemption claimants on the one hand and the railway company on the other) as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation with an interest to defeat their claims and to come between them and the government as to the performance of their obligations? '"

The same doctrine was applied in *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, to a preëmption entry, though it is true that in that case payment had been made, and the final receipt issued prior to the filing of the map of definite location.

See also *Newhall* v. *Sanger*, 92 U. S. 761, in which case the mere existence of an alleged Mexican grant, valid or invalid, and the validity of which was under investigation before the proper tribunal at the time of the filing of the map of definite location of one of the Pacific roads, a beneficiary of the very act now before us, was held to exclude all lands within its boundaries from the operation of the congressional grant.

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or preëmption law, which has been recognized by the officers of the government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the inten-

tion of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard. The reasoning of these cases is applicable here. Jones had filed a claim in respect to this land, declaring that he had settled and improved it, and intended to purchase it under the provisions of the preëmption law. Whether he had in fact settled or improved it was a question in which the government was, at least up to the time of the filing of the map of definite location, the only party adversely interested. And if it was content to let that claim rest as one thereafter to be prosecuted to consummation, that was the end of the matter, and the railroad company was not permitted by the filing of its map of definite location to become a party to any such controversy. The land being subject to such claim was, as said by Mr. Justice Miller, in *Railway Company* v. *Dunmeyer*, *supra*, "excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

While not disputing the general force of these authorities it is insisted by plaintiff that this case is not controlled by them for these reasons: First, Jones never acquired any right of preëmption because he never in fact settled upon and improved the tract; second, the land was unsurveyed at the time of the alleged settlement, and the filing was not made "within three months after the return of the plats of surveys to the land office," (10 Stat. 246,) and was therefore an unauthorized act; third, that whether the filing was made in time or not, as it was not followed by payment and final proof within the time prescribed, all rights acquired by it lapsed, the filing became in the nomenclature of the land office an "expired filing," and the land was discharged of all claim by reason thereof.

With reference to the first of these reasons it is true that there must be a settlement and improvement in order to justify the filing of such a declaratory statement. Settlement

is the initial fact. The act of September 4, 1841, c. 16, 5 Stat. 453, which was in force at the time of these transactions, gave the right of preëmption to one making "a settlement in person," and who inhabits and improves the land and erects a dwelling thereon, (§ 10,) and authorized the filing of a declaratory statement within three months after the date of such settlement. (§ 15.) In this respect a preëmption differs from a homestead, for the entry in the land office is in respect to the latter the initial fact. Act of May 20, 1862, c. 75, 12 Stat. 392; Rev. Stat. § 2290; *Maddox* v. *Burnham*, 156 U. S. 544. But it is also true that settlement alone without a declaratory statement creates no preëmption right. "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preëmptor, the rule being that his settlement alone is not sufficient for that purpose." *Lansdale* v. *Daniels*, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the preëmption claim. While the cases of *Kansas Pacific Railway Co.* v. *Dunmeyer* and *Hastings & Dakota Railway Co.* v. *Whitney*, *supra*, involved simply homestead claims, yet, in the opinion in each, preëmption and homestead claims were mentioned and considered as standing in this respect upon the same footing. Further, it may be noticed that the granting clause of the Pacific Railroad acts, differing from similar clauses in other railroad grants, excepts lands to which preëmption or homestead "claims" have attached, instead of simply cases of preëmption or homestead "rights." And the filing of this declaratory statement was, in the strictest sense of the term, the assertion of a preëmption claim, and when filed and noted it was officially recognized as such. Indeed, if this is not so, there is no preëmption claim of record until the full right of the preëmptor is established by proofs and final entry, at which time he acquires an equitable title sufficient to support taxation, and one of which he cannot be dispossessed except by some legal proceedings. *Witherspoon* v. *Duncan*, 4 Wall. 210; *Orchard* v. *Alexander*, 157 U. S. 372.

In this respect notice may also be taken of the rule prevailing in the land department where the filing of the declaratory statement is recognized as the assertion of a preëmption claim which excepts a tract from the scope of a railroad grant like this. See among other cases *Malone* v. *Railway Company*, 7 Land Dec. 13; *Millican* v. *Railroad Company*, 7 Land Dec. 85; *Payne* v. *Railroad Company*, 7 Land Dec. 405; *Railroad Company* v. *Lewis*, 8 Land Dec. 292; *Railroad Company* v. *Stovenour*, 10 Land Dec. 645.

Indeed, this declaratory statement bears substantially the same relation to a purchase under the preëmption law that the original entry in a homestead case does to the final acquisition of title. The purpose of each is to place on record an assertion of an intent to obtain title under the respective statutes. "This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale, for the time allowed the settler to perfect his entry and pay for the land." *Johnson* v. *Towsley*, 13 Wall. 72, 89. By neither the declaratory statement in a preëmption case nor the original entry in a homestead case is any vested right acquired as against the government. For each fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention. It is true one must be verified and the other need not be, but this does not create any essential difference in the character of the proceeding; and when the declaratory statement is accepted by the local land officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case and its entry on the land books. The latter, as we have seen in the two cases of *Railway Company* v. *Dunmeyer* and *Railroad Company* v. *Whitney*, *supra*, has been expressly adjudged to be sufficient to take the land out of the scope of the grant. The reasons given therefor lead to the same conclusion in respect to a declaratory statement. Counsel urges that, inasmuch as the latter need not be verified, one might file under assumed names declaratory statements on every tract within the limits of a railroad grant prior to the time of

the filing of the map of definite location, and thus prevent the railroad company from receiving any lands. This danger is more imaginary than real. In the first place, for each application fees must be paid, and it is not to be supposed that any one would throw away money for the mere sake of preventing a railroad grant from having any operation. In the second place, such declaratory statements under assumed names would be purely fictitious and could be set aside as absolutely void. Indeed, good faith is presumed to underlie all such applications. The acceptance of the declaratory statement by the local land officers is *prima facie* evidence that they have approved it as a *bona fide* application, and if, in any particular instance, it is shown to be purely fictitious, doubtless there is an adequate remedy by proper proceedings in the land office. There is in the case before us no pretence that the transaction was a fictitious one, or carried on otherwise than in perfect good faith on the part of the applicant. At any rate, Congress has seen fit not to require an affidavit to a declaratory statement, and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the preëmption law, and that is all that is necessary to except the land from the scope of the grant.

With reference to the second matter, it is true that section 6 of the act of 1853 (10 Stat. 246) provides "that where unsurveyed lands are claimed by preëmption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices." But it was held in *Johnson* v. *Towsley*, *supra*, that a failure to file within the prescribed time did not vitiate the proceeding, neither could the delay be taken advantage of by one who had acquired no rights prior to the filing. As said in the opinion in that case (p. 90): "If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of preëmption by settle-

ment or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right." See also *Lansdale* v. *Daniels*, 100 U. S. 113, 117, where it is said: "Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as in the latter event it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim." The delay in filing, therefore, had no effect upon the validity of the declaratory statement.

With reference to the third contention, it is true that section 6 of the act of 1853, heretofore referred to, provides not merely when the declaratory statement shall be filed, but also that "proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale, including such lands." But the President's proclamation, appointing February 14, 1859, as the day for commencing the sale of public lands in certain townships, in one of which was the land in question, expressly excepted and excluded mineral lands therefrom, and on that ground this land was not offered.

It was said by Mr. Secretary Noble, in his decision on the appeal of the railway company (11 Land Dec. 195, 196):

"While it is true that the proclamation included said township 12 N., of range 7 E., it also declared that no 'mineral lands,' or tracts containing mineral deposits, are to be offered at the public sales, such mineral lands being hereby expressly excepted and excluded from sale or other disposal, pursuant to the requirements of the act of Congress approved March 3, 1853.

"Pursuant to this direction the local officers withheld from

offering and sale all of said section 33, as appears by their report dated March 18, 1859. After stating all the offerings and sales made in said township and range, the report concludes: 'All the balance of the township reserved, mineral lands.' All of section 33 was so reserved.

"It thus appears that the tract in question remained in the category of unoffered lands, and was not proclaimed for sale. The preëmption act of March 3, 1843, (5 Stat. 620,) provided that the settler on unoffered land might make proof and payment at any time before the commencement of the public sale, which should embrace his land. Until such time arrived the filing protected the claim of the settler. This was the status of the law at the time said company's rights attached, and it so continued until modified by the act of July 14, 1870. 16 Stat. 279."

We see no sufficient reasons for doubting the conclusions thus reached by the Secretary.

These are all the questions presented by counsel. There was no error in the ruling of the Circuit Court, and its judgment is, therefore,

Affirmed.

GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY *v.* HEFLEY.

ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

No. 255. Submitted April 4, 1895. — Decided April 29, 1895.

The Texas statute of May 6, 1882, making it unlawful for a railroad company in that State to charge and collect a greater sum for transporting freight than is specified in the bill of lading, is, when applied to freight transported into the State from a place without it, in conflict with the provision in section 6 of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, that it shall be unlawful for such carrier to charge and collect a greater or less compensation for the transportation of the property than is specified in the published schedule of rates provided for by the act, and in force at the time; and, being thus in conflict, it is not applicable to interstate shipments.

Statement of the Case.

When a state statute and a Federal statute operate upon the same subject matter, and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the state statute must give way.

On May 6, 1882, the legislature of the State of Texas passed the following act:

"Sec. 1. *Be it enacted by the legislature of the State of Texas*, That it shall be unlawful for any railroad company in this State, its officers, agents or employés, to charge and collect, or to endeavor to charge and collect, from the owner, agent or consignee of any freight, goods, wares and merchandise, of any kind or character whatever, a greater sum for transporting said freight, goods, wares and merchandise than is specified in the bill of lading.

"Sec. 2. That any railroad company, its officers, agents or employés, having possession of any goods, wares and merchandise of any kind or character whatever, shall deliver the same to the owner, his agent or consignee, upon payment of the freight charges, as shown by the bill of lading.

"Sec. 3. That any railroad company, its officers, agents or employés, that shall refuse to deliver to the owner, agent or consignee any freight, goods, wares and merchandise of any kind or character whatever, upon the payment, or tender of payment, of the freight charges due, as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares or merchandise to an amount equal to the amount of the freight charges for every day said freight, goods, wares and merchandise is held after payment, or tender of payment, of the charges due, as shown by the bill of lading, to be recovered in any court of competent jurisdiction." Laws of Texas, extra session, 1882, c. 26, p. 35.

Under that act the defendants in error commenced an action before a justice of the peace in the county of Milam, to recover $82.80. After judgment the case was appealed to the county court of the county. In that court a trial was had, a jury being waived, which resulted in a judgment in favor of the plaintiffs and against the railway company for the full amount

claimed. That was the highest court in the State to which the case could be taken, and thereupon the defendant sued out this writ of error.

The facts appear in the findings made by the trial court, and are as follows: On August 4, 1890, Wolf & Kramer, a firm doing business in St. Louis, Missouri, shipped from that city a carload of furniture to the plaintiffs at Cameron, Texas. The shipment was by the St. Louis and San Francisco Railway Company, and the bill of lading issued by that company named 69 cents per 100 pounds as the rate. At this rate the freight charges amounted to $82.80. On the arrival of the car at Cameron the plaintiffs presented this bill of lading to the agent of the defendant company, together with $82.80, and demanded the furniture. The agent refused to deliver without payment of $100.80, that being the amount of charges due at the rate of 84 cents per 100 pounds. This was the rate named in the printed tariff sheet posted in the railroad office at Cameron. As a matter of fact, before the shipment at St. Louis, the rate had by the companies been reduced to 69 cents, but the new tariff sheet had not reached Cameron, and the agent was ignorant of the reduction. While declining to deliver the goods except upon payment at the rate named in his tariff sheet, he told the plaintiffs that he would telegraph for instructions. He did so, and was advised that the rate had been reduced, and to accept 69 cents, but the telegram was not received at once, and so the furniture was detained one full day. So far as appears, the St. Louis and San Francisco Railway Company was not only a different corporation from the defendant, but under separate management and control, though, as respects through shipments, acting under a joint tariff.

Mr. A. T. Britton, *Mr. A. B. Browne*, *Mr. J. W. Terry*, and *Mr. George R. Peck* for plaintiff in error.

No brief filed for defendants in error.

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

Opinion of the Court.

The question presented by this record is this: Is the statute of Texas imposing a penalty for a failure to deliver goods on tender of the rate named in a bill of lading applicable to interstate shipments? While the amount in controversy is small, so small, indeed, that the case could not be taken from a lower to the Supreme Court of the State, the question is of no little importance.

At the time of this transaction the act of Congress, known as the Interstate Commerce Act, of February 4, 1887, c. 104, 24 Stat. 379, as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, was in force. By section 6 every common carrier, subject to the provisions of the act, (and all railroads carrying interstate freight are subject to such provisions,) is, for the inspection and information of the public, required to print and publicly post at each station upon its routes the schedules of fares and rates for carriage of passengers and property thereon. No advance in such fares and rates shall be made except after ten days' public notice, such advance to be shown by printing and posting new schedules, or plainly indicated upon the schedules then in force, and duly posted, nor shall any reduction in such fares and rates be made except after three days' previous public notice given in like manner. The section then reads:

"And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

After this is a provision in respect to joint rates between connecting carriers. Such carriers are required to file with the Interstate Commerce Commission copies of their joint tariffs, which shall be made public by the carriers when directed by the commission, in so far as in the judgment of the commission it is deemed practicable, the commission being

given power to prescribe the measure of publicity to be given and the places in which the joint tariffs shall be published. There is also a prohibition like to that quoted of any advance of such joint rates except after ten days' notice, or any reduction except after three days' notice, and a like declaration that it shall be unlawful for any common carrier, party to any such joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation than is specified in such schedules. Section 10 makes a violation of these provisions by any carrier, or any agent or person acting for the carrier, a penal offence, subject to fine not exceeding $5000, and, in case the offence amounts to an unlawful discrimination in rates, to imprisonment for a term not exceeding two years, or both such fine and imprisonment.

Clearly the state and the national acts relate to the same subject-matter and prescribe different rules. By the state act the bill of lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the national statute ignores the bill of lading and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us: If, in disregard of the joint tariff established by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield. "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." Constitution, Art. VI, clause 2. It is no answer to say that in this

case the defendant might have complied with both the state and the national statute; that it was a party to the reduction of the joint rate; that, therefore, the bill of lading was properly issued at 69 cents per 100 pounds; that it should have promptly notified its agents at every station of such reduction; that if it had done so the agent at Cameron could have complied with the state as well as the national law, and that its negligence in this respect is sufficient ground for holding it amenable to the state law. The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law.

It may be conceded that were there no congressional legislation in respect to the matter, the state act could be held applicable to interstate shipments as a police regulation. *Railroad Company* v. *Fuller*, 17 Wall. 560. In that case a statute of Iowa, requiring each railroad company annually in the month of September to establish passenger and freight rates, and on the first day of October following put up at all the stations on its route a printed copy of such rates and cause it to remain posted during the year, and, providing that, for charging and receiving higher rates than thus posted it should forfeit not less than $100 nor more than $200 to any person injured thereby, was upheld, notwithstanding Congress had passed the act of June 15, 1866, c. 124, 14 Stat. 66, providing "that every railroad company in the United States . . . be and is hereby authorized to carry upon and over its road . . . all passengers . . . freight and property on their way from any State to another State, and to receive compensation therefor;" and a recovery in favor of a party having shipped freight from Illinois into Iowa and charged higher rates of freight than thus posted was sustained. It will be perceived that the two statutes do not conflict, do not prescribe different rules, and only in a very general sense can be said to be in relation to the same subject-matter. It was held that the state statute was simply a police regulation. While so holding,

it was also said that even if it did affect commerce the question would arise whether it did not fall within that class of cases of which several were noticed in the opinion, where an act conceded to be a regulation of interstate commerce, yet local in its character, had been sustained by reason of the absence of congressional legislation in respect thereto. Among the cases named are *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299; *Pennsylvania* v. *Wheeling &c. Bridge*, 18 How. 421; *Brig James Gray* v. *Ship John Fraser*, 21 How. 184; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Ex parte McNiel*, 13 Wall. 236. Of the same character are the following cases, since decided: *Pound* v. *Turck*, 95 U. S. 459, 462; *Hall* v. *DeCuir*, 95 U. S. 485, 488; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 562; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 702; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; and *Morgan* v. *Louisiana*, 118 U. S. 455. In this latter case certain quarantine laws of the State of Louisiana were upheld, although to a certain extent they affected commerce with foreign nations, the court saying: "It may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent."

Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. "No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution." *Henderson* v. *New York*, 92 U. S. 259, 271. "Definitions of the police power must, however, be taken, subject

to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land." *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661. "While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail." *Morgan* v. *Louisiana*, 118 U. S. 455, 464.

It is unnecessary to pursue this discussion further. The state statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The state statute must, therefore, give way.

The judgment of the county court of Milam County is

Reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

ELLENWOOD *v.* MARIETTA CHAIR COMPANY.

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

No. 234. Argued April 11, 15, 1895. — Decided May 6, 1895.

By the law of those States of the Union whose jurisprudence is based on the common law, an action for trespass upon land can only be brought within the State in which the land lies.

A count alleging a continuing trespass upon land, and the cutting and conversion of timber growing thereon, states a single cause of action, in which the trespass upon the land is the principal thing, and the conversion of the timber is incidental only; and cannot be maintained by proof of the conversion, without also proving the trespass upon the land.

A court sitting in one State, before which is brought an action for trespass upon land in another State, may rightly order the case to be stricken from its docket, although no question of jurisdiction is made by demurrer or plea.

The case is stated in the opinion.

Mr. Assistant Attorney General Whitney, with whom was *Mr. George L. Sterling* on the brief, for plaintiff in error.

Mr. A. D. Follett, with whom was *Mr. R. A. Harrison* on the brief, for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the Southern District of Ohio, by one Walton, administrator of the estate of Latimer Bailey, deceased, and a citizen of New Jersey, against the Marietta Chair Company, a corporation of Ohio.

The original petition contained two counts; one count alleging that the defendant, on January 1, 1875, and on divers days between that day and May 4, 1885, in the lifetime of Bailey, unlawfully and with force broke and entered upon a tract of land in the county of Pleasants and State of West Virginia, owned and possessed by Bailey, and, by cutting and hauling timber thereon, cut up, obstructed, incumbered and devastated the land, and cut down, removed and carried therefrom a large quantity of timber, and converted and disposed of it to the defendant's own use; and the other count alleging that the defendant, on the days aforesaid, unlawfully took and received into its possession a large quantity of logs, the property of Bailey, and then lately cut and removed from that land, and converted and disposed of the same to its own use.

A motion by the defendant, that the plaintiff be required to make his complaint more definite and certain, was ordered by the court to be sustained, "unless the plaintiff amend his petition so as to show that the trespass complained of was a continuous trespass between the times mentioned in the petition."

Opinion of the Court.

The plaintiff thereupon, by leave of the court, filed an amended petition, containing a single count, alleging Bailey's ownership and possession of the land, and of the timber growing thereon; and that, on January 1, 1875, "and on divers other days from time to time continuously between that day and" May 4, 1885, sundry persons, knowing the land and the timber thereon to be Bailey's property, without any right or authority from him, and at the instance and for the use and benefit of the defendant, cut down and removed and sawed into logs a large quantity of the timber, and the defendant, knowing the logs to be cut from the land, and both land and logs to be Bailey's property, took the logs into its possession and converted them to its own use.

After the filing of an answer denying the allegations of the amended petition, and before the case came to trial, the court, upon Ellenwood's suggestion that Walton's letters of administration had been revoked, and Ellenwood had been appointed administrator in his stead, entered an order reviving the action in the name of Ellenwood as administrator; but afterwards adjudged that this order be set aside, and that the action be abated and stricken from the docket. This writ of error was thereupon sued out in the name of Walton, and was permitted by this court to be amended by substituting the name of Ellenwood. *Walton* v. *Marietta Chair Co.*, 157 U. S. 342.

Various grounds taken by the defendant in error in support of the judgment below need not be considered, because there is one decisive reason against the maintenance of the action.

By the law of England, and of those States of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the State in which the land lies. *Livingston* v. *Jefferson*, 1 Brock. 203; *McKenna* v. *Fisk*, 1 How. 241, 247; *Northern Indiana Railroad* v. *Michigan Central Railroad*, 15 How. 233, 242, 251; *Huntington* v. *Attrill*, 146 U. S. 657, 669, 670; *British South Africa Co.* v. *Companhia de Moçambique*, (1893) App. Cas. 602; *Cragin* v. *Lovell*, 88 N. Y. 258; *Allin* v. *Connecticut River Co.*, 150 Mass. 560;

Thayer v. *Brooks*, 17 Ohio, 489, 492; Kinkead's Code Pleading, § 35.

The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not. *McKenna* v. *Fisk*, above cited; *Williams* v. *Breedon*, 1 Bos. & Pul. 329.

But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. *Cotton* v. *United States*, 11 How. 229; *Eames* v. *Prentice*, 8 Cush. 337; *Howe* v. *Willson*, 1 Denio, 181; *Dodge* v. *Colby*, 108 N. Y. 445; *Merriman* v. *McCormick Co.*, 86 Wisconsin, 142. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The Circuit Court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea. *British South Africa Co.* v. *Companhia de Moçambique*, (1893) App. Cas. 602, 621; *Weidner* v. *Rankin*, 26 Ohio St. 522; *Youngstown* v. *Moore*, 30 Ohio St. 133; Ohio Rev. Stat. § 5064.

Judgment affirmed.

JOHNSON *v.* SAYRE.

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

No. 871. Argued April 18, 1895. — Decided May 6, 1895.

In the Fifth Article of Amendments to the Constitution of the United States, providing that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger," the words "when in actual service in time of war or public danger" apply to the militia only.

A paymaster's clerk in the navy, regularly appointed, and assigned to duty on a receiving ship, is a person in the naval service of the United States, subject to be tried and convicted, and to be sentenced to imprisonment, by a general court martial, for a violation of section 1624 of the Revised Statutes.

Article 43 of the Articles for the Government of the Navy, (Rev. Stat. § 1624,) requiring the accused to be furnished with a copy of the charges and specifications "at the time he is put under arrest," refers to his arrest for trial by court martial; and, if he is already in custody to await the result of a court of inquiry, is sufficiently complied with by delivering the copy to him immediately after the Secretary of the Navy has informed him of that result, and has ordered a court martial to convene to try him.

The decision and sentence of a court martial, having jurisdiction of the person accused and of the offence charged, and acting within the scope of its lawful powers, cannot be reviewed or set aside by writ of *habeas corpus*.

This was an appeal from an order upon a writ of *habeas corpus*, discharging David B. Sayre, a paymaster's clerk in the navy, assigned to duty on the United States receiving ship Franklin, from the custody of Captain Mortimer L. Johnson, the commander of that ship, under a sentence of a naval court martial. The case appeared by the record to be as follows:

On July 6, 1893, the Secretary of the Navy signed and sent to Sayre an appointment in these terms: "Upon the nomination of Paymaster James E. Cann, U. S. N., you are hereby

appointed a paymaster's clerk in the United States Navy, for duty on board of the U. S. R. S. Franklin. Enclosed is a blank form of acceptance for your signature, also a blank oath of office, which you will duly execute and return with your letter of acceptance to the department; having done which, you will proceed to the navy yard, Norfolk, Virginia, and report to the commandant, on the 15th instant, for duty."

On July 10, 1893, Sayre took the oath of office, and returned it to the Secretary of the Navy, with an acceptance in these terms: "I hereby accept the appointment of paymaster's clerk, dated July 6, 1893, conferred on me; and do hereby oblige and subject myself, during my service as paymaster's clerk, to comply with and be obedient to such laws, regulations and discipline of the navy as are now in force, or that may be enacted by Congress, or established by other competent authority; and herewith enclose oath of office duly executed."

Sayre accordingly entered upon the performance of his duties as paymaster's clerk, under Paymaster Cann, on board the Franklin, which was the receiving ship at the navy yard in Norfolk, Virginia. Cann, besides being paymaster of the Franklin, was paymaster at Port Royal, South Carolina, and of the monitors at Richmond, Virginia; and was therefore obliged to be away from the Franklin several days in each month.

On October 10, 1894, Sayre was put under arrest, by Captain Mortimer L. Johnson, commanding the Franklin, to await the investigation of a charge of embezzlement, and was thereafter held in custody. On October 13, the Secretary of the Navy ordered a court of inquiry to convene on October 16, at the navy yard in Norfolk, for the purpose of inquiring into the method in which the pay department of the Franklin had been conducted during the time covered by the service of Paymaster Cann on board of her; and directed that Sayre be held in custody, but be permitted to attend the court of inquiry, and to consult with counsel and inspect the ship's papers. He was accordingly brought before the court of inquiry from day to day until October 19. The court of inquiry recommended that he be tried by court martial on the charge of embezzle-

ment; and he was informed of this by a letter to him from the Secretary of the Navy of October 25.

On October 25, the Secretary of the Navy also ordered a general court martial to convene at the navy yard in Norfolk on October 30, for the trial of Sayre, and of such other persons as might be legally brought before it.

The charge against Sayre was of "embezzlement, in violation of article fourteen of the Articles for the Government of the Navy," with a specification that "David B. Sayre, a pay clerk in the United States Navy, attached to and serving as such on board the United States receiving ship Franklin, at the navy yard, Norfolk, Virginia, having, on various dates between" July 15, 1893, and October 10, 1894, "been entrusted by Paymaster James E. Cann, United States Navy, the paymaster of said vessel, with sums of money belonging to the United States, in various amounts, furnished and intended for the naval service thereof, for disbursement for the purposes of said service during the temporary absence of said Paymaster Cann from the vessel, and having," on October 1, 1894, "receipted to the said Paymaster Cann for money so entrusted to his care as aforesaid," in the sum of $2701.44, did, between July 15, 1893, and October 10, 1894, "knowingly and wilfully misappropriate, and apply to his own use and benefit, from the money so entrusted to him at various times as aforesaid," the sum of $1971.11, "in violation of article 14 of the Articles for the Government of the Navy."

On October 26, a copy of the charge and specification was delivered to Sayre. The court martial met October 30, and sat from day to day until November 2. At its first meeting, Sayre was brought before it, and acknowledged that he had received a copy of the charge and specification. After they had been read, his counsel objected to the jurisdiction of the court, upon the ground that Sayre, being a paymaster's clerk, was a civilian, and not subject to trial by court martial; and also demurred, upon the ground that a paymaster's clerk could not be guilty of embezzlement of funds of the United States, because the paymaster only was vested with the management and control of those funds, and had no

power to delegate his authority to a clerk. The court martial decided that it had jurisdiction, and overruled the demurrer. Sayre then pleaded not guilty.

The facts that the accused was originally put under arrest on October 10, and that the copy of the charge and specification was first delivered to him on October 26, were not brought to the notice of the court martial, until they appeared upon the examination of Captain Johnson, the last witness called for the United States. Sayre's counsel thereupon moved that all the evidence introduced on the part of the United States be excluded, because the copy had not been served upon him until sixteen days after his arrest; and in support of this motion relied upon article 43 of the Articles for the Government of the Navy,[1] and article 1785 of the United States Navy Regulations.[2]

On November 2, the court martial, after arguments of the defendant's counsel and of the judge advocate upon this motion, and upon the whole case, overruled the motion, and found the specification proved, and the accused guilty of the charge; and sentenced him "to be confined, in such a place as the Honorable Secretary of the Navy may designate, for the

[1] The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial, unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given to the accused to make his defence against such new charge. Rev. Stat. § 1624, art. 43.

[2] 1. It is entirely within the discretion of the officer empowered to convene a court martial to direct what portions of the complaint against an accused shall be charged against him.

2. When, therefore, such competent officers shall decide to have a party tried by court martial, he will cause such charges and specifications against him to be prepared as he may consider proper, and will transmit a true copy of them, with an order for the arrest or confinement of the accused, to the proper officer, who will deliver such order to the accused, and will carry it into effect by delivering to him the copy of the charges and specifications, and, if an officer, by receiving his sword. Navy Regulations of 1893, art. 1785, p. 462.

period of two years;" to lose his pay during his confinement, to the amount of $2210; and then to be dishonorably dismissed from the naval service of the United States.

On November 17, the Secretary of the Navy approved the proceedings, finding and sentence of the court martial, and ordered the sentence to be duly executed; and designated the prison at the navy yard in Boston, Massachusetts, as the place for the execution of so much of the sentence as related to confinement; and directed him to be transferred, under a suitable guard, to that prison, to be there confined in accordance with the terms of his sentence.

On November 21, upon the petition of Sayre, the Circuit Court of the United States for the Eastern District of Virginia ordered a writ of *habeas corpus* to issue to Captain Johnson. The return to the writ stated that Captain Johnson held Sayre under the order of the Secretary of the Navy of November 17. Upon a hearing, the court, held by the District Judge, considered, as stated in his opinion on file and sent up with the record, entitled "finding of the court," that Sayre was unlawfully restrained of his liberty, because detained under a sentence to an infamous punishment, not in time of war or public danger, without indictment or trial by jury, in violation of the Fifth Article of Amendment of the Constitution of the United States, "but without prejudice in any other respect to the sentence of the court martial;" and therefore ordered him to be discharged from custody. Captain Johnson appealed to this court.

Mr. Littleton W. T. Waller, by special leave of court, for appellant. *Mr. Solicitor General* was on his brief.

Mr. John W. Happer and *Mr. A. E. Warner* for appellee.

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

By the Fifth Article of Amendment of the Constitution of the United States, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The decision below is based upon the construction that the words "when in actual service in time of war or public danger" refer, not merely to the last antecedent, "or in the militia," but also to the previous clause, "in the land or naval forces." That construction is grammatically possible. But it is opposed to the evident meaning of the provision, taken by itself, and still more so, when it is considered together with the other provisions of the Constitution.

The whole purpose of the provision in question is to prevent persons, not subject to the military law, from being held to answer for a capital or otherwise infamous crime, without presentment or indictment by a grand jury.

All persons in the military or naval service of the United States are subject to the military law; the members of the regular army and navy, at all times; the militia, so long as they are in such service.

By article 1, section 8, of the Constitution, Congress has power "to raise and support armies;" "to provide and maintain a navy; to make rules for the government of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;" and to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

Congress is thus expressly vested with the power to make rules for the government of the whole regular army and navy at all times; and to provide for governing such part only of the militia of the several States, as, having been called forth to execute the laws of the Union, to suppress insurrections, or to repel invasions, is employed in the service of the United States.

By article 2, section 2, of the Constitution, "the President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

The President is thus, in like manner, made commander in chief of the army and the navy of the United States at all times; and commander in chief of the militia, only when called into the actual service of the United States.

The Fifth Article of Amendment recognizes the like distinction, between the regular land and naval forces and the militia, as to judicial authority, that the Constitution, as originally adopted, had recognized as to the legislative and the executive. It might as well be held that the words "when called into the actual service of the United States," in the clause concerning the authority of the President as commander in chief, restrict his authority over the army and navy, as to hold that the like words, in the Fifth Amendment, relating to the mode of accusation, restrict the jurisdiction of courts martial in the regular land and naval forces.

The necessary construction is that the words, in this amendment, "when in actual service in time of war or public danger," like the corresponding words, in the First Article of the Constitution, "call[ed] forth to execute the laws of the Union, suppress insurrections and repel invasions," and "employed in the service of the United States," and those, in the Second Article, "when called into the actual service of the United States," apply to the militia only.

This construction has hitherto been considered so plain and indisputable, that it has been constantly assumed and acted on by this court, without discussion. *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Reed*, 100 U. S. 13; *Ex parte Mason*, 105 U. S. 696; *Kurtz* v. *Moffatt*, 115 U. S. 487, 500; *Smith* v. *Whitney*, 116 U. S. 167, 186. See also 1 Kent Com. 341, note; Miller on the Constitution, 506, 507; *In re Bogart*, 2 Sawyer, 396; 12 Opinions of Attorneys General, 510.

Upon an appeal from the Circuit Court of the United States in a case of *habeas corpus*, all questions of law or of fact, arising upon the record, including the evidence, are open to con-

sideration; and the Circuit Court has no authority to make conclusive findings of fact, as it might do in actions at law upon waiver of a jury, or in cases in admiralty. *In re Neagle*, 135 U. S. 1, 42; *Bond* v. *Dustin*, 112 U. S. 604; *Ralli* v. *Troop*, 157 U. S. 386, 417.

The suggestion, in the opinion below, that "the prison at Boston is shown in evidence to be one of narrow cells and limited appliances for comfort, and such as would seem to render confinement in it for a long term a punishment which the law regards as 'cruel and unusual,'" and forbidden by the Eighth Article of Amendment of the Constitution, is unsupported by anything in the record. The remarks of the Secretary of the Navy, in the General Order of March 25, 1871, No. 162, cited by the learned judge, as to the condition of the prisons at the command of the department at that time, have no tendency to show what is the present condition of any of those prisons. And no point of the kind was made at the argument in this court.

By the Articles for the Government of the Navy, established by Congress, under the power conferred upon it by the Constitution, "fine or imprisonment, or such other punishment as a court martial shall adjudge, shall be inflicted upon any person in the naval service of the United States," "who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States, furnished or intended for the military or naval service thereof;" and "all offences committed by persons belonging to the navy while on shore shall be punished in the same manner as if they had been committed at sea." Rev. Stat. § 1624, arts. 14, 23. But service on a receiving ship, even if she is at anchor at a navy yard, and not in a condition to go to sea, is "sea service," within the meaning of the statute giving officers "at sea" a higher rate of pay than when "on shore duty." Rev. Stat. § 1556; *United States* v. *Symonds*, 120 U. S. 46; *United States* v. *Strong*, 125 U. S. 656.

By the Revised Statutes, certain paymasters, including those on receiving ships or at naval stations, are each allowed a clerk; the pay of the clerk is fixed; and he may become entitled to bounty land, or to a pension. Rev. Stat. §§ 1386, 1556, 2426, 4695. He is not, indeed, deemed one of the petty officers, who are entitled to obedience, in the execution of their offices, from persons of inferior ratings. Rev. Stat. § 1410. Nor is he entitled to mileage, as an "officer of the navy," under the act of June 30, 1876, c. 159. 19 Stat. 65; *United States* v. *Mouat*, 124 U. S. 303. But he is included among "officers and enlisted men in the regular or volunteer army or navy," and as such entitled to longevity pay, under the act of March 3, 1883, c. 97. 22 Stat. 473; *United States* v. *Hendee*, 124 U. S. 309.

The appointment and acceptance of Sayre as paymaster's clerk were in accordance with the Regulations for the Government of the Navy, established February 23, 1893, by the Secretary of the Navy, with the approval of the President, pursuant to section 1547 of the Revised Statutes. Navy Regulations of 1893, art. 1697, p. 438.

He was therefore, as has been directly adjudged by this court, a person in the naval service of the United States, and subject to be tried and convicted, and to be sentenced to imprisonment, by a general court martial. *Ex parte Reed*, 100 U. S. 13.

The provision of article 43 of the Articles for the Government of the Navy, which prescribes that "the person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest," (on which Sayre relied before the court martial, and in this court,) evidently refers, as appears by the very next article, to the time when he "is arrested for trial" by court martial, and not to the time of any previous arrest, either by way of punishment, or to await the action of a court of inquiry. Rev. Stat. § 1624, arts. 24, 43, 44, 55. Sayre, being already in custody to await the result of a court of inquiry, could not be considered as put under arrest for trial by court martial, before the Secretary of the Navy had informed him of the report of the court of

inquiry, and had ordered a court martial to convene to try him. Immediately after that, and four days before the court martial met, he was furnished with a copy of the charge and specification on which he was to be tried. This was a sufficient compliance with the article in question. And it is, at the least, doubtful whether the objection that it had not been sooner delivered to him did not come too late, after he had admitted before the court martial that he had received a copy of the charge and specification, and after objections to the jurisdiction of the court and to the form of the accusation had been made and overruled, and he had pleaded not guilty, and the evidence for the United States had been introduced.

The court martial having jurisdiction of the person accused and of the offence charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise. *Dynes* v. *Hoover*, 20 How. 65, 82; *Ex parte Reed*, 100 U. S. 13; *Ex parte Mason*, 105 U. S. 696; *Smith* v. *Whitney*, 116 U. S. 167, 177–179.

Order reversed, with directions to remand Sayre to custody.

PACIFIC RAILROAD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 233. Submitted April 15, 1895. — Decided May 6, 1895.

Congress having appropriated in payment of a judgment against the United States in the Court of Claims, the full amount of the judgment, with a provision in the appropriation law that the sum thus appropriated shall be in full satisfaction of the judgment, and the judgment debtor having accepted that sum in payment of the judgment debt, the debtor is estopped from claiming interest on the judgment debt under Rev. Stat. § 1090.

On May 2, 1888, the "Pacific Railroad," a corporation of the State of Missouri, filed in the Court of Claims a petition seeking to recover interest on certain judgments it had previ-

ously obtained against the United States. There was a traverse denying the allegations of the petition. Evidence was adduced and the cause submitted to the court.

There were the following findings of facts and conclusions of law:

"I. On the 28th of April, 1885, the claimant recovered judgment against the defendants in the Court of Claims for the sum of $44,800.74.

"On the 29th of April, 1885, the claimant presented to the Secretary of the Treasury a copy of said judgment, certified by the clerk of the Court of Claims and signed by the chief justice. Said judgment was not paid, except as hereinafter stated.

"II. From said judgment both parties took an appeal to the Supreme Court, the defendants July 14, and claimant July 15, 1885.

"The case was tried and determined by the Supreme Court, and the following mandate was filed in the Court of Claims February 9, 1887:

"'United States of America:

"'The President of the United States of America to the honorable the judges of the Court of Claims, greeting:

"'Whereas lately in the Court of Claims, before you or some of you, in a cause between The Pacific Railroad, claimant, and The United States, defendant, No. 11,825, wherein the judgment of the said Court of Claims, entered in said cause on the 20th day of April, A.D. 1885, is in the following words: "The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the said Pacific Railroad do have and recover of and from the United States the sum of forty-four thousand eight hundred dollars and seventy-four cents ($44,800.74)," as by the inspection of the transcript of the record of the said Court of Claims (which was brought into the Supreme Court of the United States by virtue of an appeal taken by the United States and a cross-appeal taken by the Pacific Railroad agreeably to the act of Congress in such a case made and provided) fully and at large appears;

"'And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-six, the same cause came on to be heard before the said Supreme Court, on the said transcript of record, on appeal and cross-appeal, and was argued by counsel:

"'On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed.

"'And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Claims with directions to enter a judgment for the full amount claimed by the Pacific Railroad Company for its services.'

"III. Thereupon, on February 19, 1887, the Court of Claims entered judgment anew in favor of the claimant for the sum of $130,196.98, according to said mandate.

"'On the 9th day of February, 1885, the claimant presented to the Secretary of the Treasury a copy of said judgment for the sum of $130,196.98, certified by the clerk of the Court of Claims and signed by the chief justice.

"IV. The principal sum of said last-named judgment has been paid under the act of 1888, Feb'y 1, c. 4, 25 Stat. 24, but the defendants refuse to pay any interest on either judgment.

"*Conclusion of law.*

"The court upon the foregoing findings of fact decide as a conclusion of law that the claimant is not entitled to recover and the petition is dismissed."

Mr. James Coleman, *Mr. A. T. Britton*, and *Mr. A. B. Browne* for appellant.

Mr. Assistant Attorney General Dodge and *Mr. Samuel A. Putnam* for appellees.

Mr. Justice Shiras delivered the opinion of the court.

As taking them out of the general rule excluding creditors of the government from recovering interest, the claimants

point to section 1090 of the Revised Statutes, which reads as follows: "In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance unless presented for payment to the Secretary of the Treasury as aforesaid."

As the claimants themselves appealed from the first judgment of the Court of Claims, and did not appeal from the second judgment, it is plain that they are not within the express terms of the statute they rely on. The first judgment was not affirmed, and the second judgment was not appealed from.

The contention that, inasmuch as the claimants brought the judgment of the court below into the Supreme Court for correction and there prevailed, they are within the fair meaning of the statute, is not without force; but we are relieved from its consideration by the conduct of the claimants in accepting payment of their judgment under the act of February 1, 1888, c. 4, 25 Stat. 4, 24, the terms of which were as follows: "To pay the judgment of the Court of Claims in favor of the Pacific Railroad eighty-five thousand three hundred and ninety-six dollars and twenty-four cents, being in addition to the sum of forty-four thousand eight hundred dollars and seventy-four cents, appropriated by the act approved August fourth, eighteen hundred and eighty-six, to pay a judgment in favor of said Pacific Railroad, *which two sums shall be in full satisfaction of the judgment* in favor of the Pacific Railroad reported to Congress in the House Executive Document number twenty-nine, Fiftieth Congress, first session."

In *Stewart* v. *Barnes*, 153 U. S. 456, this court held that when a person from whom an internal revenue tax had been illegally exacted, accepted from the government the precise amount of the sum thus illegally exacted, he thereby gave up his right to sue for interest as incidental damages; and the case of *Moore* v. *Fuller*, 2 Jones, (Law,) 205, was cited, wherein the Supreme Court of North Carolina said: "The general

principle is that when the principal subject of a claim is extinguished by the act of the plaintiff, or of the parties, all its incidents go with it. Thus, in an action of ejectment, if the plaintiff, pending the suit, takes possession of the premises, upon the plea of the defendant or upon its being shown, the plaintiff will be nonsuited. So, in an action of detinue, if the plaintiff takes possession of the property claimed, he can recover no damages, for they are consequential upon the recovery of the thing sued for. This is an action of debt on a bond to recover the interest, the principal having been paid by the defendant before the bringing of the action: by that payment, the bond was discharged, and by analogy to the cases referred to, the plaintiff cannot recover the interest, which is but an incident to the principal — the bond."

To the same effect is the case of *Tillotson* v. *Preston*, 3 Johns. 229, which was an action of assumpsit for money had and received. In addition to the general issue, there was a plea of payment of the sums mentioned in the declaration. To this plea of payment the plaintiff demurred specially, alleging for one ground of demurrer that the plea did not allege that the defendant had paid to the plaintiff the interest. The court said: "The demurrer is not well taken. If the plaintiff has accepted the principal, he cannot afterwards bring an action for the interest."

See, likewise, the case of *De Arnaud* v. *United States*, 151 U. S. 483, where it was held that the receipt by a claimant against the United States for a sum less than he had claimed, paid him by the disbursing agent of a department, "in full for the above account," is, in the absence of allegation and proof that it was given in ignorance of its purport, or in circumstances constituting duress, an acquittance in bar of any further demand — citing *Baker* v. *Nachtrieb*, 19 How. 126, and *United States* v. *Childs*, 12 Wall. 232.

The judgment of the court below, dismissing the plaintiff's petition, is

Affirmed.

BEARDSLEY v. ARKANSAS AND LOUISIANA RAILWAY COMPANY.

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

No. 199. Submitted April 8, 1895. — Decided May 6, 1895.

In equity causes all parties against whom a joint decree is rendered must join in an appeal, if any be taken; and when one of such joint defendants takes an appeal alone, and there is nothing in the record to show that his codefendants were applied to and refused to appeal, and no order is entered by court, on notice, granting him a separate appeal in respect of his own interest, his appeal cannot be sustained.

Paul F. Beardsley filed his bill in the Circuit Court of the United States for the Eastern District of Arkansas against John D. Beardsley and the Arkansas and Louisiana Railway Company to enforce certain rights in the railway under certain alleged trusts, which resulted in a final decree, February 24, 1887.

The decree adjudged that complainant, Paul F. Beardsley, pay to defendant J. D. Beardsley the sum of $7756.29 within thirty days, with interest from December 24, 1886, and that, upon such payment, defendant, J. D. Beardsley, convey and deliver to complainant or his successors of record, or into the registry of the court, one-third of the full paid stock of the Arkansas and Louisiana Railway Company, (less one-third of eight shares issued to the directors,) which had been issued or ought to have been issued to defendant J. D. Beardsley, and which one-third amounted to seventeen hundred and four shares of the face value of $100 each; and that at the same time defendant John D. Beardsley deliver and convey to complainant or his solicitors, or into the registry, one-third of one hundred and forty-four first mortgage bonds earned under a construction contract between said defendant and the railway company, but not certified nor held as collateral security, and that as soon as said defendant received from the St. Louis,

Iron Mountain and Southern Railway Company two hundred and forty first mortgage bonds of the Arkansas company, held as collateral security, or as soon as the debt due the St. Louis company had been paid, that he deliver to complainant one-third of these bonds. And it was further adjudged and decreed that the defendant John D. Beardsley had a lien on the one-third interest sold by him to complainant in the stock and bonds of the Arkansas company for the payment of the sum of money herein adjudged to be due him from complainant, and that if complainant should fail to pay that sum within the time fixed, that a sale of complainant's interest in said stock and bonds be made as directed, particulars relating thereto being set forth. It was also decreed that defendant John D. Beardsley pay all the costs of the proceedings except the costs of such sale and the orders of court in pursuance thereof, which were to be paid by complainant.

From this decree an appeal to this court was allowed J. D. Beardsley, April 6, 1887, as of March 30, 1887, and the record was filed herein September 27, 1887. The decree was affirmed February 2, 1891. *Beardsley* v. *Beardsley*, 138 U. S. 262.

The present record discloses that on October 22, 1887, while the appeal first mentioned was pending, Paul F. Beardsley without leave, filed a supplemental bill making the St. Louis, Iron Mountain and Southern Railway Company a party with the original defendants, J. D. Beardsley and the Arkansas and Louisiana Railway Company. A motion to strike this bill from the files was made and a demurrer and motion to dismiss filed, but the supplemental bill was retained, an amendment allowed to it making Jay Gould a party; the demurrer overruled; the bill taken as confessed by the Arkansas and Louisiana Railway Company; issues made up on the answers of J. D. Beardsley, the St. Louis company and Gould; evidence taken; and the case went to final decree before Caldwell, J., May 9, 1891.

It was thereby decreed that defendant J. D. Beardsley held in trust for the use and benefit of the Arkansas and Louisiana Railway Company certain described lands, and he was directed within thirty days to execute and deliver to the railway com-

pany a proper deed of conveyance thereof. Certain exceptions to a master's report were sustained, and the court ordered that in all other respects the report be confirmed, and adjudged and decreed that the Arkansas and Louisiana Railway Company have and recover of J. D. Beardsley the sum of $21,072.16, with interest from August 5, 1889; and further, that it appearing to the court that since the rendition of the decree on the original bill the Arkansas and Louisiana Railway Company had issued and delivered to defendant J. D. Beardsley certificates for all the full-paid and non-assessable stock of the company ordered to be issued by the decree, thus making, with the full-paid and non-assessable stock issued prior to the decree, the aggregate amount of 5120 shares of the face value of $100 each; and that the defendant John D., since the rendition of the original decree, had sold and delivered to defendant Jay Gould fifty-one per cent of the whole number of shares of stock, and had delivered the remaining forty-nine per cent to A. L. Hopkins, as trustee, in pledge for the use and benefit of Gould, which delivery and pledge were in violation of the rights of complainant as adjudged in the original decree, upon the payment by complainant of the amount adjudged on the original bill to be due J. D. Beardsley, either to said J. D. Beardsley or his solicitor, the said J. D. Beardsley and Gould deliver and cause their trustee to deliver to complainant, or to his solicitor of record, or into the registry of the court, certificates for seventeen hundred shares of the stock of the Arkansas and Louisiana Railway Company, of the face value of $100 each, of the stock so held by said trustee. It was further ordered and decreed that upon payment by the Arkansas and Louisiana Railway Company of its debt to the defendant, St. Louis, Iron Mountain and Southern Railway Company, for which certain of the bonds of the Arkansas company were held in pledge, and upon payment by complainant of his indebtedness to defendant J. D. Beardsley, the defendants J. D. Beardsley, the St. Louis, Iron Mountain and Southern Railway Company, the Arkansas and Louisiana Railway Company, and Gould, and their trustee or trustees, deliver to complainant or his solicitor eighty of the two hundred and forty first mort-

gage bonds now held by the St. Louis, Iron Mountain and Southern Railway Company or its trustee, as collateral security, and that the Arkansas and Louisiana Railway Company after such payment cause to be duly and properly certified forty-eight of the one hundred and forty-four earned, but uncertified, bonds of said Arkansas and Louisiana Railway Company, and deliver them to complainant or his solicitor. It was further ordered and decreed that each and all of the defendants be enjoined and restrained from carrying out any of the terms or conditions of certain specified agreements between J. D. Beardsley and Jay Gould, which in any manner conflicted with the interests or rights of complainant, "as adjudged and declared in this decree or with the decree heretofore rendered on original bill." And it was decreed that defendant J. D. Beardsley pay all the costs, including a part of the fees theretofore paid to the master, and that the costs of the receiver be paid by the Arkansas and Louisiana Railway Company.

The record contains the following entry June 16, 1891: "And now, on this day, comes the defendant John D. Beardsley, by J. M. Moore, Esq., his solicitor, and files his assignment of errors, and prays an appeal to the Supreme Court of the United States from the first decree rendered in this cause on the ninth day of May, 1891; which prayer for appeal is allowed." And on the same day J. D. Beardsley gave a supersedeas bond in the sum of thirty thousand dollars, running to the Arkansas and Louisiana Railway Company alone, and reciting that "whereas, the above-named John D. Beardsley hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered against him and in favor of the said Arkansas and Louisiana Railway Company in the above-entitled action by the Circuit Court of the United States for the Eastern District of Arkansas, in chancery;" which bond was that day approved by Williams, J.

No citation was issued and served as far as appears, and the record was filed in this court, June 22, 1891, the cause being docketed under the title of "*John D. Beardsley, Appellant,* v. *The Arkansas and Louisiana Railway Company.*"

Mr. John M. Moore and *Mr. A. H. Garland* for appellant.

Mr. John J. Joyce and *Mr. Edward H. Murphy* for appellee.

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

This appeal was perfected as to the Arkansas and Louisiana Railway Company only by the giving of bond as required by statute. Rev. Stat. §§ 1000, 1012. And while the omission of the bond does not necessarily avoid an appeal, if otherwise properly taken, and, in proper cases, this court may permit the bond to be supplied, no application for such relief has been made in this case, nor could it properly be accorded after the lapse of nearly four years since the decree. The appeal might, therefore, well be dismissed, because ineffectual as to complainant, Paul F. Beardsley.

But this must be the result on another ground. To the decree, Paul F. Beardsley was party complainant, and John D. Beardsley, the St. Louis, Iron Mountain and Southern Railway Company, Jay Gould, and the Arkansas and Louisiana Railway Company were parties defendant.

It is settled, for reasons too obvious to need repetition, that in equity causes all parties against whom a joint decree is rendered must join in an appeal, if any be taken; but this appeal was taken by John D. Beardsley alone, and there is nothing in the record to show that his codefendants were applied to and refused to appeal, nor was any order entered by the court, on notice, granting a separate appeal to John D. Beardsley in respect of his own interest. The appeal cannot be sustained. *Hardee* v. *Wilson*, 146 U. S. 179; *Davis* v. *Mercantile Co.*, 152 U. S. 590.

Appeal dismissed.

WHITE *v.* JOYCE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 103. Argued December 4, 5, 1894. — Decided May 6, 1895.

A bill in equity against the administratrix of a deceased partner in a firm, which was dissolved in the lifetime of the deceased, is the proper remedy for the surviving partner, seeking a settlement in the courts of the District of Columbia, and alleging that on making it a sum would be found due to him; and when it is further alleged that part of the assets is real estate, standing in the name of the deceased, the widow and children of the deceased are proper parties defendant.

A bill filed later by the same surviving partner, and called a supplemental bill, alleging that after a decree had been entered, ordering the sale of the real estate, the trustees appointed to effect the sale had been unable to sell it, and further alleging that the deceased had died seized and possessed of certain real estate, and asking that a decree should be made ordering its sale, is not a supplemental bill, but is essentially a new proceeding, under the Maryland laws in force at the time when the District of Columbia was ceded to the United States; in which proceeding it was competent for the heirs to plead the statute of limitations, and in which it was the duty of the court to give to the minor children, defendants, coming into court and submitting their rights to its protection, the benefit of that statute; but the widow and the adult son, who had been guilty of laches, must be left by the court in the position in which they had placed themselves.

On November 29, 1871, Andrew J. Joyce filed his bill of complaint in the Supreme Court of the District of Columbia against Mary White, administratrix of Patrick White, deceased, and Francis P. White, Mary S. White, James R. White, Lewis C. White, and Charles A. White, infants, and Mary White, widow of the said Patrick White, stating that the complainant and the defendants were residents of the District of Columbia; that Patrick White died intestate in March, 1871, leaving his widow, Mary White, and the said infants his heirs at law, and leaving also another son, Robert E. White, who had since died unmarried and without issue; and that Mary White was appointed administratrix of Patrick

Statement of the Case.

White. The complainant averred that on or about June 1, 1858, he and Patrick White formed a partnership in the grocery business in the city of Washington, in pursuance of a written agreement entered into between them on that day, (a copy of the same being filed with the bill,) which was to continue for seven years. It was agreed between the partners, the bill alleged, that Patrick White was to keep the books of the firm; that the firm name should be P. White & Co.; that the capital should be $3000, to be paid in by the partners in equal portions; that, as the complainant was engaged in other business, he should employ a competent person to represent him in the business of the said firm; that Patrick White should have entire charge of the business, keep proper accounts, and sign all checks, drafts, and notes having relation to the partnership business, and to none others; that Patrick White should give a full statement and account of the business and make a settlement with the complainant whenever required so to do. It was alleged that the partners further agreed, as appeared by an instrument of writing filed with the bill, that neither member of the firm should endorse any note or sign any bond, mortgage, or other instrument by which either might become liable for the payment of any money.

The bill alleged that the partnership commenced on June 1, 1858, and that the complainant, with the consent of Patrick White, employed John J. Joyce to represent him in the business, and fully complied with all the said agreements; that after the expiration of the said seven years the partnership was continued for a further term of five years, by an agreement in writing which was filed with the bill; that the partnership terminated on June 1, 1870, except as to a settlement of the partnership affairs; that during the time the business was carried on no settlement thereof was ever made, or account thereof stated; that Patrick White undertook within that time to state such an account, but died before it was completed; that during the lifetime of Patrick White, and with his consent, the complainant employed two competent bookkeepers to make a statement of the effects and transactions of

the firm for the use of the partners, but that, owing to the death of Patrick White, they were compelled to cease their work. The complainant stated that he had in his possession, at the time of the filing of his bill of complaint, a number of the books and papers of the partnership, which had been delivered to him by Mary White since the death of her husband, and he prayed that she might be required to produce, with her answer in the cause, all other books and papers of the firm which might be in her possession. He further stated that he was informed and believed that the partnership was indebted to various persons, but did not know who any of them were, except one firm in Philadelphia.

The complainant then showed that Patrick White had purchased a certain parcel of land in the city of Washington to secure a debt due the firm, and that afterwards he and his wife, Mary White, executed a deed of one undivided moiety of the said land to the complainant, his heirs and assigns; and that in January, 1869, a debtor of the firm, on account of his indebtedness, conveyed to the complainant and Patrick White, (trading as P. White & Co.,) as tenants in common a certain other parcel of land in the said city. He stated that the said real estate was part of the assets of the partnership, and should be sold to pay the firm's debts. He averred that since the death of Patrick White he had collected the sum of $1000 due to the partnership, for which he was ready to account, and stated that he would endeavor to collect all other debts due to the same. He prayed that the defendant Mary White might discover if she had collected any debts due to the firm, and, if so, from whom collected, and the amounts thereof. Finally, the complainant alleged that the said real estate, of one undivided moiety of which Patrick White died seized, was not susceptible of partition among the heirs at law of Patrick White, and that it would be to the interest and advantage of the complainant and the defendants that the same be sold and the proceeds thereof first applied to the payment of the partnership debts, and the balance, if any, distributed among the parties to the cause.

The complainant prayed that the cause might be referred

to the auditor of the court to state an account of all the effects and transactions of the firm; that the complainant might have the right to surcharge and falsify, if need be, the books, accounts, and vouchers of the business; that the complainant might have paid to him any money found to be due to him; that an account might be taken from the commencement to the end of the partnership; that the auditor might have power to advertise for all creditors of the firm to appear before him and prove their claims, and that the complainant might have the right to deny and plead to the same; that the said real estate might be sold and the proceeds thereof applied to the payment of the partnership debts, and that after the payment thereof any of the proceeds remaining might be distributed among the parties to the cause according to their respective rights; and that, on a final settlement of the partnership account, the complainant might have whatever should be found to be due to him charged against the estate of Patrick White.

On December 23, 1871, the court appointed James White guardian *ad litem* of the infant defendants, and he filed an answer on January 5, 1872, signed by himself in person, submitting the rights of the infants to the protection of the court, and stating that he could not admit or deny the allegations of the bill.

On January 3, 1872, R. T. Merrick, Esq., entered his appearance for the defendants in the cause.

Mary White filed her answer as administratrix on January 30, 1872, admitting that Patrick White died intestate, and that she was duly appointed administratrix of his personal estate, and had entered upon the duties of her office. She averred that she knew nothing of the matters set out in the bill relating to the said partnership, and that she had no books or papers of the firm in her possession, except two papers which she filed with her answer, and which she believed to be of no value. She admitted the allegations of the bill with regard to the said real estate, and that it constituted assets of the partnership, and stated that she was willing that the property should be sold, but that she did not admit that a sale of the

same was necessary for the payment of the said debts. She averred that she had not collected any debt or claim due to the firm of P. White & Co. on account of the partnership business. She stated that she did not know whether the said real estate was or was not susceptible of partition, or whether it would or would not be to the advantage of all the parties that the same be sold. As to all the matters set out in the bill, of which the defendant stated herself to be in ignorance, she called upon the complainant to make proof. Finally, she prayed to have the benefit of the statute of limitations with regard to the partnership affairs which were carried on under the first agreement alleged to have been entered into by the complainant and Patrick White, by the terms of which the partnership existing thereunder terminated on June 1, 1865.

Issue was joined on February 20, 1872, and the court entered an order on May 7, 1872, with the consent of the solicitors for Mary White and for the guardian *ad litem*, referring the cause to the auditor to state an account of the property and transactions of the partnership, and an account of what might be found to have been due from one partner to the other at the dissolution of the partnership which existed from June 1, 1865, to June, 1870, reserving to the defendants the benefit of the statute of limitations, if the plea thereof should be valid in the premises as a defence. It was ordered that the auditor advertise for the creditors of the firm to appear before him and prove their claims; that the right be reserved to the defendants and the complainant to deny the same or plead to them; that the auditor state an account of all debts and claims against the partnership; that he have leave to employ such competent persons as might be agreed upon by the parties to the cause to assist him; that the complainant have the right to surcharge and falsify, if need be, the books, accounts, etc., kept by Patrick White; and that the auditor take the depositions of all witnesses produced before him in reference to the partnership affairs, and file such depositions with his report.

By consent of the solicitors for the defendants, John F. Hanna and Thomas J. Myers were, on July 9, 1872, appointed

special auditors to assist the auditor in the cause, and to take testimony, and afterwards, on December 5, 1873, by consent as aforesaid, John F. Riley was substituted in the place of John F. Hanna, who was absent from the city. The special auditors proceeded to examine the books, vouchers etc., of the partnership, and to take testimony, and on June 18, 1875, their report was filed, signed (the solicitors for defendants consenting) by John F. Hanna as special auditor, and by Walter S. Cox, auditor of the court. The report showed that the estate of Patrick White was indebted to the complainant in the sum of $1937.90, with interest from June 1, 1870, and to Robert White, a brother of Patrick White, in the sum of $294.23. It further appeared thereby that there was due to the said firm from the firm of Joyce & Fisher, one of the members of which was the aforesaid John J. Joyce, the sum of $1789.18 on notes, and the sum of $199.88 upon open account.

The cause was heard upon bill, answers, exhibits, proofs and auditors' report, and a decree, consented to by the solicitors for defendants, was entered on September 9, 1875, confirming the said report, and adjudging that Mary White, administratrix, was indebted to the complainant and to Robert White in the amounts aforesaid. It was decreed that, it appearing to the court that there were not sufficient assets to pay the complainant and Robert White, the partnership real estate be sold.

On July 12, 1876, the complainant filed a petition setting out that after the ratification of the auditors' report it had been found that a payment of $1523.25, made to the firm of P. White & Co. by John J. Joyce, had not been credited to him; that this error could not have been discovered from the books alone, but was made to appear by explanations of certain items; and that the auditors had since become satisfied that, in justice to the estate of John J. Joyce, deceased, this error and others should be corrected. The complainant prayed that the order confirming the report might be set aside and the cause again be referred to the auditors, with proper directions.

The report was vacated on July 12, 1876, and the cause sent

back to the auditors with directions to restate the account, and to make such corrections therein as might be necessary. The alleged error pointed out in the petition was corrected in a second report filed by the auditors on February 13, 1877, which showed that the amount due from the estate of Patrick White to the complainant was $2706.98, with interest from June 1, 1870. A decree ratifying the second report, and again directing a sale of the partnership real estate, was entered on May 29, 1877, by consent of the defendant's solicitors.

On motion of the complainant, and with the consent of the solicitors for the defendants, leave was granted him on May 24, 1882, to file a supplemental and amended bill. A bill styled by him a supplemental bill was filed on the same day, in which he set out the proceedings above mentioned, and stated that since the time of filing of the original bill one of the defendants, who was at that time an infant, had reached the age of twenty-one years. The complainant averred that the trustees appointed to sell the said real estate had, after advertising a sale and taking due steps to effect the same, been unable to get a bid for either of the pieces of property. He stated that one of the said parcels was purchased by Patrick White for the sum of $572.72, at a sale made in pursuance of a decree entered in a suit brought by the firm against one of its creditors, and that the other parcel had been conveyed to the partners by another creditor, in payment of a debt of about $800. The complainant then set out the descriptions of five certain parcels or lots of land in the city of Washington of which Patrick White died seized. He alleged that Patrick White died intestate, leaving the said Mary White as his widow and the other defendants as his only heirs at law; that Patrick White did not leave sufficient personal estate to pay all debts and claims against him; that on September 24, 1872, Mary White filed her account as administratrix, showing that after paying all the debts filed against the said estate there was left the sum of $1321.96; that this amount was distributed by the court to Mary White as the widow of Patrick White and as the guardian of her infant children, and had all been expended in the education of her children and in supporting herself and

them; and that at the time of the said distribution the complainant's claim against Patrick White's estate had not been ascertained by a decree of the court. The complainant prayed that Mary White, as administratrix, and in her own right, might answer the supplemental bill; that a guardian *ad litem* might be appointed for the infant defendants; that the said real estate of which Patrick White died seized, or as much thereof as might be necessary to pay the complainant the amount due him, might be sold.

Andrew J. Joyce died on June 8, 1882. His death was suggested to the court on the 22d of that month, and upon motion of his executrix and executor, Frances M. Joyce and William J. Miller, they were on that day made parties complainant, and the cause was revived in their name.

Mary White was appointed guardian *ad litem* of the infant defendants on July 5, 1882, and, as such, filed her answer in person on the twelfth of the same month, giving a statement of the ages of the said infants, by which it appeared that one of them was under fourteen years of age and the others above that age; that the defendants were the only heirs at law of Patrick White; that the trustees appointed to sell the said partnership property had attempted and failed to do so; that the prices paid for the property by the firm were as stated in the supplemental bill; that Patrick White died seized of the real estate described in the supplemental bill; that he did not leave sufficient personal estate to pay all the debts and claims against the same, and submitting the rights of the infant defendants to the protection of the court. On the same day she filed her answer as a defendant in the supplemental bill, admitting the matters and things therein set forth to be substantially true.

The court entered a decree on the same day, September 12, 1882, directing that the said five parcels of land of which Patrick White died seized be sold, appointing trustees to make the sale, and providing for the manner of advertising the same, etc.

On August 9, 1883, Mary White filed a petition alleging that the auditors, in their amended report, had failed to

charge John J. Joyce, of the firm of Joyce & Fisher, formerly the representative of Andrew J. Joyce in the firm of P. White & Co., with the sum of $1789.18 due on notes of Joyce & Fisher, which had been given by the latter firm for the stock and good will of the firm of P. White & Co., and the sum of $199.88 due on open account, and that the auditors had made certain other errors, specifically referred to in the petition, whereby the defendants were greatly injured. She therefore prayed to have the decree confirming the second auditors' report set aside, and the cause referred to the auditor of the court to state an account of the partnership affairs, and that the special auditors might be required to file all the partnership books and papers in their possession with the clerk of the court.

The complainants filed their answer to this petition on December 14, 1883, admitting that the Joyce & Fisher notes and the open account of that firm were in favor of the firm of P. White & Co., but averring on information and belief, and from reference to certain exhibits filed with the answer, that the sum of $731.38 had been collected from the estate of John J. Joyce. They also answered the allegations of the petition with regard to other alleged errors in the second auditors' report, and stated that they should not be surprised to find that errors in favor of and against Andrew J. Joyce had been committed in making the auditors' account, since they believed that to make up a true account from the books, papers, and vouchers of the partnership would be impossible, and that if the second report should be set aside it should be upon certain terms stated in the answer, among which was that the pleas of the statute of limitations should be overruled, as such pleas were abandoned at the hearing of the cause, although such fact was not embodied in the decrees confirming the auditors' reports.

The petition was, on August 2, 1884, dismissed.

On April 8, 1884, Ann Joyce, the widow of John J. Joyce, and Mary A. Joyce, Catherine Joyce, Philomena Joyce, Fannie Joyce, Monica Joyce, and Joseph I. Joyce, the adult children of John J. Joyce and Ann Joyce, filed an interven-

ing petition stating that John J. Joyce died on May 12, 1871, leaving surviving him as next of kin and heirs at law the petitioners, and alleging that during the lifetime of John J. Joyce he was engaged in the grocery business in the city of Washington with Andrew J. Joyce and Patrick White; that about the year 1858 he was engaged in the said business with Patrick White, under the firm name of P. White & Co.; that, being indebted to Andrew J. Joyce, it was agreed that the latter should take his place in the firm until his indebtedness should be paid; that for this purpose Andrew J. Joyce became a member of the said firm in his place; that while the business continued it was managed and controlled by Patrick White and John J. Joyce, and the profits thereof were appropriated by them to their use, and not by Andrew J. Joyce, he being only nominally connected with the firm for the purposes aforesaid. The petitioners showed that Andrew J. Joyce left a will providing, among other things, that all his interest in the said firm, after deducting therefrom the sum of $800, being the amount of the said debt due by John J. Joyce to Andrew J. Joyce at the time the latter became nominally a partner in the said firm, should become the property of John J. Joyce. It was alleged that the reason for the bequest was that the interest of Andrew J. Joyce in the said firm really belonged to John J. Joyce. The will was filed with the petitioner as an exhibit, as was also an instrument of writing, executed on April 8, 1884, referred to in the petition, whereby Andrew J. Joyce made the same disposition of his interest in the firm as was afterwards made in his will, subject to the said deduction of $800. The petitioners further showed that the cause was referred to special auditors, and that the auditors found that a large amount of money was due to Andrew J. Joyce; that, for the reason that certain errors had been discovered in the auditors' report, the report was set aside and further proceedings were directed to be had for the purpose of correcting the same, and also, that another auditor was substituted in the place of one of the auditors who made the report; that the auditors, subsequently appointed, had found and were about to award that Patrick White was not indebted

to Andrew J. Joyce at the time of the dissolution of the partnership of P. White & Co. in an amount exceeding the indebtedness of John J. Joyce to Andrew J. Joyce, as aforesaid, and that, therefore, if such award should be confirmed, and the court should decree that Patrick White was not indebted to Andrew J. Joyce, such decree would, as the petitioners believed, be a bar to any recovery by the representatives of John J. Joyce against the estate of Andrew J. Joyce for any interest which John J. Joyce owned in his lifetime in the firm of P. White & Co.; that the petitioners were interested in the question of the amount which might be found due in the accounting in the cause, and that a complete determination of the controversy could not be had without their having the right to be heard.

The court entered an order on April 15, 1884, permitting the petitioners to intervene as complainants, and referring the cause to the auditor of the court to further state the account between the parties, and to take further testimony.

On April 18, 1884, Joseph I. Joyce, administrator of John J. Joyce, deceased, and Ann Joyce, and Mary A. Rodriguez, Catherine Fisher, Philomena Joyce, Fannie Joyce, Monica Joyce, and Joseph I. Joyce filed an intervening petition, in which were repeated the allegations of the said petition of Ann Joyce and others filed on April 8, 1884. Leave to withdraw, amend, and refile this petition was granted on May 2, 1884. The petitioners were made parties complainant in the cause on May 13, 1884.

On June 13, 1884, an order was entered restraining further proceedings under the decree of September 12, 1882, and on the same day the defendants in the original and supplemental bills, upon leave granted by the court, filed a bill of review. Therein they stated that Mary S. White had become of age since September, 1882, and that James R. White, Louis C. White, Charles A. White, and Francis P. White were yet infants, and set out the proceedings theretofore had substantially as they appear above. They alleged that there was error in the decree of September 12, 1882, entered in pursuance of the prayers of the supplemental bill, for the reasons that

Statement of the Case.

the original bill was brought to settle the affairs of the partnership, and did not allege that Andrew J. Joyce was the creditor of Patrick J. White; that the infant children of Patrick White were not necessary or proper parties to the original bill, and could not be bound by proceedings had thereon; that, inasmuch as the orders and decrees in the original proceeding were almost all entered by consent, the infants could not be bound thereby, even if they were proper parties; that the auditors' reports showed that there was a large amount of assets belonging to the firm of P. White & Co., and that the trustees appointed to dispose of the assets had never reported to the court what disposition, if any, had been made of the same, or what application had been made of the proceeds; that the indebtedness found by the decree of May 29, 1877, was against Mary White as administratrix of Patrick White, and against his personal estate only, and could not establish the claim against Mary White and the said infants as the widow and heirs at law of Patrick White; that the so-called supplemental bill was an entirely new cause, and of a different nature from the original cause, being brought by a creditor of a deceased debtor against his heirs, infants and adults, to subject his real estate to the debt claimed to be due; that, the proceeding by supplemental bill thus being an original action, the complainant therein was bound to prove his claim as against the defendants, and that the proceedings in the suit against the administratrix, including the auditors' reports, were without effect and could not properly be used as against the defendants in the supplemental bill, though in fact they were so used, and no proof was made by the complainant in that bill; that the court appointed a guardian *ad litem* for the infants without it anywhere appearing that they had nominated or declined to nominate a guardian, although the record showed them to be over fourteen years of age; that the order appointing the guardian *ad litem* did not recite on whose motion it was made, and was in the handwriting of the solicitor of the complainant in the supplemental bill, and that the answer of the guardian *at litem*, which was also in the handwriting of the complainant's solicitor, admitted all the allega-

tions of the supplemental bill; that the decree founded upon the supplemental bill purported to be entered by consent of the solicitor of the defendants therein, whereas the record did not show that they appeared by solicitor; that the infants could not be bound by the consent of a guardian *ad litem* or solicitor; that the decree was absolute, and did not give the infants a day after they should become of age to show cause against the same; that one of the defendants in the supplemental bill had since become of age, and, by the bill of review, showed cause why the said decree should be reversed and set aside; that it appeared from proceedings had since the entering of the said decree that the administrator of John J. Joyce was the real party complainant, and that John J. Joyce, as a partner in the firm of Joyce & Fisher, was indebted to the firm of P. White & Co. in the sum of $1537.99, with interest from June 1, 1870, and also in the sum of $163, with interest from June 1, 1870, which sums were among the uncollected assets of the firm of P. White & Co., one-half of which should be applied to the payment of any indebtedness of Patrick White before his real estate should be sold to pay debts alleged to be due to John J. Joyce or his administrator; that the record in the case since the entry of the decree founded upon the supplemental bill presented new facts in the case, and brought in new complainants against whom the defendants (complainants in the bill of review) had a good defence; that, since the entry of the said decree, errors had been discovered in the auditor's account injurious to the estate of Patrick White. The complainants prayed that the decree of September 12, 1882, might be set aside.

Frances M. Joyce and William J. Miller, executrix and executor, filed their answer to the bill of review on June 13, 1884. They referred at some length to matters set out in the bill of review, bearing upon the correctness of certain items of the auditor's report and relating to the state of the accounts between the parties, and, in reference to the grounds upon which the complainants asked the court to treat the decree of September 12, 1882, as erroneous, the respondents denied that the complainants in the bill of review were improperly joined

as defendants in the original bill; admitted that the supplemental bill was filed as a creditor's bill by a creditor of a deceased debtor against his heirs, both adults and infants, to subject the deceased debtor's real estate to the payment of his indebtedness, and that the supplemental bill was filed on the alleged ground that the deceased debtor did not leave a sufficiency of personal assets to pay his debts; averred that the indebtedness of the deceased was found by a decree of the court in the cause, and was proved by the supplemental bill and by the sworn answers of the adult defendants, Mary White and Francis P. White, and the sworn answer of the infant defendants through Mary White, their guardian *ad litem*, and by the administratrix of Patrick White's estate; admitted that the decree appointing Mary White guardian *ad litem* did not show on whose motion the appointment was made, and that it did not show that the infant defendants nominated or declined to nominate a guardian, and that it was in the handwriting of the solicitor for the complainants in the supplemental bill; and admitted that the decree of September 12, 1882, was absolute and did not give a future day in court to such of the defendants as were infants, and stated that they were advised that in such a case a decree is never given to infant defendants when they shall have become of age to show cause against the decree.

Joseph I. Joyce, administrator, and Ann Joyce and others demurred to the bill of review, and the demurrer having been overruled, they appealed to the said court in general term. Afterwards, on April 28, 1886, Joseph I. Joyce, administrator, filed an answer adopting the answer of Frances M. Joyce and William J. Miller as his own.

Testimony was taken with relation to allegations of the bill of review concerning various items of account, etc., and, the cause coming on to be heard upon the bill of review, answers, and proceedings thereon, a decree was entered on November 22, 1888, whereby the said decree of September 12, 1882, was reversed. The defendants in the bill of review took an appeal to the said court in general term, where, on December 2, 1890, the said decree of reversal entered in special term was set aside

and the bill of review dismissed. Thereupon the complainants (defendants in the original proceedings) appealed to this court.

Mr. Henry Wise Garnett and *Mr. A. S. Worthington* for appellants.

Mr. William John Miller for appellees. *Mr. J. Coleman* was on the brief for Mary A. Rodrequez.

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

The view that we take of this case renders it unnecessary for us to consider all the questions presented by its somewhat complicated facts, and discussed in the arguments and briefs of counsel.

The bill originally filed, on November 29, 1871, by Andrew J. Joyce, as surviving partner of the firm of P. White & Co., against Mary White, the administratrix of Patrick White, the deceased member, alleging that there had never been a settlement of the affairs of the partnership, and that, upon such settlement, there would be a balance due the complainant, was, upon such allegations, altogether a proper one, in entertaining which no fault can be found with the court below. And as it further appears that there was real estate which had been purchased with firm money, and which was standing in the name of Patrick White, it may be conceded that there was no impropriety in making the widow and children of the deceased partner parties defendants to such bill. Of course, the only purpose in making the widow and heirs parties was to estop them from claiming title to the real estate standing in the name of Patrick White which belonged to the firm, and the sale of which was necessary to pay the partnership debts.

The bill alleged that the children of Patrick White were infants, under the age of twenty-one years, and asked that the court appoint a guardian *ad litem;* and the record discloses that the court so appointed one James White, who filed an answer as such, in which it was alleged that said infants

could not admit or deny the allegations of the bill of complaint, and that the guardian, therefore, submitted their rights and interests to the protection of the court. This answer was filed January 5, 1872.

Auditors were appointed to state an account, and the case was so proceeded in that, on May 29, 1877, a decree was entered, confirming the auditors' report, decreeing that there was due from Mary White, administratrix of Patrick White, deceased, to the complainant the sum of two thousand seven hundred dollars, with interest from June 1, 1870; that there was due by the partnership the sum of two hundred and ninety-four dollars; that the real estate mentioned in the bill was partnership property, and was to be sold in order to settle the partnership and pay the indebtedness, and appointing trustees to make such sale.

No further proceedings are disclosed by the record until, on April 20, 1880, the trustees, who had been appointed to make sale of the real estate, filed their bond conditioned for the faithful performance of their duties.

On May 24, 1882, more than eleven years after the death of Patrick White, and five years after the entry of the decree settling the account between the partners and ordering the sale of the partnership real estate, Andrew Joyce filed another bill, which he styled a supplemental bill, in which, after stating that the trustees had, after effort made, failed to sell the said partnership real estate, it was alleged that Patrick White had died seized and possessed of certain real estate, and it was asked that a decree should be granted ordering the sale of such real estate. To this bill Mary White, administratrix of Patrick White, deceased; Francis P. White, a son who had become of age since the filing of the first bill; Mary White, widow; Mary S. White, James R. White, Lewis C. White, and Charles A. White, minor children of Patrick White, deceased, were made defendants. By an order made July 5, 1882, Mary White, the mother, was appointed guardian *ad litem*, and, as such, she filed an answer in which it was stated that said infant defendants submitted their rights to the protection of the court. Mary White and Francis P. White filed

an answer admitting the allegations of the bill. The result was a decree dated September 12, 1882, ordering a sale of the real estate of Patrick White, deceased.

Without repeating the history of the subsequent proceedings, which are detailed at length in the statement of the facts, we come to the bill of review filed, on June 13, 1884, by the widow and children of Patrick White, by which it was sought to set aside the decree of September 12, 1882. The bill complained of many mistakes of fact and irregularities in the proceedings, which we do not find it necessary to notice. What we do deem essential allegations are those in which it is stated that the original bill, filed on November 29, 1871, was a bill in equity brought by a surviving partner to settle the affairs of the copartnership, and that the bill filed May 24, 1882, upon which the decree of September 12, 1882, was founded was an entirely new cause, of a different character and nature from the original cause, being a bill in equity by a creditor of a deceased debtor against his heirs, infants and adults, to subject his real estate to the debt claimed to be due; that this was a suit under the act of Maryland of March 10, 1785, c. 72, and could not properly be regarded as supplemental to the first bill.

The section of the act referred to is in the following terms:

"Sec. 5. If any person hath died, or hereafter shall die, without leaving personal estate sufficient to discharge the debts by him or her due, and shall leave real estate which descends to a minor or person being idiot, lunatic, or *non compos mentis*, or shall devise said real estate to a minor or person being idiot, lunatic, or *non compos mentis*, or who shall afterwards become *non compos mentis*, the chancellor shall have full power and authority, upon application of any creditor of such deceased person, after summoning such minor and his appearance by guardian, to be appointed as aforesaid, and hearing as aforesaid, . . . and the justice of the claim of such creditor is fully established, if, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper that such debts should be

paid by a sale of such real estate, to order the whole or part of the real estate so descending or devised to be sold for the payment of the debts due by the deceased."

This statute was considered by this court in the case of *Ingle* v. *Jones*, 9 Wall. 486, 495, and it was held that "it makes the proceeding against the administrator and the heir, when the latter proceeding is necessary, entirely independent of each other. The duties of the administrator are confined to the personal estate, and never extend beyond it. If that be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the heir must be instituted. In that event, whatever has been done by the administrator is without effect, as to the property sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceeding to effect its collection, and the statute of limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative."

Upon principle and authority, we think it clear that the bill filed May 24, 1882, seeking to subject the real estate of Patrick White which had descended to his heirs to the payment of debts, was essentially a new proceeding, in which it was competent for the heirs to plead the statute of limitations. Calling the bill a supplemental one would not deprive them of that right.

The record shows that, in the answer put in on behalf of the minors who were defendants by the guardian *ad litem*, it was alleged that "the said defendants being infants of tender years submit their rights to the protection of the court."

It is immaterial whether the effort to reach the real estate in the hands of the heirs by a so-called supplemental bill was or was not for the purpose of escaping from the operation of the statute of limitations. Even if the second bill were regarded as an amendment of the first, it would not deprive the defendants of their right to plead the statute of limitations, at least in equity. *Merchants' Bank* v. *Stevenson*, 7 Allen,

489. By the statute in force in the District of Columbia, (Maryland Acts of 1715, c. 23, § 2,) the action was barred in three years, or on the 1st day of June, 1873. The second bill was filed on May 24, 1882, nearly nine years after the suit was barred.

It is sufficient to say that it was the duty of the court to give the minor defendants the benefit of the statute. The act under which the proceedings were had provided that, before real estate which had descended to minor heirs could be sold to pay debts of the ancestor, "it shall appear to the chancellor to be just and proper that such debts should be paid by a sale of such real estate."

The answer of the minors, filed by the guardian *ad litem*, craved the protection of the court:

"The answer of an infant being expressed to be made by his guardian, the general reservation at the beginning, the denial of combination, together with the general traverse at the conclusion, common to all other answers, are omitted. The reason of this is that an infant is entitled to every benefit, which can be taken by exception to a bill, although he does not make such reservation, or expressly make the exception. He is also considered as incapable of entering into the unlawful combination; and his answer cannot be excepted to for insufficiency; nor can any admission made by him be binding." Story Equity Pl. § 871.

In *Wright* v. *Miller*, 1 Sandford Ch. (N. Y.) 109, it was held that the answer of an infant defendant by his guardian *ad litem* is not binding upon him, and no decree can be made on its admission of facts. Where relief is sought against infants, the facts upon which it is founded must be proved; they cannot be taken by admission; and *Wrottesley* v. *Bendish*, 3 P. Wm. 236, was cited to that effect.

Where there are infant defendants, and it is necessary in order to entitle the complainant to the relief he prays that certain facts should be before the court, such facts, although they might be the subject of admission on the part of the adults, must be proved against the infants. 1 Daniell's Ch. Pr 238; *Mills* v. *Dennis*, 3 Johns. Sup. Ct. 367.

This record discloses that no proof whatever was adduced to sustain the allegations of the second bill. The admissions of the answers were solely relied on.

It is, however, contended on behalf of the appellees that where a decree is signed by the court, with the consent of the party or of his solicitor, there can be no bill of review except for fraud or collusion; that, even in the case of infants, a decree entered with the consent of their solicitor cannot be set aside except on allegation and proof of fraud; and *Walsh* v. *Walsh*, 116 Mass. 377, and *Thompson* v. *Maxwell*, 95 U. S. 391, 398, are cited to that effect.

To bring themselves within the scope of those cases the appellees assert that the minor defendants by a solicitor of record consented to the decree of September 12, 1882. This is denied by the appellants.

The issue upon this question is found in certain allegations of the bill of review and in the answers thereto. The bill alleges that the order of May 24, 1882, giving leave to the complainant to file the supplemental bill, and which purports to have been passed by consent, was in the handwriting of the solicitor for the complainant; that the order of July 5, 1882, appointing Mary White, mother of the infant defendants, their guardian *ad litem* to answer said supplemental bill, does not show on whose motion the order was passed, and the order was in the handwriting of the solicitor for the complainant; that the answer filed on July 12, 1882, by Mary White as guardian *ad litem* was so filed by the guardian *ad litem* without an attorney or solicitor, and was entirely in the handwriting of the solicitor for the complainant, that the decree of September 12, 1882, appears by the record to have been passed when the minor defendants were not represented by any attorney or solicitor.

To these allegations the defendants in the bill of review answer, acknowledging that said orders were in the handwriting of the solicitor for the complainant, and, as respects the answer of the guardian *ad litem*, they say: "We admit the said answer of the guardian *ad litem* is in the handwriting of the solicitor for the complainant, as alleged, and, in further

answer, we are advised by said solicitor that he, from the best of his knowledge, remembrance, and belief, prepared said answer at the request of said Mary White, guardian *ad litem* of said infant defendants, and that before she swore to and filed the same she submitted the same to Mr. Morris, solicitor of record in said cause for said defendants." And they further allege that "we are advised and believe, and, so believing, say that said cause was heard by the court, on the statement of facts contained in the papers and proceedings in said cause given to the court by solicitor of complainant and the said defendants, and the decree was prepared by the solicitor of complainant and was submitted to Mr. Morris, solicitor of defendants in said cause, who, on behalf of the said defendants, consented to the same, and was then signed by the court; and in further answer we say that we are informed and believe that Mr. Morris represented as solicitor on the hearing of said cause not only the infant defendants and their guardian *ad litem*, but also represented as solicitor in said cause the said Mary White and Francis P. White."

No evidence was taken by either party on this question. The answers can scarcely be regarded as responsive to the allegations of the bill, beyond the admissions therein contained, that the orders and the answers of the guardian *ad litem* were in the handwriting of the solicitor for the complainant. The remaining statements were in the nature of avoidance, and, at any rate, only profess to be based on hearsay.

When we resort to the record of the case in which the supplemental bill was filed, and which forms part of the record before us, we fail to find any evidence that the infant defendants were represented by any solicitor. The answer put in on their behalf, and in which their rights are submitted to the protection of the court, purports to be filed by the guardian *ad litem*, and is not authenticated by the signature of any counsel. It is true that at the foot of the decree of September 12, 1882, and which, it may be observed, is not a final one, but merely an order of sale, there is the following entry: "I agree to the foregoing decree. M. F. Morris, solicitor for defendants."

Opinion of the Court.

But it is by no means a necessary inference, from this writing, that Mr. Morris either was or represented himself to be solicitor for the infants. The record shows that when the previous order of May 24, 1882, was made granting leave to file the supplemental bill, Messrs. Merrick and Morris appeared as solicitors for the adult defendants, and consented to the filing of such bill. But it cannot be claimed that they thereby represented themselves to be entitled to represent the infants, because the bill itself shows that the infants were unrepresented, and prayed that a guardian *ad litem* should be appointed. The appointment of the guardian was subsequently made on July 5, 1882, when first the infants were in court. If the infant defendants are to be estopped by the consent of a solicitor, as against their submission of their rights to the protection of the court, the fact that they were actually represented by a solicitor should be made to appear either by a formal entry appearing of record, or by evidence showing such fact. It is contended in the brief of the appellees that such formal entry was made, by the filing of a præcipe signed by R. T. Merrick, requesting the clerk to enter his appearance for the defendants, and it is said that it is well known that Mr. Morris was Mr. Merrick's partner. It is enough to say, that this appearance by Mr. Merrick for the defendants was entered on January 3, 1882, several months before the supplemental bill was filed. It would be strange reasoning that would find in such an appearance any right to appear for infant defendants in a bill not yet filed.

Nor can it be safely implied, from the fact that Mr. Morris styled himself as solicitor for the defendants, and appeared before the auditors as such, that he had been employed to act as solicitor for the infants. Such conduct was entirely consistent with the admitted fact that he was authorized to appear for the adult defendants.

Without pursuing the subject further, we reach the conclusion that the court below erred in dismissing the bill of review so far as the minors were concerned, and that the decree should be modified so as to protect their interests in the estate which they inherited from the father, Patrick White.

A different conclusion is necessary as respects Mary White, the mother, and Francis P. White, the adult son. The record discloses that, on July 12, 1882, they filed a joint answer to the bill filed May 24, 1882, in which they admitted the allegations thereof; and on September 12, 1882, their solicitor, Mr. Morris, consented to the decree of that date. We perceive no proof of fraud or collusion affecting them, and in their petition of November 30, 1888, in which they prayed for leave to withdraw their answer, they do not aver that they were induced to answer as they did by reason of any misrepresentation or fraud practised upon them. The long delay of six years from the filing of their answer, and of more than four years from the bringing of the bill of review, is not satisfactorily explained, and, upon well-settled principles, a court of equity must leave them in the position in which they voluntarily placed themselves.

The decree of the court below is reversed; the appellants, Mary White and Francis P. White, and the appellees to pay one-half of the costs, respectively, and the cause remanded with directions to proceed in accordance with this opinion.

KEYES *v.* EUREKA CONSOLIDATED MINING COMPANY.

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

No. 228. Argued April 15, 1895. — Decided May 6, 1895.

A person in the employ of a smelting company invented a new method of tapping and withdrawing molten metal from a smelting furnace. He took out a patent for it, and permitted his employer to use it without charge, so long as he remained in its employ, which was about ten years. After that his employer continued to use it, and, when the patent was about to expire, the patentee filed a bill against the company, praying for injunctions, preliminary and perpetual, and for an accounting. Before the return of the subpœna the patent had expired. On the trial it appeared that the invention had been used for more than seventeen years with the knowledge and assent of the patentee, and without any com-

Counsel for Appellee.

plaint on his part, except that the company had not paid royalties after he quitted its employment. The defences were, (1) that the Circuit Court had no jurisdiction of the case because no Federal question was involved and there was no diversity of citizenship of the parties; (2) that, even if there was a Federal question involved, the Circuit Court as a court of equity had no jurisdiction of the case because complainants had a plain, adequate, and complete remedy at law. The court below sustained both of the defences and dismissed the bill. *Held*, that the decree was fully justified.

THIS was a bill in equity filed by appellants against appellee in the Circuit Court of the United States for the Northern District of California to recover for the infringement of a patent. The patent, No. 121,385, bears date November 28, 1871, and was issued to appellants as joint inventors, the invention consisting of a method of tapping or withdrawing molten lead or other metals from a smelting furnace. The bill was filed October 29, 1888, and contained the usual prayer for an injunction, preliminary and perpetual, and for an accounting for damages and for profits. The subpœna was issued on that day, returnable December 3, 1888, but no notice was given of an application, nor was any application made, for a preliminary injunction. Appellee answered January 7, 1889, and a replication was filed on the fourth of the following February. No question was made as to the validity or construction of the patent, and the patent does not appear in the record. The defences were, (1) that the Circuit Court had no jurisdiction of the case because no Federal question was involved and there was no diversity of citizenship of the parties; (2) that, even if there was a Federal question involved, the Circuit Court as a court of equity had no jurisdiction of the case because complainants had a plain, adequate, and complete remedy at law. The Circuit Court, Sawyer, J., sustained both of the defences and dismissed the bill, 45 Fed. Rep. 199, whereupon the case was brought to this court on appeal.

Mr. Robert E. Foot, with whom was *Mr. John Flournoy* on the brief, for appellants.

Mr. A. B. Browne for appellee.

Mr. J. H. Miller, *Mr. M. M. Estee*, and *Mr. D. Friedenrich* filed a brief for appellee.

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

As stated by the Circuit Court, when this patent was applied for and issued, complainants were both in the employment of the defendant, one as superintendent of defendant's mine, and the other as assayer and smelter at the mine and smelting works, each receiving a regular salary. While thus engaged they made the invention covered by the patent, and on April 19, 1871, before the application for the patent, put the improvement on the first furnace of defendant, and on April 24, the date of the application, put it on the second furnace. These improvements were continuously used in defendant's works from that time on to the commencement of this suit. Complainant Keyes left defendant's employment September 1, 1872, and complainant Arents on November 10, 1872. They were both aware of the use of the improvement thereafter and down to the time the suit was commenced, and it does not appear that Keyes had any communication with defendant upon that subject, but complainant Arents notified defendant's president in June, 1872, that the company could use the improvement while he remained in its employment, but that afterwards he would require the company to pay what others had to pay for its use, and, subsequently to November 10, 1872, Arents at various times made demands upon the company's secretary for payment for the use of the improvement, and in the summer of 1888 made a similar demand upon the company's president. Defendant did not contest the validity of the patent nor deny the use of the improvement, but defended on the ground that no case for equitable jurisdiction was presented upon the facts; and that, moreover, it clearly appeared that defendant had an implied license to use the invention without compensation while complainants continued in its employment, and to use it after they left for the same royalties charged other parties; and, there-

fore, that the remedy of complainants was an ordinary action at law, over which, as no diversity of citizenship appeared, the Circuit Court had no jurisdiction.

We think from an examination of the evidence that the Circuit Court was entirely right in its conclusion that there was at least an implied license to use the improvement upon the same terms and royalties fixed for other parties from the time complainants left defendant's employment while defendant was entitled to use the invention without payment of any royalties during the continuance of such employment. And, apart from that, that the decree cannot be reversed on the ground that the Circuit Court erred in dismissing the bill because when it was filed complainants were not entitled to any relief resting on grounds of equity, while their remedy at law, then and thereafter, was plain, adequate, and complete.

The jurisdiction in equity was predicated upon the right to an injunction "according to the course and principles of courts of equity." Rev. Stat. § 4921. The subpœna was issued and served October 29, 1888, returnable on the first Monday in December, which was December 3, 1888. The patent expired November 28, 1888, between the day of service of subpœna and the return day, and before defendant was required to or did file its answer.

No notice of an application for a preliminary injunction was given, nor any application made therefor, nor was there any showing on the pleadings or otherwise of irreparable injury to the complainants by the continued use of the invention for twenty-nine days after the bill was filed and before the expiration of the patent. Such a contention after seventeen years of use by appellee with appellants' knowledge would have been absurd, and even if appellants had applied for a preliminary injunction before the return day, the court would have been justified in refusing to award it. Obviously, the laches of appellants were such, upon their own showing, for the delay was unexplained, as to disentitle them to a preliminary injunction, as ruled by Mr. Justice Brewer, when Circuit Judge, in *McLaughlin* v. *People's Railroad* 21 Fed. Rep. 574, and by Judge Blodgett in *American Cable Railway*

Co. v. *Chicago City Railway Co.*, 41 Fed. Rep. 522. See also *Keyes* v. *Pueblo Smelting Co.*, 31 Fed. Rep. 560.

This record discloses that the invention had been used for more than seventeen years with the knowledge and assent of appellants and without any complaint on their part, except that appellee had not paid royalties after complainants quit its employment. This being so, the case clearly falls within *Root* v. *Railway Co.*, 105 U. S. 189; *Clark* v. *Wooster*, 119 U. S. 322; and *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193; and the decree was fully justified.

In *Clark* v. *Wooster*, Mr. Justice Bradley, delivering the opinion of the court, said: "As to the first point, the bill does not show any special ground for equitable relief, except the prayer for an injunction. To this the plaintiff was entitled, even for the short time the patent had to run, unless the court had deemed it improper to grant it. If, by the course of the court, no injunction could have been obtained in that time, the bill could very properly have been dismissed, and ought to have been. But by the rules of the court in which the suit was brought only four days' notice of application for an injunction was required. Whether one was applied for does not appear. But the court had jurisdiction of the case, and could retain the bill, if, in its discretion, it saw fit to do so, which it did. It might have dismissed the bill, if it had deemed it inexpedient to grant an injunction; but that was a matter in its own sound discretion, and with that discretion it is not our province to interfere, unless it was exercised in a manner clearly illegal."

In whatever aspect viewed, we perceive no ground for disturbing the decree.

Decree affirmed.

CATHOLIC BISHOP OF NESQUALLY *v.* GIBBON.

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

No 277. Argued April 9, 10, 1895. — Decided May 6, 1895.

No question as to jurisdiction in this case having been taken in the court below or here, this court waives the inquiry whether an objection to the jurisdiction might not, if seasonably taken, have compelled a dismissal.

In the administration of the public lands, the decisions of the land department upon questions of fact are conclusive, and only questions of law can be reviewed in the courts.

In the absence of some specific provision to the contrary in respect of any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior.

The decision of the Secretary of the Interior of March 11, 1872, sustaining the claim of the plaintiff in error to a small tract — less than half an acre — of the 640 acres claimed under the act of August 14, 1848, c. 177, 9 Stat. 323, if not conclusive upon the plaintiff in law, was right in fact.

In section 1 of the act of Congress of August 14, 1848, c. 177, establishing the territorial government of Oregon, is the following proviso: "Provided, also, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong." 9 Stat. 323. Oregon as then organized included all that region west of the Rocky Mountains and north of the forty-second degree of north latitude, part of which became afterwards the Territory and later the State of Washington.

In February, 1887, the appellant, as plaintiff, commenced a suit in the District Court of the Second Judicial District of Washington Territory against the defendants, John Gibbon, T. M. Anderson, and R. T. Yeatman. In the bill then filed the plaintiff alleged that under and by virtue of the forego-

ing proviso it was entitled to a tract of 640 acres, at and adjacent to the present town of Vancouver, 430 acres of which were in the occupancy of the defendants as officers and soldiers of the United States, who held the same as a military reservation; and the prayer was for an injunction, a decree of title, and a surrender of possession. Under the direction of the Attorney General the United States attorney for the Territory of Washington entered the appearance of the United States, and filed an answer in behalf of all of the defendants. While the case was pending in the territorial courts, Washington was admitted as a State, and the case was thereupon transferred to the Circuit Court of the United States for the District of Washington. In that court, upon pleadings and proof, a decree was entered in favor of the defendants dismissing the bill. 44 Fed. Rep. 321. From such decree the plaintiff appealed to this court.

Mr. A. H. Garland and *Mr. H. J. May* for appellant. *Mr. Rufus C. Garland* was on their brief.

Mr. Solicitor General for appellees.

Mr. Justice Brewer delivered the opinion of the court.

No question was raised in the pleadings or otherwise on the record as to the jurisdiction of the court below over a controversy of this character, but the case was heard and disposed of by the Circuit Court on the merits of the plaintiff's claim. It has been in like manner argued in this court, and, therefore, waiving the inquiry whether the objection to the jurisdiction might not, if seasonably taken, have compelled a dismissal, we shall proceed to consider the merits.

In this case a large volume of testimony has been taken, which it would be a waste of time to attempt to review in detail. Notwithstanding some conflict in minor matters, there is little difficulty in determining what was the true situation of affairs at Vancouver at the time of the passage of the act of 1848. To a clear understanding of that situation, a brief historical statement of preceding events is necessary. Some

years prior to 1838 the Hudson Bay Company had established a trading post at Vancouver. This was done under the assumption that it was within the British possessions. In and about this post were gathered quite a number of employés of the company. It was purely a trading post, with the buildings, appurtenances, and employés naturally attached to such a post established far from civilization and in the midst of the Indian country. Many of these employés were Catholics. In the year 1834–1835 these Catholics forwarded petitions to the Bishop of Juliopolis to send missionaries to them. To these applications the bishop, on June 6 and 8, 1835, made responses, the first being a letter to Dr. McLaughlin, of the Hudson Bay Company, reading as follows:

"Sir: I have received last winter and this spring a petition from certain free families, established on the river Willamette, requesting the help of missionaries to instruct their children and themselves. My intention is to use all my efforts to procure their request as soon as I can. I have no priests at my disposal at Red River, but I will make a trip to Europe this year. I intend to make it my business to procure these free people and the Indians afterwards the means of knowing God. I send together with this an answer to the petition I have received. I request that you please forward it to them. I join with it some catechisms which might be useful to those people if anybody can read among them. Those persons say they are protected by you. Please induce them to do their best and to deserve by a good behavior to profit by the favor they ask. I have the honor to be, sir,

"Your most humble ob't serv't,

"+ I. N.,

"*Bishop of Juliopolis.*

"6 June, 1835 — Red River."

The other, enclosed with it, commences as follows:

"To all the families established on the Willamette River and other Catholic persons beyond the Rocky Mountains, greeting and benediction:

"I have received, my dearest brethren, your two petitions, the one dated 3d July, 1834, and the other 23d February, 1835. Both ask for missionaries to teach you and your children. Such a request from people deprived of all religious help could not fail to touch my heart. Indeed, if I had it in my power I would send you some, even this year, but I have no priests at my disposal at Red River. I must get some from Canada or elsewhere, which requires time. I will give it my attention during a trip I am going to make in Canada and Europe this year. If my efforts are successful I will send you help very soon. My intention is not only to procure to you and your children the knowledge of God, but also the numerous Indian tribes among which you live. I exhort you meanwhile to deserve, by a good behavior, that God may help my undertaking."

Subsequently, and on April 17, 1838, the Bishop of Quebec sent Francis Norbert Blanchet and Modeste Demers as missionaries into this region, giving them a letter of instructions, from which we quote the following:

"Instructions for Messrs. Francis Norbert Blanchet and Modeste Demers, priests, appointed missionaries for that portion of the diocese of Quebec which is situate between the Pacific Ocean and the Rocky Mountains:

"1st. They must consider as the first object of their mission to draw from barbarity and the disorders which follow from it the Indian nations spread in that country.

"2d. The second object is to lend their services to the bad Christians who have there adopted the morals of the Indians and live in licentiousness and the forgetfulness of their duties.

"3d. Convinced that the preaching of the gospel is the safest means of obtaining these happy results, they will lose no opportunity of inculcating its principles and its maxims either in their private conversations or in their public instructions.

"4th. In order more promptly to render themselves useful to the nations of the country where they are sent, they will from the first moment of their arrival apply themselves to the study of the Indian languages, and will endeavor to

reduce them to regular principles so as to be able to publish a grammar of them after some years of residence.

"5th. They will prepare for baptism with all possible haste the infidel women who live in a state of concubinage with Christians, in order to replace those irregular by lawful marriages.

"6th. They will apply themselves with a particular care to the Christian education of the children, establishing for that purpose, as much as their means will afford them, schools and catechisms in all the villages which they will have occasion to visit.

* * * * *

"9th. The territory which is particularly assigned to them is that which is comprised between the Rocky Mountains at the east, the Pacific Ocean at the west, the Russian possession at the north, and the territory of the United States at the south. It is only in that extent of territory that they will establish missions, and it is particularly recommended to them not to form any establishment on the lands the possession whereof is contested by the United States. They will be allowed, however, in conformity with the indult of the Holy See, dated February 28, 1836, a copy of which accompanies the present, to exercise, when needed, their faculties in the Russian possessions as well as in that part of the American territory which joins their mission. As to that part of the territory, it is probable that it does not belong to any of the dioceses of the United States, but if the missionaries are informed that it is a part of some dioceses, they will abstain from exercising any act of jurisdiction there in obedience to the indult cited above unless they be authorized to it by the bishop of such diocese.

"10th. As to the place where they will fix their principal residence it will be on the river Cowlitz or Kowiltyhe, which empties into the river Columbia on the north side of this last river; on their arrival at Fort Vancouver they will present themselves to the person who then represents the honorable Hudson Bay Company, and they will take his advice as to the precise situation of that establishment.

"11th. They are particularly recommended to have all possible regard for the members and employés of that company with whom it is very important for the holy work with which they are charged, to be constantly in good intelligence.

"12th. As they cannot rely entirely upon the resources from the Association for Propagation of the Faith, established a year ago in this diocese, to provide for their sustenance and the construction of the chapels and houses which they will establish in various places of their mission, they will induce the white inhabitants and the nations of the country to contribute for these objects as much as their means will allow them.

* * * * *

"14th. The territory where this mission is — be established having been annexed by the indult of the 28th of February, 1836, mentioned above to the Territory of the Northwest, the spiritual government of which is entrusted to the Right Reverend Bishop of Juliopolis, the new missionaries will correspond as regularly as possible with that prelate, whom they will also inform of the state of their mission and whose orders and counsels they will receive with submission and respect."

With these instructions the two parties named proceeded to the territory of Oregon, and arrived at Vancouver on November 24, 1838. The former of the two was still living when this case was commenced, and his testimony was taken, he being at the time Archbishop of Oregon City. He testified that in connection with his associate he established a Catholic mission station at Vancouver, as well as at two or three other places in Oregon; that when they established the Vancouver station there were many Indians in the neighborhood, and that they did a great deal of missionary work among them. After describing the character of that work, and stating that the missionary station was kept up from the year 1838 to the fall of 1844, at which time he left for Europe and did not return until August, 1847, he added this testimony:

"Int. 34. From 1838 to the time you left Oregon in 1844, where were religious services held at Vancouver?

"Ans. In an old store inside the pickets.

"Int. 35. Was that room or building during that time used for any other than religious and missionary services and labors?

"Ans. It was used only for Catholic religious services and missionary labors.

"Int. 35½. State who attended services then in that building.

"Ans. Servants of the Hudson Bay Company, their wives and children, Indians of the place and neighborhood — Dr. McLaughlin often came — and others.

"Int. 36. Before 1844 had you purchased or obtained any place or building at Vancouver outside of the pickets or fort of the H. B. Co. for any purpose whatsoever?

"Ans. I had not purchased, but had obtained a piece of ground that was intended for the building of a church for this station. The company was not willing to sell; that piece of ground was shown to me from the saw-mill west and including the present site. We were allowed to fence it, but our means did not allow us to do so. This land was east of the present Catholic church and near an old mill or mills, and extended thence west, but I do not well recollect now how far west it came. I think the church now stands on this land. Before I left for Europe I recommended Rev. M. Demers to build a church on that land.

"Int. 37. By whom was this land shown to you?

"Ans. To the best of my recollection it was by James Douglas, Esq., chief factor of the company and governor of the F. V. in absence of Dr. McLaughlin.

"Int. 38. Did you or not before leaving Oregon in 1844 purchase any building at Vancouver?

"Ans. Yes; I did, from one of the company's servants.

"Int. 39. What building and for what purpose?

"Ans. For the purpose of teaching Indians and the Indian women, and children of the company's servants outside the fort.

"Int. 40. State whether or not you used that building as a place for the instruction of the Indians at Vancouver and in its vicinity.

"Ans. Yes; we did.

"Int. 41. When did you buy that building?

"Ans. I think in 1839 or 1840.

"Int. 42. Was it in use by you for the same purpose up to the time you left Oregon in 1844?

"Ans. That I can't say; I suppose it was.

"Int. 43. On your return to Vancouver in 1847 in what condition did you find this mission station, and who was, if any one, in charge as the missionary priest?

"Ans. I found the mission station in charge of Vicar General Demers.

"Int. 44. Where were the religious services then held?

"Ans. In the present church building.

"Int. 45. Since then do you know whether any repairs or improvements have been made upon this building; and, if yea, by whom and when?

"Ans. I have been told that some repairs have been made; of my own knowledge I know repairs have been made of late years. These repairs have all been at the expense of the Bishop of Nesqually.

"Int. 46. State whether or not there was a Catholic mission station at Vancouver amongst the Indian tribes on the 14th day of August, 1848.

"Ans. There was; Father Delavane was the head of the station. He was appointed to this station in 1847 by me after my arrival from Europe. This part of the country was not a part of my diocese, but it was under my jurisdiction.

"Int. 47. Was it the same missionary station you had founded in 1838?

"Ans. It was the same.

"Int. 48. Whether or not there has been a Catholic church and service here since then until now.

"Ans. Yes, sir."

He stated that no Catholic priest was ever, by contract or otherwise, a chaplain to the Hudson Bay Company at Vancouver; that the Hudson Bay Company granted them £100 per year as an acknowledgment of their services. He further testified:

"Int. 72. From the time of your coming to the country in '38 to the fall of 1844, where did you live when at Vancouver?

"Ans. Inside of the pickets, in a room of the H. B. Co.

"Int. 73. State whether or not you ever paid to the Co. anything for your board.

"Ans. Never.

"Int. 74. State whether or not you ever offered to pay them for your board.

"Ans. Yes, sir; when I had bought that little house we were afraid to be too much charge to the Co. I told the governor we would live outside and pay the expense of our living. The answer made was that we were not a burden to the H. B. Co. I said we were afraid we were troublesome to the Co. The answer was as I have above stated. The Co. or its officers were very kind and generous to us."

Cross-examination:

"Int. 2. In 1848 was the mission in possession of any land?

"Ans. It was in possession of the land where the church is.

"Int. 3. From what source did it get that land?

"Ans. From Mr. Douglas, who showed me the place. This was done at my request, that we might have a more established place.

"Int. 4. Did the mission ever acquire any right to that land except by the consent or permission of Mr. Douglas?

"Ans. No; it did not; there was no other way.

"Int. 5. Has the mission ever claimed to exercise ownership over any part of the land except that on which the church is built?

"Ans. No; we did not, except what was granted for the church, and we expected to have a deed for the land from the Hudson Bay Co. when the Co. could give one.

"Int. 6. In 1848 where did Mr. Delavane reside?

"Ans. Inside of the pickets of the H. Bay Co.

"Int. 7. Where in 1849, and till he left?

"Ans. In the same place.

"Int. 8. Did you or any other priest before 1850 live anywhere about Vancouver except within the Co.'s pickets?

"Ans. No, sir.

"Int. 9. From whom did you buy the small house spoken of by you in your testimony?

"Ans. I don't recollect the name.

"Int. 10. Where was it?

"Ans. West of the fort.

"Int. 11. Did not the company own all the buildings occupied by its servants?

"Ans. I think not. They belonged to the servants and they sold them.

"Int. 12. Did you buy any land with the house?

"Ans. No, sir.

"Int. 13. Did you buy anything but the use of the house?

"Ans. I bought the house.

"Int. 14. Did the company know you bought it?

"Ans. I suppose they did.

"Int. 15. How much did you give for it?

"Ans. Between twenty and twenty-five dollars.

"Int. 16. Who erected the church?

"Ans. The Hudson's Bay Company or Mr. Douglas.

"Int. 17. Did you ever pay anything for its erection?

"Ans. No, sir."

We have quoted thus fully from the testimony of this witness, because of his early and continued relations to the church work at Vancouver, and because the other testimony offered in behalf of the plaintiff is really nothing more than in corroboration. It discloses very clearly what was the character of the mission establishment at Vancouver, what its occupation was, and what the extent of its work and its relation to the Hudson Bay Company.

Under the treaty of June 15, 1846, between the governments of the United States and Great Britain it was provided:

"The possessory rights of the Hudson's Bay Company and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected." 9 Stat. 870.

On July 1, 1863, another treaty was concluded between the parties, which, reciting that "it is desirable that all questions between the United States authorities on the one hand, and the Hudson's Bay and Puget's Sound Agricultural Companies on the other, with respect to the possessory rights and claims

of those companies, and of any other British subjects in Oregon and Washington Territory, should be settled by the transfer of those rights and claims to the government of the United States for an adequate money consideration," provided for the appointment of a commission to examine and decide upon all such claims. 13 Stat. 651. This commission awarded $650,000 in full satisfaction of these claims, which award was accepted by the United States, and on July 11, 1870, a joint resolution was passed, making an appropriation on account thereof. 16 Stat. 386.

In May, 1849, Major Hathaway, of the United States army, with a company of soldiers, arrived at Vancouver and rented from the Hudson Bay Company buildings for quarters for his troops, and, with the consent of the company, established a camp upon the land in dispute. In October, 1850, Colonel Loring, commanding the United States troops at that place, issued a proclamation creating a military reservation four miles square, with definite boundaries, and including this land. This proclamation declared the reservation to be subject only to the temporary possessory rights of the Hudson Bay Company, and that all improvements within the limits of the reservation would be appraised and payment recommended. On December 8, 1854, Colonel Bonneville, commanding officer at Vancouver, pursuant to instructions from the Secretary of War, and in conformity to an act of Congress, approved February 14, 1853, (10 Stat. 158,) reduced the area of the reservation to 640 acres, caused the same to be surveyed, and new boundaries marked. At the same time the buildings and improvements on the reservation, including the Catholic church, were appraised by a board of military officers. On May 16, 1853, the plaintiff asserted its claim to the land by filing a notice thereof with the surveyor general of Oregon Territory. This application was followed up by proceedings in the land department, which resulted in a final decision by the Secretary of the Interior on March 11, 1872, sustaining the claim of the plaintiff to a small tract (less than half an acre) upon which the building used as a church was situated, and denying it as to the rest of the land. On the 15th of

January, 1878, the President approved a final survey and plat of the military reservation, confirmed the previous action of the War Department, and declared the reservation to be duly set apart for military purposes.

Upon these facts, it may well be doubted whether the decision of the Secretary of the Interior is not conclusive. The act of Congress purports to confirm "the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations." It is a question of fact whether there was at Vancouver a missionary station, and also a like question, if one existed, how much land it occupied. The rule is that in the administration of the public lands the decision of the land department upon questions of fact is conclusive, and only questions of law are reviewable in the courts. *Johnson* v. *Towsley*, 13 Wall. 72; *Warren* v. *Van Brunt*, 19 Wall. 646; *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Vance* v. *Burbank*, 101 U. S. 514; *Quinby* v. *Conlan*, 104 U. S. 420; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Baldwin* v. *Stark*, 107 U. S. 463; *United States* v. *Minor*, 114 U. S. 233; *Lee* v. *Johnson*, 116 U. S. 48; *Wright* v. *Roseberry*, 121 U. S. 488; *Cragin* v. *Powell*, 128 U. S. 691; *Knight* v. *U. S. Land Association*, 142 U. S. 161; *United States* v. *California & Oregon Land Co.*, 148 U. S. 31; *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 327.

While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general powers vested in that department. Revised Statutes, section 441, reads: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . Second. The public lands, including mines." And section 453 provides that "the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the survey and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land."

Referring to this latter section, and particularly the clause "under the direction of the Secretary of the Interior," it was said by Mr. Justice Lamar, speaking for the court in *Knight* v. *Land Association*, 142 U. S. 161, 177: "It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States." See also *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, and cases cited in the opinion. It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary.

But the contention of the plaintiff is that there was error in the construction of the statute and in respect to a matter of law. It not only concedes, but also insists, that the award to the plaintiff of the ground upon which the church was situated amounts to a determination by the land department that there was at the date of the act a Catholic mission at Vancouver, and, relying upon the authorities we have quoted, it claims that such determination is conclusive as to that fact. It insists further, that the grant made by the proviso was of 640 acres, and says that the existence of a Catholic mission having been as a matter of fact conclusively established, entitles the plaintiff as a matter of law to the 640 acres surrounding the mission. We do not so understand the terms of the grant. It is not a grant certain of 640 acres. The language is "not exceeding 640 acres." This places a limit in area beyond which the grant may not go, but does not define what is

granted. For that we must look elsewhere in the proviso, and the description is partly found in the words "now occupied." This is not a grant new and absolute of so many acres, but a confirmation of rights flowing, or supposed to flow, from occupancy. In *Missionary Society* v. *Dalles*, 107 U. S. 336, 343, this very question was before the court for consideration. The facts in that case were that in 1836 the Methodist Episcopal Church established a missionary station at The Dalles, in Oregon. In 1847 that church transferred the station to the American Board of Commissioners for Foreign Missions. The American Board continued in occupation for a short time, but one of its missionaries having been murdered by the Indians, it, through fear of Indian hostility, temporarily at least abandoned the mission, and at the date of the passage of the act of August 14, 1848, there were no missionaries at The Dalles, and no station in actual occupancy. The next year the American Board restored the station to the Methodist Episcopal Church, and in June, 1850, the latter caused a survey to be made of 640 acres, for the purpose of a claim under this proviso. The court held that the claim of the applicant could not be sustained, saying, after referring to the act: "The words are 'now occupied.' To occupy means to hold in possession; to hold or keep for use; as to occupy an apartment. Webster's Dictionary. The appellant contends that this act confers title on it for lands which it did not occupy at the date of the act, but which it had voluntarily abandoned eleven months before, and the occupancy of which it never resumed, either for missionary or any other purposes. Not even a liberal construction would support such a claim."

From this it appears that there must be occupancy, and the extent of the occupancy is one limit of the grant. This occupancy must be independent and separate, and not inferior and subordinate. It must be an occupancy in one's own right, and not under and dependent upon another.

This act of Congress is not exceptional in its character but in line with the general course of legislation in respect to the settlement and development of our western territories. The pioneer has always been regarded as entitled to favorable

consideration, and while his occupancy has not been deemed of itself sufficient to establish title to the soil, yet it has been held to give him certain possessory rights which are the subject of contract, and create a superior equity in respect to the acquisition of title. *Lamb* v. *Davenport*, 18 Wall. 307, illustrates this. In early days one Lownsdale settled upon a tract of land in Oregon, on which is now the city of Portland. Certain transactions were had between him and others in respect to that land prior to the acquisition of title, and the validity of those transactions was the subject-matter of this litigation, and in respect thereto the court said, on page 314:

"Of course, no legal title vested in any one by these proceedings, for that remained in the United States — all of which was well known and undisputed. But it was equally well known that these possessory rights, and improvements placed on the soil, were by the policy of the government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well-understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of their own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts."

Rector v. *Gibbon*, 111 U. S. 276, is even more closely in point In that case, three parties, Rector, Hale, and Gaines, had for a series of years claimed lands adjacent to the Hot Springs, in the State of Arkansas. Finally, in a suit which came to this

court (*Hot Springs Cases*, 92 U. S. 698) it was adjudged that neither of these claimants had any title to the land, but that it still remained the property of the United States. Subsequently an act was passed (19 Stat. 377) for a survey of the tract and the platting of the same into lots and blocks, and providing that the commissioners appointed to make the survey and plat should "finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value, which shall be fixed by the commissioners." One Ballantine was in occupation of certain premises under a lease from Rector, one of the claimants. The commissioners awarded the right of purchase to Ballantine, but this court held such award erroneous, and that the right of purchase was in Rector, the landlord, the court saying, on page 283:

"The government did not treat him and the other claimants as wanton intruders on the public domain, for then it might have ejected them by force. Instead of that it authorized proceedings for a judicial ascertainment of the merits of their respective claims. The act of 1877 embraces, therefore, under the designation of claimants and occupants, those who had made improvements, or claimed possession under an assertion of title or a right of preëmption by reason of their location or settlement. It was for their benefit that the act was passed, in order that they should not entirely forfeit their claims from location or settlement and their improvements, but should have, except as to the portions reserved, the right of purchase. Parties succeeding, by operation of law or by conveyance, to the possession of such claimants and occupants, would succeed also to their rights. But lessees under a claimant or occupant, holding the property for him, and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease implies not only a recognition of his title, but a promise to surrender the possession to him on the termination of the lease. They, therefore, whilst retaining possession, are estopped to deny his rights. *Blight's Lessee* v. *Rochester*, 7 Wheat. 535.

"This rule extends to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law or by purchase and assignment. The lessees in this case, and those deriving their interest under them, could, therefore, claim nothing against the plaintiff by virtue either of their possession, for it was in law his possession, or of their improvements, for they were in law his improvements, and entitled him to all the benefits they conferred, whether by preëmption or otherwise."

So, in the act before us, Congress, recognizing certain possessory rights, flowing from occupancy, made a donation to the occupant of the premises so occupied to the extent of not exceeding 640 acres. That this was a donation instead of a grant of the right to purchase is immaterial. The donation feature was inserted because of the benefits supposed to flow from the religious work of the mission, and proceeded upon the same principle that exempts from taxation the property of religious organizations. But the occupancy which was contemplated was an independent occupancy — one exercised by the mission in its own right. No such occupation appears here. The real occupant was the Hudson Bay Company; it had the possessory right. It had been in occupation long before the coming of the two missionaries, and whatever occupation the mission station had was under and by permission of the Hudson Bay Company. It was no more than a tenant at will or by sufferance. The United States, by treaty prior to this act, guaranteed to protect the possessory rights of the Hudson Bay Company, and it cannot be supposed that they intended by this act to ignore those rights and grant away the land to those who occupied under the company and by its sufferance. If it be said that by giving permission to the purchaser to build a church and occupy it the Hudson Bay Company vacated and surrendered its own possession, it only did so to the extent of the ground actually occupied by such church and buildings. So, if the award by the Secretary of the Interior is a decision that there was in fact a Catholic mission at Vancouver, it is also a decision of the further fact that its occupation was limited to the tract awarded. There

Counsel for Appellant.

is nothing in the record to impeach his action, and if the question were an open one, and to be tried *de novo*, there is in the record no sufficient testimony to justify any other conclusion. The situation is not dissimilar to that which would arise if some religious organization should come into the city of Washington and acquire title to a certain lot, and erect thereon a building. No one would think of saying that thereby it became the occupant of the city. Its occupation would be limited to the lot it bought and placed its building upon.

These considerations are decisive of this case. The decree of the Circuit Court is

Affirmed.

TEALL *v.* SCHRODER.

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

No. 272. Argued April 9, 1895. — Decided May 6, 1895.

When a power of attorney to sell and convey lands of the donor of the power, duly executed, is placed on record in the State in which the lands are situated, in the place provided by law for that purpose, and sales and transfers of the lands covered by the power are made by the donee of the power, and are in like manner placed on record, all persons interested, whether residing in the State or elsewhere, are charged with the necessary knowledge on those subjects, and are held to all the consequences following its acquisition.

Whenever property is claimed by one owner, and he exercises acts of ownership over it and the validity of such acts is not questioned by his neighbors till after the lapse of many years when the statute of limitations has run, and those who, for any apparent defects in the title to the property, would naturally be most interested in enforcing their claims, make no objection thereto, a fair presumption arises, from the conduct of the parties, that the title of the holders and claimants of the property is correctly stated by them.

THE case is stated in the opinion.

Mr. H. M. Foote for appellants. *Mr. George H. Sears* and *Mr. F. P. Dewees* were with him on his brief.

Opinion of the Court.

Mr. S. F. Leib for appellees. *Mr. M. M. Estee* was with him on his brief.

Mr. Justice Field delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of California, by Jane M. Teall, Timothy H. Teall, and Harvey Benedict, residents and citizens of the State of New York, against A. Schroder and three hundred and thirty-four other defendants, residents and citizens of the State of California, to enforce the transfer by them to the complainants of certain lands described in the bill of complaint, situated in the city of San José in that State, and represented as covering a large part of the city. There are various charges made as to the manner in which the defendants came into possession of the property, imputing fraudulent conduct on their part, and invoking the interposition of the equity powers of the court for its correction.

The bill was filed on the 1st of June, 1889, and represents that the complainants are residents and citizens of the State of New York, and have never been in California, and that the defendants are residents and citizens of California; that one Oliver Teall, stated to be the ancestor of the complainants, was, on the first day of August, 1857, the owner and in possession of certain real property, situated in the city of San José, county of Santa Clara in the latter State, more particularly described as certain pieces or parcels of land and town lots, designated by certain numbers in blocks, on the official map or plat of the city; and alleges that on the 2d day of February, 1852, he executed and delivered to one Davis Devine an instrument of writing appointing him his attorney in fact, and authorizing him in his, Teall's, name and to his use to enter upon and take possession of all lands, tenements, and hereditaments in the State of California to which he then was or might thereafter become entitled, or in which he was or might become interested, and in his name to grant, bargain, and sell, or to lease and demise the same, or any parcel thereof,

for such sum or price as to him, Devine, might seem meet, and to execute good and sufficient deeds of conveyance by quitclaim for the same.

That power of attorney was duly acknowledged and filed for record in the office of the recorder of the county of Santa Clara on the 16th day of March, 1852, and has ever since remained on the records of the county, and was unrevoked and in full force until the death of Teall on the 12th day of August, 1857.

The bill further alleges that prior to the first day of August, 1857, Devine, as attorney in fact of Teall and pursuant to the authority thus vested in him, took possession of all the premises mentioned, and continued in possession thereof until his death; that in violation of the trust reposed in him, on a day and date unknown to the complainants, but while in possession of the premises as the attorney in fact of Teall, he caused the whole of the premises to be conveyed to himself in the following manner, to wit: "Pretending to act as attorney in fact of Teall, he executed and delivered to one A. L. Rhodes a deed of release and quitclaim of all of the premises, bearing date as of the 1st day of August, 1857, and reciting a consideration of $5000, and that on the same day said A. L. Rhodes, by a similar deed, with a similar consideration recited, reconveyed all of the premises to Devine; that the conveyances were acknowledged on the 17th day of September, 1857, and were recorded on the 8th day of October thereafter, and have ever since remained on the records of the county of Santa Clara."

The bill further alleges that the alleged conveyances, and each of them, were fraudulent and void as to Oliver Teall and those claiming under him; that no consideration passed from Rhodes to Devine, or from Devine to Rhodes therefor; that the same were not authorized by Teall, nor was any consideration paid to him therefor, nor was any ratification thereof ever made by him, but that the deeds were made solely for the purpose of enabling Devine to deal with and dispose of the property as his own, and to defraud Teall and those claiming under him out of the property.

Opinion of the Court.

The bill further alleges that on the 12th day of August, 1857, Teall died in the city of Syracuse, in the State of New York, of which place he had for many years been a resident; and also upon information and belief, that the conveyances from Devine to Rhodes and from Rhodes to Devine were not executed upon the dates borne by them respectively, but were executed after the death of Teall, on the 17th of September, 1857; that during all this time the premises were and still are within the boundaries of the former pueblo of San José de Gaudalupe, and are included in the pueblo and its successor, the city of San José, a municipal corporation organized under the laws of California, and that the constituted authorities thereof, by virtue of a grant of the Mexican government, made prior to the cession of California to the United States, held the premises in trust for persons in possession or entitled to the possession thereof; that on the 4th of June, 1884, letters patent of the United States were issued to the mayor and common council of the city of San José, as the constituted authorities of the city, for the premises under the trust mentioned, and that the legal title is now held by the patentee, except as the same has been conveyed to others by those authorities and their predecessors; that all the defendants, except the mayor and common council of the city of San José, have entered upon and are now in possession of portions of the premises by virtue of conveyances from Devine made subsequently to the record of the conveyance to him by Rhodes.

It is apparent from the development of the facts in this case that the allegations of fraud on the part of Rhodes and Devine, as set forth in the bill, are made, not upon any knowledge of facts, showing such fraud, by the complainants, but upon surmises or conclusions inferred by them from the circumstance that no conveyance of the premises in controversy appears of record from Devine to Oliver Teall after the execution by the latter of the power of attorney to him, or to any other person for Teall's benefit.

As appears from the admitted allegations of the bill and the proceedings in the case, Oliver Teall, after the execution of his power of attorney to Devine, but on what particular day

is not stated, removed from the State of California to Syracuse in the State of New York, and there resided until his death on the 12th of August, 1857. But it does not appear from anything disclosed in the record or proceedings that he ever revoked in the meantime the power of attorney to sell his property, executed by him to Devine, or that Devine ever communicated with the complainants respecting the property of which he had been constituted an attorney in fact to sell or lease, or that he made any sales or leases thereof for Teall or remitted to him any money on their account. All that can be learned from the record in this case is that after the departure of Teall from California to New York he never exercised any control over any of the property, or made any improvements thereon or executed any leases or made any sales thereof, or claimed any right to exercise any such control. It appears that after his removal, Devine claimed to be the owner of the premises in San José, respecting which the power of attorney purported to be issued, and managed and controlled the same as absolute owner thereof, and, so far as disclosed, that no one ever called in question his right as owner. In the meantime, and during the several years of Devine's residence in San José, from 1852 until his death in 1876, a period of twenty-four years, the city of San José greatly increased in population and wealth, from a small town to a city of over 30,000 inhabitants, embracing many large houses and public buildings, and was noted for the beauty of its scenery, and the healthfulness of its climate. From these advantages it naturally became an attractive place of residence in the State, and was the seat of many institutions of learning. During this period the title of the city, which rested upon an alleged Mexican grant of several leagues, was investigated by the authorities of the United States, and finally confirmed under the act providing for the settlement of private land claims in California, and a patent of the United States was issued to the municipal authorities of the city as the successors of the pueblo, for the lands embraced within its boundaries, and under such patent the title was vested in parties in possession of the property under conveyances from Devine

executed after the power of attorney was issued to him by Teall. The titles conferred by such conveyances from the pueblo authorities have always been respected and maintained. Whilst the property in controversy, consisting of several hundred different parcels of land in the city of San José, and county of Santa Clara, remained in the possession of Devine or parties claiming by conveyances from him, without any disturbance of their asserted title and any question of its validity, and thirty-two years after the death of Teall and fourteen years after the death of Devine, when the circumstances attending the acquisition of the title to the property involved had passed from the recollection of the survivors or successors of the claimants, consisting of numerous individuals, partnerships, companies, and corporations, numbering in all three hundred and thirty-seven defendants, the present suit was brought to obtain a transfer to the complainants of the property held by parties claiming under Devine, with allegations of fraudulent conduct on the part of some of the parties, which we have mentioned, the better to enable the complainants to invoke the equity jurisdiction of the court for their protection.

To the bill the defendants, appearing in different sets, demurred, alleging as grounds of demurrer that more than thirty-one years had elapsed since the alleged causes of complaint accrued to the complainants and those under whom they claim, whereby the causes of complaint had become barred by the statute of limitations of the State, and had also become stale under the general rules of equity jurisprudence.

The law of the State creating the limitations, to which particular reference was made, is found in section nineteen of the act defining the time for commencing civil actions, passed April 22, 1850; and in subdivision four of section 338 of the Code of Civil Procedure of California; and further, it was contended that the alleged causes of complaint had become stale because of the lapse of time, according to the general principles of equity, and that the complainants had been guilty of laches in failing to attempt the enforcement of the same at the proper time, and it was insisted that so long a time had passed since the matters took place, that it would be contrary to equity and

good conscience for the court to take cognizance thereof, and to require any answer to them. Section nineteen of the act of April 22, 1850, reads as follows: "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." This section applies specifically to actions for equitable relief. Other sections of the act provide for the limitation of actions at law. Subdivision four of section 338 of the Code of Civil Procedure is as follows: "An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues; the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The power of attorney from Teall to Devine was on record from March, 1852, and open to the daily inspection of the complainants and of all parties interested in the title to the property. They could have ascertained, by inquiry, from Teall at any time previous to his death, and from many others afterwards, the character of the title and the reasons why the property was allowed to remain in its then condition and under the control of an attorney in fact of Teall. And the conveyances from Devine to Rhodes and from Rhodes to Devine, which are stated in the bill to have been made previous to August 1, 1857, were placed on record on the 8th of October, 1857, and remained on record ever afterwards, open to the inspection of all parties desirous of obtaining information respecting their execution or the property to which they related. As the complainants and all other parties interested could have obtained the necessary knowledge upon those subjects by proper inquiries, they are charged with such knowledge from the time those conveyances were placed on record, and held to all the consequences following its acquisition.

The court below was of opinion that these grounds of demurrer were well taken, and sustained them, and ordered the suit to be dismissed. From this decree sustaining the demurrer and dismissing the bill, the present appeal was brought to this court.

Aside from the general considerations, upon which the dis-

missal of the suit must be maintained in a court of law or equity, from the fact that the statute of limitations of California bars the action, whether brought at law or in equity, there are other considerations arising upon the facts stated which show that the complainants were barred from all relief when this suit was instituted. It is evident that Devine considered himself and acted as owner of the property, after the conveyance made to him by Rhodes, to whom he had conveyed the same under the power of attorney from Teall.

Wherever property is claimed by one as owner, and he exercises acts of ownership over it, and the validity of such acts is not questioned by his neighbors until after the lapse of many years, when the statute of limitations has run, and those who, for any apparent defects in the title of the property, would naturally be most deeply interested in enforcing their claims, make no objection thereto, a fair presumption arises, from the conduct of the parties, that the title of the holders and claimants of the property is correctly stated by them.

In the present case it appears that Teall, represented as having the title, executed a power of attorney to his son-in-law, Devine, and subsequently left the State of California and settled in Syracuse, New York, leaving the property in the hands of his son-in-law in California, who afterwards claimed to be the owner thereof and exercised acts of ownership over it, unquestioned by any one, and no subsequent claim being made to the ownership by Teall or by any relative of his, not even so far as to pay or offer to pay any taxes on the property, and many years having elapsed, covering the period prescribed by the statute of limitations for instituting suits for its recovery, and rights of property to large numbers having accrued thereunder, it may be fairly presumed by the courts that the statement of the party thus exercising unquestioned ownership was correct. The holding of property under a claim of ownership for many years operates to confer a title by adverse possession, which the courts, in the interest of the peace of the community and of society generally, will not permit to be disturbed.

It is suggested, and the suggestion is a reasonable one, that Devine was really the owner of the property, although, in

view of the many questions arising under the Mexican law as to the actual condition of the title of the land covered by the grant to the pueblo previous to its confirmation, he took the precaution, which at the time was deemed wise, to act as the attorney of the ostensible owner rather than as the actual owner, and that subsequently a deed was transmitted to Teall for execution, conveying the title in fee to Devine in the place of the power of attorney. But, as stated, news of his sickness having been received by Devine, it was thought best to convey the title to Rhodes, who subsequently could convey it to Devine in case a deed was not received from Teall before his death. This may seem to be a strained view of the case, but considering the silence which Teall and his relatives observed respecting the property, the refusal of every one who might claim under him if he continued in possession of a valid title to take part in any attempt to disturb Devine's title, and the continued management and control of the property by the latter for twenty-four years, it does not make the suggestion at all improbable.

Whether this be true or not, the right of Devine, after so many years of undisputed and notorious possession of the property, with a claim of its ownership shuts out, under the statute of limitations of California, the claims of all other persons either to its possession or ownership.

Decree affirmed.

SAYWARD *v.* DENNY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 951. Submitted April 22, 1895. — Decided May 6, 1895.

When the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any State, is drawn in question by a state court, it is essential to the maintenance of jurisdiction here that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed there, and that the decision of the highest

Statement of the Case.

court of the State, in which such decision could be had, was against the title, right, privilege, or immunity so set up or claimed; and in that regard, certain propositions must be regarded as settled: 1. That the certificate of the presiding judge of the state court, as to the existence of grounds upon which the interposition of this court might be successfully invoked, while always regarded with respect, cannot confer jurisdiction to reëxamine the judgment below; 2. That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way; 3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment; 4. That the petition for the writ of error forms no part of the record upon which action is taken here; 5. Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule; 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed; 7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such Federal question by its decision.

Tested by these principles it is quite apparent that this writ of error must be dismissed.

Motion to dismiss. This was an action at law brought by Arthur A. Denny and F. X. Prefontaine, as executors of the last will and testament of James Crawford, deceased, against William P. Sayward, in the Superior Court of Kitsap County, State of Washington, to recover moneys paid by James Crawford on a contract which he had executed as surety for William P. Sayward as principal. The complaint alleged that the contract referred to was executed by Sayward as principal, by and through his authorized agent, George A. Meigs, and by George A. Meigs, James Crawford, and William Harrington as sureties, and set it forth *in hæc verba*, it being an agreement for the purchase of logs of Dingwall and Haller, to be used in certain lumber mills belonging to Sayward. It was further averred that Crawford and Harrington had no interest in the contract and executed it only as sureties for the accommodation of Sayward; that afterwards Haller commenced an action thereon for the purchase price of the logs, against Crawford, Harrington, Meigs, and Sayward; that

Crawford and Harrington appeared in and defended the action, as did Meigs, and such proceedings were had therein that about November 3, 1882, Haller recovered judgment against Crawford, Harrington, and Meigs in the sum of $15,248.01 with costs; "that said Sayward was never served with process in said action, and never appeared in said action; that at all the times during the pendency of said action he was outside of the State (then Territory) of Washington, and was out of the jurisdiction of said court;" that Crawford died leaving a last will and testament, in which plaintiffs were named as executors; that the will was duly admitted to probate, and plaintiffs appointed and qualified and entered upon their duties as executors; that thereafter Haller presented his claim to said executors as a judgment creditor, and the executors were compelled to pay, and did pay, out of Crawford's estate for the use of defendant Sayward the sum of $9200, to apply, and it was applied, to the payment of the judgment; that Sayward had never repaid said sum of money to Crawford or his estate, or any part thereof, and it remained due with interest; that at the time the judgment was obtained, and at the time the cause of action accrued against Sayward, he was out of and absent from the State of Washington, and at no time since the cause of action accrued, until within a year prior to the commencement of the action, had Sayward returned or come into the State of Washington. To this complaint defendant demurred, on the ground that it did not "state facts sufficient to constitute a cause of action." The demurrer was overruled, and defendant excepted; and thereupon answered, denying the allegations of the complaint except that he was the owner of the mills for the manufacture of lumber mentioned therein; averred that he was never served with process in the original action nor appeared therein; and pleaded as affirmative defences, the statute of limitations and that the executors were discharged from their trust and were not competent to bring the action. The cause was tried by a jury, and, upon the verdict, the executors obtained a judgment against Sayward for the sum of $17,680.25, whereupon he appealed to the Supreme Court of the State of

Washington, alleging errors, and the judgment was by that court affirmed. The case is reported, in advance of the official series, 39 Pac. Rep. 119. A writ of error from this court was allowed by the Chief Justice of Washington, and a motion to dismiss was submitted.

Mr. G. M. Emory for the motion.

Mr. Charles E. Shepard opposing.

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

As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any State, was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the State, in which such decision could be had, was against the title, right, privilege, or immunity so set up or claimed. And in that regard, certain propositions must be regarded as settled. 1. That the certificate of the presiding judge of the state court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to reëxamine the judgment below. *Powell* v. *Brunswick County*, 150 U. S. 433, 439, and cases cited. 2. That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way. *Miller* v. *Texas*, 153 U. S. 535; *Morrison* v. *Watson*, 154 U. S. 111, 115, and cases cited. 3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. *Loeber* v. *Schroeder*, 149 U. S. 580, 585, and cases cited. 4. That the petition for the writ of error forms no part of the record upon which action is taken here. *Butler* v. *Gage*, 138 U. S. 52, and cases cited. 5. Nor do the arguments of counsel, though the opinions of the

state courts are now made such by rule. *Gibson* v. *Chouteau*, 8 Wall. 314; *Parmelee* v. *Lawrence*, 11 Wall. 36; *Gross* v. *U. S. Mortgage Co.*, 108 U. S. 477, 484; *United States* v. *Taylor*, 147 U. S. 695, 700. 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt* v. *Sheldon*, 1 Black, 518; *Maxwell* v. *Newbold*, 18 How. 511, 515. 7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such Federal question by its decision. *Powell* v. *Brunswick County*, 150 U. S. 400, 433.

Tested by these principles it is quite apparent that this writ of error must be dismissed.

The errors assigned question the various rulings of the trial court, which were passed on and sustained by the Supreme Court, but of these, reference need be made to but two, namely, in respect of the admission in evidence of the judgment recovered by Haller against Crawford, and the exclusion of evidence offered to show that Sayward was not liable to Haller to the extent of the judgment recovered by Haller against Crawford. The contention is that the result of the rulings and decisions of the trial court in these respects, as affirmed by the Supreme Court, was to hold plaintiff in error conclusively bound by the judgment rendered against Crawford in an action "in which he was not a party and of which he had no notice;" and that this was in effect to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the Constitution of being protected from such deprivation or denial.

But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the

demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the Supreme Court in disposing of the rulings below.

The Supreme Court treated the subject of the admission of the judgment as follows:

"The next contention grows out of the action of the court in admitting in evidence a copy of the judgment upon which the money sought to be recovered had been paid by plaintiffs. The reason for objecting to the introduction of this copy was that the defendant had not been served with process in the action, and could not be affected by the judgment. Authorities have been cited to establish the doctrine that one not served with process in an action is not bound by a judgment rendered therein; but they are none of them in point, under the circumstances of this case. A judgment against the sureties, rendered without their consent, and especially after a defence made in good faith by them, is at least *prima facie* sufficient to authorize them to recover of their principal the amount which they have been called upon to pay thereon; and if the principal had knowledge of the pendency of the action, even though he was not served with process therein, the judgment rendered against the sureties, without fault on their part, would be conclusive in an action by them to recover money which they had paid on account of such judgment."

And, as to the exclusion of evidence complained of, the Supreme Court said:

"The foundation of the next allegation of error is stated by the appellant as follows: 'In a suit by surety for subrogation, principal entitled to use every legal defence.' This is not an exact statement of the principle which it is claimed was negatived by the court upon the trial. The plaintiffs did not seek a technical subrogation to the rights of the plaintiff in the original action; they sought an independent recovery of money which they had paid on account of the defendant, and introduced the judgment only for the purpose of showing that such payment was not a voluntary one. As stated before, the weight of authority is to the effect that a judgment like the one sought to be introduced in the case at bar is at least

prima facie evidence as against the principal; and that it is conclusive unless some collusion or fraud upon the part of the surety is shown. The testimony offered by the defendant did not tend to show any such fraud or collusion, and, if it did, it was not competent under the pleadings. There was no sufficient allegation of fraud or collusion on the part of the sureties in the answer. Besides, we think the evidence disclosed a state of facts from which it could be fairly presumed that defendant had notice of the pendency of the former suit."

We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error.

Writ of error dismissed.

THE OREGON.[1]

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Nos. 270, 273. Argued April 8, 9, 1895. — Decided May 6, 1895.

A steamer steaming in a dark night at the rate of fifteen miles an hour through a narrow inland channel where a local pilot is put in charge of it, should have a lookout stationed on either bow, and the master should be on deck; but a failure to comply with these requirements will not, in

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[1] The Docket titles of these cases are: "No. 270, *John Simpson* v. *The Steamer Oregon, her tackle &c., the Oregon Short Line and Utah Northern Railway Company:*" No. 273, "*The Oregon Short Line and Utah Northern Railway Company* v. *The Ship Clan Mackenzie, John Simpson, Claimant, et al.*"

Statement of the Case.

case of collision, suffice to condemn the steamer, unless there be proof that the failure contributed to the collision.

From the facts as stated by the court in the statement of facts and in the opinion, it is held that there can be no doubt that the collision between the Oregon and the Clan Mackenzie was attributable to the inefficiency of the pilot and lookout of the Oregon.

Where one vessel, clearly shown to have been guilty of a fault adequate in itself to account for a collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault, and this principle is peculiarly applicable to a vessel at anchor, complying with regulations concerning lights and receiving injuries through the fault of a steamer in motion.

The provision in Rev. Stat. § 4234 that every sail vessel shall on the approach of a steam vessel during the night time, show a lighted torch upon that point or quarter to which the steam vessel shall be approaching, is no part of the International Code, and would seem to apply only to American vessels, and has no application to vessels at anchor.

Under all ordinary circumstances a vessel discharges her full duty and obligation to another vessel by a faithful and literal observance of the International rules.

The obligors in a stipulation given for the release of a vessel libelled for a collision are not, in the absence of an express agreement to that effect, responsible to intervenors in the suit, intervening after its release; but the court below may treat their petitions as intervening libels, and issue process thereon, or take such other proceedings as justice may require.

This suit was originally instituted December 31, 1889, by the filing of a libel in admiralty by John Simpson, master of the British ship Clan Mackenzie against the steamer Oregon, to recover damages for a collision between the two vessels, which occurred December 27th in the Columbia River about a mile above a point in the river known as Coffin Rock light, and resulted in the sinking of the Clan Mackenzie, and the loss of two of her crew. The libel charged the Oregon with fault in not having a proper lookout or a competent pilot, and in failing to keep out of the way of the Clan Mackenzie, which was then at anchor.

Upon the Oregon being arrested, a claim to her was interposed by the Oregon Short Line and Utah Northern Railway Company, and a stipulation given in the sum of $260,000 to answer the libel. Subsequently, intervening petitions were filed by James Laidlaw, administrator of the estates of the

two seamen of the ship who were killed in the collision, by John Simpson and his wife individually, and by eighteen others of the crew of the Clan Mackenzie for the loss of their property, clothing, and effects in the sinking of the ship. Copies of these petitions were served upon the claimant, but no warrant of arrest was issued, and no separate stipulation was given to answer the intervenors' demands.

James Joseph, another of the crew, also intervened, alleging that he had been seriously injured by the collision, and asking damages therefor. Exceptions to these petitions were filed, denying the right to intervene after the vessel had been discharged from arrest. These exceptions were overruled, and the claimant ordered to answer. Answers were accordingly filed.

Subsequently, and on April 5, 1890, the Oregon Short Line and Utah Northern Railway Company, charterer of the Oregon, filed a cross-libel against the Clan Mackenzie, charging that the collision occurred through the fault of the latter, in failing to display a proper anchor light, to keep a proper anchor watch, or to call the steamer's attention by shouting, ringing the ship's bell, or showing a lantern or torch, as required by Rev. Stat. § 4234. A stipulation was given in the sum of $50,000 to answer this cross-libel, and the cases came on to a hearing in the District Court upon libel and cross-libel.

The District Court found the Oregon to have been in fault for excessive speed, for want of a proper lookout, and of an officer on deck, and for the negligence of her pilot in mistaking the anchor light of the Clan Mackenzie for that of Coffin Rock, and for not keeping farther out in the channel of the river. The District Court also found the Clan Mackenzie to have been in fault for the want of a proper lookout, for failure to ring her bell, and for the omission to exhibit a torch. The case was adjudged to be one of mutual fault, and a decree was entered dividing the damages. The intervening petitions were held to have been properly filed, and one-half of their claims was ordered to be paid by the Oregon, and the other half out of the money found to be due to the Clan Mackenzie. 45 Fed. Rep. 62. From this decree both parties appealed to

the Circuit Court, which affirmed the decree of the District Court, and made the finding of facts printed in the margin.[1]

[1] FINDING OF FACTS.

First. That the Clan Mackenzie is a British vessel of twenty-five hundred tons burden, built of iron, two hundred and fifty-nine feet in length, thirty-eight feet beam, and twenty-three feet in the hold, and was early in the forenoon of December twenty-sixth, eighteen hundred and eighty-nine, at Astoria, Oregon, bound for Portland from Rio Janeiro, in ballast, and in tow of the steamboat Ocklahama, of which one Henry Empkins was master and pilot.

Second. That about eight o'clock in the evening of said day said vessel came to anchor on the Oregon side of the Columbia River in five fathoms of water, at three feet flood tide and about nine hundred feet distant from and a little below a dock and woodyard for steamboats called Neer City; also, about three-fourths of a mile below Goble's Point and a mile above Coffin Rock.

Third. That immediately below said Coffin Rock and a short distance inside of it, on the face of a wooded promontory and at a height of about thirty feet from the water, there is and was at said time maintained a government light, described as a tubular-lens lantern of one hundred candle power, with a radiating power of four miles, and easily visible on a dark, clear night from three to four miles.

Fourth. That said steamboat Ocklahama was owned at said date by the Oregon Railway and Navigation Company, but was in possession and control of said Oregon Short Line and Utah Northern Railway Company under a lease from said Oregon Railway and Navigation Company, and that said Henry Empkins, as master and pilot, was the agent of the said Oregon Short Line and Utah Northern Railway Company.

Fifth. That said pilot anchored the Clan Mackenzie on the edge of the ship channel, which at that point is nearly half a mile wide at the mean of the lowest low waters and well out of the usual track of the ocean steamers that ply between Portland and San Francisco, and also back and out of the range of said Coffin Rock light.

Sixth. That under the direction of said pilot there was placed in the fore rigging of said Clan Mackenzie on the starboard side midway between the foremast and the shrouds, between twenty and twenty-five feet above the deck and thirty-five to forty feet above the water, an anchor light, which was a white light in a copper lantern with a globular corrugated lens over eight inches in diameter, and that the material used in it was equal to the best coal oil, and it would burn eight hours without trimming; that it was easily visible on a dark, clear night a mile away and was kept in place and burning brightly from ten o'clock P.M. of said December twenty-sixth up to and at the moment of the collision hereinafter mentioned.

Seventh. That said pilot then proceeded with said Ocklahama to the dock of the woodyard at said Neer City, where said steamboat was tied up for the night.

Counsel for Defendant in Error.

Mr. C. E. S. Wood for Simpson and the Clan Mackenzie.

Mr. Artemas H. Holmes for the Oregon and the Railway Company. *Mr. W. W. Cotton*, *Mr. John F. Dillon*, and *Mr. J. M. Wilson* were with him on his brief.

Eighth. That said Clan Mackenzie was well and properly anchored, and that the light hung in the rigging thereof was properly hung and was in all respects a good and sufficient anchor light.

Ninth. That about nine o'clock in the evening of said December twenty-sixth, eighteen hundred and eighty-nine, the Oregon, an iron steamship of about one thousand tons burden and three hundred feet in length, and being operated by said Oregon Short Line and Utah Northern Railway Company under the lease from the Oregon Railway and Navigation Company as owner thereof, left Portland, Oregon, for San Francisco, California, with a cargo of freight and passengers, under the charge of a pilot, and drawing between sixteen and seventeen feet of water and having a proper mast light and side lights burning.

Tenth. That the night of said December twenty-sixth, eighteen hundred and eighty-nine, was dark and clear, the weather calm, with some clouds in the sky; a few stars were visible, and according to the calendar the moon set at 9.42 P.M.

Eleventh. That during the passage of the Oregon down the Columbia River, and up to the time of the collision, the pilot thereof was on the centre of the bridge just abaft and above the pilot-house, and there was a man at the wheel and another forward on the forecastle head acting as a lookout. The steersman and lookout came on duty at twelve o'clock, and besides these no person connected with the vessel was on duty on deck from that time to the collision.

Twelfth. That near one o'clock, and a mile or more above Goble's Point and opposite the railway ferry landing, the anchor light of the Clan Mackenzie and the Coffin Rock light might both have been seen from the ship's channel in the Columbia River, and there the pilot of the Oregon saw one light which he took for said Coffin Rock light.

Thirteenth. That from this point the Oregon followed the bend of the river to the westward for nearly a half mile until both lights were shut out by Goble's Point, and in the course of the next half mile she came back to the northward, so that by the time she was abreast of the foot of Sand Island and just above Goble's Point, if she had been in midchannel, both lights would have been plainly visible from her deck, though somewhat in line, the light of the Clan Mackenzie being the farther in shore; but the Oregon, instead of being in midchannel, hugged the shore in the bend above Goble's Point, and came abreast of said point on the south side of the channel, when the pilot saw a light, which he supposed to be Coffin Rock light, and headed for it, giving the steersman the course northwest by north, which was held to the moment of the collision, while the general

Counsel for Intervenors.

Mr. William A. Maury by leave filed a brief for intervenors. *Mr. Raleigh Stott*, *Mr. W. L. Boise*, *Mr. George C. Stout*, and *Mr. C. W. Fulton* were with him on the brief.

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direction of the ship channel from abreast of said Goble's Point to below Coffin Rock light is north-northwest.

Fourteenth. That the light which the pilot saw both above, at, and below Goble's Point and which he mistook for the Coffin Rock light, was in fact the anchor light of the Clan Mackenzie, but that the Coffin Rock light was burning brightly during all said times, and should have been visible from the deck of the Oregon.

Fifteenth. That during said time, and up to the moment of the collision, the Oregon was going through the water at the rate of twelve miles an hour and about fifteen miles past the land.

Sixteenth. That the Oregon arrived within three hundred feet of the Clan Mackenzie when the pilot and lookout of the Oregon simultaneously discovered the Clan Mackenzie, and the helm of the Oregon was immediately put to port.

Seventeenth. That the course of the Oregon was not changed in time to avoid a collision, and she struck the Clan Mackenzie in a direction slightly diagonal to her keel between the port cathead and the stem, and cut into her for a distance of about thirty feet.

Eighteenth. That from the deck of the Oregon the outline of the shore from Goble's Point to Coffin Rock was easily distinguishable, and the light of the Clan Mackenzie should have been seen and distinguished for at least a quarter of a mile.

Nineteenth. That it was and is the custom of vessels being towed from Astoria to Portland to anchor for the whole or part of a night in the Columbia River, which fact should have been known to the persons in charge of the Oregon, and they should have kept a good lookout for such vessels in order to avoid a collision.

Twentieth. That said collision was caused primarily by the fault of the Oregon, in that she was being run at too high a rate of speed; that she did not have a proper lookout on the bow; that she should have had at least one officer on deck to oversee said lookout, and that her pilot was negligent or incompetent in mistaking the anchor light of the Clan Mackenzie for that of Coffin Rock light and in not keeping well out into the channel of the river before rounding Goble's Point, so as to bring the Coffin Rock light plainly in view before giving the steersman the course, and also in standing continuously at the middle of the bridge over and above the light in the pilot-house instead of moving back and forth thereon.

Twenty-first. That there was a watch on board the Clan Mackenzie, who had instructions from the master to keep a good lookout and ring the bell if the weather became thick or foggy, and that said watch saw the light of the Oregon when about three-fourths of a mile away and her hull when at a distance of about one-fourth of a mile, when he perceived that she was

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

At the time of the collision in question, which occurred about one o'clock on the morning of December 27, 1889, the ship Clan Mackenzie, an iron sailing vessel of 2500 tons burden, bound from Rio Janeiro to Portland in ballast, was lying at anchor in five fathoms of water on the westerly or Oregon side of the Columbia River, about 900 feet distant from and below a steamboat dock known as Neer City, about three-quarters of a mile below Goble's Point, and one mile above Coffin Rock. She was anchored on the edge of the ship channel, which, at that point, is nearly half a mile wide at low water, and well out of the usual track of ocean steamers plying up and down the river, and out of the range of Coffin Rock light. She was provided with an anchor watch, and was displaying the proper statutory anchor light between twenty and twenty-five feet above the deck. In this condition she was run into and sunk by the steamship Oregon. The circumstances above detailed raise a presumption of fault on the part of the Oregon, and the burden of proof is upon her to exonerate herself from

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heading directly for the Clan Mackenzie and commenced shouting and continued to do so until just before the collision, but he did not ring the bell. The weather was not thick or foggy.

Twenty-second. That said Clan Mackenzie was not provided with a torchlight to be shown on the approach of danger and none was shown at the time the Oregon was approaching.

I further find from the evidence now introduced in connection with that introduced in the District Court that it is not customary when a ship is at anchor in a harbor, river, or channel, as in this case, with her anchor light burning brightly, and the night is clear and without fog, to show a torch or a flash light or ring a bell on the approach of a steamer, and that if a torch or flash light is not already prepared and at hand and ready for use that it would take five minutes to obtain one from the place where they are usually kept and light it.

Twenty-third. That said Clan Mackenzie, being a foreign vessel, was not required, under section forty-two hundred and thirty-four of the Revised Statutes, to burn a torch on the approach of the Oregon, and it was not the custom on the Columbia River to do so or to ring a bell in a clear night under like circumstances, but the liability to a collision would have been greatly diminished had either been done in time.

liability. *The Clarita and The Clara*, 23 Wall. 1, 13; *The Virginia Ehrman and The Agnese*, 97 U. S. 309, 315; 1 Parsons on Shipping, 573. Has she succeeded in doing so? An answer to this question requires the consideration, both of her own movements, and of the alleged delinquencies on the part of the Clan Mackenzie.

1. The Oregon was an iron steamship, 300 feet in length, and of about 1000 tons burden, and was navigated by the railway under a charter from her owner, the Oregon Railway and Navigation Company, in a freight and passenger trade between Portland and San Francisco. She left Portland at about nine o'clock in the evening in question with a cargo of freight and passengers, under charge of a river pilot, drawing about sixteen feet of water, and displaying her proper riding lights. The weather was calm and the sky somewhat cloudy, but the night was dark and clear — such a night as is most favorable to the discovery of lights. The deck watch was composed of the river pilot in command, who was on the bridge just above the pilot-house; a man at the wheel, and a lookout upon the forecastle head. No officer and no other man connected with the vessel was on deck from the time the watch was changed at 12 o'clock until the collision.

Considering the darkness of the night, her rate of speed, which was fifteen miles an hour past the land, the narrowness of the channel, and the probability of meeting other vessels, the greatest watchfulness was required, and we think that prudence demanded at least an additional lookout. The watch was the smallest that would be tolerated under any circumstances, and even were it sufficient for navigation by daylight, it by no means follows that it was sufficient for running a river in a dark night. It is hardly possible that, in a four-hour watch, the attention of the lookout should not be occasionally diverted from his immediate duty. Yet the withdrawal of his eye from the course of the vessel even for the fraction of a minute may occur at a moment when a light comes in sight, and before this light can be accurately located and provided for, a collision may take place. As was said by Mr. Justice Swayne in *The Ariadne*, 13 Wall. 475, 478:

"The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of the vessel with all the property, and the lives of all on board. The same consequences may result to the vessel with which his shall collide. In the performance of his duty the law requires indefatigable care and sleepless vigilance."

Where, as in this case, the circumstances are such as to require more than ordinary care, we think it not too much to require a lookout to be stationed on either bow. It was said in the case of *The Ogdensburg* (*Chamberlain* v. *Ward*), 21 How. 548, 571, that ocean steamers usually have two lookouts in addition to the officer of the deck, and that no less precaution should be taken by first-class steamers on the Lakes. In the case of *The Germania*, 3 Mar. Law Cases (O. S.), 269, a case of a steamer which had come into collision with a barque in the English Channel in a dark night, the Privy Council were advised by the nautical assessors, who assisted them, that it was the usual practice in king's ships to have never less than two lookouts at the bowsprit, and their lordships announced themselves as not satisfied with the sufficiency of the reason alleged for having only one lookout in that case. While, in the case of *The Colorado*, 91 U. S. 692, the collision took place during a dense fog, it was said, in the opinion of the court, that a watch consisting only of the mate, one wheelsman, and one lookout, besides the engineer, would hardly be considered sufficient for a large propeller, even in a clear night.

Nor are we satisfied with the conduct of the master in leaving the pilot in sole charge of the vessel. While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while the pilot is on board, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on

deck, and that the men are attentive to their duties. *The Iona*, L. R. 1 P. C. 426.

In *The Batavier*, 1 Spinks, 378, 383, it was said by Dr. Lushington: "There are many cases in which I should hold that, notwithstanding the pilot has charge, it is the duty of the master to prevent accident, and not to abandon the vessel entirely to the pilot; but that there are certain duties he has to discharge (notwithstanding there is a pilot on board) for the benefit of the owners." In an official report made by a maritime commission in 1874, the Elder Brethren of Trinity House are said to have expressed the opinion "that in well-conducted ships the master does not regard the presence of a duly licensed pilot in compulsory pilot waters as freeing him from every obligation to attend to the safety of the vessel; but that, while the master sees that his officers and crew duly attend to the pilot's orders, he himself is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist, not only to urge upon the pilot to use every precaution, but to insist upon such being taken." Marsden on Collisions.

These deficiencies in the watch, however, are rather evidences of negligence, and illustrative of lax management in the navigation of the vessel than distinct faults in themselves, and would not suffice to condemn the vessel in the absence of evidence that they contributed to the collision. The question still remains, what was the particular act or omission which brought about the collision?

At Goble's Point, three-quarters of a mile above where the Clan Mackenzie lay, there is a bend in the channel; but the anchor light of the ship, as well as Coffin Rock light, might have been seen from the deck of the Oregon near the railway ferry landing, a mile or more above Goble's Point. The pilot did in fact see one of such lights, which he took to be Coffin Rock light. As the steamer neared Goble's Point, however, both lights were shut in by the land; but a little before reaching the point, if she had been in midchannel, both lights would have been plainly visible from her deck, though somewhat in line, that of the ship being a little nearer the bank.

But the Oregon, instead of being in midchannel, hugged the shore in the bend above Goble's Point, and was on the southerly (more properly, the westerly) side of the channel as she came abreast of the point, when the pilot saw a light, which he supposed to be Coffin Rock light, and headed for it, giving the wheelsman the course N. W. by N., which was held to the moment of the collision, although the general direction of the ship channel from a point abreast of Goble's Point is N. N. W. (This finding is probably a mistake for N. W. by N. $\frac{1}{2}$ N.) The light which the pilot saw both above, at, and below Goble's Point, and which he mistook for the Coffin Rock light, was in fact the light of the Clan Mackenzie. But the Coffin Rock light was burning brightly all this time, and should have been visible from the deck of the Oregon.

The pilot did not in fact discover the Clan Mackenzie until he was within 300 feet of her, when he and the lookout simultaneously made her out, and the wheel was immediately put to port. The change of course, however, was too late to avoid a collision, and the steamer struck the Clan Mackenzie in a direction slightly diagonal to her keel, between the port cathead and the stem, and cut into her a distance of about thirty feet. It is stated by the District Judge that the pilot sought to excuse himself for seeing but one light, by suggesting that the two lights must have been so near in line that a mast of the Clan Mackenzie intercepted the rays of the Coffin Rock light. But, as the outline of the shore from Goble's Point to Coffin Rock was easily distinguishable from the deck of the Oregon, it was manifestly owing to the negligence or inefficiency of the lookout, that the two lights were not separated and distinguished, as the Oregon rounded Goble's Point. Indeed, the finding of the Circuit Court is that both lights might have been seen at the railway ferry landing, a mile above Goble's Point, and from the course of the river at and below the landing, it is impossible that the two lights should not have been distinguished before the steamer reached the point; and, even after that, they could hardly have been so constantly in line as not to be separated, if the lookout had been attentive to his duty. In all probability, however, he

was watching the Coffin Rock light, and gave no thought to the possibility of there being another light between him and Coffin Rock. From the fact that the Clan Mackenzie was anchored on the westerly edge of the channel, and that as soon as she was perceived, the order was given to port, it would appear that the Oregon was considerably to the westward of her proper course, and that, instead of shaping her course outside of Coffin Rock light, she was in reality heading directly for the light of the Clan Mackenzie, which she mistook for the other. The pilot should not have been taken unawares by the presence of the ship, as there is a distinct finding that it was the custom of vessels being towed from Astoria to Portland to anchor for the whole or part of the night in the Columbia River, and that this fact should have been known to the persons in charge of the Oregon, and they should have kept a good lookout for such vessels. Add to this the further fact that the lookout of the Clan Mackenzie repeatedly hailed the steamer, while she was yet a quarter of a mile away, and that the Oregon neither distinguished her light nor heard her hail, and the inattention or incompetency of the lookout becomes even more clearly manifest. In short, there can be no doubt whatever that this collision was attributable to the inefficiency of the pilot and lookout of the Oregon.

2. The District Judge was also of opinion that the Clan Mackenzie failed to discharge her whole obligation to the steamer, and should consequently share the loss. In this opinion the Circuit Judge, with evident hesitation, concurred. As we had occasion to remark in *The City of New York*, 147 U. S. 72, 85, where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter.

So far as concerns the management of the Clan Mackenzie, the facts found are that her anchor watch was charged by the master to keep a good lookout, and ring the bell if the weather became thick or foggy; that the watchman saw the light of the Oregon about three-quarters of a mile away, and her hull when at a distance of about one-quarter of a mile, when he perceived that she was heading directly for the Clan Mackenzie, and commenced shouting, and continued to do so until just before the collision, but did not ring the bell; that the Clan Mackenzie was not provided with a torchlight, to be shown on the approach of danger, and none was shown at the time the Oregon was approaching.

Upon these facts the Clan Mackenzie was found to have been in fault, first, in not providing her anchor watch with a torchlight or flare-up, whereby her presence might have been indicated to the approaching steamer; and, second, because her anchor watch did not avail himself of the means at hand for this purpose, to wit, the ship's bell. The International Code, (Rev. Stat. § 4233,) in force at this time, provided, (rule ten,) that "all vessels, whether steam-vessels or sail-vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all round the horizon, and at a distance of at least one mile."

This rule was substantially, if not literally, complied with. The light was of the regulation size, and if it were hung a little over twenty feet above the hull, the difference was entirely immaterial, as it is found to have been seen by the pilot of the Oregon, though mistaken for the Coffin Rock light.

The obligation to exhibit a torch is claimed to arise directly from Revised Statutes, sec. 4234, which provides that "collectors, or other chief officers of the customs, shall require all sail-vessels to be furnished with proper signal lights, and every such vessel shall, on the approach of any steam-vessel

during the night-time, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching." This section was incorporated into the Revised Statutes from an act passed February 28, 1871, c. 100, 16 Stat. 440, and is strictly no part of the International Code, which was originally adopted in 1864. This act is entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes." Its first section enacts: "That no license, register, or enrolment shall be granted, or other papers issued, by any collector or other chief officer of the customs, to any vessel propelled in whole or in part by steam, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with." The act then proceeds to lay down certain requirements, designed for the protection of life upon steam vessels, and obviously intended to apply only to American vessels. The seventieth section contains the provision in question, subsequently incorporated into the Revised Statutes as § 4234. Indeed, the forty-first section of the act expressly provides that it "shall not apply to public vessels of the United States, or to vessels of other countries." Even if this section (Rev. Stat. § 4234) stood alone and unexplained by the other provisions of the act of which it was a part, it would seem to apply only to American vessels, since Congress could hardly have intended to make it the duty of collectors to require foreign sail vessels to be furnished with proper signal lights, even if it had the power to do so.

But, even admitting that § 4234 was intended to cover foreign vessels, we think it has no application to vessels at anchor, but was designed to supply an obvious deficiency in the International Code, with respect to vessels under way. By rule 8 of the original code of 1864, sailing vessels under way were required to carry colored lights visible at a distance of two miles, but so enclosed by inboard screens that they were wholly invisible to vessels coming up astern or approaching from either side, unless such approach were from a direction not more than two points abaft the beam. In other words,

one or the other of such colored lights was visible over an arc of the horizon of twenty points of the compass; but no provision was made for the exhibition of a light to a steamer coming up within the unilluminated arc of twelve points; and, in a dark night, of course there was great danger of collision, since the code provided that "no other" lights than those mentioned in its rules should be carried. Even if a steamer approached from ahead, the colored lights were frequently so dim as to escape observation, and the exhibition of a torch was a very proper additional precaution.

No such argument, however, applies to the case of vessels at anchor, which were required by rule 10 (Art. 8 of the Revised Code of 1885) to exhibit a large white light so constructed as to be visible all around the horizon, and at a distance of at least a mile. If a proper lookout be kept upon the approaching steamer, this is an adequate provision for a clear night, and the additional requirement of exhibiting a torch might impose upon the vessel anchored in a stream where steamers are constantly passing and repassing the duty of keeping a torch burning the entire night. Suppose, for instance, the vessel were anchored in New York Bay or in the lower part of the Hudson River, in ordinary weather there probably would not be a moment during the whole night when a steamer might not be said to be approaching her, within the meaning of the section, and if she were required to exhibit a torch to every such steamer, she would be required to keep one burning practically all the time. That would not only be wholly unnecessary, but liable to lead to great confusion and annoyance to passing steamers. The very fact that the section applies only to sailing vessels indicates that it refers to sailing vessels under way, since there is just as much reason for requiring a steamer to exhibit a torchlight at anchor as a sailing vessel, as the light displayed by both is the same. Indeed, it is at least open to question whether this provision, so far as it applies to the high seas, was not repealed by article 11 of the act of March 3, 1885, c. 354, 23 Stat. 438, 440, which requires that "a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or

flare-up light." The failure of the International Code to make some provision for notice to vessels coming up astern of another was so manifestly a *casus omissus* that, even before the adoption of the Revised Code, it was held that the leading vessel was bound to exhibit a light astern. This position was treated as a "special circumstance," requiring the use of extraordinary precautions. *The John Fenwick*, L. R. 3 Ad. & Ec. 500; *The Anglo-Indian*, 3 Asp. Mar. Law Cas. 1; *The Philotaxe*, 3 Asp. Mar. Cas. 512.

It is insisted, however, that, irrespective of the statute, the Clan Mackenzie was bound to make use of every precaution which the exigencies of the case called for, to avert a collision; that she had no right to rely upon her statutory light, but was bound either to exhibit a torch, ring a bell, or in some other equally efficient manner call the steamer's attention to the fact of her presence in the river. Undoubtedly, where the circumstances of the case are such as to demand unusual care, such care should be exercised. Indeed, there is a special provision in rule 24 that "in construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger." The code, however, is supposed to make provision for all ordinary cases.

It originated in the English Merchant Shipping Act Amendment Act of 1862, the twenty-fifth section of which provided for the adoption by Order in Council of certain rules and regulations for preventing collisions at sea; requiring the adoption of certain lights, fog signals, and steering and sailing rules adapted to almost every case. These regulations were adopted *in totidem verbis* by the act of Congress of April 29, 1864, Rev. Stat. § 4233, and by all the leading maritime nations of the world; and in the case of *The Scotia*, 14 Wall. 170, were held by this court to have become the general law of the sea, and obligatory upon all nations which had given their assent to them. In the subsequent case of *The Belgenland*, 114 U. S. 355, 370, they were said to be binding upon foreign as well as domestic ships, unless the contrary were

made to appear. In 1880, a new system, not differing radically from the former one, was adopted in England; and by the act of March 3, 1885, 23 Stat. 438, c. 354, became the law in this country so far as concerned vessels navigating the high seas. The object of this code was to establish a uniform system of rules and regulations, which should be obligatory throughout the world, taking the place of the various and somewhat conflicting usages which had theretofore obtained among maritime nations. As before stated, they are regarded as sufficient protection for a vessel under ordinary circumstances; and one vessel meeting another, whether of the same or different nationality, has a right to assume that both are governed by the same laws, and each may regulate her own conduct accordingly. Exceptions to these rules, though provided for by rule 24, should be admitted with great caution, and only when imperatively required by the special circumstances of the case. It follows that, under all ordinary circumstances, a vessel discharges her full duty and obligation to another by a faithful and literal observance of these rules. The power to superadd to them other requirements involves the power to determine what shall be superadded, and in this particular there is room for a great and embarrassing diversity of opinion. Thus, one court might hold that, in addition to displaying the regulation light, a vessel at anchor should swing a torch; another, that she should ring a bell; another, that she should blow a horn, beat a drum, or fire a cannon, and the result would be that a lookout would never know when he had performed his full duty to an approaching vessel. In the answer in this case it is averred that the lookout on the ship "did nothing to attract the attention of those on board said steamer, either by shouting, ringing said bell, or swinging a lantern or a torch, or otherwise; that if said lookout had shouted, or had rung said bell, or had swung a lantern or torch upon the approach of said steamer, the said night being still and dark as aforesaid, said collision would have been avoided." The proof showing, however, that the lookout did, in fact, hail the steamer, the respondent is forced to abandon this position, and claim that he should have rung his bell or swung his lantern or torch.

Opinion of the Court.

If courts were at liberty to add to the requirements of the statute, it would always be claimed that the signal added was not the proper signal that should have been used. Undoubtedly, if there be fog, or thick weather, a vessel at anchor is bound by rule 15 to ring a bell; but, in an ordinary clear night, with no immediate danger impending, we think a proper anchor light supplies every needful precaution. And while in *The Merchant Prince*, 10 P. D. 139, it was held that the exhibition of a flare-up light was not forbidden by article 2 of the Revised Code requiring that certain lights, and no others, should be carried; yet we are aware of no case holding that a vessel at anchor in a clear night is bound to do more than display her anchor light until danger of collision is imminent. It is true that article 24 of the Revised Code provides that nothing shall exonerate a ship from the consequences of the neglect of any precaution which may be required by the ordinary practices of seamen, or by the special circumstances of the case. But in this case there is a distinct finding that it is not customary when a ship is at anchor in a harbor, river, or channel, as in this case, with her anchor light burning brightly, and the night is clear and without fog, to show a torch or flash light, or ring a bell on the approach of a steamer. Under such circumstances the Clan Mackenzie cannot be charged with the neglect of any custom or "ordinary practice" to exhibit a torch or ring a bell.

In measuring her duty under the circumstances of this case, it must be borne in mind that her lookout had no reason whatever to apprehend danger, until the Oregon had rounded Goble's Point, and taken her course for Coffin Rock. She was then about three-quarters of a mile distant, and at her rate of speed of fifteen miles an hour, (a mile in four minutes,) would cover this distance in three minutes. Even then he had a right to assume that she would take the usual course down the centre of the channel, would see his light, and give it a proper berth. He certainly was not bound to presume that she would be guilty of the gross and almost incomprehensible negligence of turning from her proper course and running directly down upon him, and until it became manifest that she

had not observed his light, he was not called upon to act. It was then too late to light a torch, if he had had one at hand, or perhaps even to ring a bell, and in view of the finding of the Circuit Court that, if a torch or flash light is not already prepared and at hand and ready for use, it would take five minutes to obtain one from the place where they are usually kept and light it, we are unable to understand how the court could have held the Clan Mackenzie liable for the non-exhibition of a torch, unless upon the theory that it was her duty to keep one lighted all the time. As soon as the lookout became satisfied that the Oregon either had not seen or had mistaken his light, he did what in the excitement of the moment seemed to him best. He hailed her, and continued to shout until just before the collision. It was a case of action *in extremis*, and, while it is possible that a bell might have called the attention of the approaching steamer, it is by no means certain that it would have done so, and whether the lookout acted wisely or not, he evidently acted upon his best judgment; and the judgment of a competent sailor *in extremis* cannot be impugned. Indeed, we are not prepared to say that a hail could not have been heard as far as a bell, and considering the character of the lookout that was kept on the Oregon, it is very doubtful whether a bell would have been heard or regarded. As we have already observed, it is not sufficient for the Oregon to cast a doubt upon the management of the Clan Mackenzie. In view of the clearness of her own fault, it is not unreasonable to require that she should make the fault of the other equally clear. This she has fallen far short of doing.

It is also argued with great insistence that the anchor light of the Clan Mackenzie was lowered when the Oregon first came in sight, and that such fault was the primary and sole cause of the collision. We have examined the testimony upon that point, which is slight, and are therefore of the opinion that the court was amply justified in refusing to make this finding.

Although this collision occurred in 1889, we have assumed that the original Code of 1864 applied to it, in view of the

exception in section 2 of the Revised Code "as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States." The question is immaterial, however, since the provisions of the Codes of 1864 and 1885 are substantially identical as to the requirements involved in this case, and we do not, therefore, find it necessary to express a decided opinion upon the point. Our conclusion is that the Oregon was solely in fault.

3. The courts below were also in error in entertaining jurisdiction of the intervening petitions. These petitions were filed after a stipulation had been given for the release of the Oregon, upon the original libel of Simpson, to recover for the loss of the Clan Mackenzie. No new warrant of arrest was issued upon these petitions, but the claimant, the Oregon Short Line and Utah Northern Railway Company, was ordered to answer them, and, in the final decree, damages were awarded to the intervening petitioners, and the claimant ordered to pay into court the sum of $35,531.19, to be applied, first, to the payment of the intervenors, and then to the payment of the original libel. We are unable to understand upon what theory this apportionment was made.

The stipulation given for the release of the Oregon was as follows:

"Whereas a libel was filed in this court on December 31, 1889, by John Simpson against the steamer Oregon, her tackle, apparel, and furniture, for the reasons and causes in said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of said libellant, and a claim has been filed by the Oregon Short Line & Utah Northern R'y Co. and the said claimant and W. S. Ladd and Van B. De Lashmutt, sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its sureties execution may issue against their goods, chattels, and lands for the sum of two hundred and sixty thousand dollars: Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and sixty thousand dollars, conditioned

that the claimant above named shall abide by and pay the money awarded by the final decree rendered in the cause by this court, or, in case of appeal, by the appellate court."

Here is a simple agreement to become responsible for the final decree rendered in the cause in which the stipulation is given, and the words "for the benefit of whom it may concern" refer undoubtedly to the owners of the Clan Mackenzie, in whose behalf Simpson, the master, had filed the libel. We know of no authority which permits the liability of sureties upon such a stipulation to be enlarged by the inclusion of claims other than the ones which the stipulators agree to pay. To such a claim the surety may well reply *non in hæc foedera veni*. The stipulators may be so well satisfied that the claimant has a defence to the original libel as to be willing to take upon themselves the contingency of a decree requiring its payment, but they may neither know, nor be able to conjecture, what other demands may be made against the property.

In the case of *The Palmyra*, 12 Wheat. 1, 10, in which this court held that it had power to reinstate a prize cause after dismissal, the general liability of sureties upon a stipulation is thus stated by Mr. Justice Story: "Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court, which it could properly exercise if the thing itself were still in its custody. This is the known course of the admiralty. It is quite a different question whether the court will, in particular cases, exercise its authority where sureties on the stipulation may be affected injuriously; that is a question addressed to its sound discretion."

In *Newell* v. *Norton*, 3 Wall. 257, the libellant originally proceeded against the vessel, the master and owner, and the pilot for a collision. The libel was subsequently amended, by leave of the court, by dismissing it as to the pilot, and sustaining it as against the vessel and her master or owner. This amendment was held to have been properly granted, inasmuch as it appeared that the liability of the sureties was neither

increased nor diminished by it. And in this connection the court quoted the familiar doctrine that "every person bailing such property is considered as holding it subject to all legal dispositions of the court." There was no intimation, however, that the liability of the sureties could be increased by the insertion of additional claims.

On the other hand, in the case of *The North Carolina*, 15 Pet. 40, appealed from the Court of Appeals of the Territory of Florida, a libel for salvage was filed originally against seventy-two bales of cotton. One Houseman appeared as claimant, and gave a stipulation for its agreed value. The Superior Court of the Territory decreed restitution of the seventy-two bales. Houseman appealed to the Court of Appeals of the Territory, where the libellant proceeded for one hundred and twenty-two bales taken in salvage, charged that it was forcibly and wrongfully taken, and claimed damages for the marine tort. The Court of Appeals sustained this claim for the whole amount, and made a personal decree against Houseman beyond the sum for which the stipulation was taken. This was held to be error, the court saying that in so far as the seventy-two bales were concerned, either party was authorized to make amendments, or introduce new evidence, in order to support his title in the appellate court. But the libellant could not introduce a new subject of controversy, by bringing into the case the additional fifty bales, or make a decree against the claimant *in personam*.

Nearer in point, and almost exactly analogous in principle, is the case of *The Nied Elwin*, 1 Dodson, 50. This vessel, sailing under Danish colors, was captured by a privateer, and subsequently restored, by consent, to the owners. A claim was interposed for the cargo by a firm in Copenhagen, to whom the judge restored four-sevenths, and ordered further proof of the remainder. Bail was given to the captor in double the appraised value of the latter, and subsequently the judge pronounced the goods to be Danish property, and apparently ordered it to be returned to the owners. The King's advocate then moved for the condemnation of the property to the Crown in consequence of hostilities since declared between

England and Denmark, and also for a monition against the bail to answer the adjudication.

He argued that the bail bond should be considered as a substitute for the thing itself; that it was not confined to the captor, to whom it was given, but was to answer all questions relative to the property, which might arise before the ultimate adjudication of the cause; that the Crown must be considered as identified with the captor, and that, in case of property condemned to the Crown, instead of the captor, by whom the proceedings were originally instituted, the responsibility of the bail was indisputable.

Sir William Scott, (afterwards Lord Stowell,) in delivering judgment, said that the question was whether the persons who had given bail were subject to the demands of the Crown to account for the value of the goods. At the time the property was delivered on bail, the question was whether it belonged to subjects of Denmark. If so, the claimant would be entitled to restitution. The court announced that it could not entirely concede to the position that these bonds were mere personal securities, given to the individual captors, but they were regarded as pledges or substitutes for the thing itself, "in all points fairly in adjudication before the court." "But," said he, "the question still recurs, has the Crown the right to enforce payment from these parties in the event, which has since occurred, of Danish hostilities? I am of opinion that it has no such right. . . . The court does, indeed, upon the intervention of hostilities accept the old proceedings, and upon them pronounce for the interest of the Crown; but it does so merely for the purpose of saving time and expense, and not with any view of fixing a responsibility upon those who have given bail to answer a very different question. If the court were to accede to the prayer of the Crown upon this occasion the effect would be monstrous; it would extinguish altogether the practice of delivering property upon bail, a mode so much encouraged by the court and by the legislature. No British merchant would become security for foreign claimants in any case, if he should be considered responsible to the extent of such a possible contingence as that of a subsequent intervention of hostilities."

Opinion of the Court.

The gist of this opinion is that, if the change in the case had been merely that of substituting the Crown for the original captors, the bail would have been responsible, but that the subsequent intervention of hostilities so far changed the original cause of action as to exonerate the bail. In other words, the contract of a surety, whether at common law or in admiralty, is one *strictissimi juris*, and cannot be changed by implication. While the bail is intended as a substitute for the property itself, it is only such, as stated by Sir William Scott, "in all points fairly in adjudication before the court."

In the case of *The Saracen*, 2 W. Rob. 451, 457; *S. C.* 4 Notes of Cases, 498, 507, a contest arose between different parties injured by a collision over the proceeds of the sale of the libelled vessel. In delivering his opinion with respect to certain questions of practice which arose in the case, Dr. Lushington observed: "In concluding my remarks upon this part of the case, I may here observe, that if bail had been given in the present instance, such bail, I apprehend, would have been responsible only to the plaintiffs in the action which they had bailed. It could not, I conceive, for a moment be contended that the claimants bringing the subsequent action would have any title to recover against such bail, or to participate in any fund which they might bring into the registry of the court in discharge of their liabilities as bail." A similar observation was made by the same eminent judge in the subsequent case of *The Clara*, Swabey 1, 4. See also *The William Hutt*, Lush. 25.

The case of *The T. W. Snook*, 51 Fed. Rep. 244, is exactly in point. In this case a vessel was arrested for damages done to another vessel by a collision, and was released upon bond. Afterwards an insurance company intervened, claiming that the cargo of the libellant vessel had been insured by the company, and had been totally destroyed by the collision. A decree was rendered condemning the respondent vessel. *Held*, that the insurance company should not be allowed to be let in to share in the decree to the extent of what might remain of the penalty of the bond after satisfying the decree in regard to the damage to the other vessel, since the bond was given

only to satisfy the cause of action sued for in the original libel. The case of the Oregon was cited, but Judge Blodgett held it to be inapplicable to the facts of that case. We find it impossible to distinguish this case from the one under consideration. It was quoted with approval at the last term of this court in the case of *The Haytian Republic*, 154 U. S. 118, 127, in which a vessel libelled for smuggling, and discharged upon giving the bond required by law, was held to be subject to a libel in another district for another offence alleged to have been committed prior to the offence charged in the first libel.

The District Judge, in his opinion upon exceptions to certain of these petitions, quotes general admiralty rule 34 as authority for the proposition that, if third parties intervene in any admiralty case, the other party or parties in the suit may be required, by order of the court, to make due answer. This is entirely true, but the rule has reference only to those cases where the vessel is still in custody, or where she has been sold and the proceeds of sale paid into court. If still in custody when intervening petitions are filed, the vessel cannot be released until a stipulation is given to answer all the libels on file. But if, after the stipulation is given, and the vessel is discharged from custody, other libels are filed, a new warrant of arrest must be issued, and the vessel again taken into custody.

We think the court must have confounded a stipulation given to answer a particular libel with a stipulation for the appraised value of the vessel, under the limited liability act, which, by general admiralty rule 54, is given for payment of such value into court whenever the same shall be ordered, and in such case the court issues a monition against all persons claiming damages against the vessel, to appear and make due proof of their respective claims. And by rule 55, after such claims are proven and reported, "the moneys paid, or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight . . . shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims." By rule 57, if the ship has been

already libelled and sold, the proceeds shall represent the same for the purpose of these rules. In all the cases cited, in which it has been said that the stipulation is a substitute for the thing itself, the remark has been made either with reference to the particular suit in which the stipulation is given, or with reference to a stipulation for the appraised value of the vessel, where the stipulation stands as security for any claim which may be filed against her up to the amount of the stipulation. Thus in *The Palmyra*, 12 Wheat. 1, it was held that the court possessed the power to reinstate any case dismissed by mistake upon the ground that the stipulators were liable to the exercise of all those authorities upon the part of the court, which it could properly exercise, if the thing itself were still in its custody. See also *The Ann Caroline*, 2 Wall. 538; *The Wanata*, 95 U. S. 600, 611; *The Webb*, 14 Wall. 406; *United States* v. *Ames*, 99 U. S. 35; *The Union*, 4 Blatchford, 90.

The injustice of holding the sureties in this particular case liable to the intervenors is the more manifest from the decree that was entered requiring their claims to be paid before that of the principal libellant. If it so happened that the sureties were unable to respond to the full amount of their stipulation, or to an amount sufficient to pay all the claims, the result would be that the intervenors, who had taken no steps to arrest the vessel, and were admitted under the original libel of Simpson, might be able to appropriate to themselves the whole or the greater part of the fund, and leave the original libellant wholly unprovided for. A proposition which would bring about this result surely cannot be a sound one.

The decree of the Circuit Court must, therefore, be

Reversed, with costs to the original libellants as against the steamship Oregon, and with costs to the Oregon as against the intervenors, and the case remanded to the Circuit Court for further proceedings in conformity with this opinion; without prejudice, however, to the right of the court below, or of the District Court, in its discretion, to treat the intervening petitions as independent libels, and to issue process thereon against the steamship Oregon, her owners or charterers, or to take such other proceedings therein as justice may require.

KENNEDY *v.* MAGONE.

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

No. 232. Submitted March 28, 1895. — Decided May 20, 1895.

A charge by the collector of customs at New York for storage in the public store, for labor, and for cartage from the general-order warehouse to the public store made upon uninvoiced and unclaimed goods under the value of $100 sent to a general-order warehouse, and taken thence to a public store for examination on the application of the owner, is a valid charge authorized by law.

THE case is stated in the opinion.

Mr. A. P. Ketchum for plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

In April, 1888, the steamer Ohio arrived at New York, having on board two packages consigned to Thomas Cook & Son. These packages were not invoiced, and, being unclaimed, were sent by the custom-house authorities to a general-order warehouse. In October following, Kennedy and Moon, plaintiffs in error, as assignees of the bills of lading for the merchandise, applied to enter the same. The application recited that the contents of the packages were under one hundred dollars in value. The merchandise was thereupon sent for examination, by the collector's direction, from the general-order warehouse to the public store adjoining the appraiser's office, where it remained for more than two days, when the goods were finally passed and delivered. Before the packages were removed from the general-order warehouse to the public store, the importer paid the cost of hauling from the landing to the general-order warehouse and for storage, etc., therein. On final liquidation of the entry, seventy cents were demanded, that is to say, ten

cents on each package for storage in the public store, ten cents on each for labor, and fifteen cents on each for cartage from the general-order warehouse to the public store. This amount was paid by the owners under protest, and, after an appeal to the Secretary of the Treasury, suit was commenced for its recovery. At the conclusion of the evidence the court instructed a verdict in favor of the collector. The plaintiff brought the case here by writ of error.

The record leaves no doubt that the usage at the port of New York conformed with the regulations of the Treasury Department, in making the charges here involved, and that those charges are in themselves reasonable. The practice of the New York custom-house is thus stated in the record: "The rule is that on all packages that are sent into the appraiser's stores for examination or appraisement, there are storage and cartage, under appraisement orders, of free or defective invoices, and where there is no invoice. Ordinarily, on goods which are entered for consumption with an invoice, and on packages sent from the dock to the appraiser's building, there would be no charge at all for cartage, nor for storage either, if there was a straight invoice. A straight invoice is where an invoice describes the contents of each and every package, giving its value and all the particulars. An invoice which does not give the contents of each and every package is not a straight invoice. We call it a defective invoice. Upon goods entered upon such an invoice it is the practice of the government to exact storage charges." The same thing is stated in the record in another form: "When goods are imported into this port and entered by a straight invoice it is the practice to send to the public store for examination one package from each invoice at any rate, and at least one out of every ten. Sometimes all the packages are sent to the public store, but it is not usual. Where the importation or consignment is without an invoice and consists of a number of packages, all the packages, no matter how numerous, must be sent to the public store, because if there is no valuation given, then it is the appraiser's business to ascertain the amount."

This custom is the result of rulings of the Treasury Depart-

ment. Syn. Dec. 8993. See Customs Regulations, 1884, art. 618; General Appraiser's Decision No. 2825, November 16, 1894. The authority to make such regulation is here denied, but we think it clearly results from the law. Rev. Stat. § 2989. Viewing the matter, however, as a question of law, aside from the regulations, the validity of the charges here questioned is abundantly sustained.

As a general rule, an invoice is required for an importation. But merchandise may be admitted in certain cases by the Secretary of the Treasury without invoice, and "whenever the value of the imported merchandise does not exceed one hundred dollars, the collector may admit it to entry without the production of the triplicate invoice, and without submitting the question to the Secretary of the Treasury, if he is satisfied that the neglect to produce such invoice was unintentional, and that the importation was made in good faith and without any purpose of defrauding or evading the revenue laws." Rev. Stat. § 2859. For the purpose of appraisement the collector is empowered to designate on the invoice of importation a certain number of packages which are to be sent to the public store. Rev. Stat. § 2901. No charge is made for the transportation to the appraiser's office of the packages thus selected. When goods are unclaimed they are sent from the landing to a public store owned or leased by the United States, or to a general-order warehouse, or a private bonded warehouse, and "all charges for storage, labor, and other expenses accruing on any such merchandise, not to exceed, in any case, the regular rates for such objects at the port in question, must be paid before delivery of the goods." Rev. Stat. § 2965.

The whole controversy here turns upon the contention that, inasmuch as the packages were unclaimed, it was unlawful to subject the owners to charges for hauling them from the general-order warehouse to the public store, or for their storage in the public store and expenses there incurred. The argument is that, as the goods were under the value of one hundred dollars, and could therefore be entered upon proper showing without an invoice, they should not have been sent to the public

store, and thereby subjected to a greater charge than would have been imposed on goods which were regularly invoiced. But this contention overlooks the fact that invoice is the rule and admission without invoice the exception. The statute allowing the collector to admit without invoice imposes not an absolute but a discretionary duty upon him, for it says that he may do so "if he is satisfied that the neglect to produce such invoice was unintentional, and that the importation was made in good faith and without any purpose of defrauding or evading the revenue laws." It was of course competent for the collector on application for entry of uninvoiced goods to direct that they should be transferred from the general-order warehouse to the public store, to be there submitted to such detention and examination as was reasonable, to enable him to discharge this duty. While authorizing the collector to send uninvoiced goods to the public storehouse, the law expressly imposes upon the owner the expenses of storage, labor, etc., caused in such case. Rev. Stat. § 2965. The plaintiffs' case is based upon the mistaken idea that uninvoiced and unclaimed goods are in the same class as invoiced and unclaimed goods. In the one case the entry is permissive and involves judgment on the part of the collector, while in the other the right of the owner is subject only to the condition that a regular entry be made as required by law. The distinction is illustrated by other provisions of the statute; thus, although no charge is made for weighing, gauging, or measuring merchandise regularly invoiced "in all cases in which the invoice or entry does not contain the weight, or quantity, or measure of merchandise, now weighed or measured or gauged, the same shall be weighed, gauged, or measured at the expense of the owner, agent, or consignee." Rev. Stat. § 2920.

Judgment affirmed.

DE SOLLAR *v.* HANSCOME.

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

No. 303. Argued and submitted April 23, 1895. — Decided May 20, 1895.

It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment.

Where the existence of a contract is a matter of doubt, equity will not, as a rule, decree specific performance, especially when it appears that the property to which it relates was rapidly rising in value.

On June 6, 1889, the appellant, as plaintiff, filed a bill in the Circuit Court of the United States for the District of Colorado for the specific performance of a contract for the sale of real estate. The defendant appeared and answered, and also filed a cross-bill, the purpose of which was to secure a decree cancelling an agreement for the sale of the real estate in controversy, made by an agent of the defendant, and placed on record by the plaintiff. Pleadings having been perfected, proofs were taken, and, upon a final hearing, on July 12, 1890, a decree was entered dismissing plaintiff's bill, and decreeing on behalf of the defendant a cancellation of the recorded agreement.

Among the undisputed facts are the following: In the fore part of the year 1888 the defendant lived in Wichita, Kansas, and was the owner of the lots in controversy. Some correspondence passed between him and J. J. Henry, of Denver, in reference to a sale, and on February 29 he wrote this letter:

"Wichita, Kans., *Feb.* 29, 1888.

"John J. Henry, Esq., Denver, Col.

"Dear Sir: Yours of the 25th is rec'd; am sorry you have to work so hard to sell my lots on Clarkson St., for I am not so very anxious to close them out even at the $5000, the price I held them at some time since. If I make any change on them it will be to advance the price, as I had just about as

soon hold them as to sell for $5000, and I think the time is up that I offered to sell them for that sum. Friends have advised me not to sell them now, as property was advancing in that section. In no case should I sell them for less than $5000, and I should insist on having at least ½ cash and the balance in one and two years at the longest, interest at 8 per ct. and payable semi-annually, and I should prefer to make the time shorter. As I now expect to be in Denver on or before March 10th, perhaps we can then arrange about a sale, if not disposed of before, but, as I have before written, I am not at all anxious to sell at my first offer of $5000 and half cash.

"Yours truly, W. B. Hanscome."

On the receipt of this Henry and plaintiff signed the following agreement:

"Denver, Colorado, *March* 3, 1888.

"Know all men by these presents that I, John J. Henry, acting as agent for Wm. B. Hanscome, of Wichita, Kansas, have agreed to sell to H. S. De Sollar, of the city of Denver and State of Colorado, the three lots owned by the said Wm. B. Hanscome situated on Clarkson Str. between 16th and 15th avenues; 15th avenue is known as Colfax avenue; — block, numbers of lots not known, but they are believed to begin the 4th lot from the corner of 15th street and are on the west side of Clarkson Str., fronting east. The lots are each 25 ft. on Clarkson St., running back to an alley, and are 145 ft. in depth. Said De Sollar is to pay five thousand dollars, $5000, for the lots above described, payments as follows, to wit: Two hundred dollars, $200, in cash this day, the receipt whereof is hereby acknowledged, and twenty-three hundred dollars, $2300, on or before the evening of the 24th day of the present month of March; the remaining sum of the purchase money, $2500, one-half, or $1250, is to be due and payable on or before one year from the date of deed, and the other half, $1250 in two years, on or before, from date of deed, each sum bearing interest at the rate of eight, 8, per cent per annum, interest payable semi-annually; payment on these

deferred amounts to be secured by notes and deed of trust on the property now bargained for.

"It is understood that a good, sufficient, and satisfactory deed is to be made by the said Wm. B. Hanscome for the said described property on or before the 24th day of the present month of March, at which time the papers are all to be dated and executed. It is also further understood that the property conveyed is to be clean and clear of all incumbrance.

"And it is further understood that if the said H. S. De Sollar is or should be in default in meeting the second payment herein provided for, then the $200 paid this day shall be forfeited.

"Jno. J. Henry.
"H. S. De Sollar."

A few days thereafter defendant reached Denver and at first, at least, repudiated the action of his agent. Subsequently the plaintiff placed the letter and agreement on record, whereupon this defendant, as plaintiff, commenced an action at law to recover damages. In the complaint he alleged ownership of the lots, that the letter and agreement had been placed upon the record for the purpose of clouding his record title, that they did have the effect to cloud such title, and interfered with his full enjoyment of the premises and the ready sale of the lots, and prayed damages in the sum of $5000. To this complaint an answer was filed, which, in addition to certain denials, set forth that after Hanscome's arrival in Denver he had fully approved, ratified, and confirmed the agreement made by Henry, his agent, and that defendant had placed the papers on record in good faith and to protect his own rights. The case was tried before the court and a jury, and resulted in a verdict and judgment for the defendant therein, the plaintiff and appellant here.

In addition to these undisputed facts there is a conflict in the testimony as to what took place at or about the time the letter and agreement were placed on record. The defendant insists that, though he at first refused to ratify the action of his agent, he afterwards went to the plaintiff, and offered to

carry out the contract, but the latter declined to proceed any further with the matter; that subsequently the parties changed front; the plaintiff insisted on carrying out the contract while he declined to make a deed. It seems that on examination there was found on record a receipt, signed by a man named Dubbs, of $25, and purporting to be a receipt by him, as agent of the defendant, of so much money on account of a sale of the property, and that there was a dispute between the parties as to whose duty it was to have this apparent cloud removed.

Mr. Chapin Brown for appellant. *Mr. Arthur H. O'Connor* was with him on the brief.

Mr. W. C. Kingsley for appellee submitted on his brief.

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

It is unnecessary to review the testimony as to the personal negotiations between the parties after the defendant's arrival in Denver, or to attempt to decide which of them most accurately recollects the transactions. It is enough to say that there is a serious contradiction between them, and perhaps it would be difficult to determine the real facts. The plaintiff insists, and that is the burden of his contention, that the judgment in the law action is conclusive as to the fact of defendant's assent to the contract as executed by his agent, while the defendant claims that it settles only that this plaintiff, acting under the advice of counsel in placing the papers on record, was guilty of no wilful or malicious wrong, and, therefore, not liable in damages. The same learned judge who presided at the trial of the law action decided this case, and we have before us his charge to the jury in that to compare with his opinion in this case.

It is true that in his charge the judge said to the jury, "the chief question for your consideration, therefore, is whether the plaintiff, by his conduct and by what he did when he came to know what had been done in his name, ratified and confirmed this agreement;" but he also charged that there

was no question of punitive damages in the case, because, for reasons stated, the defendant acted in good faith, and, in respect to actual damages, said: "There is no direct showing of damage, because the property, according to the testimony, was, at the time the suit was brought, worth more than the defendant was to pay for it, so that in respect to the value of the property the plaintiff lost nothing by the delay, and it is only a question of what would be allowed by the jury for doing a thing of that kind, filing a paper which gave to the defendant no right and which he was not entitled to insist upon, and which operated as a cloud upon the title of the plaintiff." And again: "The question is mainly whether you will accept the plaintiff's account or the defendant's in respect to the negotiations which took place between them from the 12th to the 23d of March, 1888. If you decide that the plaintiff's account is correct, you can return such damages as he may be entitled to. If you agree with the defendant, your finding ought to be for him."

Obviously, the jury, under these instructions, were at liberty to find for the defendant, if they thought that in fact the plaintiff had suffered no damages by the filing for record of the letter and agreement. When the judge, speaking of ratification, uses such expressions as "the chief question" and "the question is mainly," he indicates the existence of another though subordinate question. And when he charges that punitive damages cannot be recovered, that there is no direct evidence of any damage and that the jury may award to plaintiff, if they find a ratification, "such damages as he may be entitled to," he plainly authorizes a verdict against the plaintiff for want of "damage." It may be said that if a wrong was done the plaintiff was, technically, entitled to, at least, nominal damages, but no instruction to that effect was given. The charge was, ratification or no ratification, damage or no damage. That the learned judge was of opinion that the verdict of the jury was only a finding that the plaintiff had suffered no damages, is probable from his opinion in this case, for he says, in reference to his instructions:

"In other words, in a suit, for clouding the title, it must

appear that, the act of the defendant was wilful, and to a considerable extent malicious, done with intent to injure the owner of the property; and when there were negotiations continued through many days in respect to the purchase of the property, and which resulted in an agreement which was full and complete in all its details, except that there were some matters of difference between the parties touching the title, it could not be said that the purchaser would be subject to an action for putting the papers on record.

"There can be no reason to doubt the correctness of the position assumed in the trial of that action, and that it was well decided by the jury."

Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment.

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russell* v. *Place*, 94 U. S. 606, 608.

There is in this case no extrinsic testimony tending to show upon what the verdict of the jury was based. We have simply the record of the former judgment, including therein the testimony and the charge of the court from which to determine that fact, and in the light of the charge it is obviously a matter of doubt whether the jury found that the agreement made by the agent was ratified by the principal,

or that no damage had in fact been sustained by placing the papers upon record. We are not now concerned with the inquiry whether the instructions of the court were correct or not. We look to them simply to see what questions were submitted to the jury, and if they left it open to the jury to find for the defendant upon either of the two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other. The principal contention, therefore, of the plaintiff fails.

This practically disposes of the case, for the testimony leaves it doubtful whether there was any contract between the parties. Obviously the agreement signed by Henry as agent was not within the scope of the authority given. Authority to sell for $5000, one-half cash, is not satisfied by an agreement to sell for $5000, $200 cash, $2300 in three weeks, and the balance on time. Further, the agreement was not in fact for $5000, but only $4950, the agent calling it $5000, and claiming only $100 as his commission instead of $150. Whether the defendant afterwards ratified his agent's action is a matter in respect to which the testimony is, as we have stated, conflicting. And where the existence of a contract is a matter of doubt equity will not, as a rule, decree specific performance, especially in a case like this where, as appears, the property was rapidly rising in value.

We see no error in the conclusions of the Circuit Court, and its decree is, therefore,

Affirmed.

EPISCOPAL CITY MISSION *v.* BROWN.

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

No. 250. Submitted April 4, 1895. — Decided May 20, 1895.

M., after mortgaging lots in Boston to the Episcopal Mission, conveyed them to the wife of B. with a clause in the deed that she thereby assumed

Statement of the Case.

and agreed to pay the mortgages, and B. gave M. his bond to ensure his wife's performance of her agreement. B. and wife about the same time conveyed to M. parcels of land in Chicago subject to mortgages, which M. assumed. The mortgages on the Boston lots not being paid, the mortgagee foreclosed them. They were sold for sums less than the amounts due on the mortgages. M. assigned to the mortgagee the bond of B., and a suit in equity was begun in the name of the assignee and of M. against B. and his wife, seeking a decree condemning the latter to pay the debt. The wife answered denying any knowledge of the transaction, which she averred took place without her knowledge or consent, and the answer of B. set up a nonperformance by M. of his agreement to assume and pay the mortgages on the Chicago property, whereby B. had been compelled to pay large sums of money. *Held*,

(1) That the mortgagee had only the rights of M. and was subject to all rights of set-off between M. and B.;

(2) That the proof left no doubt that the deed to the wife of B. was made without her knowledge and that she was not a party to it;

(3) That in whatever aspect it was viewed the assignee of M. could not recover.

On March 1, 1877, George W. Meserve mortgaged to the Episcopal City Mission, a Massachusetts corporation, certain lots in the city of Boston, which were designated as "lots 3 and 4." The mortgages were for the sum of $19,500 on each lot. On the same day Meserve conveyed these lots to Lucy T. Brown, the wife of John B. Brown. The consideration of the conveyance was $30,000, "to me paid by said Lucy T. Brown, wife of John B. Brown." After referring to the mortgages above mentioned, the deed contained these words: "Which mortgages, with all interest thereon, the said Lucy T. Brown hereby assumes and agrees to pay, and to protect and save harmless said grantor therefrom." On March 19, 1877, the following bond was executed by John B. Brown:

"Know all men by these presents, that I, John B. Brown, am holden and stand firmly bound unto George W. Meserve in the sum of ten thousand dollars, to the payment of which to the said Meserve or his executors, administrators, or assigns I hereby bind myself, my heirs, executors, and administrators.

"The condition of the obligation is such, that whereas the said George W. Meserve did, by deeds dated March 1, 1877, convey unto Lucy T. Brown two separate estates on Purchase Street, Boston, Mass., each estate being subject to a mortgage

of $19,500, at six and one-half per cent interest, to the Episcopal City Mission, of even date with said deeds, which said mortgage and interest thereon the said Lucy T. Brown assumed and agreed to pay and hold the said Meserve harmless therefrom:

"Now, therefore, if the said Lucy T. Brown shall perform the obligations of said deeds as therein expressed, and save the said Meserve harmless, then this obligation shall be void, otherwise it shall be and remain in full force and virtue, only to the extent, however, that the said Meserve suffers harm."

On the 14th day of March, 1877, John B. Brown and Lucy T. Brown deeded to Meserve certain parcels of land situated in the city of Chicago. It was stated that the deed was executed for "one dollar and for other good and valuable considerations," the receipt whereof was acknowledged by the sellers. The property conveyed was described as encumbered by various mortgages amounting in principal to $12,225.70, subject to a credit of $2680, leaving a balance in principal of $9545.70, which, with the interest due, made the amount of the assumption taken by Meserve exceed ten thousand dollars.

On March 1, 1884, the Boston property was sold to pay the mortgage debt, and was bought in by the Episcopal City Mission, which, after applying the price to the debt, stated that there was a deficiency on one lot of $10,074.71, and on the other of $10,574.71. In February, 1886, Meserve assigned to the Mission "all claims, demands, or rights of action, of whatever sort or kind in law or equity, which I may have against John B. Brown, formerly of Boston, and Lucy T. Brown, wife of the said John B. Brown." On March 18, 1887, Meserve specially assigned to the same corporation all his right, title, and interest in and to the bond given to him by John B. Brown as above mentioned.

In July, 1890, the Episcopal City Mission and George W. Meserve brought their bill against Lucy T. Brown and John B. Brown in the Circuit Court of the United States for the Northern District of Illinois. They set out the mortgages given by Meserve to the Episcopal City Mission; the sale of the mortgaged property by Meserve to Mrs. Brown; the

assumption by her of the mortgage debt; the bond given to Meserve by Brown; the foreclosure proceedings; and the amount of the indebtedness remaining after crediting the price as above stated. The bill averred that repeated demands had been made upon Brown and his wife to pay the balance of the mortgage debt; that they had refused to do so, and that the Browns pretended that Meserve was indebted to John B. Brown for a larger amount than that which he owed Meserve; that this fact entitled him to a set-off; and that, in fact, he owed Meserve nothing. The bill further charged the financial irresponsibility of Meserve, and his inability to pay the remainder of the debt. Complainants prayed that the corporation might be subrogated to the rights of Meserve against Brown and his wife, and that a decree might be passed condemning the latter to pay the debt. Mrs. Brown answered by denying any liability. She averred that she had been no party to the purchase of Meserve's Boston property, and had done nothing whatever in the way of acceptance or ratification in connection with the transaction; that some time after the purchase she was informed by her husband that her name had been used in Meserve's deed, for his benefit, and that she never at any time knew the contents of the deeds or the assumptions therein purported to have been taken by her. She averred her belief that the deeds were made in her name in consequence of an agreement between her husband and Meserve, by which her husband undertook to convey to Meserve certain property in Chicago, and Meserve was to assume the incumbrances thereon to the discharge of her husband, while Meserve was to deed to him the property in Boston, and he was to assume all incumbrances resting upon it. She also averred that Meserve had failed to carry out his obligations by discharging the debt assumed by him, and that, in consequence of this, her husband had been compelled to pay the same, and had a claim against Meserve exceeding the amount of any demand which the latter might have upon him. She prayed that if she should be held liable for the Boston transaction, she be allowed, by way of set-off,

credit for the amount of the obligations under which Meserve rested in connection with the Chicago property. The answer of Brown also averred that the deed had been taken in the name of Mrs. Brown without her knowledge or consent, and without her being in any way a party to the contracts; that the sale of the Boston property was the result of an agreement between himself and Meserve, by which they bound themselves to exchange property in Chicago belonging to Brown for the property in Boston belonging to Meserve; that by the agreement between them the deed for the Boston property was made in the name of Mrs. Brown for Brown's convenience, and that it was done with the full assent of Meserve, it being understood between them that Brown's liability resulting from the sale of the Boston property should be $10,000 evidenced by the bond which was the equivalent of the obligation, to be assumed by Meserve in favor of Brown in consequence of the transfer to be made to Meserve, of the Chicago property, the agreement being that each party should mutually assume the risk beyond these obligations. The answer further set out that in pursuance of their agreement Brown's bond was given for $10,000 to Meserve, and the sale of the Chicago property was made to Meserve, who assumed the incumbrances upon it; that Meserve had failed to carry out his assumption of the Chicago incumbrances, and that Brown had been compelled to expend in consequence more than twenty thousand dollars, and asserted that Brown, therefore, was released from all claim on the bond.

After taking much testimony the complainants filed an amended bill, which again stated the agreement between Meserve and Brown, recited the sales of the Chicago and Boston property; the giving of the bond by Brown; the default in the payment of the mortgage on the Boston property, and the sale thereof, and the deficiency in the amount realized. It also averred the defences set up by Mrs. Brown, and her denial of responsibility under the assumptions in the Boston sales. It averred that Brown's conduct in making his wife a party to the deed was fraudulent, and denied his right to set

off any indebtedness to him on the part of Meserve against the Episcopal City Mission. It prayed for a decree subrogating the Mission to the rights of Meserve against Brown and wife. To this amended bill Mrs. Brown answered by practically reiterating her former defences. Brown answered also, setting up substantially the same defence which he had advanced before, and further specially denying that any fraud had been practised on Meserve in substituting the name of his wife for his own, and averring that, on the contrary, her name had been used as "a straw grantee" with the full knowledge of Meserve, and that his bond of $10,000 had been given by him to evidence the extent of his obligation, and that this was a part of the contract between the parties.

The decree below rejected the claim of the complainants. *Episcopal City Mission* v. *Brown*, 43 Fed. Rep. 834.

Mr. George Burry for appellants.

Mr. Charles M. Osborn and *Mr. Samuel A. Lynde* for appellees.

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

Whatever be the obligations created by the assumptions contained in the deeds to Mrs. Brown, and the bond which was furnished by Brown, it is clear that the Mission has only the rights of Meserve, and therefore can assert only such cause of action, legal or equitable, as Meserve may possess. *Kelley* v. *Ashford*, 133 U. S. 610; *Willard* v. *Wood*, 135 U. S. 309. The corporation being thus limited to the rights which it takes from Meserve, is clearly subject to all set-offs existing between Meserve and Brown. The proof leaves no doubt that the deed to Mrs. Brown was made without her consent, and that she was in no way a party thereto, either originally or by ratification. Indeed, the court below, in its opinion, states that it was conceded, in that forum, that there was no case against Mrs. Brown, and we do not understand that it is seriously contended here that the record shows any foundation for recovery against her. The only point really at issue is

whether Brown is liable for the whole amount of the mortgages resting upon the Boston property, or whether his liability is limited to the amount in his bond. The proof shows that prior to the making of the deeds of the Boston property to Mrs. Brown there was an understanding between Brown and Meserve that the deeds should be made to the former, and that the insertion of the name of Mrs. Brown was subsequently agreed on between the parties.

It is urged that, inasmuch as Brown had no authority to use his wife's name, he is liable for the whole debt, either as a trustee, or in consequence of his having acted as agent for his wife without authority. These contentions are not supported by the record. The proof shows that the substitution of Mrs. Brown for her husband, as the purchaser, was made with the full consent and knowledge of Meserve, and that this arrangement was carried out by both parties with full knowledge of all its consequences. By these understandings Meserve on the one hand was to buy from Brown property situated in Chicago and assume the incumbrances thereon — these amounting to about $10,000; and Brown on the other hand was to purchase the Boston property from Meserve and to assume a personal responsibility for a sum equal to the amount which Meserve had assumed in regard to the Chicago property. In other words, the contracts practically amounted to an exchange of the Chicago property for the Boston property, each party relying upon the property itself as the means of discharging the debt except for the sum of $10,000, for which each respectively assumed personal responsibility to the other. The contract having been made upon this basis and for this purpose, and the use of the name of the wife being the result of an agreement between the parties, the contention of the complainants is reduced to the assertion that the contract must be annulled because the parties agreed to make it, and because its enforcement would bring about the very ends which they intended should follow. The conclusion which we thus reach upon the facts coincides with that of the court below. We have omitted for the sake of brevity quotations from the testimony, but the evidence of Meserve himself is so conclusive in

regard to the intention of the parties in making their contracts that we excerpt briefly from it at this point:

"Q. Can't you recall to your mind any reasons or circumstances leading to the taking of that bond from Mr. Brown? A. Yes; it was to hold me against a possible loss on those notes.

"Q. Can you recall any of the circumstances or reasons which led to the fixing of the amount of that bond? A. Well, in my own mind it seems probable.

"(Objected to.)

"Q. Will you state what those facts and circumstances were?

"(Objected to.)

"A. To make Mr. Brown's liability equal to my own. I had assumed about $10,000 in Chicago. My feeling was that he had assumed $39,000 there, and there could not possibly be a loss to that extent, if any. I did not feel that there would be any. I recollect it now as a sort of balance between us in our liabilities.

"Mr. Burry. All this is objected to.

"Q. As a matter of fact it was not equal to the difference, was it?

"(Objected to as leading and incompetent.)

"A. I knew my mortgages to be well-secured mercantile property that could not depreciate to any great extent; his was secured by vacant land.

"Q. Why did you take any bond at all, then? A. Because I was deeding to a straw grantee, to somebody that I did not know.

"Q. Well, why didn't you put in the bond the whole amount of the difference, at any rate? A. Because I knew there could be no possible way of making my security worthless by any handling it in three years; there could be no way; the property was insured, and the land was there, which had cost almost the amount of the notes. Had the buildings burned down, the land, with $10,000, would have been security for my note.

"Q. Did you inquire into the solvency of Mr. Brown? A. I did not.

"Q. Did you inquire into the solvency of Mrs. Brown? A. No.

"Q. Did you make any inquiries in relation to her? A. No. Mr. Brown's broker recommended him to be a business man who would be likely to take care of his property, and I regarded him as such.

"Q. Mr. Meserve, did you perform your contract in reference to protecting Mr. Brown against the indebtedness which you assumed?

"Mr. Burry. All this subject is objected to.

"A. No, sir.

"Q. Mr. Meserve, have you any pecuniary interests in the prosecution of this suit? A. Yes.

"Q. What is that interest? A. To furnish an offset for the suits he has against me, helping the matter to a settlement.

"Q. Have you ever paid anything on account of any of these offsets? A. No, sir.

"Q. When did you commence the prosecution of this suit? A. I don't know.

"Q. Did you ever employ any attorney to commence this suit. A. No, sir.

"Q. Have you ever paid anything or are you liable for anything by which you would suffer damage by reason of any failure of Mr. Brown to pay the indebtedness which is alleged to be due to the Episcopal City Mission under those mortgages?

"Mr. Burry. Objected to as calling for a legal conclusion.

"A. I have paid nothing.

"Q. Have you made an arrangement with the Episcopal City Mission by which they have substituted any liability on your part for the supposed liability against Mr. and Mrs. Brown or any arrangement in relation to that matter?

"(Objected to as calling for a legal conclusion.)

"A. I gave the authority to bring this suit with the understanding that it would relieve me of liability.

"Q. On those mortgages? A. Yes."

This testimony of Meserve makes it clear that he has paid

nothing on account of the mortgage on the Boston property which Brown, to the extent of his bond, undertook to discharge. The record makes it equally clear that Meserve has failed to carry out his assumption, in favor of Brown, of the mortgages on the Chicago property. In order to pay these mortgages assumed by Meserve, Brown has disbursed, as found by the lower court, the sum of $9122.63, leaving a considerable portion of the debt unpaid, and that some arrangement has been made by Brown with a third party looking to the discharge of this balance. It is insisted here that in discharging a portion of the debt Brown did not pay out in actual money the sum which he claims as an offset, but that part of his payments were made in securities which he has charged at their face value, while they would not bring that amount in the market, and it is urged that only the market value of these securities should be allowed him by way of set-off. It is also asserted that the interest which he has charged on his disbursements is excessive; and further, that inasmuch as the arrangement which he made for the payment of the balance of the debt did not involve the expenditure of any money on his part, he cannot set off that balance. All these arguments rest logically upon the proposition that Brown is only entitled to compensate against Meserve his actual disbursements made in the payment of the debt which Meserve assumed. We do not think it necessary to decide whether this position be sound or unsound. If it applies to Brown, it must apply with equal force to Meserve. As we have stated, it was intended by these parties that the obligations of each to the other should be correlative, and hence the contract resulting from the assumption by Meserve is as binding on him as is the assumption evidenced by the bond of Brown.

Now, if Brown be only entitled to set off as against Meserve the sum of money expended by him in paying the mortgages which Meserve assumed, it is clear that Meserve can only recover from Brown the sums actually disbursed by him in paying the mortgages which Brown assumed. This being so, as Meserve has paid nothing he can recover nothing, and there is an end of the case. If, on the other hand, the parties were

each entitled to enforce as against the other the sum of their respective obligations, without reference to the amounts disbursed by them in the discharge of those obligations, then, as the obligations assumed by Meserve towards Brown are equal if they do not exceed the amount of the bond given by Brown, the case is also at an end.

Judgment affirmed.

WRIGHT AND WADE *v.* UNITED STATES.

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

No. 766. Submitted December 10, 1894. — Decided May 20, 1895.

On proof of the loss of the written authority issued by a marshal to a deputy marshal whom he had appointed, parol evidence is admissible to show the facts of the appointment and of the services of the deputy.

One acting as a *de facto* deputy by authority of the marshal comes within the provisions of the act of June 9, 1888, c. 382, 25 Stat. 178, "for the protection of the officials of the United States in the Indian Territory."

It is the obvious purpose of the act not only to bring within the jurisdiction of the United States those who commit crimes against certain persons therein enumerated, when engaged in the performance of their duties, but also to bring within the same jurisdiction those committing offences against such officials after they have ceased to perform their duties.

On April 7, 1894, the Grand Jury of the United States Circuit Court of the Fifth Circuit, Eastern District of Texas, presented an indictment against Sephus Wright and Thomas Wade, late of the Choctaw Nation, and of Atoka County, Indian Territory. The indictment charged that these parties on January 9, 1894, "in Atoka County, in the Choctaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting part of the Eastern District of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with their malice aforethought," etc., "murder one Mike Peter,"

etc.; and after charging the commission of this crime in two counts, it added: "And he, the said Mike Peter, had theretofore, to wit, on or about the 23d day of December, in the year of our Lord 1893, acted in the legal capacity of a *posse* and guard for and in behalf of a certain deputy United States marshal, for the Eastern District of Texas, to wit, William Colbert, who was then and there lawfully empowered to employ and deputize him, the said Mike Peter, in said capacity of *posse* and guard. And the said Mike Peter had theretofore at divers and sundry times acted in said capacity of *posse* and guard appointed, and empowered to so act by certain deputy marshals in and for said district. And by virtue of his said employment in the said capacity of *posse* and guard by the officers aforesaid, and by virtue of the laws of the said United States, then and there valid and existing, he, the said Mike Peter, was then and there entitled to the protection of the laws of the said United States of America."

On May 30, 1894, the case came on for trial, when the defendants filed a plea to the jurisdiction of the court and a motion to quash the indictment. The plea to the jurisdiction was as follows:

"Now come the defendants in the above-entitled and numbered cause, and for plea herein say that this court should not further prosecute this suit, for the reason that this court has no jurisdiction over the person, life, or liberty of these defendants, and no jurisdiction to try and determine this cause, for the reason that said defendants are all by blood Chocta' Indians, living and residing in said Chocta' Nation, Indian Territory; and that said offence is said to have been committed in said Chocta' Nation, Indian Territory; and that the deceased, Mike Peter, at the time of the alleged killing, was a Chocta' Indian by blood, living and residing in said Chocta' Nation, Indian Territory. That deceased at the time of the alleged killing is not alleged in the ind. to have been Indian agent or policeman appointed under the laws of the United States, or was ever such officer, nor was he a United States deputy marshal, or had he ever acted as such, nor a *posse comitatus* guard killed while lawfully engaged in

the execution of any of the United States processes; nor was the said Mike Peter, at the time of the alleged killing, lawfully engaged in any duty imposed upon him as agent, policeman, deputy marshal, *posse comitatus*, or guard, or was he ever at any time a United States officer, created by virtue of the laws of the United States, by reason of which this court could acquire jurisdiction over defendants."

The motion to quash was based on the following grounds:

"1st. Because said indictments fail to allege that Mike Peter, the deceased, was acting as *posse* or guard at the time of the alleged killing, or an officer of the United States government.

"2. Because said indictments fail to allege that the offence for which these defendants stand charged was committed within the sole and exclusive jurisdiction of this court."

The court declined to act upon the plea to the jurisdiction, for the reason that "it was dependent upon the facts of the case, and would be submitted to the jury as other facts to be proven and controlled by the charge of the court." Exception was reserved to this ruling. The motion to quash was overruled, and exception was also reserved.

The trial then proceeded, and William Colbert was put upon the stand and questioned as to whether he was or was not a deputy marshal. Objection was made to this question upon the ground that oral testimony was inadmissible to show whether a person was or was not a deputy marshal, and Colbert was temporarily withdrawn from the stand, and J. J. Dickerson was sworn. He testified, over objection, that he had been the marshal of the district for the preceding four years; that his commission was at Galveston, and he did not have it with him; that he had appointed Colbert as one of his deputies; that he had given him a commission as such; that he had exacted a bond from some of his deputies but not from others. Being asked if he knew whether an oath of office had been administered to Colbert as a deputy marshal, he answered that he could not say, but that Colbert had acted as a deputy for a long time, and had been his deputy up to the time that his successor to the office of marshal had quali-

Statement of the Case.

fied. The clerk of the court testified that he had been such since the establishment of the court in 1889; that he kept no record of the oaths administered to deputy marshals, and that none had ever been kept; that the appointment by the marshal of his deputies was placed on file, and the commission, issued by the marshal, was given to the deputy, so that he might have evidence of his appointment; that he had looked into the proper place where Colbert's appointment should be, but could not find it. Colbert was then recalled, and was allowed, over objection, to testify to his official position. He said that he had been a deputy marshal under Dickerson during his whole term of office, and had been regularly appointed by him and sworn by Captain Brooks, the clerk of the District Court; that he was unable to produce the commission given him as evidence of his appointment, because he had destroyed it at the expiration of Dickerson's term; that he was still a deputy marshal, having been reappointed by Dickerson's successor. He also testified that Mike Peter, the deceased, had acted for him as a *posse* man and guard at different times; that on one occasion, in December, 1893, Peter had gone with him from Atoka in the Indian Country, to Paris, Texas, a distance of one hundred and twenty-six miles, as a guard over a person arrested for horse-stealing; that, although Peters had never served as a guard in bringing any one to Paris, except on this one occasion, he was "working for him all the time in looking up offenders;" that he, the deceased, frequently helped him as a *posse* in making arrests, although at the particular time when the killing occurred he was not acting as a *posse* or guard. After the conclusion of the testimony the defendant requested the court to charge as follows:

"1st. The court instructs the jury that, as to whether or not Wm. Colbert at the time he appointed deceased as a *posse* man (if you believe he ever appointed him) was, at the time of said appointment, a duly appointed and qualified deputy marshal, is a material inquiry in this case, and unless you believe, from the evidence, that said Colbert was appointed by a United States marshal for the Eastern District of Texas, and duly commissioned and the oath of office administered to

him by any judge or justice of any state court within the same district, or by any justice of the peace having authority therein, or before any notary public duly appointed in such State, then and in that event you will find the defendants not guilty.

"2d. If the jury should believe from the evidence that the oath of office was administered to Wm. Colbert by Captain Brooks, as clerk, then, and in that event, you are instructed that the oath of office was not administered by any officer authorized to administer oaths to United States deputy marshals, and you will find the defendants not guilty.

"3d. Unless the jury should find from the evidence that Wm. Colbert was a United States deputy marshal, duly appointed, and had executed a bond as required by law, and that the same had been filed and recorded in the office of the clerk of the District or Circuit Court for the Eastern District of Texas, you will find the defendants not guilty.

"4th. The court charges the jury that unless they find from the evidence that Mike Peter was, at the time he was killed, acting as guard or *posse* man for a legally qualified deputy marshal, they will find the defendants not guilty.

"5th. Unless the jury find from the evidence that Wm. Colbert was a duly qualified United States deputy marshal at the time deceased, Mike Peter, was acting as guard or *posse* man for him, they will find the defendants not guilty.

"6th. If a reasonable doubt arises out of the evidence as to whether Wm. Colbert was a legally qualified United States deputy marshal at the time deceased acted for him as guard or *posse* man, they will find defendants not guilty."

All these requests were refused, and exceptions were duly reserved.

It was admitted on the trial that both of the defendants and the deceased were Choctaw Indians, living in the Choctaw Nation at the time of the killing. After a verdict of guilty, the defendants moved for a new trial, which motion was overruled, and the case was then brought here by error. The assignments of error are eight in number, and complain of the court's refusal to sustain the plea to the jurisdiction; of its

overruling the motion to quash; of error in permitting Dickerson and Colbert to testify to the appointment of the latter, and in allowing Colbert to testify to his acts as deputy marshal, when it did not appear by record evidence that he had been legally appointed, or that any official copy of his oath had been made; and they also aver that the court erred in refusing the requests to charge, in leaving the question of jurisdiction to the jury, and in overruling the motion for a new trial.

No appearance for plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

The accused, being Choctaw Indians, and the deceased having been a member of the same tribe, the jurisdiction of the court depended upon the provisions of the act of Congress, approved June 9, 1888, which is as follows:

"That any Indian hereafter committing against the person of any Indian agent or policeman appointed under the laws of the United States, or against any Indian United States deputy marshal, *posse comitatus*, or guard, while lawfully engaged in the execution of any United States process, or lawfully engaged in any other duty imposed upon such agent, policeman, deputy marshal, *posse comitatus*, or guard by the laws of the United States, any of the following crimes, namely, murder, manslaughter, or assault with intent to murder, assault, or assault and battery, or who shall in any manner obstruct by threats or violence any person who is engaged in the service of the United States in the discharge of any of his duties as agent, policeman, or other officer aforesaid within the Indian Territory, or who shall hereafter commit either of the crimes aforesaid in said Indian Territory against any person who, at the time of the commission of said crime, or at any time pre-

vious thereto, belonged to either of the classes of officials hereinbefore named, shall be subject to the laws of the United States relating to such crimes, and shall be tried by the District Court of the United States, exercising criminal jurisdiction where such offence was committed, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases." Act of June 9, 1888, c. 382, 25 Stat. 178.

The averments of the indictment, if true, brought the case clearly within the jurisdiction of the court. It was no error to refuse to sustain the plea to the jurisdiction, for its correctness depended upon the alleged existence of certain facts which were not admitted. All the matters stated in the assignments of error, whether applying to the court's action on the motion to quash, or in regard to the plea to the jurisdiction, or the objections to the admissibility of evidence, and to the refusal to give the charges requested, really embrace only two points. 1st. Whether it was admissible to show by parol the appointment and service of a deputy marshal, and whether one can be considered a deputy marshal if sworn in by the clerk of the District Court. 2d. Whether under the act of Congress, above referred to, the offence of killing a *posse* man or guard, came within the jurisdiction of the United States, if the killing occurred when the deceased was not actually engaged in performing services.

Without expressing an opinion as to the necessity of issuing a regular commission to a deputy marshal, or as to the authority of the clerk of the District Court to administer the oath to such officer, it is clear that, on proof of the loss of the written authority issued by the marshal to a deputy whom he had appointed, it was permissible to offer oral evidence of the fact of appointment and of the services of the deputy. His appointment and service made him a *de facto* officer, even if the clerk who administered the oath was not empowered to do so. Acting as *de facto* deputy by the authority of the marshal, he came clearly within the provision of the statute of 1888, and is entitled to be considered as such dep-

uty for the purposes of that statute. *Norton* v. *Shelby County*, 118 U. S. 425, 445, 446; *In re Manning*, 139 U. S. 504; *Ball* v. *United States*, 140 U. S. 118, 129.

The second contention is equally unsound. The obvious purpose of the statute was not only to bring within the jurisdiction of the United States those who commit crimes against certain persons therein enumerated, when engaged in the performance of their duties, but also to bring within the same jurisdiction those committing offences against such persons after they have ceased to perform their duties. The context of the law leaves no doubt on this subject, for it clearly provides for two classes of crimes — offences committed against the persons designated when performing their duty, and like offences committed against such persons after they have ceased to perform their official duties. It says: "That any Indian hereafter committing against the person of any deputy marshal, *posse comitatus* or guard, while lawfully engaged in the execution of any United States process, or lawfully engaged in any other duty imposed upon such deputy marshal, *posse comitatus* or guard by the laws of the United States, shall," etc. Then, in providing for the other contingency, it adds: "Or who shall hereafter commit either of the crimes aforesaid in said Indian Territory against any person who, at the time of the commission of said crime or at any time previous thereto, belonged to either of the classes of officials hereinbefore named, shall be subject to the laws of the United States relating to such crimes, and shall be tried by the District Court of the United States exercising criminal jurisdiction where such offence was committed," etc. To hold that offenders who commit the designated crimes against the officers or agents named in the statute are only subject to its provisions when the crime is committed against the officer while actually engaged in performing his duty, would not only destroy the letter of the law, but frustrate its obvious purpose. That purpose was not only to secure the persons therein named, when actually engaged in the discharge of their duties, but also to protect them after their duties were performed.

Judgment affirmed.

STONEROAD *v.* STONEROAD.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 11. Submitted November 9, 1893. — Decided May 20, 1895.

The act of Congress of June 21, 1860, c. 167, confirming the claim of Preston Beck, Jr., to a grant of land from Mexico made before the Treaty of Guadalupe Hidalgo, by necessary implication contemplated that the grant should be thereafter surveyed, and that such survey was essential for the purpose of definitely segregating the land confirmed from the public domain.

Such survey could only be made by the proper officer of the political department of the government; but notice thereof was not necessary.

Such survey having been made by such officer, and on the trial of this case evidence having been introduced tending to show that land of the defendant in controversy lay outside of the lines of that survey, but within the limits of the designated boundaries of the grant under which the plaintiff claimed, the defendant was entitled to have the jury instructed that if they found from the evidence that the grant had been properly surveyed by the United States, and that that survey had been approved, as the correct location of the grant, and that the land in dispute in the defendant's occupation and possession was outside the limits of the survey, they must find for the defendant, although they might believe that the land so in dispute was within the boundaries of the grant, as set forth in the original title papers thereof.

The right of the defendant in error to avail himself of the legal privilege of appeal from the survey to the Secretary of the Interior is not concluded by any expression of opinion by the court in this case.

In 1854 Congress passed "An act to establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes." Act of July 22, 1854, c. 103, 10 Stat. 308. Sections 8 and 9 of this law read as follows:

"Sec. 8. *And be it further enacted*, That it shall be the duty of the Surveyor General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico;

and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Gaudalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

"SEC. 9. *And be it further enacted*, That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act."

Under these provisions Preston Beck, Jr., a citizen of the United States and a resident of the territory of New Mexico, presented his petition to the Surveyor General, on May 10, 1855, to be recognized as the legal owner, in fee, of a certain tract of land lying in the county of San Miguel, in that territory "known as the Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas," and bounded "on the north by the landmarks of the sitio of Don Antonio Oritz and the mesa of the aguage de la Yegua, on the south by the river Pecos, on the east by the mesa of Pajarito, on the west by the point of the mesa of the Chupaines. . . . And the

said Preston Beck, the 'present claimant,' claims a perfect title to said land by virtue of a grant made on the twenty-third day of December, in the year one thousand eight hundred and twenty-three, by Bartolmé Baca, governor and superior political chief of the province of New Mexico, by and with the advice and approbation of the provincial deputation of the said province of New Mexico, to Juan Estevan Piño, a citizen of New Mexico, which said grant was made as aforesaid by authority of the laws, usages, and customs of the republic of Mexico in force at the time, and of the laws and regulations of Spain which were declared and recognized to be in force and effect at that time in the republic of Mexico. . . .

"The said Preston Beck claims and further states that he cannot show the quantity of land claimed by him except as set forth in said grant, as within the above-described well-known metes and boundaries nor can he furnish a plat of survey, as no survey has ever been executed.

"Claimant further states that one Alexander Hatch and about one hundred other persons have settled upon said grant without a title from any person or from any government and with a full knowledge of the existence of the claim now presented.

"Claimant further states that by virtue of said grant Juan Estevan Piño was lawfully put in possession of said tract of land by the competent authorities, and settled upon said claim with a large amount of property, and there held possession of the same for the space of twenty-one years and until expelled by the hostilities of the savage Indian tribes; that upon the death of Juan Estevan Piño the said tract of land was inherited by his two sons, Justo Piño and Manuel D. Piño, who were his only heirs, and the present claimant claims his title by virtue of deeds from Justo Piño and Gertrudes Roscom, his wife, and from Manuel D. Piño and Josefa Oritz, his wife, all of original grants and deeds of transfer and documentary titles, marked A, B, C, D, E, are herewith filed and made part of this claim.

"Claimant files this his said claim before you under the 8th

section of the act of Congress approved 22 July, 1854, entitled 'An act to establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes,' and respectfully asks confirmation by you of his said claim."

The controversy initiated before the Surveyor General by the filing of this petition was decided by him in 1856. His opinion recites the claim, the grant made, the fact that the grantee was put in possession by the alcalde, the acquisition by Preston Beck, Jr., from the grantee or heirs, of all their rights, states that a hearing was had between Beck as owner of the grant and a large number of settlers, and continues:

"This case was argued very elaborately by the counsel on both sides, and many points concerning boundaries of the grant were introduced in the testimony, and the arguments, which this office deems unnecessary at present to notice, as they have no direct reference to the validity of the grant.

"This case has been considered by this office with much attention, and as it is understood that the validity of nearly all the private land claims in this Territory depends upon the same principles, all the authorities that could be procured having any bearing on the case have been carefully examined and maturely deliberated. The documents presented in this case are original, and the signatures of the granting officers and conveyors are proven by testimony to be genuine, and the chain of title from the original grantee to the present claimant is complete. . . .

"The boundaries set forth in the granting decree and natural points, well known to all the community, and in the absence of any survey, which was not required in the grant, are amply sufficient to designate such portion of land as was intended to be severed from the public domain. The evidence presented by the claimant shows that the grantee did have possession of the land granted to him; that he occupied it with his stock and cultivated certain portions of it, and he continued to do so until he was driven off by the hostile Indians. Not having voluntarily abandoned the land, he did therefore voluntarily forfeit his right to the grant.

[*It is evident from the context that the word* "not" *has been omitted before the word* "therefore" *in the last sentence.*]

"The intention of the provincial deputation and the recommendation of the governor and no conditions being attached to it makes the grant a positive and absolute one, and vests in the grantee a title in fee to all the land embraced within the boundaries set forth in the granting decree.

"The objections made by counsel against the validity of the grant are therefore overruled.

"Believing this to be one of the cases coming under the provisions of the treaty of Guadalupe Hidalgo of 1848, and having strong claims to validity under the decisions of the Supreme Court of the United States in similar cases, the grant made to Juan Estevan Piño to a certain tract of land in the county of San Miguel, and known as the Hacienda de San Juan Bautista del Ojito del Rio de las Gallinas, and of which Preston Beck, Junior, is the present claimant, is hereby approved, and the Congress of the United States is respectfully recommended to cause a patent to be issued to the said Preston Beck, Jr., by the proper department and cause the same to be surveyed."

On June 21, 1860, Congress passed an act, c. 167, of which the first section reads as follows:

"That the private land claims in the Territory of New Mexico, as recommended for confirmation by the Surveyor General of that Territory, and in his letter to the Commissioner of the General Land Office of the twelfth of January, eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the Surveyor General as number sixteen, be, and they are hereby, confirmed: *Provided*, That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants." 12 Stat. 71.

Statement of the Case.

Preston Beck's claim was designated as "Number one" in the report of the Surveyor General, and was therefore embraced in this confirmatory act. After the passage of the above act, a survey of the grant in question was made by the officers of the government and approved by the Secretary of the Interior. A statement of facts signed by both parties admits that this survey was made "without notice to the owners of said grant, or either of them." It is also admitted that Preston Beck, Jr., in whose name the grant was confirmed, died in 1860, a short time before the passage of the confirmatory act, leaving his estate, in which the above grant was included, to his brother, cousin, nephews and nieces, all of whom were non-residents of the Territory of New Mexico. It is conceded by the same statement that at the time of the making and approval of the survey, three of the beneficiaries under the will of Preston Beck, Jr., were minor children and three others were married women; and that the plaintiff, George W. Stoneroad, was not one of the legatees under said will, but subsequently acquired a third undivided interest in the grant. And it is further admitted that none of the owners of the land have acquiesced in the survey since the same was made and approved.

In 1885, George W. Stoneroad, the person thus conceded to be the owner of one-third of the original grant, brought an action of ejectment against James P. Stoneroad, alleging that he was entitled to the possession of the Preston Beck grant, and that the defendant had illegally possessed himself of a portion thereof. The defendant pleaded not guilty. At the trial of the case the parties entered into the stipulation, in which the facts, as above stated, were admitted, and one clause of this stipulation, in addition, says, in reference to the act of Congress, "said confirmation being absolute and without any condition whatever, and to the extent of the boundaries given in the original muniments of the title, as the same are correctly copied in said Exhibit A" — the "Exhibit A" referred to being the original grant, describing the property as above mentioned. Besides the admissions which were thus made, oral evidence was introduced tending to show that the defend-

ant James P. Stoneroad possessed two tracts of land outside of the lines of the survey made by the government, but, as asserted, within the limits of the designated boundaries of the grant. At the trial the defendant asked the court to give the following instruction:

"The jury are instructed that if they find from the evidence in this case that the grant, in evidence in this case, has been surveyed by the proper authorities of the United States, and that such survey has been approved by the proper authorities of the United States as the correct location of said grant, and that the land in dispute in this case and in the occupation and possession of said defendant is outside the limits of survey, they must find for the defendant, though they may also believe that the said land so in dispute is within the boundaries of said grant, as such boundaries are set forth in the original title papers of said grant, and the recommendation of the Surveyor General relative there to is evidence in this cause."

This instruction was refused, and a verdict was rendered in favor of the plaintiff. The defendant, after an ineffectual attempt to obtain a new trial, took the case by writ of error to the Supreme Court of the Territory. There the judgment below was affirmed, and the defendant then brought the case here by error.

Mr. Charles H. Gildersleeve for plaintiff in error.

Mr. John H. Knaebel and *Mr. T. B. Catron* for defendant in error.

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

The first and fundamental question is, did the act of Congress of 1860, which confirmed the claim of Preston Beck, Jr., as recommended by the Surveyor General, provide for, or by necessary intendment contemplate that a survey of the grant should be made in order to separate the land embraced within it from the public domain? And we are not relieved from

the consideration of this question by the admission made by the parties to the suit, that the confirmation was "absolute and without any condition whatever." This admission is in no way the concession of a fact, but is a declaration by the suitors of their opinion on a matter of law. Whether the act of Congress was absolute or conditional, whether it required, even though it absolutely confirmed the title, that a survey should be made to determine the extent of the property, depends upon the terms of the law. The report of the Surveyor General who passed upon the claim states among the reasons for his recommendation to Congress: "The boundaries set forth in the granting decree are natural points, well known to all the community, and in the absence of any survey, which was not required in the grant, are amply sufficient to designate such portions of land as were intended to be severed from the public domain."

In his recommendation to Congress, however, which is practically the decretal part of his opinion, he says: "The Congress of the United States is respectfully recommended to cause a patent to be issued to the said Preston Beck, Jr., by the proper department, and cause the same to be surveyed." It was this recommendation which was acted upon by Congress.

We think the confirmatory act of 1860, by necessary implication, contemplated that the confirmed grant should be thereafter surveyed, and that such survey was essential for the purpose of definitely segregating the land, to which the right was confirmed, from the public domain, and thus finally fixing the extent of the rights of the owners of the grant. To hold otherwise would be to conclude that Congress had confirmed the claim and yet deprived the claimant of all definite means of ascertaining the extent of his possessions under the confirmed title. In view of the fact that the Surveyor General's report showed the importance of the grant, and that it had never been surveyed, we think it must be considered that Congress intended that it should be surveyed in order that its boundary lines might be accurately fixed, before the issue of a patent. The grant was an unconfirmed Mexican grant, and, therefore, before it could take a definite and conclusive shape

so far as the United States was concerned, it required action and approval on the part of this government. As said by this court, in speaking of grants within this territory of New Mexico, in the case of *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80, 81, "Undoubtedly, private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States, by the treaties, belonged to the political department of the government; and Congress might either itself discharge that duty, or delegate it to the judicial department. *De la Croix* v. *Chamberlain*, 12 Wheat. 599, 601, 602; *Chouteau* v. *Eckhart*, 2 How. 344, 374; *Tameling* v. *United States Freehold Co.*, 93 U. S. 644, 661; *Botiller* v. *Dominguez*, 130 U. S. 238."

Now, at the time of the passage of this confirmatory act, and for a long time prior thereto, the general laws of the United States confided to certain administrative officers the duty of surveying not only the public lands but also private land claims. Rev. Stat. §§ 441–453. The practice of the United States in dealing with the public domain and all governmental grants of land is to survey and issue a patent. For this purpose, in the proper administrative branch of the government, accurate and efficient machinery, accompanied with full remedial process for the correction of error, is provided. In speaking of the general policy of the law as to the surveying of the public domain, including private land grants, this court, through Mr. Justice Lamar, in *Knight* v. *United States Land Association*, 142 U. S. 161, 177, said:

"That section provides as follows: 'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . Second. The public lands, including mines.' Section 453 provides: 'The Commissioner of the General Land Office shall perform, *under the*

direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all agents [*grants*] of land under the authority of the government.' Section 2478 provides : 'The Commissioner of the General Land Office, *under the direction of the Secretary of the Interior*, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [The Public Lands] not otherwise specially provided for.'

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims, and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. As was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this pueblo case (5 Land Dec. 494): 'The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt.' "

It is not to be presumed that Congress intended, by confirming a grant which had never been surveyed, and had, therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation, especially when this survey was fully provided for by the general law, in accordance with the uniform public policy of the government in dealing with questions of this character. The general rule being to exact a survey, the grant here under consideration could only be exempted from this requirement by an express statement in the act of Congress indicating an intention to depart from the rule in the particular instance. No such intention is anywhere expressed in the confirmatory act. Indeed, the idea that the act, whilst confirming the title, did not contemplate a survey, for the purpose of marking its limits, amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined, since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter. Construing, then, the confirmatory act, in connection with the general law of the United States, the recommendations of the Surveyor General upon which the confirmation was made and the essential requirements of the case as presented to Congress, we conclude that a survey of the grant was contemplated by the confirmatory act, and we will determine the rights of the parties in accordance with this conclusion.

It is unquestioned that shortly after the confirmation of the grant a survey was made, and that the land in possession of the defendant below is outside of its lines. The plaintiff's case, therefore, necessarily rests upon a disregard of the official survey. In order to sustain his position two legal propositions are advanced: first, that the holders of the grant are not bound by the survey, for the reason that it was made without notice to them, and because at the time of the survey some of them were minors and some were under coverture; and, second, that the survey did not conform to the boundaries of the grant, and, therefore, should be judicially corrected. Both these propositions are untenable. The first attacks the survey

as a whole, upon the theory that notice was an essential prerequisite, and that coverture and minority were obstacles to the right of the government to survey the claim as confirmed, for the purpose of ascertaining the extent of the grant and in order to separate it from the public domain. It is unnecessary to point out the fallacy which underlies this proposition, because, even if its correctness be conceded, the concession would be fatal to the plaintiff's case. As we have seen, a survey was necessary. Now, if the survey was illegal, and is to be treated as not existing, then we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant. In other words, if it be conceded that there is no survey, the plaintiff is without right to relief, since a survey was essential to carry out the confirmatory act. The second proposition is equally unsound. It presupposes the existence in the courts of the United States of a power to survey the public domain, and thus discharge a function confided by law to an administrative branch of the government. In *West* v. *Cochran*, 17 How. 403, 414, this court, speaking through Mr. Justice Catron, said:

"It has often been held by this court that the judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for any other purpose; but that claimants were compelled to rely upon Congress, on which power was conferred by the Constitution to dispose of and make all needful rules and regulations respecting the territory and property of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority; a consideration that has occupied a prominent place in the legislation of Congress from an early day."

Considering the same subject in *Knight* v. *U. S. Land Association*, *supra*, speaking through Mr. Justice Lamar, the court said, p. 176:

"It is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively

to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding. *Cragin* v. *Powell*, 128 U. S. 691, 699, and cases cited. Under this rule it must be held that the action of the Land Department in determining that the Von Leicht survey correctly delineated the boundaries of the pueblo grant, as established by the confirmatory decree, is binding in this court, if the department had jurisdiction and power to order that survey."

These views are particularly applicable to the case in hand, since the act providing for the office of the Surveyor General for New Mexico authorizes him to examine and report, under such rules and regulations as the Secretary of the Interior may adopt, and requires that his report shall be transmitted to Congress for its action. Even if the general rule were otherwise, these provisions necessarily preclude judicial cognizance of the subject-matter, and confine it to the supervision of the political and administrative departments of the government. And the terms of the act become especially cogent when considered in connection with antecedent legislation under similar circumstances. They differ materially from the language of the measures previously adopted by Congress for confirming the outstanding titles in Louisiana, Florida, and California. In those cases the statutes, while creating administrative officers for the purpose of ascertaining and passing on the grants, expressly gave a right to the parties to invoke the aid of the courts in order that the correctness of the actions of the officers named might be judicially determined. It was under such provisions that many of the cases referred to and relied on by the defendant in error were decided. The absence of a provision in the present statute for a judicial review of the Surveyor General's action indicates the intention of Congress to reserve to itself the right to pass upon such claims. *Astiazaran* v. *Santa Rita Mining Co.*, *supra*. Hence the many authorities cited by the defendant in error have no application. Thus *United States* v. *Arredondo*, 6 Pet. 691; *Mitchell* v. *United States*, 9 Pet. 711, and *Fremont* v. *United States*, 17 How. 542, were the results of

an express provision giving parties an ultimate recourse to the courts. *Langdeau* v. *Hanes*, 21 Wall. 521, involved no assertion of a power in the courts to destroy a survey duly made; there the survey had been made, and was not assailed. The finding of the court below in that case, which was here affirmed, was as follows: "1st. That the act of confirmation of 1807 was a present grant, becoming so far operative and complete, to convey the legal title when the land was located and surveyed by the United States in 1820, as that an action of ejectment could be maintained on the same." In *Whitney* v. *Morrow*, 112 U. S. 693, there had been an unquestioned segregation of the property after the confirmation by the commissioners under a special act of Congress, by long-continued actual possession.

Nothing in the record indicates that the defendant in error has availed himself of the legal privilege of appeal to the Secretary of the Interior, and of course his right to so do is not concluded by any expression of opinion which we have made. Our conclusion is, that the instruction requested by the defendant was wrongfully refused in the lower court, and the judgment of the Supreme Court of the Territory of New Mexico, which upheld the action of the court below, was erroneous. It is, therefore, ordered that the judgment be

Reversed.

RUSSELL *v.* MAXWELL LAND GRANT COMPANY.

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

No. 321. Submitted April 29, 1895. — Decided May 20, 1895.

A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any collateral attack in the courts.

On May 19, 1888, the defendant in error, as plaintiff, commenced this action in the Circuit Court of the United States for the District of Colorado to recover the possession of a cer-

tain tract of land. After answer the case came on for final trial on October 10, 1890. The verdict and judgment were in favor of the plaintiff, and the defendants allege error.

The facts disclosed by the testimony are substantially these: On May 19, 1879, a patent was issued by the United States to Charles Beaubien and Guadalupe Miranda, their heirs and assigns, for a tract of land known as the Maxwell Land Grant. This patent recites that on January 11, 1841, the territorial governor of New Mexico (that being at the time a part of the Republic of Mexico) made a grant to Beaubien and Miranda of a tract of land with specified boundaries; that on June 21, 1860, Congress passed an act confirming such grant, with the boundaries therein specified; that on December 16, 1878, the Surveyor General of the United States for the Territory of New Mexico returned to the Land Department at Washington a survey officially made, giving in detail the boundaries as established by that survey; and in terms "grants the tract of land embraced and described in the foregoing survey." The land in controversy is within the limits of the survey, and thus within the terms of the patent. In 1871 the regular surveys of public lands in the southern part of Colorado were extended so as to include this land, which by those surveys was marked and described as the west half of the southeast quarter, and the northeast quarter of the southwest quarter, and the southwest quarter of the northeast quarter of section 20, township 33 south, range 68 west of sixth principal meridian. On April 6, 1874, Richard D. Russell, the ancestor of defendants, applied at the local land office to enter this tract under the homestead laws, and on September 5, 1876, proved up and received his final receipt therefor.

Mr. Ira W. Buell, *Mr. W. S. Harbert*, and *Mr. George R. Daley* for plaintiffs in error.

Mr. Charles E. Gast and *Mr. Frank Springer* for defendant in error.

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

Opinion of the Court.

The Maxwell Land Grant is no stranger to this court. After the issue of the patent a bill was filed by the United States to set it aside on the ground of error and fraud, and after an exhaustive investigation, both in the Circuit and this court, a decree was entered, dismissing the bill. *Maxwell Land Grant Case*, 121 U. S. 325; 122 U. S. 365; *Interstate Land Company* v. *Maxwell Land Grant Company*, 139 U. S. 569, 580, in which it was said:

"The confirmation and patenting of the grant to Beaubien and Miranda operated to divest the United States of all their rights to the land embraced in the grant which this country acquired from Mexico by the treaty of Guadalupe Hidalgo. And the only way that that grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican government to some other person."

See also *Beard* v. *Federy*, 3 Wall. 478; *More* v. *Steinbach*, 127 U. S. 70. The confirmation of this grant was made by act of Congress of June 21, 1860, c. 167, 12 Stat. 71. Whatever doubts might have existed before as to the limits or extent of the grant, were settled by that confirmation. *Langdeau* v. *Hanes*, 21 Wall. 521; *Tameling* v. *United States Freehold Co.*, 93 U. S. 644. The only claim of the defendants is one under the United States, arising on April 6, 1874, fourteen years after the confirmation of the Maxwell Land Grant. It is therefore inferior and subordinate to that of the plaintiff.

In order to obviate the effect of this, the defendants offered to prove on the trial that the survey described in and upon which the patent was based was inaccurate, and that a correct survey would run the lines of the Maxwell Land Grant so as to exclude therefrom the tract in controversy. This testimony was rejected by the court, and this is the error complained of.

In the suit brought to set aside the patent, it was said by this court, 121 U. S. 382:

"In regard to the questions concerning the surveys, as to their conformity to the original Mexican grant and the frauds which are asserted to have had some influence in the making of those surveys, so far from their being established by that

satisfactory and conclusive evidence which the rule we have here laid down requires, we are of opinion that if it were an open question, unaffected by the respect due to the official acts of the government upon such a subject, depending upon the bare preponderance of evidence, there is an utter failure to establish either mistake or fraud."

The accuracy of the survey is, therefore, so far as the government is concerned, no longer open to inquiry. If in a direct proceeding in equity brought by the United States to set aside the patent on the ground of error in the survey the matter has become *res judicata*, it would seem that the patentee could not be compelled in every action at law between itself and its neighbors to submit the question of the accuracy of the survey as a matter of fact to determination by a jury. Nor is the matter open to such inquiry. A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any collateral attack in the courts. By section 453, Revised Statutes, full jurisdiction over the survey and sale of the public lands of the United States, and also in respect to private claims of land, is vested in the Commissioner of the General Land Office, subject to the direction of the Secretary of the Interior. In *Cragin* v. *Powell*, 128 U. S. 691, 698, it was said by Mr. Justice Lamar, speaking for the court, and citing in support thereof a number of cases:

"That the power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

The case of *Beard* v. *Federy*, *supra*, is in point. In that case the effect of a patent to land in California, after confirma-

tion and survey, was before the court. The land, as in this case, was claimed under an old Mexican grant, and while the proceeding for confirmation of such claims in California differed from that pursued in New Mexico, yet the result of the confirmation was the same. There as here was a statutory provision that the confirmation should not prejudice the rights of third persons, and some reliance was placed upon that provision. It was said by the court, discussing this entire question, on page 492:

"By it (the patent) the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section. The term 'third persons,' as there used,

does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

In *More* v. *Steinbach*, *supra*, the same propositions were affirmed, the court saying, on page 83: "All the questions necessarily involved in the determination of a claim to land under a Spanish or Mexican grant, and in establishing its boundaries, are concluded by it in all courts and proceedings, except as against parties claiming by superior title, such as would enable them to resist successfully any action of the government in disposing of the property." See also *Stoneroad* v. *Stoneroad*, *ante*, 240.

These authorities are decisive upon this question. And in the nature of things a survey made by the government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the Land Department. None other is named in the statutes. If in every controversy between neighbors the accuracy of a survey made by the government were open to question, interminable confusion would ensue. Take the particular case at bar; if the survey is not conclusive in favor of the plaintiff, it is not conclusive against it. So we might have the land grant company bringing suit against parties all along its borders, claiming that, the survey being inaccurate, it was entitled to a portion of their lands, and, as in every case the question of fact would rest upon the testimony therein presented, we should doubtless have a series of contradictory verdicts; and out of those verdicts, and the judgments based thereon, a multitude of claims against the United States for return of money erroneously paid for land not obtained, or for a readjustment of boundaries so as to secure to the patentees in some other way the amounts of land they had purchased.

It may be said that the defendants have the same right to rely upon the regular surveys, that the plaintiff has upon the survey of this special land grant. This is undoubtedly true,

but the survey is one thing and the title another. If sectional lines had been run through the entire limits of the Maxwell grant, it would not thereby have defeated the grant or avoided the effect of the confirmatory act. A survey does not create title; it only defines boundaries. Conceding the accuracy of a survey is not an admission of title. So the boundaries of the tract claimed by defendants may not be open to dispute, but their title depends on the question whether the United States owned the land when their ancestor filed his homestead claim thereon. If at that time the government had no title, it could convey none.

In this connection it may be well to notice a distinction which interprets some dicta and decisions found in respect to the jurisdiction of courts over boundaries. Whether a survey as originally made is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts. In the case before us the offer was not to show that the land in controversy was one side or other of the line established by the survey. On the contrary, it was conceded that it was within the limits of the survey, and the offer was simply to show that that survey was inaccurate, and that the lines should have been run elsewhere, but this is not a matter for inquiry in this collateral way in the courts.

There was no error in the ruling of the Circuit Court, and its judgment is

Affirmed.

BOYD *v.* JANESVILLE HAY TOOL COMPANY.

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

No. 305. Argued April 23, 24, 1895. — Decided May 20, 1895.

Under letters patent No. 300,687, granted June 17, 1884, to John M. Boyd for improvements in hay elevators and carriers, the patentee, in view of the state of the art, was entitled, at most, only to the precise devices mentioned in the claims, and that patent, so construed, is not infringed by machines constructed under patent No. 279,889, granted June 19, 1883, to F. B. Strickler.

John M. Boyd filed a bill in the Circuit Court of the United States for the Western District of Wisconsin against the Janesville Hay Tool Company and its officers, charging the defendants with infringement of letters patent granted the complainant, numbered as No. 300,687, and dated June 17, 1884, for an improvement in hay elevators and carriers.

The answer denied that complainant was the original and first inventor, and alleged anticipating patents, prior knowledge and use by others, and that defendants have made and sold hay carriers in accordance with patent No. 279,889, granted June 19, 1883, to F. B. Strickler.

There was a general replication; evidence was put in; on November 9, 1888, a decree was entered dismissing the bill of complaint, and from this decree an appeal was taken to this court.

Mr. Curtis T. Benedict for appellant.

Mr. Charles K. Offield for appellee.

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

John M. Boyd, the appellant, filed his application on October 25, 1882, and, after several amendments, letters patent were granted him on June 17, 1884, and numbered as No.

300,687. The specification discloses that the invention has relation to improvements in hay elevators and carriers, and consists in the peculiar construction of the several parts and in their combination and arrangement. There are fourteen claims, of which twelve appear to be for combinations of parts, and two for specific devices which are claimed to be novel.

It clearly appears that Boyd was not a pioneer in this department of machinery. Many inventors had preceded him, and many patents had been issued for improvements in hay carriers in form and purpose similar to those described in Boyd's specification. We think the case is one where, in view of the state of the art, the patentee is only entitled, at the most, to the precise devices mentioned in the claims.

It is conceded that the defendants, before this suit was commenced, were manufacturing and selling hay carriers made under the Strickler patent, No. 279,889, dated June 19, 1883; and it is claimed, on behalf of the appellant, that, as the application for the Strickler patent was filed on May 15, 1883, several months after Boyd's application, the Strickler patent furnishes no defence to the defendants if the machines made and sold by them infringed any of the Boyd claims.

Upon the assumption that, owing to the previous condition of the art, Boyd is to be restricted to the exact and specific devices claimed by him as novel, we do not deem it necessary to determine whether either Boyd or Strickler invented anything, because we think that the appellant has failed to show that the defendants have used the particular devices to which Boyd can be considered entitled. Our discussion, therefore, will be confined to the question of infringement.

As both applications were pending in the Patent Office at the same time, and as the respective letters were granted, it is obvious that it must have been the judgment of the officials that there was no occasion for an interference, and that there were features which distinguished one invention from the other. In *Pavement Co.* v. *City of Elizabeth*, 4 Fish, 189, Mr. Justice Strong said: "The grant of the letters patent was virtually a decision of the Patent Office that there is a substantial difference between the inventions. It raises

the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent." It would also seem to be evident that, as the purpose of the invention was the same, and as the principal parts of the respective machines described were substantially similar, it was also the judgment of the office that the distinguishing features were to be found in some of the smaller and, perhaps, less important devices described and claimed. *Burns* v. *Meyer*, 100 U. S. 671.

We find it useful to adopt the following description of the Boyd invention, given in appellant's brief:

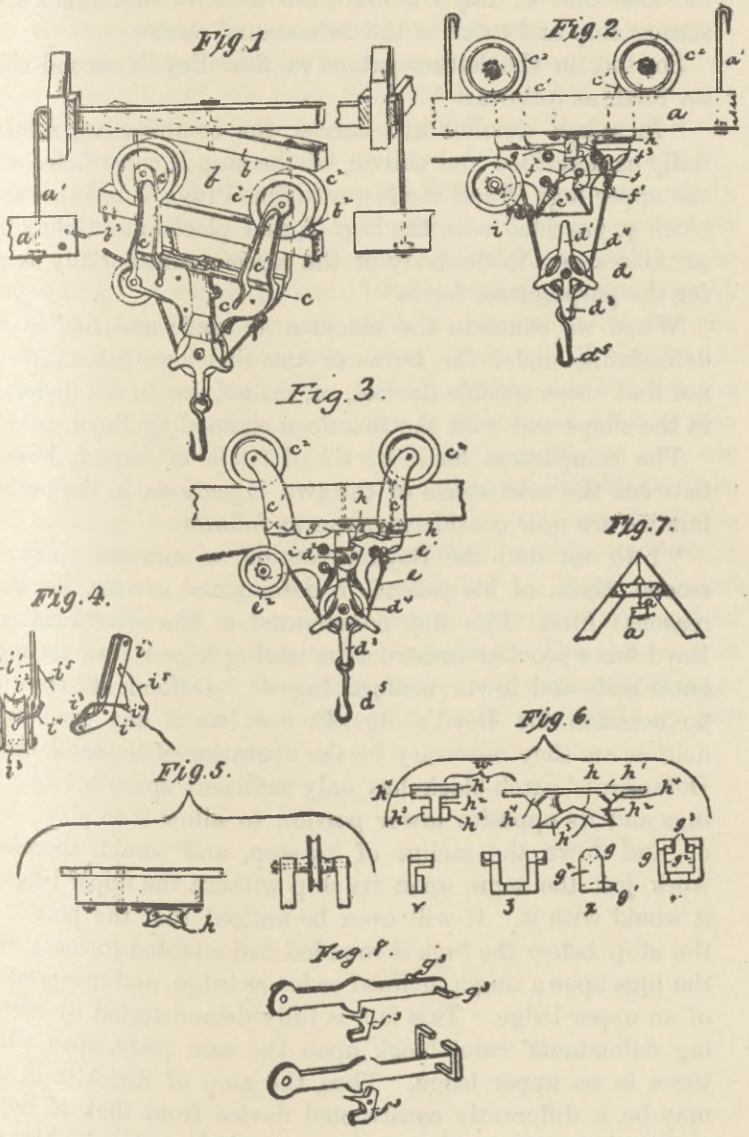
"This carrier involves novel features, which may be stated in a general way as follows:

"The stop h, (adapted to be secured to the under side of a single track,) having the continuous lugs h^3 inclined upwardly from each end of the stop to the centre, and therewith the downwardly inclined lugs or bearings h^4; the stop being adapted to lift the catch coming to it from either direction; to engage the catch and prevent the travel of the carrier; to force the catch down (if it fails to fall by gravity) as it leaves the stop, and to permit the carrier to run past it when desired. The catch (or key) g sliding vertically in the carrier, having lugs adapted to catch the inclines of the stop and be lifted thereby; and (being held up by the grapple) to engage the stop and prevent travel of the carrier on the track; and when released to 'drop' in front of and lock the grapple.

"The combination of the vertically-sliding catch g, with the stop aforesaid, and with the tilting grapple, by which the catch or key is lifted by the stop into locking engagement with said stop, and is locked thereto by the grapple, and being released falls or is forced down by the stop into locking engagement with the grapple."

We learn from this description that what the counsel of the appellant regards as the special features of the Boyd invention are the stop h, the catch g, and their combination in the manner pointed out. And when we turn to the evidence of the appellant's expert, Cunningham, we find that, in analyzing the Boyd machine, he dwells chiefly on the functions

J. M. BOYD. Hay Elevator and Carrier. Patented June 17, 1884.



of the stop and of the catch, as constituting its meritorious features, and that the effect and purpose of his testimony, as likewise that of Boyd himself, are to show that there are a similar stop and catch in the defendants' carrier.

So, too, in the letters patent we find Boyd's second claim set forth as follows:

"In a hay elevator and carrier, the combination, substantially as described and shown, of the stop h, constructed with the upper lugs h^4 and the lower inclined lugs h^3 and the catch-block g, provided with the lugs g^3, and placed and sliding in a suitable recess in the body of the carrier, substantially as and for the purposes set forth."

When we examine the machine as made and sold by the defendants, under the terms of the Strickler patent, we do not find these specific devices, or, rather, we do not find them in the shape and with the functions claimed by Boyd.

The comparison made by the defendants' expert, Powers, between the mechanism of the two inventions, in the particulars we are now considering, was as follows:

"I do not find the Boyd invention, as summed up in the second claim of his patent, in defendants' carrier, for these reasons: First. The stop enumerated in the second claim of Boyd has a peculiar construction, having lugs h^4 upon its upper outer ends and lower inclined lugs h^3. Defendants' stop has no occasion for Boyd's lugs h^4, nor has it any such lugs; neither are they necessary for the operation of the catch-block. Defendants' catch-block has only sufficient space between its lugs and its opposite lower portion to allow it to play freely up and down the incline of its stop, and would, therefore, work just the same upon its stop without the upper ledge as it would with it. It will even be noticed that the portion of the stop below the lugs is rounded and adapted to coact with the lugs upon a single inclined or lower ledge, and independent of an upper ledge. This fact is fully demonstrated by operating defendants' catch-block upon the cam plate, upon which there is no upper ledge. Thus, the stop of Strickler is, and may be, a differently constructed device from that of Boyd, and such a construction as leaves entirely out a leading es-

sential element enumerated in the second claim of the Boyd patent.

"A reference to figure 2 of the Strickler patent (page 266) clearly shows that his catch-block was adapted to be governed by the lower ledge entirely, not to encounter the upper ledge of the stop at all, and this more fully confirms me in the opinion that the Strickler stop is an entirely different device in principle and operation from that of Boyd with its upper lugs h^4.

"I further find the Boyd catch-block to be substantially different in the fact of the largely increased space between its lugs and base, rendered necessary in order to enable it to engage lugs h^4, which are considerably higher up from lugs h^3, in order to enable said catch-block to remain at its extreme height until it encounters stops h^3 at either end of the device, it being the operation of the Boyd machine not to stop the carrier centrally to the stop h, but at either end of it at stop h^4. It is obvious that Boyd's catch-block could not be made operative upon a single ledge as can that of Strickler's; but, on the other hand, it is adapted to such a stop specifically as Boyd shows in all of his figures in which it is shown, four in number, to wit, in figures 2, 3, 5, and 6 of his drawings; and no modification of the stop is shown or described further than as seen in these four figures in his patent. The same is true of Boyd's catch-block; it being shown in all cases with a large space up and down to enable it to work practically up just such a stop as he shows."

F. B. STRICKLER. Hay Elevator and Carrier. Patented June 19, 1883.

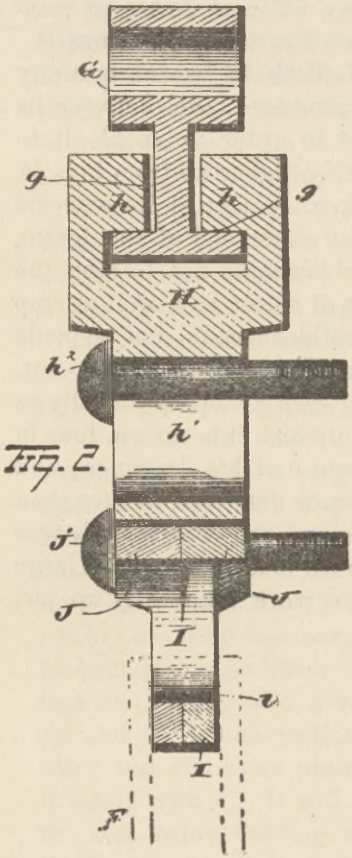


Fig. 2.

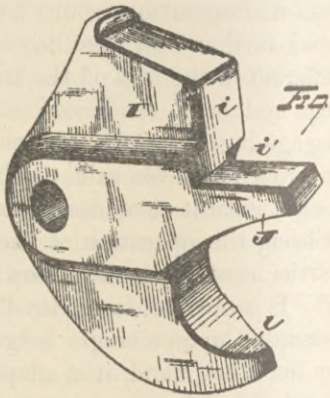


Fig. 3.

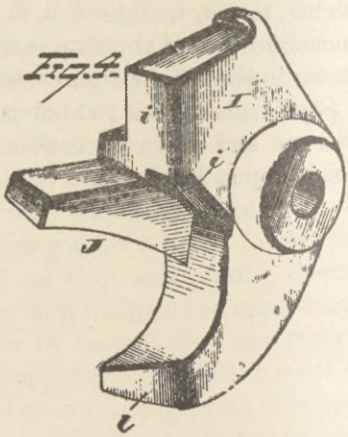


Fig. 4.

Statement of the Case.

We regard and adopt this comparison as correct; nor do we find anything in the evidence or the argument of the appellant to the contrary.

Doubtless, if the Boyd patent contained an invention entirely new, and first adapted to the end sought, such differences might be regarded as formal and evasive. But, coming as he did in the train of the numerous inventors that had preceded him, whose inventions had been patented and put into practical use, we must conclude that Boyd, if entitled to anything, is only entitled to the precise devices described and claimed in his patent. Of course, it follows that if the defendants' specific devices are different from those of Boyd, no combination of such devices could be deemed an infringement of any combination claimed by Boyd.

These views of the case bring us to the conclusion reached by the court below, and its decree dismissing the bill is accordingly *Affirmed.*

Mr. Justice Gray did not hear the argument and took no part in the decision of the case.

VIRGINIA *v.* TENNESSEE.

ORIGINAL.

No. 8. Original. Submitted May 6, 1895. — Decided May 20, 1895.

This court is without jurisdiction to enter a consent decree at this term in a cause finally determined at October term, 1893, and improperly retained upon the docket at this term.

The following papers were presented to the court in support of a motion for a decree in this case:

To G. W. Pickle, *Attorney General of Tennessee:*

Take notice that the State of Virginia, by R. Taylor Scott, her attorney general, on Monday, the 6th day of May, 1895,

at Washington, D. C., will move the Chief Justice and Associate Justices of the Supreme Court of the United States to enter as a decree of said court in the cause aforesaid the decree in form and substance as set out in the paper "*marked H*," attached hereto and made part and parcel of this notice, said "*paper H*" being the form and substance of a decree as agreed by and between the counsel who represent the parties, plaintiff and defendant, in the aforesaid cause.

THE COMMONWEALTH OF VIRGINIA,
By R. TAYLOR SCOTT, *Attorney General.*

RICHMOND, VA., *April* 15, 1895.

I do hereby accept legal service of the notice hereto attached, dated the 15th day of April, 1895, and consent that the decree in form as thereto annexed shall be made in *this* cause; and I do further agree that this shall be done without amendment to the original bill filed by the State of Virginia in this case, if this can be lawfully done.

Given under my hand this 18th day of April, 1895.

G. W. PICKLE,
Attorney General for Tennessee.

"MARKED H."

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1894.

THE STATE OF VIRGINIA.
v.
THE STATE OF TENNESSEE. } No. 3, Original.

This day this cause came on to be further heard upon the record heretofore made and motion in writing submitted to the court by the State of Virginia, viz.: That this court, in accordance with its opinion and the decree made in this cause on the 13th day of April, 1893, have laid down, remarked, and defined the boundary line by said decree established between the States of Virginia and Tennessee according to the compact made between them in 1803. On consideration whereof and with the consent of the complainant, given by her

attorney general, and there being no objection on the part of the State of Tennessee, the court doth adjudge, order, and decree that —— ——, who are hereby appointed special commissioners for that purpose and authorized to do all and singular such acts as may be necessary, do lay down, distinctly remark, and clearly define the boundary line established between the States of Virginia and Tennessee by the compact of 1803, as construed by the opinion and decree of this court made on the 13th day of April, 1893. In executing this decree the court doth direct that the said special commissioners be permitted to use the court's record of this case or such part thereof as they shall find necessary.

The court doth direct that the boundary line aforesaid between Cumberland Gap and White Top Mountain shall be marked at intervals of not over five (5) miles by distinct and durable stone monuments;

That the corner between the States of Virginia and Tennessee upon said mountain be also marked by a durable monument of stone;

That the said boundary line from White Top Mountain through Denton's valley and the country in the record called the "Triangle" shall be marked by stone monuments, so designed, located, and arranged as to make distinct and unmistakable this line;

That stone monuments be placed at the eastern and western limits of the cities of Bristol, in the States of Virginia and Tennessee, and the said boundary line through said cities be distinctly and clearly marked;

That a corner stone as a monument be placed at Cumberland Gap;

That the said boundary line from Station Creek, near Cumberland Gap, to the western corner on the top of Cumberland Mountain, at proper intervals be marked by stone monuments;

That said special commissioners, as soon as possible after assuming the duties imposed by this decree, do make full report to this court of their action pursuant thereto, and with said report do return a plat and survey of the aforesaid boundary line, monuments, etc.

And the court doth further order and decree that the costs of said survey, plat, etc., when allowed by this court, shall be paid equally by the parties to this cause — that is to say, one-half thereof by the State of Virginia and the other half thereof by the State of Tennessee.

Mr. R. Taylor Scott, Attorney General of the State of Virginia, for the motion.

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

This was a suit to establish the true boundary line between the States of Virginia and Tennessee, and proceeded to a decree on April 3, 1893, at October term, 1892, "that the boundary line established between the States of Virginia and Tennessee by the compact of 1803, between the said States, is the real, certain, and true boundary between the said States, and that the prayer of the complainant to have the said compact set aside and annulled, and to have a new boundary line run between them on the parallel of 36° 30′ north latitude, should be, and the same is hereby, denied, at the costs of the complainant."

In view of some observations made, on the argument of the case, upon the propriety and necessity, if the line established in 1803 were sustained, of having it rerun and remarked, so as thereafter to be more readily identified and traced, it was stated in the opinion "that on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the line." *Virginia* v. *Tennessee*, 148 U. S. 503, 528. Subsequently, on May 15, 1893, a motion was made on behalf of the State of Virginia to restore the boundary marks between the two States alleged to be indistinct and obliterated, and to allow complainant to take additional testimony, the consideration of which was postponed to October term, 1893, when and on

October 16, 1893, the motion was denied. Application is now made on behalf of the State of Virginia to this court to enter a decree in this cause for the remarking of the boundary line as set forth therein, to the granting of which the State of Tennessee consents. But we find ourselves unable to enter the order desired, as our power over the cause ceased with the expiration of October term, 1893, and it should not have been retained on the docket. The application must therefore be denied, but without prejudice to the filing of a new bill or petition, upon which, the parties being properly before the court and agreeing thereto, such a decree may be entered.

Application denied and case stricken from the docket.

NORTHERN PACIFIC RAILROAD COMPANY *v.* URLIN.

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

No. 272. Submitted April 5, 1895. — Decided May 20, 1895.

While it cannot be safely said that, in no case can a court of errors take notice of an exception to the conduct of the trial court in permitting leading questions, such conduct must appear to be a plain case of the abuse of discretion.

There was no error in permitting medical witnesses testifying in behalf of the plaintiff to be asked whether the examinations made by them were made in a superficial or in a careful and thorough manner.

It is competent for a medical man called as an expert to characterize the manner of the physical examinations made by him.

When a party is represented by counsel at the taking of a deposition, and takes part in the examination, that must be regarded as a waiver of irregularities in taking it.

When a deposition is received without objection or exception, objections to it are waived.

In an action against a railroad company to recover for personal injuries, the declarations of the party are competent evidence when confined to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and

symptoms, and if made to a medical attendant are of more weight than if made to another person.

There is no error in not permitting the defendant to cross-examine the plaintiff on a subject on which he had not been examined in chief.

When the court has fully instructed the jury on a subject, a request to further charge in the same line and in the same manner may be refused as calculated to confuse the jury.

When the verdict in this case was rendered, the jury was polled at the request of the defendant and each answered that the verdict as read was his. No objection was made by defendant or request that the verdict should be signed, and judgment was entered in accordance with the verdict. *Held*, that this was a waiver by the defendant of the irregularity in the foreman's not signing the verdict as required by the local law of Montana.

This was an action brought by Alfred J. Urlin, in the Circuit Court of the United States for the District of Montana, against the Northern Pacific Railroad Company, to recover for personal injuries received by him when travelling as a passenger in one of its trains.

The car in which the plaintiff was riding became derailed, and was thrown down a bank and overturned. The complaint charged that the accident was due to "the defective, decayed, and rotten condition of the cross-ties" in the road, and that the plaintiff received "severe and dangerous wounds and internal injuries."

The case proceeded to trial before the court and a jury, and resulted in a verdict for the plaintiff in the sum of $7500, and the jury also returned certain special findings which had been submitted to them at the request of the defendant. Judgment was entered upon said verdict and special findings. During the trial several exceptions were taken by the defendant, which were allowed and signed by the judge, and which are brought for review to this court by a writ of error.

Mr. A. H. Garland, *Mr. W. E. Cullen*, and *Mr. J. K. Toole* for plaintiff in error.

Mr. Frank H. Woody for defendant in error.

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

The first assignment avers error in permitting the medical witnesses, who testified in behalf of the plaintiff, to be asked whether the examinations made by them "were made in a superficial or in a careful and thorough manner."

It is urged that this question was objectionable, both as leading and as taking from the jury the determination of the inquiry whether the medical examination was thorough or otherwise.

It cannot be safely said that, in no case, can a court of errors take notice of an exception to the conduct of the trial court in permitting leading questions. But such conduct must appear to be a plain case of the abuse of discretion.

"We are not aware of any case in which a new trial has ever been granted for the reason that leading questions, though objected to, have been allowed to be put to a witness." *Green* v. *Gould*, 3 Allen, 466.

"The allowance of a leading question is within the discretion of the court, and is no ground for reversal." *Farmers' Co.* v. *Groff*, 87 Penn. St. 124.

"Circuit Courts must be allowed the exercise of a large discretion on the subject of leading questions." *Parmelee* v. *Austin*, 20 Illinois, 35.

The second ground, that this question called for the opinion of the witnesses as to the manner in which the physical examinations were made, and thus supplanted the judgment of the jury in that particular, does not seem to us to be well founded. The obvious purpose of the question was to disclose whether the judgment of the physicians as to the plaintiff's condition was based on a superficial or on a thorough examination, and we think it was competent for the witnesses, who were experts, to characterize the manner of the examination.

The refusal of the court to suppress the deposition of Dr. W. P. Mills because it did not disclose that the witness was cautioned and sworn before testifying, as required by the statute, is assigned for error. But it appears that the defendant company was represented by counsel and took part in the examination, and this must be regarded as a waiver of any

irregularity in the taking of the deposition. *Mechanics' Bank* v. *Seton*, 1 Pet. 299, 307; *Shutte* v. *Thompson*, 15 Wall. 151, 159. Moreover, although a motion was made to suppress the deposition before the trial, yet when it was offered at the trial no objection was made or exception taken, and thus the objection was waived. *Ray* v. *Smith*, 17 Wall. 411, 417.

The third assignment is strenuously pressed on our attention in the brief of the plaintiff in error. It arises out of the refusal of the court below to suppress certain portions of the depositions of Drs. Mills and DeWitt because of incompetency and as merely hearsay.

This objection is founded upon the witnesses having been permitted to testify to statements made by the defendant, at various times, to the physicians in respect to his feelings, aches, and pains, and it is contended that such statements were made too long after the occurrence of the injury to be part of the *res gestæ*, but were merely narrations of past incidents; and it is further urged that, whatever reason there may have formerly been, when a party could not himself testify to his sensations, for liberality in admitting such statements, now that he is a competent witness, such reason no longer operates.

An inspection of the depositions shows that the statements objected to were mainly utterances and exclamations of the defendant when undergoing physical examinations by the medical witnesses. As one of the principal questions in the case was whether the injuries of the defendant were of a permanent or of a temporary character, it was certainly competent to prove that, during the two years which had elapsed between the happening of the accident and the trial, there were several medical examinations into the condition of the plaintiff. Every one knows that when injuries are internal and not obvious to visual inspection, the surgeon has to largely depend on the responses and exclamations of the patient when subjected to examination.

"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of

body or mind, they furnish satisfactory evidence, and often the only proof of its existence, and whether they were real or feigned is for the jury to determine. So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant they are of greater weight as evidence, but if made to any other person they are not, on that account, rejected." 1 Greenl. Ev. 14th ed. sec. 102.

In *Fleming* v. *Springfield*, 154 Mass. 520, 522, where such a question arose, it was said:

"The testimony of Dr. Rice was properly admitted. The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narrative of something that was past; and it may be fairly inferred that it was made for the purpose of medical advice and treatment. At any rate, although it was only a day or two before, or possibly during the trial, it does not appear that such is not the case."

The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant they are of more weight than if made to another person.

In the eighth assignment complaint is made because the counsel of defendant was not permitted to cross-examine the plaintiff with reference to the details of the grocery business, in which he had been engaged, prior to the occurrence of the accident.

It is true that the plaintiff had alleged, by way of special damage, that at the time he received the injury he was engaged in the grocery business, and that his said business was yielding him a sum of one hundred dollars per month; and if the plaintiff had adduced any evidence to support such allegation of special damage, it certainly would have been com-

petent for the defence to have cross-examined him as to the particulars of such business. But the record discloses that, at the trial, the plaintiff refrained from going into evidence on the subject of the alleged special damage. All that was said was that prior to the accident the plaintiff was engaged in the lumber and grocery business, but no attempt was made to show the extent or value of such business. There was therefore no error in not permitting the defendant to cross-examine on that subject.

The twelfth assignment alleges error in the refusal of the court to give the following instruction:

"The court instructs the jury that even if you should believe from the evidence that there were rotten ties in the road or track at other points than at the particular point where the train left the track, this is not sufficient to find that the defendant was negligent in this case."

To have given this instruction would not have been erroneous, but we cannot say that its refusal was reversible error. It is obvious from other parts of the charge and instructions given that the court fully instructed the jury on the subject, and in the line of the defendant's request. Thus the following instructions were given:

"In considering this issue you are called upon to determine from the evidence, first, as to whether or not the cross-ties of the defendant's track at the point where the derailment occurred, or any number of them, were decayed and rotten. If you find that they were, then, second, you are called upon to determine whether or not the derailing of said cars constituting a portion of the train occurred on account of these rotten ties.

"If you should find that said derailment occurred on account of said rotten and decayed ties, third, then you are called upon to determine whether or not defendant carelessly or negligently allowed or permitted said cross-ties to remain in and constitute a portion of its track at said point.

"You will observe that you are to determine whether or not defendant carelessly or negligently allowed said cross-ties to remain in and constitute a portion of its track at said point,

for if it did not carelessly or negligently permit this, it is not liable, although the accident should have occurred on account of this."

Moreover, the court, at the request of the defendant, gave the following instruction:

"The court instructs the jury that if you should find from the evidence that the accident by which plaintiff suffered the injuries complained of by him resulted from the negligence of the defendant and from the decayed, defective, and rotten condition of the cross-ties in defendant's railroad at or near the point where the train was derailed, then you will find for the plaintiff, and you will assess his damages at such reasonable sum as will compensate him for the injuries and sufferings thus sustained and no more."

Having so fully and repeatedly instructed the jury on this subject, and in the manner requested by the defendant, the court may well have refused the instruction prayed for as calculated to confuse the jury.

The contention that the judgment below was invalid because the verdict of the jury was not signed by the foreman, as required by a section of the Code of Montana, is, in our opinion, without merit. The record discloses that when the verdict was rendered, at the request of the defendant, the jury was then and there polled by the clerk, and each of said jurors answered that the verdict as read was theirs. Whereupon the plaintiff moved for judgment in accordance with said verdict; the motion was granted, and judgment was ordered accordingly. No objection was made, or request that the verdict should be signed was then made by the defendant, and we think that the court below was justified in treating the irregularity, if such it were, as having been waived.

At all events, the record contains no assignment of error in this particular, and we are not called upon to consider the subject.

Our examination of the other specifications of error fails to disclose anything calling for formal consideration.

The judgment of the court below is accordingly

Affirmed.

TODD *v.* UNITED STATES.

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

No. 822. Argued March 26, 1895. — Decided May 20, 1895.

A preliminary examination before a commissioner of a Circuit Court is not a case pending in any court of the United States, within the meaning of Rev. Stat. § 5406.

Todd and others were indicted under section 5406 of the Revised Statutes, reading as follows:

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property, on account of his having so attended or testified, . . . each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

The indictment stated:

"That heretofore, etc., J. W. Todd, alias Watson Todd; George W. Kelley, [etc., naming plaintiffs in error and others,] whose Christian names and surnames, respectively, are to this grand jury otherwise unknown, unlawfully, corruptly, forcibly, and feloniously did combine, conspire, and confederate together, by force and intimidation and threats, to injure Wiley Pruett, and William Pruett, who had theretofore been witnesses and testified against Joe Arnold, Milton Farmer, and George Kelley upon a charge of endeavoring to influence, intimidate, and impede witnesses in a court of the United States, in violation of the criminal laws of the United States, tried preliminarily by and before Robert Charlson, acting as a commissioner of the Circuit Court of the United States for said district, in

Mr. Solicitor General's Argument for the United States.

their person and property on account of the said witnesses above named having testified in said cause in the said court as aforesaid, and in pursuance of said conspiracy and to effect the object thereof the said defendants and each of them did assault, beat, bruise, and wound with weapons the said Wiley Pruett and William Pruett, contrary," etc.

A demurrer to the indictment was interposed and overruled, and a *nolle prosequi* having been entered as to certain defendants, Todd, Roberts, and Mitchell, and ten others, were tried and convicted, and a motion in arrest of judgment having been made and denied, were each sentenced to imprisonment at hard labor for four years and payment of $500 and costs.

Thereupon they sued out a writ of error from this court.

The case was argued on the 26th of March, 1895, by *Mr. John C. Fay* for the plaintiffs in error, and by *Mr. Assistant Attorney General Whitney* for the defendants in error. On the 29th of the following April leave was granted by the court to counsel to file briefs within four days upon the question whether a commissioner of the Circuit Court of the United States, when holding a preliminary examination, may be regarded as a "court of the United States," within section 5406 of the Revised Statutes. Such briefs were filed.

Mr. John C. Fay for plaintiffs in error.

Mr. Solicitor General for the United States.

By an order made on April 29th, leave was given counsel to file briefs upon the question whether a commissioner of the Circuit Court of the United States, when holding a preliminary examination, may be regarded as a "court of the United States" within section 5406 of the Revised statutes.

The definition of the powers of a commissioner of a Circuit Court is stated but meagrely and diffusely in the statutes. That he exercises judicial functions, has been repeatedly recognized by the decisions of this court. *United States* v. *Jones*, 134 U. S. 483, 486. That he is not a court within the meaning of Sec. 1 of Art. III of the Constitution is

apparent. No part of the judicial power of the United States is vested in him within the meaning of that article of the Constitution.

In the case of *In re Luis Oteiza y Cortes*, 136 U. S. 330, petition for a writ of *habeas corpus*, the Consul General of Spain at the city of New York filed a complaint on oath before a duly authorized United States commissioner, charging that one Luis Oteiza y Cortes was secretary or clerk of the Bureau of Public Debt of the island of Cuba, an officer in the employment of the Kingdom of Spain, and had charge of public funds and money, and that he had converted the same to his own use. The complainant therefore charged the said Luis Oteiza y Cortes with the crime of embezzlement of the bonds or certificates of indebtedness, and asked for a warrant for his apprehension under certain conventions or treaties. A warrant was issued by the commissioner, and the accused was arrested and brought before the commissioner; evidence of the matter on both sides was heard by the commissioner, who certified that on the examination and the hearings which had been had he deemed the evidence sufficient to sustain the charge, and committed the accused to the custody of the marshal, to be held until a warrant for his surrender should issue according to the stipulations of the treaty, or he should be otherwise dealt with according to law. Mr. Justice Blatchford speaking for this court, quoting the language of Mr. Justice Miller in 127 U. S. 461, said (page 334):

"We are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial, by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country, before an examining or committing magistrate, for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding in which he shall be finally tried upon the charge made against him. . . .

The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says, that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged."

And quoting (page 337) from the language of Judge Wallace in 21 Blatchford, 300 —

"The depositions and proofs presented a sufficient case to the commissioner for the exercise of his judicial discretion, and his judgment cannot be reviewed upon this proceeding. He is made the judge of the weight and effect of the evidence, and this court cannot review his action, when there was sufficient competent evidence before him to authorize him to decide the merits of the case."

From which it seems that a commissioner of a Circuit Court does exercise important judicial functions; does hear and decide upon evidence laid before him; and has the power to summon and compel the attendance of witnesses. While he has not the power to convict, he has the power to discharge, and thus there is lodged with him some of the most important powers that are entrusted to the highest courts of the land. Witnesses summoned before him may by their testimony compel the discharge or the further prosecution of the accused. The detention or obstruction of such testimony is obviously of the utmost importance, as well to the accused as to the government. Section 5406 provides that if two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein freely, fully, and truthfully . . . they shall be punished," etc. While a commissioner of a Circuit Court is not a court of the United States within the meaning of Art. III of the Constitution, he may yet be a court of the United States in the sense that a committing magistrate is a court, or that the Interstate Commerce Commission, or the Court of Private Land Claims is a court. These are not

courts whose judges hold their offices during good behavior and receive compensation which cannot be diminished during their continuance in office, but they are nevertheless courts of the United States in a very important sense.

Looking, then, to the end had in view, to the evil to be prevented, to the free, unobstructed, and complete protection of the rights of the citizen, we submit that within the meaning of section 5406 of the Revised Statutes, a commissioner of the Circuit Court of the United States is a court of the United States.

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

After this case had been submitted to us on certain alleged errors, we became impressed with the fact that a more serious question existed than any that had been discussed, and that is, whether a preliminary examination before a commissioner is a proceeding "in any court of the United States" within the meaning of section 5406. The attention of counsel was called to this, and briefs have been furnished on each side. With the assistance furnished by these briefs we have carefully examined the question, and are of the opinion that it must be answered in the negative.

It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. "There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute." *United States* v. *Lacher*, 134 U. S. 624; Endlich on the Interpretation of Statutes, sec. 329, 2d ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280.

That a commissioner is not a judge of a court of the United States within the constitutional sense is apparent and conceded. He is simply an officer of the Circuit Court, appointed and removable by that court. Rev. Stat. § 627. *Ex parte Hennen*, 13 Pet. 230; *United States* v. *Allred*, 155 U. S. 591.

A preliminary examination before him is not a proceeding in the court which appointed him, or in any court of the United States. Such an examination may be had not merely before a commissioner, but also before any justice or judge of the United States, or before any chancellor, judge of a state court, mayor of a city, justice of the peace, or other state magistrate. Rev. Stat. § 1014. And it cannot be pretended that one of those state officers while conducting a preliminary investigation is holding a court of the United States. Technically, we speak of an examining magistrate, and not of an examining court. The distinction is recognized in the statutes, § 1014, by which sundry judicial officers of the United States and of the States are authorized to conduct an examination and imprison or bail the defendant, "for trial before such court of the United States as by law has cognizance of the offence." Also § 911, which provides that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof." But a commissioner, like a justice of the peace, is not obliged to have a seal, and his warrants may be under his hand alone. *Starr* v. *United States*, 153 U. S. 614. Again, the district attorney is allowed certain fees per diem for an examination before a judge or commissioner and for his attendance in a court of the United States; also for mileage in travelling to the place of holding any court or to the place of any examination before a judge or commissioner. § 824. And a witness is entitled to fees "for each day's attendance in court or before any officer pursuant to law." § 848. While a preliminary examination may be in the strictest sense of the term a judicial proceeding, yet the language of the statute is not broad enough to include every judicial proceeding held under the laws of the United States. The offence described is a conspiracy to deter by force, etc., "any party or witness in any court of the United States."

Doubtless it was within the power of Congress to legislate in this direction fully for the protection of every witness called upon by the laws of the United States to give testi-

mony in any place and under any circumstances, *Logan* v. *United States*, 144 U. S. 263, but it has not as yet seen fit to do so, and has only provided for his protection when called as a witness in a court of the United States. *United States* v. *Clark*, 1 Gallison, 497, is in point. In that case, under a statute punishing perjury "in any suit, controversy, matter, or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States," 1 Stat. 116, the defendant was indicted for perjury on a preliminary examination before a judge of the District Court of the United States, and it was held by Mr. Justice Story that the indictment could not be maintained, saying: "The statute does not punish every perjury, but only a perjury done in *a court of the United States*. Plainly, therefore, it is of the very essence of the offence that it should be charged as committed in such court. Now, under the authority of the United States there are but three courts known in law, the District, Circuit, and Supreme Court; and as Congress alone can, by the Constitution, ordain and establish courts, none can exist but such as they create and name. . . . A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law." In connection with that case it is worthy of notice that Congress subsequently changed the statute, (4 Stat. 118,) and that now in force, Rev. Stat. § 5392, extends to every "oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered."

Further discussion seems unnecessary. As a preliminary examination before a commissioner cannot be considered a case pending in any court of the United States, it follows that this indictment is fatally defective and charges no offence against the laws of the United States.

The judgment is *Reversed.*

Mr. Justice Harlan dissented.

UNION PACIFIC RAILWAY COMPANY *v.* WYLER.

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

No. 217. Argued April 3, 4, 1895. — Decided May 20, 1895.

In an action by an employé of a railroad company against the company, based upon the general law of master and servant, and brought to recover damages for an injury which had happened to the plaintiff in Kansas while on duty there, an amended petition which changes the nature of the claim, and bases it upon a statute of Kansas giving the employé in such a case a right of action against the company in derogation of the general law, is a departure in pleading, and sets up a new cause of action; and the statute of limitations as applied to such new cause of action treats the action as commenced when the amendment was incorporated into the pleadings, and not as begun when the action itself was commenced.

This result is not in any way affected by the fact that the amended petition was filed by consent, as such consent covers only the right to file the amendment, but does not waive defences thereto when filed.

On the 25th of September, 1885, Otto Wyler, the defendant in error, sued the Union Pacific Railway Company, plaintiff in error, in the Circuit Court of Jackson County, State of Missouri, to recover damages for a personal injury. The petition alleged that in April, 1883, and for a long time prior thereto, he was employed by the defendant at Wyandotte, Kansas, in repairing locomotives and engines; that at the date stated the corporation had in its employ other men beside himself, among whom was one Charles B. Kline, who at that time "was wholly incompetent and unfit for the position which he occupied, and the work he performed; that said incompetency was wholly unknown to plaintiff at said time, though well known to defendant, and defendant negligently and wrongfully kept and retained said Kline in its employ with full knowledge of his incompetency; that at said time and place plaintiff, at the request of defendant, and in the ordinary course of his employment, was engaged in repairing a fire box in one of defendant's locomotives; that

on this particular occasion plaintiff was, at the request of defendant, assisted in said work by said Kline; that plaintiff and said Kline whilst so engaged in repairing said fire box of said locomotive were in the act of lifting and placing in position the fire dump belonging thereto, (which was a part of their said business and employment,) said dump being made of iron and of great weight; that while engaged in such business, and without fault on the part of the plaintiff, and through the negligence and mismanagement of defendant in retaining and employing the said Kline, after knowing his incompetency, the said heavy iron dump was carelessly and negligently thrown down, and let fall against the plaintiff," by reason of which he was injured and damaged to the extent of $25,000, for which judgment was asked.

In October, 1885, the defendant filed a general denial, and on the 16th of November, 1885, removed the cause to the Circuit Court of the United States for the Western District of Missouri. On the 18th of November, 1886, an amended answer was filed, averring that the plaintiff's injury resulted from his own negligence, and pleading in bar of the action a limitation of two years under the laws of the State of Kansas. On the 3d of November, 1887, the plaintiff replied to the amended answer denying the charge of negligence, and demurred to the third clause thereof, which pleaded the Kansas statute of limitations. On the 5th of January, 1888, the demurrer to the defendant's answer was submitted to the court. On the 23d of May the defendant amended his answer by inserting in the third clause, which set out the statute of limitations of Kansas, the averment that both parties were residents of that State at the time of the accident and had continued so up to that date. This amendment was consented to by counsel, on condition that the demurrer which had been filed to the first amended answer should be considered as pleaded against the last answer, and that it be submitted. The court sustained the demurrer to so much of the answer as set up the bar of the Kansas statute.

Thereupon consent was filed that the defendant should withdraw its answer and be at liberty to demur to the peti-

tion. A general demurrer was then filed. This demurrer was sustained, with leave to amend *instanter*. On October 30, 1888, the plaintiff filed an amended petition, in which he reiterated his original averments, and added thereto the charge that his injury resulted from "the negligence and mismanagement of the defendant, its agents, and employés, and in consequence of the negligence and mismanagement of said Kline." On the 2d day of November, 1888, by consent of counsel, plaintiff filed a second amended petition. This restated the averments of the first amended petition, except that it eliminated the charge of incompetency on the part of Kline, and the averment of knowledge of such incompetency in the defendant, and rested the cause of action exclusively upon the negligence of Kline, as a fellow-servant of the plaintiff, averring that the corporation was liable to plaintiff for injury suffered by him through the negligence of a fellow-servant, for the reason that a right of action was given in such case by the law of Kansas, where the accident occurred. The language of the petition is as follows: "That by reason of the premises [the negligence above stated] the plaintiff had and has a cause of action against the defendant under and by virtue of the law of Kansas in such cases made and provided in sec. 1, chapter 93, Laws of Kansas of 1874."

On the 3d of November, 1888, the defendant answered the amended petition; 1st, by confessing that the plaintiff was in its employ, and admitting the existence of the Kansas statute; 2d, by claiming that the injury suffered was brought about through the plaintiff's own fault; 3d, by asserting that both parties were citizens of the State of Kansas at the time the accident occurred, and had been so ever since, and hence, the right to recover was barred by the limitation of two years created by the Kansas law; and, 4th, claiming that, as the cause of action alleged in the second amended petition was wholly different from that averred in the original and the first amended petition, the same was barred by a limitation of five years created by the laws of the State of Missouri.

On the 4th of March, 1889, leave was granted to withdraw the foregoing answer and to file a demurrer. On the next

day the parties appeared in open court, and a new amended answer was filed. This averred, in somewhat different phraseology, the defences already stated, and added a new one, namely, want of jurisdiction. To the third ground of this answer plaintiff demurred, and to the second ground he filed a general denial. His demurrer was sustained on March 6. On the issues thus made up the case was twice tried and the jury failed to agree. In September, 1891, the case was tried for the third time, and resulted in a verdict in favor of the plaintiff for $10,000. After motions for new trial and in arrest of judgment had been overruled, the case was brought here by error.

Mr. A. A. Hoehling, Jr., and *Mr. Samuel Shellabarger* for plaintiff in error. *Mr. John W. Beebe*, *Mr. J. F. Dillon*, *Mr. H. Hubbard*, and *Mr. J. M. Wilson* were on their brief.

Mr. W. Hallett Phillips for defendant in error. *Mr. T. P. Fenlon*, *Mr. J. W. Jenkins*, and *Mr. W. C. Wells* filed a brief for same.

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

It was claimed at bar that the demurrer filed instead of being to the last answer, was to the first amended answer, and therefore that it was addressed to the third ground therein set out, that is to say, the plea of limitation under the Kansas statute, and that the general denial, instead of being addressed to the second ground in the last amended answer, applied to the second ground in the first amended answer, which averred negligence on the part of the plaintiff. The record does not support this contention, although it indicates that the pleader intended that the demurrer and the denial should have that effect, but mistakenly applied them to the last amended answer. The controversy on this point, however, is immaterial in the view of the conclusions which we have reached.

The statute law of Kansas provides as follows: "Every railroad company organized or doing business in this State

shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any person sustaining damage." Laws of Kansas, 1874, c. 93, § 1.

The occurrence for which the plaintiff seeks to recover damages happened in the State of Kansas in April, 1883. The first petition was filed in the state court of Missouri on September 25, 1885, that is to say, two years and five months after the injury. Actions for damages for personal injury, not arising from contract, are barred by the general law of Kansas after a period of two years. General Statutes of Kansas, 1868, art. 3, c. 80. The first amended petition was filed October 30, 1888, and the second amended petition November 2, 1888. At least five years and six months therefore intervened between the occurrence which caused the damage and the filing of the second amended petition. The statute law of Missouri bars actions on account of personal injury in five years. Rev. Stat. Missouri, 1889, vol. 2, §§ 6773–6775. The question of the operation of the statutes of limitation of Kansas and Missouri, upon the right of action here asserted, lies, therefore, at the very threshold of the case. It is an elementary rule that limitations are governed by the law of the forum, and not by the law of the place where the event happened, which gave rise to the suit. This is not denied, but it is argued that the Kansas statute operates in this case as a bar to the action in the court of Missouri, because of circumstances which make the case an exception to this general rule. It is also contended that the five-year limitation of the law of Missouri bars the action, and this proposition is based upon the claim that the second amended petition propounded an entirely new and distinct cause of action.

Before considering the limitation which it is asserted results from the Kansas statute, we will determine whether the action is barred by the law of Missouri, because if so, it will be unnecessary to decide whether the Kansas statute has an extra-territorial effect. The decision as to the application of the Missouri law involves, first, the ascertainment of whether the amended petition presented a new cause of action. The

legal principles by which this question must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of action in case of an amendment. In many of the States which have adopted the Code System great latitude has been allowed in regard to amendment; but even in those States it is held that the question of what constitutes a departure in an amended pleading is nevertheless to be determined by the rules of common law, which thus furnish the test for ascertaining whether a given amendment presents a new cause of action even although it be permissible to advance such new cause, by way of an amendment.

Coke upon Littleton, 304 *a*, says: "When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himselfe generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first."

Comyn's Digest, "Pleader," (F. 8,) states the same rule, and gives the following illustrations of departure:

"In debt on bond by sheriff against his bailiff to pay him 20*d.* for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine* v. *Irwin*, M. 4 G. 2, C. B. Fort. 368.

"So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure." Pl. Com. 105 *b*.

Chitty on Pleading, 1, pp. 674, 675, states the principle as follows: "A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a

declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament."

Stephen on Pleading, pp. 412, 413, thus elucidates the point: "These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also [a] departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder."

Gould on Pleadings, pp. 423, 424, says:

"When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure."

* * * * *

"Again, a declaration or plea, asserting a right at common law, is not fortified by the subsequent allegation of a right created by statute. If, therefore, to an action of trespass, laid in common form, for taking the plaintiff's cattle, the defendant justifies the taking of them damage feasant, by distress; and the plaintiff replies, that the defendant drove them out of the county, (which is not actionable by the common law, though made so by the statute 52 H. 3, and 1 and 2 Ph. & M. c. 12,) the replication is a departure, for the same reason as in the last case. The plaintiff in this case should have founded his action upon the statutes."

Saunders on Pleading and Evidence, pp. 806, 807, thus supports these authorities: "A departure in pleading is said to be when a party quits or departs from the case or defence which he has first made and has recourse to another; it is when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it. A departure may be either in the substance of the action or defence, or the law on which it is founded."

The courts have, by their decisions, made application of these principles to changes in the facts averred or law relied

on, thus illustrating the rule in many aspects. Where it was first alleged in an action for libel that the defendant had attacked the solvency of the plaintiff, and by amendment that he had assailed the plaintiff's integrity in his personal conduct without questioning his solvency, this was held to be a new cause of action. *Mohr* v. *Lemle*, 69 Alabama, 180. See also *Smith* v. *Smith*, 45 Penn. St. 403, where the same rule was applied in a case of slander. Where a party alleged that he was forcibly ejected from a train, and then by amendment averred that he was misled by the agents of the corporation into getting out at a wrong station, it was held to be a new cause of action. *A. G. S. R.* v. *Smith*, 81 Alabama, 229. Where a party declared upon a contract, under which he claimed as assignee, and amended so as to rest on a contract which he alleged was made directly with himself, it was held a new cause of action. *Bingham* v. *Talbot*, 63 Texas, 271.

An action of assumpsit was changed by amendment into an action of debt; the conclusion was that the amendment was a new cause of action. *Crofford* v. *Cothran*, 2 Sneed, 492. At common law no action lies in favor of one person for the death of another; a statute allowed such an action to be brought in the name of a personal representative; by mistake an action of this kind was brought in the name of the wife of a person who had been killed; it was amended so as to make the personal representative the nominal plaintiff; *Held*, that it was a new cause of action. *Flatley* v. *M. & C. Railroad*, 9 Heiskell, 230. A party filed a bill in equity against a corporation without alleging its dissolution, etc., and that he was without remedy at law; after he amended so as to insert all the necessary allegations to give equity jurisdiction; *Held* that this also was a new cause of action. *Dudley* v. *Price*, 10 B. Mon. 54. A bill was filed for the reconveyance of land only, and an amendment referred to certain slaves; *held*, the allegations concerning the latter were another cause. *Christmas* v. *Mitchell*, 3 Iredell, 535.

In Georgia the doctrine has been applied to the very condition of the pleadings here before us. There the court said:

"Whenever a suit is commenced in this State, and the plaintiff relies for his right of action and his recovery upon a foreign statute, he must plead said statute. If he pleads it defectively, or shows in some way that he relies upon it, he will be entitled, under our code, to amend by setting out the statute, or such parts of it as he relies on, as was done in the case of *Railroad Co.* v. *Nix*, 68 Georgia, 572. If, however, he commences his action, and relies upon his common law right, we do not think he can amend his common law declaration by setting out the statute, and relying upon that for his right to sue and for his recovery. In this case the original declaration was founded upon the common law right. Nothing was even intimated therein to the effect that he relied upon the statute. According to the decision in *Cotton Mills* v. *Railroad Co.*, and cases cited therein, made at this term, (10 S. E. Rep. 113,) this amendment would have added a new and distinct cause of action. But it is argued by counsel for plaintiff in error that all of the facts required by the Alabama statute to be pleaded were already pleaded in the declaration, and that simply to mention the statute in the amendment, and recite the same facts therein, would not be a new cause of action. While it may be true that all the facts required by the Alabama statute had been set out in the declaration, still those facts alleged in the common law declaration were mere surplusage and had no legal vitality, and would have been so regarded by the court trying the case. It required the pleading of the statute to give them any vitality at all. As we have seen, that statute is not mentioned or intimated in the original declaration, and hence to have allowed the amendment offered would have been allowing the introduction of a new cause of action." *Bolton* v. *Georgia Pac. R. R. Co.*, 83 Georgia 659.

Other applications of the general principle may be found in the cases of *Bower* v. *Thomas*, 69 Georgia, 47; *Vance* v. *Thompson*, 1 Sneed, 321; *Railroad* v. *Foster*, 10 Lea, 351; *Thomas* v. *Insurance Co.*, 108 Illinois, 91; *Robertson* v. *McIlhenny*, 59 Texas, 615; *Martin* v. *Young*, 85 N. C. 156; *Guild* v. *Parker*, 43 N. J. Law, 430; *Hiatt* v. *Auld*, 11 Kansas, 176; *Rolling Mill* v. *Monka*, 107 Illinois, 340.

The question then is, does the second amended petition state a new cause of action, so as to amount to a departure? In examining this question we must bear in mind what is the common and general law governing the relation of master and servant, which prevails also in Missouri. By this law a servant cannot recover from a common master for injuries suffered from the negligence of a fellow-servant. However, where the master knowingly employs an incompetent servant, or where he keeps a servant in his employ after he has acquired knowledge of his incompetency, he is liable for damages caused to a fellow-servant, resulting from such incompetency. The statute of the State of Kansas which makes employers operating a railroad liable to one servant for the neglect of another, without regard to the rule of incompetency as above stated, is clearly in derogation of the general law, which, as we have said, prevails in Missouri where the action was originally brought. *Corbett* v. *St. L., M. & S. Railroad*, 26 Mo. App. 621; *Worheide* v. *M. C. & F. Co.*, 32 Mo. App. 367; *Moran* v. *Brown*, 27 Mo. App. 487; *Bowen* v. *C. B. & K. C. R. R.*, 95 Missouri, 268; *Steffen* v. *Mayer*, 96 Missouri, 420.

The first petition manifestly proceeded exclusively on that part of the general rule which holds the master liable who with knowledge employs or retains an incompetent servant. It made no reference to the Kansas statute, and did not directly aver negligence on the part of the fellow-servant, except in so far as this might be inferred from the averment of his incompetency. The language is "that at the said time Kline was wholly incompetent and unfit for the position he occupied and the work he performed; that said incompetency was wholly unknown to plaintiff at the said time, though well known to defendant, and defendant negligently and wrongfully kept and retained said Kline in its employ with full knowledge of his incompetency." In fact when it charges the cause of the injury, the petition seems to eliminate all pretence of a right to recover, because of the fellow-servant's negligence, as distinguished from his incompetency, by resting the right upon the latter, for it says: "While engaged in such business and without fault on the part of the plaintiff

and through the negligence and mismanagement of defendant in retaining and employing said Kline after knowing of his incompetency, the said heavy iron dump was carelessly and negligently thrown down and let fall."

It seems impossible to conceive of language which could more directly rest the cause of action on the general or common law of master and servant. And that this was the reliance is shown by the fact that when a demurrer to the petition was sustained, the amended petition for the first time specifically added to the charge of incompetency of the fellow-servant an unequivocal averment of his negligence. A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the States the laws of other States are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, 363; *Hempstead* v. *Reed*, 6 Connecticut, 480; *Swank* v. *Hufnagle*, 111 Indiana, 453; *Root* v. *Merriweather*, 8 Bush, 397. Although this rule is not invariably adhered to, it is part of the law as administered in the State of Missouri. *Babcock* v. *Babcock*, 46 Missouri, 243.

The suit here was brought in a Missouri court, and was necessarily controlled by the law of that State.

It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure

or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal courts take judicial notice of the laws of the several States. *Priestman* v. *United States*, 4 Dall. 28; *Owings* v. *Hull*, 9 Pet. 607; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227; *Cheever* v. *Wilson*, 9 Wall. 108; *Junction Railroad* v. *Bank of Ashland*, 12 Wall. 226. This rule, however, does not affect the present suit, which was commenced in the court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes, which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute.

The amended petition, which averred the statute of Kansas, having asserted a new cause of action, the next question is, was recovery under this petition barred by the Missouri statute of limitations? The general rule is, that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the

statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies.

The doctrine on this subject is stated in the case of *Sicard* v. *Davis*, 6 Pet. 124. There the plaintiff brought an action of ejectment, in which he laid his demise as having been made by Steven Sicard on January 30, 1815, and at the November term of the court in 1821 he was given leave to amend by laying his demise in the name of the heirs of the original grantee of the lands, Joseph Phillips and others, to whom the land had been conveyed before the execution of the deed under which Sicard acquired his title. This court, speaking through Mr. Chief Justice Marshall, said that "limitations might be pleaded to the second allegation, though not to the first, because the second count in the declaration being on a demise from a different party asserting a different title, was not distinguishable, so far as respects the bar of the act of limitations from a new action."

The text-writers have uniformly recognized this principle. In Wood on Limitations of Actions, p. 14, note 4, it is said: "If, however, a new declaration or complaint is filed, setting up a new cause of action, the statute runs until such new declaration is filed, and may be pleaded thereto."

See also Buswell on Limitations, p. 515. In *Mohr* v. *Lemle*, *supra*, the Alabama court thus speaks:

"The latitude of amendment allowed the plaintiff cannot be permitted to work injustice to the defendant, or to deprive him of any just and rightful defence. The plaintiff may introduce a new cause of action by amendment; but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for that cause of action, at the time of making the amendment. The whole doctrine of relation rests in a fiction of law, adopted to

subserve, and not to defeat right and justice. When the amendment introduces a new right, or new matter, not within the *lis pendens*, and the issue between the parties; if at the time of its introduction, as to such new right or matter, the statute of limitations has operated a bar, the defendant may insist upon the benefit of the statute, and to him it is as available, as if the amendment were a new and independent suit."

So again in the same State, in one of the cases already cited, the court said: "While a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is, that if the amendment introduces new matter or a different cause of action not within the *lis pendens*, as to which the statute of limitations has operated a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit." *Ala. G. S. R. R. Co.* v. *Smith*, 81 Alabama, 229.

Other applications of the doctrine may be found in the following cases: *Toby* v. *Allen*, 3 Kansas, 399; *Hiatt* v. *Auld*, 11 Kansas, 176; *Rolling Mill* v. *Monka*, 107 Illinois, 340; *Crofford* v. *Cothran*, 2 Sneed, 492; *Flatley* v. *M. & C. Railroad*, 9 Heiskell, 230; *Dudley* v. *Price's Administrator*, 10 B. Mon. 84; *Buntin* v. *C. R. I. & P. R. R.*, 41 Fed. Rep. 744; *A. & P. Co.* v. *Laird*, 58 Fed. Rep. 760.

Nor do we think this question is in any way affected by the fact that the second amended petition was filed by consent. The consent covered the right to file it, but did not waive the defences thereto when filed. If the interruption to the running of the statute created by the first summons applied only to the cause of action therein set out, it would have required an express renunciation of the benefit of the statute, which had fully operated upon the new cause of action set out in the amended petition — when that petition was filed. In Sicard's case, *supra*, although the amendment had been filed by leave of court, and was, therefore, a part of the pleadings, it was held that the bar of the statute applied to the new cause of action alleged in the amendment, and the rule there enforced is followed in the other cases cited.

Judgment reversed.

RICHARDS *v.* CHASE ELEVATOR COMPANY.

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

No. 310. Argued April 25, 1895. — Decided May 20, 1895.

If letters patent be manifestly invalid upon their face, the question of their validity may be raised on demurrer, and the case may be determined on the issue so formed.

Letters patent No. 308,095, issued November 18, 1884, to Edward S. Richards for a grain transferring apparatus, are wholly void upon their face for want of patentable novelty and invention.

This was a bill in equity for the infringement of letters-patent No. 308,095, issued November 18, 1884, to the plaintiff Richards, for a grain transferring apparatus.

The purpose of the invention, as stated by the patentee, was "to provide improved means for transferring and weighing grain without mixing different lots or loads with each other, thus preserving the identity of each lot while it is being transferred from one car to another."

The device in question was substantially one for shifting grain from one car to another through an elevator, by means of which the grain is raised from one car to a hopper in the elevator, where it is weighed and discharged into another car. The device is illustrated by the drawings on page 300:

The patentee thus explained the operation of his device: "The car to be unloaded — for example, the car B — is drawn upon the track F and allowed to stand in such a position that the door will be directly opposite the chute J. If the grain is to be transferred to a car opposite, or about opposite, the car B — for example, to the car D — I close the door or valve L and open the valve K. The grain is then shovelled from the car by means of a steam shovel, or otherwise, into the chute J, from which it passes into the elevator leg, through which the buckets move upwards. The grain is thus elevated and discharged into the hopper of the hopper scales, located for discharging its contents into the car D. That hopper has its

Statement of the Case.

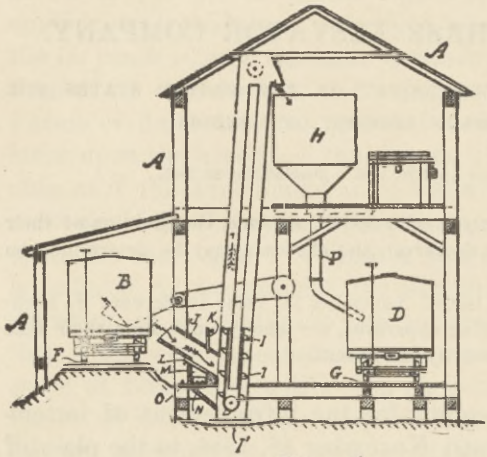


Fig. 1.

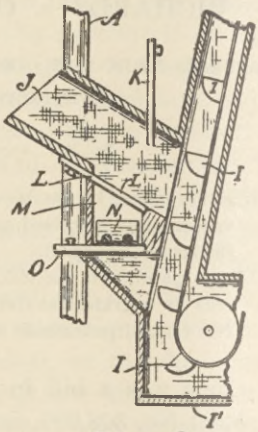


Fig. 2.

valve closed while being filled, but when filled the grain therein is weighed and discharged into the car intended to receive it."

The patentee further explained that if the cars are not opposite to each other, he closes the valve K and opens the valve L, through which, by a similar method, the grain is carried, lifted, and discharged into the other car.

The claims of the patent were as follows:

"1. The combination of a fixed or stationary building, the tracks F and G, an elevator apparatus, an elevator hopper scales having a fixed or stationary hopper provided with a valve or slide in its bottom, and a discharge spout, P, adapted and arranged for discharging the grain directly from the said hopper into a car, substantially as specified and for the purposes set forth.

"2. The combination of a fixed or stationary building, the tracks F and G, two or more elevating apparatus, a series of two or more elevator hopper scales having fixed or stationary hoppers, each having a valve or slide in its bottom, the discharge spouts PP, adapted and arranged for discharging the grain directly from said hoppers, respectively, into a correspondingly arranged car, a horizontal conveyor, the chutes

JJ, having therein the doors or valves K and L, and the slides or doors OO, all arranged substantially as shown and described, with relation to each other and for the purposes set forth."

A demurrer was interposed to the bill to the effect that the patent and both claims thereof were wholly void upon their face, for the want of patentable novelty and invention. This demurrer was sustained, and the bill dismissed. 40 Fed. Rep. 165. Thereupon plaintiff appealed to this court.

The case was argued with No. 311, *Richards* v. *Michigan Central Railroad Company*, and No. 312, *Richards* v. *Chicago & Grand Trunk Railroad Company*.

Mr. Charles K. Offield for appellant in all the cases.

Mr. John W. Munday for the Chase Elevator Company. *Mr. Edmund Adcock* was on his brief.

Mr. George S. Payson for the Railroad Companies.

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

While patent cases are usually disposed of upon bill, answer, and proof, there is no objection, if the patent be manifestly invalid upon its face, to the point being raised on demurrer, and the case being determined upon the issue so formed. We have repeatedly held that a patent may be declared invalid for want of novelty, though no such defence be set up in the answer. *Dunbar* v. *Myers*, 94 U. S. 187; *Slawson* v. *Grand Street Railroad*, 107 U. S. 649; *Brown* v. *Piper*, 91 U. S. 37.

The patent in question is for the combination of, (1) a fixed or stationary building; (2) two railway tracks; (3) an elevating apparatus; (4) elevator hopper scales, having a fixed or stationary hopper, provided with a valve or slide in its bottom; (5) a discharge spout, arranged for discharging the grain directly from the hopper into a car.

The second claim has the same combination duplicated, with the addition of a horizontal conveyor; the chutes JJ having therein doors or valves, and the slides or doors OO.

It is not claimed that there is any novelty in any one of the elements of the above combination. They are all perfectly well known, and if not known in the combination described, they are known in combinations so analogous that the court is at liberty to judge for itself whether there be any invention in using them in the exact combination claimed. We do not feel compelled to shut our eyes to a fact so well known as that elevators have, for many years, been used for transferring grain from railway cars to vessels lying alongside, and that this method involves the use of a railway track, entering a fixed or stationary building; an elevator apparatus; elevator hopper scales for weighing the grain; and a discharge spout for discharging the grain into the vessel. There is certainly no novelty in using two railway tracks instead of one, or in discharging the grain into a second car, instead of a storage bin or a vessel. Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements. Indeed, the multiplicity of elements may go on indefinitely without creating a patentable combination, unless by their collocation a new result be produced. Thus, nothing would have been added to the legal aspect of the combination in question by introducing as new elements the car from which the transfer was made; the engine that drew such car; the steam shovel; the engine that operated the shovel and the elevator; as well as the locomotive which drew the loaded car from the building, though these are all indispensable features, since each of them is an old and well-known device, and performs a well-understood duty.

Suppose, for instance, it were old to run a railroad track into a station or depot for the reception and discharge of passengers, it certainly would not be patentable to locate such station between two railroad tracks for the reception of passengers on both sides, and to add to the accommodations a ticket office, a newspaper stand, a restaurant, and cigar stand, or the thousand and one things that are found in buildings of

that character. It might as well be claimed that the man who first introduced an elevator into a private house, it having been previously used in public buildings, was entitled to a patent for a new combination.

Not a new function or result is suggested by the combination in question. The cars run into the building on railway tracks, as they have done ever since railways were invented. The building is fixed and stationary, as buildings usually are. It is no novelty that it should contain an elevating device, and that the latter should raise the grain to the hopper scale, and should discharge it either into a bin or a vessel, or into another car. In principle it makes no difference which.

In fact, the combination claimed is a pure aggregation, and the decree of the court dismissing the bill is, therefore,

Affirmed.

THE BEACONSFIELD.[1]

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

No. 943. Submitted April 22, 1895. — Decided May 20, 1895.

The carrier is so far the representative of the owner, that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried.

If a cargo be damaged by collision between two vessels, the owner may pursue both vessels, or either, or the owners of both, or either; and in case he proceeds against one only, and both are held in fault, he may recover his entire damages of the one sued.

A person who has suffered injury by the joint action of two or more wrongdoers, may have his remedy against all or either, subject to the condition that satisfaction once obtained is a bar to further proceedings.

If the owner of a vessel, libellant on his own behalf and on behalf of the owner of the cargo, takes no appeal from a decree dismissing the libel as to his own vessel, the owner of the cargo may be substituted as libellant in his place, and the failure of the owner of the vessel to appeal is a technical defence which ought not to prejudice the owner of the cargo.

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[1] The docket title of this case is *Elizabeth Cleugh, Claimant of the Steamship Beaconsfield, and William Libbey, Surety*, v. *Albert W. Sanbern.*

Statement of the Case.

Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety; and so long as the cause of action remains practically the same, a mere change in the name of the libellant, as by substituting the real party in interest for a nominal party, will not avoid the stipulation as against the sureties.

This case, which is an outgrowth of that of *The Britannia*, 153 U. S. 130, arose upon a certificate of the Circuit Court of Appeals touching the liability of the Beaconsfield to respond for a moiety of the loss upon her cargo, by reason of her collision with the Britannia. The questions certified are based upon the finding of facts printed in the margin.[1]

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[1] Statement of Facts.

1. On December 21, 1886, John Lucas Cotton, master, and George Cleugh, owner of the Beaconsfield, as bailees of her cargo, filed an amended libel against the Britannia in the District Court for the Southern District of New York, to recover the sum of $45,000, damage to such cargo by reason of her collision with the Britannia, for which the latter was charged to have been solely in fault.

2. On January 7, 1887, the Compagnie Française de Navigation à Vapeur, owner of the Britannia, answered this libel, claiming the collision to have been caused solely by the fault of the Beaconsfield.

3. On the same day it also filed a petition against the Beaconsfield, reciting the former proceedings, averring the collision to have been caused wholly or partly by the fault of the Beaconsfield, that she ought to be proceeded against in the same suit for the damage to her cargo, and prayed for process against her to the end that she might be condemned for such damage.

4. The Beaconsfield was arrested under process issued upon this petition, and was released from custody upon her claimant, Cleugh, filing a stipulation for value in the sum of $23,000, with William Libbey and George C. Magoun as sureties.

5. Subsequently George Cleugh, owner of the Beaconsfield, answered this petition, denying the liability of the Beaconsfield, and excepting to the jurisdiction of the court to enforce any liability against her, by reason of the proceedings taken under this petition. John Lucas Cotton and George Cleugh, as libellants, also answered this petition, denying liability on the part of the Beaconsfield.

6. The case came on to be tried in the District Court upon these pleadings, and also upon cross libels by the owners of the Britannia and Beaconsfield, against each vessel respectively, for damages sustained by the vessels themselves. The District Court found both vessels to have been in fault, and divided the damages. The case is reported in 34 Fed. Rep. 546.

Upon this state of facts, the Court of Appeals certified to this court, for its decision, the following questions:

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7. A final decree was entered in the District Court July 9, 1889, in favor of Cotton and Cleugh, libellants, against the steamship Britannia and the steamship Beaconsfield in the sum of $50,249.26, and condemning each vessel in a moiety of said sum, amounting to $25,124.63.

8. Cross appeals from this decree were taken to the Circuit Court by George Cleugh, claimant of the Beaconsfield, and the Compagnie Française, claimant of the Britannia.

9. Pending these appeals, and on October 3, 1890, Elizabeth Cleugh was substituted as claimant of the Beaconsfield, in place of George Cleugh, deceased, and the libel of John Lucas Cotton and George Cleugh against the Britannia was continued in the name of Cotton alone.

10. Upon hearing in the Circuit Court upon the cross-appeals, the decree of the District Court was reversed, and the Britannia found to have been solely in fault for the collision. 42 Fed. Rep. 67 ; 43 Id. 96. A decree was thereupon entered in favor of Cotton, as bailee of the cargo of wheat laden on the Beaconsfield, against the Britannia in the sum of $53,907.11.

11. From this decree the Compagnie Française appealed to the Supreme Court October 8, 1890. John Lucas Cotton, libellant, did not appeal from the decree of the Circuit Court.

12. The appeal of the Compagnie Française came on to be heard in the Supreme Court with the appeals of the Britannia from the decree dismissing her libel against the Beaconsfield, for damage sustained by the vessel itself, and from the decree sustaining the libel of the Beaconsfield against her for like damage sustained in the collision.

13. In the Supreme Court both vessels were found to have been in fault, and a mandate issued directing the decree of the Circuit Court to be reversed, and the cause to be remanded, with directions to enter a decree in accordance with the opinion of such court, and for further proceedings in conformity, etc.

14. Upon the further proceedings so ordered, an affidavit was filed showing that a telegram had been received from the owners of the Beaconsfield as follows: "You must not consent to any decree in our names, except against Britannia for half damages. We only agreed to be libellants as bailees of cargo against Britannia; we forbid our names being used in any decree against Beaconsfield for loss of cargo. Please do needful to give effect to this. (Signed) Cleugh, Cotton." A like telegram was addressed by libellant Cotton to his own counsel.

15. Libellant then moved, June 1, 1894, that the libel be amended by substituting the name of Albert W. Sanbern, owner of the cargo of the Beaconsfield, as sole libellant in the place of John Lucas Cotton, and for the entry of a final decree in the name of Sanbern. This motion was opposed by Elizabeth Cleugh, claimant of the Beaconsfield, and by the sureties, but was granted by order of June 4, 1894, and on the same day, a decree was entered

1. Whether, in entering said final decree, condemning each vessel in a moiety of said damages, the Circuit Court obeyed the mandate of the Supreme Court.

2. Whether, upon the above statement of facts, the libellant, Albert W. Sanbern, was entitled to a final decree condemning the steamship Beaconsfield, her engines, tackle, apparel, and furniture, in a moiety of the cargo damage, amounting to $31,526.64, as adjudged in the said final decree.

3. Whether, upon the above statement of facts, the libellant, Albert W. Sanbern, was entitled to judgment against William Libbey, surety, in the sum of $23,000, as directed by the said order of June 12, 1894, and as adjudged in the said judg-

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in favor of Sanbern, as owner of the cargo, against the Britannia and Beaconsfield for the sum of $63,053.28, and condemning each vessel for one-half of this amount, namely, $31,526.64. By this decree, the stipulators on the part of both steamships were ordered to show cause why execution should not issue against them for the amount of their stipulations.

16. The sureties upon the stipulation of the Beaconsfield made return to the order to show cause, alleging the filing of the libel by Cotton, master, and Cleugh, owner of the Beaconsfield, as bailees of the cargo; that there was no allegation of fault on the part of the Beaconsfield in this libel, or in their answer to the petition of the Compagnie Française; that the question of liability between the Beaconsfield and the libellants was never actually litigated, and the bills of lading under which the goods were carried had never been interposed by way of defence; that at the time the stipulation was given, Cotton and Cleugh were the parties libellant, and continued to be such until after the final decree in the District Court, when the libel was amended by dropping the name of George Cleugh, who had died, and continuing it in the name of Cotton alone, although Elizabeth Cleugh, as administratrix of the co-libellant, was substituted in George Cleugh's place as claimant; that after the mandate was handed down, the libel was again amended, by substituting the name of Sanbern, as owner of the cargo, in place of Cotton, one of the bailees. By reason of these matters, Libbey, the surviving surety, claimed to be exonerated from his liability on the stipulation of value of January 10, 1887. An order was, however, entered directing judgment and execution against Libbey, in the amount of his stipulation, $23,000, and judgment was accordingly entered against him.

17. Thereupon Elizabeth Cleugh, claimant of the Beaconsfield, appealed from the decree against the steamer, and William Libbey, surety, appealed from the judgment against him, to the Court of Appeals, each assigning separate errors, and bringing up the matters aforesaid for review by such court. Meantime the decree against the Britannia for a moiety of the damages had been paid.

ment entered pursuant to the said order, and filed June 12, 1894.

Mr. J. Parker Kirlin for appellants.

Mr. William G. Choate and *Mr. Sidney Chubb* for appellee.

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

Stripped of its complication of libels and cross libels, this case is by no means difficult to understand. The Beaconsfield having been sunk in a collision with the Britannia, her master and owner, as bailees of her cargo, proceeded against the Britannia for damages done to such cargo. This they had a right to do. It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried. If a cargo be damaged by collision between two vessels, the owner may pursue both vessels, or either, or the owner of both or either; and in case he proceed against one only, and both are held in fault, he may recover his entire damages of the one sued. A person, who has suffered injury by the joint action of two or more wrongdoers, may have his remedy against all or either, subject, however, to the condition that satisfaction once obtained is a bar to any further proceeding. *The Atlas*, 93 U. S. 302, 315; *Lovejoy* v. *Murray*, 3 Wall. 1. Did the case rest here, there could be no doubt of the right of the libellant to recover the whole damage to the cargo of the Britannia, although, as owner of the Beaconsfield herself, Cleugh could recover only a moiety of his damage to the vessel, in case the collision were adjudged to be the mutual fault of both vessels.

By general admiralty rule 59, however, it is provided that "in a suit for damage by collision, if the claimant of any vessel proceeded against . . . shall, by petition, on oath, . . . showing fault or negligence in any other vessel con-

tributing to the same collision, and the particulars thereof, and that such other vessel, or any other party, ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against."

Pursuant to this rule, the French company, owner of the Britannia, filed its petition, alleging fault on the part of the Beaconsfield, and praying that she might be proceeded against in the same suit for such damage. This was done, and the litigation resulted in a decree of the District Court dividing the damages. A moiety of the decree was really against the libellants, as owner and master of the Beaconsfield, or rather against Libbey and Magoun, sureties, upon their stipulation.

Both parties appealed to the Circuit Court, which reversed the decree of the District Court, and adjudged the Britannia to be solely in fault. The owner of the Britannia appealed, but Cotton, master of the Beaconsfield, who in the meantime had become sole libellant, did not appeal from the decree dismissing his libel against his own vessel, for the obvious reason that his position as libellant of his own vessel for damage to her cargo was forced upon him by the act of the French company, and conflicted with his interest as representing the owner of the Beaconsfield. In this court, the decree of the Circuit Court was reversed, and the case remanded for further proceedings in conformity with the opinion. This opinion stated that the conclusion reached in this court was the same as that arrived at in the District Court, "and accordingly, we reverse the three decrees, and remand the causes to the Circuit Court, with directions to enter decrees in accordance with this opinion, that both vessels were in fault, and that the damages should be divided." 153 U. S. 144. The result of this was virtually a restoration of the decree of the District Court dividing the damages and awarding to Cotton, master of the Beaconsfield, and bailee of her cargo, a decree against the Beaconsfield for one-half the damages.

Opinion of the Court.

In this juncture, the proctors for Elizabeth Cleugh, administratrix, (who in the meantime had become owner of the Beaconsfield,) and Cotton, were instructed by their clients not to consent to any decree against the Beaconsfield, upon the ground that they, Cotton and Cleugh, had only consented to be libellants, as bailees of the cargo, against the Britannia, and they (the proctors) were forbidden to use their names for any decree against the Beaconsfield. Upon libellant's motion, Sanbern, the owner of the cargo, was then substituted as libellant in the place of Cotton, and a final decree entered against the Beaconsfield in the Circuit Court for a moiety of the damages, and the sureties ordered to show cause why execution should not issue against them.

We know of no reason why this decree should not have been granted. Sanbern had a right to suppose that his interests as owner of the cargo would be protected by Cotton, who was suing as his bailee. Had he sued in person, he could, and probably would, have libelled both vessels, and ought not to be prejudiced by the fact that Cotton, assuming to act for him, libelled but one. When the Beaconsfield was drawn into the litigation by the petition of the French company, and his own vessel thus made to respond to his libel, Cotton should have either withdrawn from the suit, and asked that Sanbern be substituted, or in his answer to the petition of the French company should at least have set up any defence he might have had against the owner of the cargo, arising under the bill of lading or from any other cause. If the attention of the court had then been drawn to the fact that Cotton was occupying inconsistent positions, it would doubtless have ordered the owner of the cargo to be substituted for him as libellant. Had no petition been filed against the Beaconsfield by the French company, the case would have stood quite differently, as there would have been no suit against the Beaconsfield upon which a decree could have been rendered. The failure of Cotton to call the attention of the court to the inconsistent positions occupied by him, or in answering the petition of the French company, to claim any defence arising upon the bill of lading or otherwise, was ample authority for

the court to enter a decree for a moiety of damages against the Beaconsfield.

The failure of Cotton, acting as bailee of the cargo, to appeal from the decree of the Circuit Court dismissing his libel as against his own vessel, is a technical defence which ought not to prejudice the owner of the cargo. If Sanbern had then been the libellant, and had failed to appeal from the decree dismissing his libel as against the Beaconsfield, possibly he might be held to be estopped; but he cannot be estopped by the failure of Cotton, who was acting in his own interest in not appealing. In this particular the case is much like that of *The Umbria*, 11 U. S. App. 612, in which a decree was entered in the court below in favor of the owners of the cargo of a vessel sunk in a collision with another vessel, which was there found to be solely in fault; but on appeal by the owner of such vessel, the owners of the cargo not appealing, both vessels were found in fault, and a decree was entered dividing the damages. The owners of the cargo, though not appealing, were held to be entitled to a decree against the owner of the sunken vessel to the same extent as though they had appealed. This case goes to the extent of holding that, even if Sanbern himself had been the libellant, his failure to appeal from the decree of the Circuit Court, dismissing his libel as against the Beaconsfield, would not estop him from recovering against her, if such decree were reversed by this court, and both vessels adjudged to be in fault.

It is insisted, however, that the sureties on the stipulation were released by the amendments to the libel, first, continuing it in the name of Cotton alone after the death of Cleugh, instead of in the name of Cotton and Cleugh, as administratrix; and again, in substituting Sanbern as owner of the cargo instead of the original libellants. Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety, and so long as the cause of action remains practically the same, a mere change in the name of the libellant, as by substituting the real party in interest for a nominal party, will not avoid the stipulation

as against the sureties; or, as it is stated in some cases, stipulations are to be interpreted as to the extent and limitation of responsibility created by them by the intention of the court which required them, and not by the intention of the parties who are bound by them. It was said by Judge Ware in *Lane* v. *Townsend*, 1 Ware, 286, 293: "If, therefore, there is an ambiguity in the terms of the stipulation, or the construction of them is doubtful, it is not the intention of the party for which we are to inquire, for the will of the party had nothing to do in determining its conditions; the doubt must be removed by consulting the intention of the court, or the law which required the stipulation and dictated its terms." The introduction, however, of a new cause of action is something which the sureties are not bound to contemplate, and it necessarily follows that they cannot be held. This was the ruling of this court in the recent case of *The Oregon*, *ante*, 186, in which, after a libel had been filed for a collision, and the usual stipulation to answer judgment given, other libels for damages arising from the same collision were filed without a rearrest of the vessel, and it was held that this was a new cause of action, and the court acquired no jurisdiction to render a judgment against the sureties. See also *The North Carolina*, 15 Pet. 40.

The law upon this subject is nowhere better stated than in *The Nied Elwin*, 1 Dodson, 50, cited and abstracted in *The Oregon*, in which Sir William Scott held that, in a case of prize, the substitution of the Crown for the captors did not release the sureties, but that they could not be held for a new cause of action, viz., the intervention of hostilities between Great Britain and Denmark, after the stipulation was given. In respect to the first question he says: "I cannot entirely accede to the position which has been laid down on behalf of the claimant, that these bonds are mere personal securities given to the individual captors; because, I think, they are given to the court as securities to abide the adjudication of all events at the time impending before it. This court is not in the habit of considering the effect of bonds precisely in the same limited way as they are viewed by the courts of com-

mon law. In those courts they are very properly construed as mere personal securities for the benefit of those parties to whom they are given. In this place they are subject to more enlarged considerations; they are here regarded as pledges or substitutes for the thing itself, in all points fairly in the adjudication before the court."

Even if this action had been at common law, it is not altogether certain that the amendment, substituting the name of the real party in interest for a nominal party, would not be good. *Chapman* v. *Barney*, 129 U. S. 677. The obligation of the sureties to respond for the damage done by the Beaconsfield to her cargo was neither increased nor diminished by a mere change in name of the party libellant.

All the questions certified are, therefore, answered in the affirmative.

ANDES *v.* ELY.

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

No. 295. Argued April 17, 18, 1895. — Decided May 20, 1895.

Lyons v. *Munson*, 99 U. S. 676, affirmed to the point that under c. 907 of the laws of New York for 1869, the county judge was the officer charged by law with the duty to decide whether municipal bonds could be legally issued in payment of subscriptions to railroad stock, and that his judgment was conclusive till reversed by a higher court.

Orleans v. *Platt*, 99 U. S. 684, affirmed to the point that such a judgment could not be collaterally attacked.

These judgments are not affected by *Craig* v. *Andes*, 93 N. Y. 405, as that case has since been held by the Court of Appeals of New York to have been a collusive case, and not to stand in the way of a reëxamination.

The attaching a condition to his signature by a petitioner under that statute of New York does not necessarily vitiate it.

One who contracts with a corporation as such cannot afterwards avoid the obligations so assumed by him on the ground that the supposed corporation was not one *de jure*.

If the county judge in a notice issued by him under that act fails to specify the place at which the hearing on the petition will be had, it will be presumed that his regular office is the place intended for it.

Statement of the Case.

When municipal bonds issued in payment of a subscription to railroad stock recite on their face that all necessary steps have been taken to justify their issue, the municipality is estopped from showing the contrary in an action brought by a *bona fide* holder to enforce them.

A town, under the laws of the State of New York, is a corporation, so far as respects the making of contracts, the right to sue, and the liability to be sued.

On September 1, 1871, the town of Andes, in the county of Delaware, State of New York, issued ninety-eight thousand dollars of its bonds in payment of a subscription to the capital stock of the Delhi and Middletown Railroad Company, and received in exchange therefor stock of said company to an equal amount. The recitals in the bonds were as follows:

"Issued by virtue of an act of the legislature of the State of New York entitled 'An act to authorize the formation of railroad corporations and to regulate the same,' passed April 2, 1850, and an act to amend an act entitled An act to authorize the formation of railroad corporations and to regulate the same, passed April 2, 1850, so as to permit municipal corporations to aid in the construction of railroads, passed May 18 (1869), 'sixty-nine, three-fifths being present."

"These acts authorize any city or town, except in the counties of New York, Kings, Erie, Greene, Albany, Westchester, Ontario, Seneca, Yates, Onondaga, and Niagara, to subscribe to the stock of any railroad corporation formed in pursuance of said acts, and these acts authorize the town of Andes to subscribe to the stock of the Delhi and Middletown Railroad Company and to issue town bonds in payment thereof, all necessary and legal proceedings having been taken and had under said acts."

The act of 1869, referred to in these recitals, (Laws of New York, 92d Sess., 1869, p. 2303,) contains these provisions:

"Sec. 1. Whenever a majority of the taxpayers of any municipal corporation in this State, whose names appear upon the last preceding tax list or assessment role of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge of the county in which such

corporation is situated, by petition verified by one of the petitioners setting forth that they are such a majority of taxpayers and represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, (but not to exceed twenty per centum of the whole amount of taxable property as shown by said tax list and assessment roll,) and invest the same or the proceeds thereof in the stock or bonds (as said petition may direct) of such railroad company in this State as may be named in said petition, it shall be the duty of said county judge to order that a notice shall be forthwith published in some newspaper in such county, or if there be no newspaper published in said county, then in some newspaper printed in an adjoining county, directed to whom it may concern, setting forth that, on a day therein named, which shall not be less than ten days nor more than thirty days from the date of such publication, he will proceed to take proof of the facts set forth in said petition as to the number of taxpayers joining in such petition, and as to the amount of taxable property represented by them."

"SEC. 2. It shall be the duty of the said judge at the time and place named in the said notice to proceed to take proof as to the said allegations in said petition; and if it shall appear satisfactorily to him that the said petitioners, or the said petitioners and such other taxpayers of said town as may then and there appear before him and express a desire to join as petitioners in said petition, do represent a majority of the taxpayers of said municipal corporation as shown by the last preceding tax list or assessment roll, and do represent a majority of the taxable property upon said list or roll, he shall so adjudge and determine and cause the same to be entered of record. And such judgment and the record thereof shall have the same force and effect as other judgments and records in courts of record in this State."

The bonds were issued by virtue of the following proceedings: On May 6, 1871, a petition of certain taxpayers of the town of Andes was presented to the county judge of Delaware County, upon which an order was entered and notice given,

as required by the statute, which order and notice were in these words:

"To whom it may concern:

"Notice is hereby given that a petition purporting to be signed by a majority of the taxpayers of the town of Andes, in the county of Delaware, representing a majority of the taxable property in the limits of said town, duly verified by one of the petitioners, has been filed in my office, and that I shall proceed on the 22d day of May next, at 1 o'clock P.M., to take proof of the facts set forth in said petition as to the number of taxpayers joining in such petition and as to the amount of taxable property represented by them.

"Given under my hand, at Delhi, in said county, on the 6th day of May, 1871.

"EDWIN D. WAGNER,
"*County Judge of Delaware County.*

"On reading and filing the annexed petition of a majority of the taxpayers of the town of Andes, Delaware County, representing a majority of the taxable property in the limits of said town, verified by James H. Davis, one of said petitioners, setting forth that they are such a majority of taxpayers and represent such a majority of the taxable property, and that they desire said town of Andes shall create and issue its bonds to the amount of ninety-eight thousand dollars and invest the same or the proceeds thereof in the stock of the Delhi and Middletown Railroad Company, an association formed in said county and State.

"Now, on motion of White and Jacobs, attorneys for said petitioners, [ordered] that a notice be forthwith published in the Andes Recorder, a newspaper published in said county, directed to whom it may concern, that on the 22d day of May, 1871, I shall proceed to take proof of the facts set forth in said petition as to the number of taxpayers joining in such petition and as to the amount of the taxable property represented by them.

"Delhi, May 6th, 1871.

"EDWIN D. WAGNER,
"*County Judge of Delaware County.*"

Due publication thereof was made. The petition referred to was upon nineteen separate sheets of paper, each of them containing the petition in full and each signed by different taxpayers. Sixteen of them were unconditional; to two of them was attached a condition, "that said road is located by Fish Lake and Shavertown;" and one of them had this proviso, "above conditions (consent) shall be null and void unless said road shall be located by Shavertown and Lumberville." On the day named in the notice, to wit, May 22, 1871, two orders were entered, the first, after stating the presentation of the petition, the order for notice, proof of publication of notice and of the allegations in the petition, ended with this adjudication:

"I do hereby adjudge and determine that said petitioners do represent a majority of the taxpayers of said town of Andes, Delaware County, as shown by the last preceding tax list or assessment roll, and do represent a majority of the taxable property upon said list or roll, and do hereby adjudge and determine that the same be entered of record.

"Given under my hand, at Delhi, in said county, on the 22d day of May, 1871.

"EDWIN D. WAGNER,
"*County Judge of the County of Delaware.*"

The second appointed the three commissioners required by the act to carry out its provisions. Subsequently, one of the commissioners having resigned, another was appointed in his place, and the three thus appointed acted on behalf of the town in issuing the bonds.

From the time of their issue, down to and including September 1, 1881, the town regularly paid the interest as it fell due upon the bonds, and also paid and retired $3000 of the principal thereof. Thereafter, some question having arisen as to the validity of the bonds, the town defaulted in payment of further interest, and on December 30, 1889, the defendant in error brought this action in the Circuit Court of the United States for the Northern District of New York on coupons cut from such bonds. Answer having been filed, the case was

tried December 31, 1890, and the jury, by direction of the court, returned a verdict in favor of the plaintiff for the sum of $32,324.80. To reverse this judgment the defendant sued out this writ of error.

Mr. W. H. Johnson for plaintiff in error.

Mr. John B. Gleason for defendant in error.

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

The act of 1869 has been heretofore presented to this court for consideration, and the effect of a judgment of a county judge determined. *Orleans* v. *Platt*, 99 U. S. 676; *Lyons* v. *Munson*, 99 U. S. 684. In the former case it was said:

"The county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court."

And in the latter:

"The county judge unquestionably had jurisdiction to decide upon the application made by the taxpayers. His judgment until reversed was final. If there were errors the proceedings should have been brought before a higher court for review by a writ of *certiorari*, and, if need be, the issuing and circulation of the bonds should have been enjoined, subject to the final result of the litigation. The judgment rendered can no more be collaterally attacked in this case than could any other judgment of a court of competent jurisdiction rendered with the parties, as in this case, properly before it."

It is objected that since those decisions the Court of Appeals of the State of New York has pronounced the very judgment on the strength of which these bonds were issued invalid. *Craig* v. *Town of Andes*, 93 N. Y. 405. In that case the Court of Appeals, by a bare majority, held that the petition was fatally defective because it was, as to some of the petitioners, conditional, and that, by reason thereof, it warranted no action by the county judge. But in the subsequent case of *Calhoun* v. *Millard*, 121 N. Y. 69, it was developed that *Craig*

v. *Town of Andes* was a collusive action, the town owning the coupons sued on and paying for the services of counsel on both sides. And it was held that the decision so obtained could not be considered as an adjudication binding the bondholders in any subsequent controversy between them and the town, the court saying: "We fully assent to the claim of the counsel for the bondholders, that an adjudication obtained under such circumstances ought not to stand in the way of a re-examination by the court of the grounds upon which it proceeded."

It is true that the court did not reëxamine the proposition affirmed in the former opinion, but, after thus indicating that the question was open for further consideration, disposed of the case upon other grounds. The question must, therefore, be considered an open one in the courts of New York, and there is nothing in the decisions of those courts to compel a reëxamination by us of our prior rulings.

Several objections, however, to the validity of this judgment are called to our attention, and require notice. The first and principal one arises out of the fact, considered vital by the Court of Appeals in the case of *Craig* v. *The Town of Andes*, *supra*, that the petition was, as to some of the petitioners, conditional. It is admitted that if the names of the conditional petitioners were stricken from the list, the remainder would not constitute a majority of the taxpayers, or represent a majority of the taxable property. The argument is that a conditional petition amounts to nothing. The unconditional petitioners were neither a majority of the taxpayers nor representing a majority of the taxable property. The statutory petition was never filed. The condition upon which action by the county judge could legally be had did not exist. He, therefore, never acquired any jurisdiction, and his judgment was *coram non judice* and void.

We are unable to assent to this contention. The petition as presented alleged that the petitioners were a majority of the taxpayers, and represented a majority of the taxable property. It thus stated the facts necessary to invoke the action of the county judge. It nowhere disclosed the amount of the

taxable property in the town, or the number of the taxpayers, and nowhere stated how much of such taxable property belonged to the petitioners, either separately or altogether. There was but a single verification, and that at the bottom of one of the nineteen sheets upon which the petition was written. That sheet was signed by over forty names, and signed unconditionally. It is fair, however, to regard the nineteen sheets, though in form separate, as really constituting but one petition, and the single verification, which was made on May 6, 1871, the day of presentation to the judge, as applicable to such petition as a whole. Otherwise this single verified sheet was a perfect petition, open to no objection and compelling action by the county judge; and if this case is to turn on narrow grounds then each sheet may be considered a separate petition, and one being technically beyond objection, the others may be ignored, and the jurisdiction of the county judge rested upon that one.

But we are not disposed to rest our conclusion upon this narrow ground. There was but the one petition, signed by about 200 parties, of whom 50 attached a condition to their signatures. Was that sufficient to defeat the jurisdiction? The conditions named were the location of the road by Fish Lake, Shavertown, and Lumberville. The various sheets composing the petition were all dated November 23, 1870, but the verification and the filing were May 6, 1871. Intermediate these two dates, and on March 4, 1871, the railroad company filed in the office of the clerk of Delaware County a map of the route selected by it, certified by its president and chief engineer to be "a correct map and profile of the route intended to be adopted by said company for their railroad." An examination of the route thus located shows that it passes by the three places named, so that at the time the petition was filed the conditions had been performed by the railroad company. Is it not fair to hold that the petition was at the time of its presentation an unconditional petition on the part of all the signers? There was in fact no limitation or restriction on the express request of all the petitioners for the issue of the bonds. At least, when such a petition was presented,

it was within the competency of the county judge to hear and determine whether or no the conditions named had been performed. The petition called for some action. The duty of judicial inquiry arose, and there can be no judicial inquiry without jurisdiction. He was compelled to examine and determine whether the verification was in proper form, whether there were in fact the signatures of any petitioners on the paper, whether any railroad company was named, and whether there was an application for the issue of bonds, and if there were any limitation or qualification to a signature, whether such limitation or qualification affected substantially the merits of the application. If he found a condition of a substantial character he was then called upon to ascertain and decide whether the condition had been waived, or so far performed since the signature as to cease to be any limitation upon the petition. An error in his rulings upon any of these matters did not oust him of jurisdiction. This, it must be borne in mind, is not the case of a total failure in respect to any particular matter required by the statute to be stated in the petition.

But we may go further, and hold that attaching a condition to a petition does not always and necessarily vitiate it. A subscription by a municipality to the stock of a railroad company stands upon a different footing from one made by an individual. In the latter case it is a mere transaction for purposes of pecuniary gain, and there is no limitation on the right of the individual to subscribe to the stock of any railroad corporation, no matter where such corporation proposes to build its road. But a municipal subscription requires something more than the mere prospect of pecuniary gain. It can be upheld only on the theory that by the construction of the road some public benefit to the municipality is secured, and that public benefit may justify, and sometimes require, the insertion in the subscription of a condition in respect to the matter of location. A railroad corporation naming the termini of its road has large latitude in respect to the location of the intermediate route. One location may be so far from a particular town between the termini as to make indefensible a subscription by such town in aid of the construction,

and to incorporate a condition in the subscription which makes the location one of public benefit to the town cannot be held absolutely void. Suppose the entire petition had been for the issue of bonds on condition that the road should be located through the town of Andes, could it be adjudged that such a petition was a nullity and laid no foundation for action by the county judge? We think not.

While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to this case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the county judge, the bonds were issued, more than $100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity. We think there is eminent wisdom and justice in the observations of the Court of Appeals in the case of *Calhoun* v. *Millard*, *supra:*

"The town and the taxpayers permitted the bonds to be dealt with and taken by savings banks and others for nearly ten years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition, encouraged investment therein as safe and valid securities. The bonds, resting on the adjudication of the county judge, were apparently valid. The legislature has still the power to ratify them and make them valid obligations of the town. *Williams* v. *Town of Duanesburgh*, 66 N. Y. 129; *Horton* v. *Town of Thompson*, 71 N. Y 513; *Rogers* v. *Stephens*, 86 N. Y. 623. They are now in the hands of *bona fide* holders, that is, of persons who have paid value for them without notice. . . . The denial of relief in this case may result practi-

cally in the enforcement of the bonds in question, and also of other town bonds issued and held under similar circumstances. But in contrasting the relative conduct and situation of the town and the taxpayers on the one side, and the purchasers of bonds on the other, we cannot say that such a result will be repugnant to any principle of justice or equity."

Again, it is objected that there was no legal incorporation of the Delhi and Middletown Railroad Company. The statutory provisions of the State of New York in respect to the formation of railroad corporations are found in chapter 140, Laws of 1850; Rev. Stat. N. Y. 6th ed. vol. 2, p. 519. The record shows that the articles of association, duly verified, were filed and recorded in the office of the Secretary of State, as required by section 2 of the act. The objection is that the statute requires that there shall be subscribed at least $1000 of stock for every mile of railroad proposed to be laid, and that, as appears from the articles, certain subscriptions were made on condition that the road was located through Lumberville, and others, provided the road went to Shavertown. These subscriptions being conditional it is claimed amount to nothing, and as the unconditional subscriptions are less than $1000 per mile of the proposed road, it is insisted that the attempted incorporation was a failure. We deem it unnecessary to consider this question, for it is familiar law that one who contracts with a corporation as such cannot afterwards avoid the obligations assumed by such contract on the ground that the supposed corporation was not one *de jure*. *Leavenworth* v. *Barnes*, 94 U. S. 70; *Commissioners* v. *Bolles*, 94 U. S. 104; *Casey* v. *Galli*, 94 U. S. 673; *Chubb* v. *Upton*, 95 U. S. 665. Further, after the contract had been made, the bonds issued, and the stock received by the town, the legislature of the State of New York passed, in two successive years, acts authorizing the town to sell and dispose of such stock. At a special town meeting, held after the passage of the first act, the town voted not to sell, and at a meeting held after the second act it voted to sell. These two acts of the legislature were distinct recognitions of the existence of the corporation known as the Delhi and Middletown Railroad Company,

whose stock, held by the town, the latter was permitted to sell. *Comanche County* v. *Lewis*, 133 U. S. 198; *State ex rel.* v. *Commissioners &c.*, 12 Kansas, 426; *State* v. *Stevens*, 21 Kansas 210; *State* v. *Hamilton*, 40 Kansas 323. There is no evidence of any challenge on the part of the State of the validity of the corporate franchises assumed to exist, and exercised by the company. In view of these considerations it is impossible now to recognize as valid the claim that by reason of the supposed defect in the original incorporation all the acts of the town, in respect to the issue of bonds, the subscription to and the receiving of stock, were void.

Again, it is objected that the proceedings before the county judge were absolutely void on the ground that the notice does not specify the place at which the hearing on the petition is to be had. It is enough to say in reply to this objection that where a notice fails to name any other place it will be presumed that the place intended is the regular office of the county judge. No particular specification is required unless the hearing is to be had at some place other than that at which his judicial work is customarily done. The statute under which these proceedings were had recognizes this. The section which provides for notice prescribes that the county judge shall order the publication of a notice "setting forth that on a day therein named . . . he will proceed to take proof," etc. Nothing is said in respect to naming a place for the hearing, and yet the next section commences, "it shall be the duty of the said judge at the time and place named in the said notice," etc. Any seeming discrepancy between these sections is removed by the consideration that in the absence of other specification the law writes into the notice the office of the county judge as the place of hearing.

A further objection is that the county judge was disqualified on the ground that he was at the time a stockholder in the Delhi and Middletown Railroad Company, and this provision of the Revised Statutes of the State of New York is cited, "That no judge of any court can sit as such in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of

consanguinity or affinity to either of the parties." The name of the county judge appears on the articles of association, filed with the Secretary of State, as a subscriber to one share of stock; but his testimony, which is not contradicted, is as follows:

"I signed for one share of stock, and the next day I stated to the person with whom I took the stock that I would not take it, and he agreed to take my name off. I don't know who it was, and I can't tell as I signed my name or not. I know I saw the proper person and cancelled my agreement to take the stock, and I never took it; it was agreed that I should not. I think it was the same person I saw first when I made the agreement. The bonding proceedings of the town of Andes were had before me as county judge. The talk as to my taking stock was some time before the proceedings were had before me. The certificate of stock was never tendered or offered to me."

Obviously he was not a party interested, and therefore there is no need to inquire whether, if interested, the fact could now be shown in a collateral attack so as to avoid the judgment.

But further, in view of the recitals in the bonds, are these questions open for inquiry? Ample authority was given by the statutes of the State referred to. Whether the various steps were taken which in this particular case justified the issue of the bonds was a question of fact; and when the bonds on their face recite that those steps have been taken it is the settled rule of this court that in an action brought by a *bona fide* holder the municipality is estopped from showing the contrary. See the many cases commencing with *Knox County* v. *Aspinwall*, 21 How. 539, and ending with *Citizens' Savings Association* v. *Perry County*, 156 U. S. 692. It may be said that those decisions are not wholly in point, inasmuch as these bonds were signed, not by regular officers, but by commissioners specially appointed; and that before a recital made by them can be held to conclude the town it must appear that they were duly appointed, and thus had authority to act. Doubtless this distinction is not without significance. Yet

they were acting commissioners, and their authority was recognized, for each bond was registered in the office of the county clerk, and attested by the signature of the county clerk with the seal of the county; and if we go back of that to the records of the county judge, the appointing power, there appears there a separate order, in due form, appointing them commissioners, which order recites a prior adjudication of all the essential facts. Giving full force to the distinction which exists between the action of general and special officers, there must be, even in respect to the latter, some point in the line of inquiry back of which a party dealing in bonds of a municipality is not bound to go in his investigations as to their authority to represent the municipality, and that point it would seem was reached when there is found an appointment in due form made by the appointing tribunal named in the statute. However, as our examination of all the proceedings in fact had in respect to the issue of these bonds satisfies us of their validity, it is unnecessary to rely upon the mere recitals.

Finally, the jurisdiction of the trial court is challenged on the ground that under the act of Congress of March 3, 1887, c. 373, 24 Stat. 552, as amended by the act of August 13, 1888, c. 866, 25 Stat. 433, a subsequent holder of negotiable paper payable to bearer cannot invoke the jurisdiction of the Federal courts unless the original holder was also entitled to sue therein. But the statute excepts from this provision instruments made by a corporation, and a town under the laws of the State of New York is a corporation, so far as respects the making of contracts, the right to sue and the liability to be sued. *Lorillard* v. *Monroe*, 11 N. Y. 392.

These are the only questions which are of sufficient importance to require notice. We see no errors in the rulings of the Circuit Court, and its judgment is, therefore,

Affirmed.

UNION PACIFIC RAILWAY COMPANY *v.* HARRIS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 896. Submitted April 15, 1895. — Decided May 20, 1895.

Writs of error to Circuit Courts of Appeals in actions for damages for negligence of railroad coporations are allowed when the corporations are chartered under the laws of the United States.

In an action against a railway company to recover for injuries caused by a collision with a car loaded with coal for a coal company which had escaped from the side track and run upon the main track, it is *held*, in view of the evidence, to be no error to charge that the railway company is bound to keep its track clear from obstructions, and to see that the cars which it uses on side tracks are secured in place, so that they will not come upon the track to overthrow any train that may come along.

When in such an action the defendant sets up a written release of all claims for damages signed by plaintiff, and the plaintiff, not denying its execution, sets up that it was signed by him in ignorance of its contents, at a time when he was under great suffering from his injuries, and in a state approaching to unconsciousness, caused by his injuries and by the use of morphine, the question is one for the jury, under proper instructions from the court; and in this case the instructions were proper.

This was an action brought in the Circuit Court of the United States for the District of Colorado by Robert E. Harris against the Union Pacific Railway Company to recover for personal injuries received by him while he was a passenger on defendant's train. Plaintiff recovered judgment in the Circuit Court and the defendant sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit, by which the judgment was affirmed. 63 Fed. Rep. 800. A writ of error from this court was allowed and the cause having been docketed, motions to dismiss or affirm were submitted.

Mr. George G. Vest for the motions.

Mr. William Teller, *Mr. Samuel Shellabarger* and *Mr. Jeremiah M. Wilson* opposing.

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

The complaint alleged Harris to be "a citizen of the State of Colorado," and complained of "the Union Pacific Railway Company, defendant, which was heretofore and now is duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the city of Omaha and State of Nebraska, and is now and was at the time and times hereinafter stated, a citizen of the State of Nebraska." The motion to dismiss is made upon the ground that the judgment of the Circuit Court of Appeals was final, inasmuch as the jurisdiction was dependent upon the opposite parties being citizens of different States. As, however, the judgments of the Circuit Courts of Appeals are final in this class of cases only when 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," plaintiff in error insists that this judgment was not final, since the jurisdiction depended not solely on diverse citizenship, but also upon the fact that plaintiff in error was a Federal corporation.

In *Northern Pacific Railroad Company* v. *Amato*, 144 U. S. 465, a suit was brought in the Supreme Court of New York against the railroad company to recover damages for personal injuries sustained by the plaintiff, and was removed by the defendant into the Circuit Court of the United States for the Southern District of New York on the ground that it arose under an act of Congress in that the defendant was a corporation created thereby, and a writ of error to the Circuit Court of Appeals for the Second Circuit was sustained. In that case the citizenship of the plaintiff was not mentioned in the complaint or in the petition for removal, and the petition stated that the action arose under an act of Congress. It was accordingly held that the judgment of the Circuit Court of Appeals was not made final by section 6 of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826. In the present case jurisdiction was invoked on the ground of diverse citizenship, and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental, and, further,

that as the case did not involve the validity or construction of the charter of plaintiff in error, no Federal question arose. It is not for us to inquire why writs of error to Circuit Courts of Appeals in actions for damages for negligence of railroad corporations should be allowed simply because the corporations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language. Nevertheless, as plaintiff below appears to have really proceeded on the ground of diverse citizenship, we think there was color for the motion to dismiss although, as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it. But this brings us to the motion to affirm, which, as we do not need further argument, we proceed to dispose of.

The complaint alleged that plaintiff on July 30, 1892, was a passenger for hire upon one of defendant's coaches in a train with a locomotive, being operated and conducted by defendant between the city of Georgetown and the city of Denver, defendant being by the terms of the contract of passage bound to deliver plaintiff safely at Denver, and having undertaken to carry and convey him in safety to that city, and to use due care and diligence thereabout; but that defendant, in disregard of its undertaking and promise and its duty in that behalf, carelessly and negligently ran one or more of its freight cars out on one of its sidings, known as Silver Age Mill siding, and negligently left the same insecure and unsafe, and in such a position and condition as to interfere with the passage of the train of cars, upon which plaintiff had passage, along the main line of defendant's track, so that when the train upon which plaintiff was a passenger came along it ran into this freight car and the injuries complained of were inflicted. This was supported by the evidence, from which it also appeared that the freight car in question was loaded for the Silver Age Mill Company with coal and was unloaded by that company's men.

The defendant in its answer denied all negligence, but admitted "that it had standing upon its side track, at about the

place mentioned in said complaint, one or more freight cars; but denies that the said freight cars were left insecure or unsafe, or in such a position as to interfere with the passage of the train of cars upon which this plaintiff was riding." The answer contained no allegation or suggestion that any other company had any control over the side track or the freight cars, or that any other company was in any manner responsible for the negligence which resulted in the collision.

The Circuit Court charged the jury that "there is no room for controversy, notwithstanding the fact that this car was delivered to the mining company filled with coal, and for the use of the mining company, and that it would seem from the evidence that after unloading the car, it was not sufficiently fastened in respect of the brakes; perhaps it was necessary to block the wheels also in such a place as that; but that whatever was necessary to keep it securely in place upon the side track was not done, and it moved down upon the track so as to overthrow the cars in the train which came down with the plaintiff. The act of negligence of the servants of the mining company is to be ascribed to the defendant. In other words, the railway company as to its passengers is bound to keep its track clear from obstructions of this kind; to see that the cars which it uses on side tracks are secured in place so that they will not come upon the track to overthrow any train that may come along; and there seems to be no question but that the car in which plaintiff was riding was overthrown by the freight car coming down from the switch or side track and on to the main track in collision with the cars of the train which carried the plaintiff."

To the giving of these instructions defendant excepted. But we agree with the Circuit Court of Appeals that on the evidence and under the pleadings there was no reversible error therein; and that this is so as to the motion at the conclusion of the evidence by defendant for an instruction that the defendant was not liable, and that the Silver Age Milling Company was, if there were a liability at all. Indeed, it is stated by the Circuit Court of Appeals that it was conceded on argument that defendant's negligence was sufficiently established.

The stress of the contention of the railroad company is thrown, however, upon another branch of the case. The complaint was filed November 26, 1892, and the answer January 11, 1893. On July 8, 1893, the defendant below filed a supplemental answer setting up a written release in bar of the action, executed four days after the accident, to which supplemental answer a replication was filed July 11, 1893, averring as ground of avoidance of such release that plaintiff's mind at the time of its execution was so enfeebled by opiates, shock, and pain that he was unable to enter into contractual relations; that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought; and that the release was obtained through misrepresentation and fraud. The trial commenced July 14, and was concluded, by the rendition of the verdict, on July 17, 1893. Upon the issues joined, the validity of the release was a matter to be left to the jury. And although the bill of exceptions does not purport to contain all the evidence, it appears therefrom that there was evidence tending to sustain the replication. Certain exceptions were taken by plaintiff in error in relation to the admission of evidence over objection, and these were dismissed by the Circuit Court of Appeals with this observation: "A separate statement and consideration of these exceptions is not necessary as none of them is of any general importance. They have all been considered carefully, and we are satisfied none of them has any merit." We are of the same opinion, but will refer by way of illustration to two of the rulings complained of. One of the questions in the case was whether Harris was bound to have read the release at the time he signed it, and that involved considering whether he was able to do so. He was asked upon the trial whether he could read any part of the release without spectacles, it being contended that he did not have his spectacles at the time the claim agent of the railroad company interviewed him in his bed just after the accident. The witness testified that he could not read the fine print with spectacles nor the large print without; that his eyesight was not as good as it was when the release was presented to him; but that

at that time he could not have read a word of it without his glasses. Again he was asked: "Were you at the time of signing that conscious that you were signing any agreement other than for your expenses of sickness and loss of time for two weeks?" and he answered: "That is what he told me; that is just what he told me;" and that the release was not read to him by the claim agent. We do not think that any ruling in reference to this testimony can be held as substantially incorrect. The word "conscious" related to the understanding of the witness at the time, and the question and answer are to be taken with the other testimony and the instructions in the case; and we find nothing in these particulars calculated to mislead the jury or to be so prejudicial to the defendant as to justify complaint.

The railway company moved that the jury be instructed that upon the evidence the release was a complete bar to the action, which instruction the court declined to give and defendant excepted; but, as there was evidence tending to sustain plaintiff's contention in relation to the validity of the release, the instruction was properly refused. The court charged the jury in this regard in substance as follows: "A release of this kind is of the highest significance in general when it appears that the situation and circumstances of the parties show that it has been entered into with an understanding of the rights of the parties respectively, and with intent to include all matters of difference between them;" and "that when the parties are upon an equal footing, and there seems to be no reason to believe that any mistake has been made in respect to it, that neither party is at liberty to deny the force and effect of what it may contain; he is not at liberty to say that he did not read it or that he did not understand it;" but that "when it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind that makes it probable that he acted without deliberation, without an understanding of the act with which he is charged, the instrument itself may be disregarded;" that in this instance, plaintiff having been injured July 30, and, while he was lying in bed apparently quite ill, "was approached by an agent of

the defendant company and was induced to sign the release, which has been put in evidence before you;" and upon that "it becomes a question in the first instance whether he was in a condition to know precisely what he was doing. He seems to have had in some degree and to some extent the possession of his faculties; he had used whiskey at the time of the accident or shortly afterwards, and morphine had been administered to him on several occasions. There is a question as to the effect of the accident, how far he was disabled by it, and as to the effect of the drug and of the whiskey, perhaps, on his mind; whether he was then in a condition to deal with such a subject as was presented to him. If he was not, and you can say that his faculties were in such a state that he could not comprehend what he was doing, and the force and effect of the paper which he signed, you may say he is not to be charged with it;" "and aside from that, if there was a misunderstanding of the facts, whether the facts were wilfully misstated by the agent of the railway company or not is not a very material question; but the question is whether the facts were understood by both parties;" that upon that the agent to the railroad company said "that he only spoke in a general way of making a settlement," and "his language was such as to comprehend all matters that were in difference between them, while plaintiff says that he was not asked to consider nor did he consider the question of the liability of the railroad company to him for the injury which he had received;" and "that in reckoning up what should be paid to him, they considered only the question in respect to his illness, his doctor's bill and the like, and the loss of time for two weeks;" and if the jury accepted "plaintiff's account of the negotiation between them as against that of the agent of the railway company, then it would appear that the plaintiff, at least, did not understand the subject-matter of the negotiation, and as to what is expressed in the release he says that he did not read it and could not read it without his spectacles, and that he did not have them at the time this paper was given to him."

The court further instructed the jury that "under some circumstances a man in full health and accustomed to the

transaction of business executing such a paper as that, would not be at liberty to deny his knowledge of its contents; but with one in the situation of plaintiff, lying on his bed and somewhat prostrated by the shock which occurred at the time of the accident, he may be excused from reading it if he did not in fact read it;" "he may be excused because he was in some pain, misery, and perhaps, to some extent under the influence of the morphine which he had taken;" and further that "if he understood what he was doing and understood that he was making a settlement of the whole business, the entire matter between himself and the railroad company, then he is bound by the settlement without regard to the amount of money which he received. . . . If the settlement was made with a full understanding of the rights of the parties, the plaintiff then being in a state of health to enable him to transact such business, and upon that you say that the settlement is binding upon the plaintiff, he is concluded of this action, and you need make no further inquiry in respect of it; that is to say, his action cannot be maintained." And the court further charged the jury that if they made an allowance to the plaintiff they should deduct from it what he had received.

To various parts of the charge defendant excepted, but we deem it unnecessary to go over these exceptions in detail, as the charge as a whole was in accordance with the great weight of authority upon the subject, and was correct upon the issues joined and the evidence thereon. *Chicago, Rock Island & Pac. Railway* v. *Lewis*, 109 Illinois, 120; *Bliss* v. *New York Central & Hudson River Railroad*, 160 Mass. 447; *Mullen* v. *Old Colony Railroad*, 127 Mass. 86; *Chicago, Rock Island & Pacific Railroad* v. *Doyle*, 18 Kansas, 58; *Lusted* v. *Chicago & Northwestern Railroad*, 71 Wisconsin, 391; *Dixon* v. *Brooklyn City & Newton Railroad*, 100 N. Y. 170; *Illinois Central Railroad* v. *Welch*, 52 Illinois, 183; *Mateer* v. *Missouri Pacific Railway*, 105 Missouri, 320; *Stone* v. *Chicago & West Mich. Railroad*, 66 Michigan, 76; *Smith* v. *Occidental & Oriental Steamship Co.*, 99 California, 462.

Judgment affirmed.

Counsel for Defendant in Error.

BOSTON AND ALBANY RAILROAD COMPANY *v.* O'REILLY.

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

No. 197. Submitted March 15, 1895. — Decided May 20, 1895.

Where a case has gone to a hearing, testimony been admitted to a jury under objection but without stating any reasons for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state for the first time a reason for that objection which would make it good.

Evidence offered by the plaintiff to show the profits of his business and admitted under objections is *held* not to be such as to enable the jury to intelligently perform its duty of finding the earnings of the plaintiff after allowing for interest on capital invested, and for the energy and skill of his partners.

Other evidence, admitted under objections, *held* to be too uncertain to be made the basis for damages, and to have probably worked substantial injury to the rights of the defendant.

While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting.

In October, 1890, Patrick J. O'Reilly, in the Circuit Court of the United States for the District of Massachusetts, brought an action against the Boston and Albany Railroad Company for personal injuries received while riding as a passenger on one of that company's trains.

The declaration contained three counts, alleging negligence on the part of the company in respect to the condition of a certain truck attached to the tender of the engine which drew the train, in respect to the journal of the tender, and in respect to the condition of the defendant's track, rails, and roadbed. The defendant's answer consisted of a general denial. The trial resulted in a verdict for the sum of $15,000, and to the judgment entered for that amount a writ of error was sued out of this court.

Mr. Samuel Hoar for plaintiff in error.

Mr. Charles W. Needham, *Mr. John B. Cotton*, and *Mr. Frank L. Washburn* for defendant in error.

Opinion of the Court.

Mr. Justice Shiras delivered the opinion of the court.

The first three specifications of error complain of the action of the court in permitting the plaintiff O'Reilly to testify as to what he had made out of his business for several years before the accident, and to give an estimate of how much he made annually by his own individual exertion; and also, in view of the fact that he had sold the business, good will, and everything connected with the business before the accident occurred, to testify that when he so sold out he did it with the intention of continuing the business.

The first objection urged to the admission of this evidence is, that it went to show special damage caused to the plaintiff by the loss and interruption of his business, whereas there were no allegations of such special damage contained in the declaration. It does not appear, however, that objection was specifically made to the evidence on the ground that the declaration contained no allegations of the special damage sought to be shown; and it is perfectly well settled in this court that where a case has gone to a hearing, testimony been admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state, for the first time, a reason for that objection which would make it good. *Roberts* v. *Graham*, 6 Wall. 578; *Patrick* v. *Graham*, 132 U. S. 627.

Objections were made in the present case to the admission of the evidence in question, but such objections did not, in our judgment, apprise the court of the specific ground of objection now urged, and hence did not afford an opportunity of permitting an amendment of the declaration, upon such terms as the interests of justice seem to require.

If, then, this were the only ground on which we are asked to proceed in disposing of these assignments of errors, we should not feel disposed to disturb the judgment. But when we come to examine the objections that were sufficiently taken to the evidence in question, we find error so serious as to compel a reversal.

The plaintiff was permitted to make an estimate of the annual value of his labor and the jury to find a verdict, based upon the business of a steam thresher in which the plaintiff at one time had an interest, but which he had parted with before he met his injuries. Even if his interest had continued as an existing one till the time of the accident, and even if there had been an allegation of special damage in the declaration, there was no evidence sufficient to enable the jury to measure the amount of said special damage. The plaintiff testified that he had partners, who divided with him, but did not state in what proportions. The amounts alleged to have been earned in the business fluctuated widely. There was no allowance made for the cost and wear of the machinery. The duty of the jury to find the wages or earnings of the plaintiff, after allowing for the interest on the capital invested and for the energy and skill of the partners, could not, in the absence of evidence on those topics, have been intelligently performed.

It is said that the court made no ruling that the plaintiff might prove the profits of his business, and in the bill of exceptions it is so stated. Still, the fact remains that the evidence was admitted, although objected to as incompetent, because the profits of the business, as it was proposed to show them, depended upon so many outside matters, and were too remote.

It further appears that, after having been permitted to put in an estimate of what his personal earnings were from participation in the threshing business, and after it appeared that such business had been brought to a close by the sale of the machine and the good will the fall before the accident, the plaintiff was permitted, under objection, to testify that when he sold out he did it with an intention of resuming the business. To resume such a business would, of course, have required the purchase of another plant, and it is equally obvious that the fate of a new venture was merely conjectural. Such evidence is too uncertain to be made the basis of a verdict for damages, and may well be believed to have worked substantial injury to the rights of the defendant. *Richmond & Danville Railroad* v. *Elliott*, 149 U. S. 266.

The fourth, eighth, and ninth specifications allege error in

the court permitting the nurse and physician to testify that the plaintiff told them, some time after the accident, that a piece of nail had come out of his knee, and in permitting the physician to point out upon the plaintiff's knee the scar of the hole out of which the plaintiff had told him the nail had come. These matters could not fairly be regarded as part of the *res gestæ* but were mere hearsay. *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99.

If the record disclosed no other error, the admission of this evidence might have been passed by as immaterial. Still, it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting. *Deery* v. *Cray*, 5 Wall. 795, 807; *Gilmer* v. *Higley*, 110 U. S. 47.

We do not deem it necessary to notice other exceptions taken to the rulings of the court below.

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

PARK BANK *v.* REMSEN.

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

No. 316. Argued April 29, 1895. — Decided May 20, 1895.

The rulings of the Court of Appeals of New York, unanimously made, that the warehouse company did not become indebted to the plaintiff by reason of its endorsement of the notes which form the basis of this action, as the company was an accommodation endorser, of which fact the plaintiff was chargeable with notice, and that the liability of Remsen, as trustee of the company, was not primary, but secondary and dependent altogether upon a statute of that State of a penal character, ought to be recognized in every court as, at least, most persuasive, although the case in which the ruling was made has not yet gone to final judgment.

Statement of the Case.

This court has held in *Chase* v. *Curtis*, 113 U. S. 452, that that statute of New York is penal in character, and must be construed with strictness against those sought to be subjected to its liabilities.

In the absence of any controlling decision this court is unwilling to hold that a provision of a general statute imposing a personal liability upon trustees or other officers of a corporation is incorporated into a special charter by a clause therein declaring that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under such general act.

This case was tried by the court without a jury, and from the findings the following facts appear: The German-American Mutual Warehousing and Security Company (hereafter called the warehouse company) was a corporation of the State of New York, incorporated by c. 701, Laws N. Y. 1872, vol. 2, p. 1673. Section 9 of this chapter provides that "the corporation hereby created shall possess all the general powers and privileges, and be subject to all the liabilities conferred and imposed upon corporations organized under and in pursuance of an act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed February seventeenth, eighteen hundred and forty-eight, and the several acts extending and amending the same." It never made or published any of the reports required by section 12 of the act of 1848, which directed every company within the first twenty days of each year to make and publish in some newspaper a report signed by the president and a majority of the trustees, and verified by the oath of the president or secretary, and showing the total capital stock, the proportion actually paid in, and the amount of existing debts. Robert Squires was president, and William Remsen, the defendants' testator, a director and trustee of the company. Squires, Taylor & Co. were a firm doing business in the city of New York. It was composed of Robert C. Squires, (a son of the president of the warehouse company,) Charles E. Taylor, and Burnett Forbes. In 1878 this firm made two promissory notes, each to the order of themselves, which notes were endorsed by themselves in blank, and, after such endorsement, were also endorsed by the warehouse com-

pany, the endorsement being made by the president of the company and without the knowledge of Remsen or the other directors. These notes were discounted by the plaintiff. They were not paid at maturity, and, notice having been duly given, the plaintiff commenced an action in the Superior Court of the city of New York against the warehouse company as endorser. It recovered a judgment against the company, which was affirmed by the general term. 53 Jones & Spencer, 367. The company appealed to the Court of Appeals of the State, and on October 8, 1889, that court reversed the judgment. 116 N. Y. 281. It held that the warehouse company was not liable on the ground that it was an accommodation endorser, and that the plaintiff was chargeable with notice of the character of the endorsement, because the notes were presented for discount by the makers, who received the avails thereof.

Section 12 of the act of 1848, c. 12, hereinbefore referred to, provides that, for failure to file the reports specified therein, the trustees "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." N. Y. Rev. Stats. 8th ed. vol. 3, p. 1957.

Mr. Robert D. Murray for plaintiff in error. *Mr. Francis C. Barlow* filed a brief for same.

The decision of the New York Court of Appeals is not binding upon the parties to the case at bar. Before considering the main question involved in the case at bar it is necessary to show that this court is not bound by the decision of the Court of Appeals of New York, which decided that the warehouse company was not liable upon the endorsements in question. *Park Bank* v. *German-American Warehousing & Security Co.*, 116 N. Y. 281.

Of course, if this court is bound by that decision, then the notes are not debts of the warehouse company, and are consequently not a liability of the company for which a trustee can be held under section 12 of the manufacturing act, and this action would necessarily fail. Of course, this court may

yield to the reasoning of the Court of Appeals, — but there is no reasoning in the opinion of that court.

There is no question of *res judicata* involved. If the question of the liability of the warehouse company on these endorsements were *res judicata* in this action, that would be the end of our case. But *res judicata* is neither pleaded or pretended in this action, and it is incumbent upon the defendant to plead and prove such a defence. And if it were pleaded, it would fail, because it is not proved, for two reasons.

(1) There is nothing to show that a judgment was ever entered against the plaintiff. As a matter of fact, no judgment ever was entered. The Court of Appeals simply reversed the judgment and ordered a new trial. As there was no judgment, there can be no question of *res judicata.* A citation of authorities on this point would be unnecessary. So far as the question of *res judicata* is concerned, there is therefore no reason why the plaintiff should not again sue the warehouse company in the courts of the State of New York.

(2) But if there had been a judgment against the plaintiff in the action against the warehouse company, that judgment would not bar the plaintiffs or protect the defendant in this action. Judgments bind only parties and privies.

The defendant Remsen was not a "party" to the action against the warehouse company. Nor was he a "privy," as has been decided by our Court of Appeals.

Miller v. *White*, 50 N. Y. 137, was an action precisely like that at bar, — that is, it was an action brought by a creditor of a manufacturing corporation, against a trustee of the corporation, for failing to file an annual report — which is the action which we bring against this defendant, under section 9 of the charter of the warehouse company and section 12 of the manufacturing act.

In *Miller* v. *White*, the plaintiff had previously recovered a judgment against the corporation, for the debt with which he charged the defendant as trustee — and the plaintiff there claimed that that judgment bound the trustee, as to the indebt-

edness of the corporation. But the Court of Appeals held that the trustee was not a "privy" to a judgment against his corporation, (and it was not pretended that he was a party, although the court held that he was not,) and, therefore, that the judgment against the corporation did not bind him.

The plaintiff was compelled to prove the indebtedness of the corporation *de novo*, as we have done in this action against the defendant William Remsen.

As the plaintiff in this action could not claim that a judgment which held that the warehouse company was liable established such liability as against this defendant, so the defendant in this action could not claim that a judgment that the warehouse company was not liable protects him.

The ground of the decision in *Miller* v. *White* was that a trustee is "neither a party or a privy" to an action against a corporation, and, as a judgment against the corporation does not bind the trustee, so a judgment in favor of the corporation does not protect him — since, as the courts say in *Meltzer* v. *Doll*, 91 N. Y. at p. 373, "It is of the essence of an estoppel by adjudication, that it should be mutual." See also, as following, *Miller* v. *White*: *Bruce* v. *Platt*, 80 N. Y. 379; *Whitney* v. *Cammann*, 137 N. Y. 342.

But here there is no judgment in favor of the warehouse company, but a simple discontinuance by the plaintiff after the decision of the Court of Appeals of New York, that the plaintiff had notice from the form of the transaction that the notes were endorsed by the warehouse company for the accommodation of Squires, Taylor & Co. If there were a judgment, it was for the defendant to plead and prove it.

The decision in *Miller* v. *White* is conclusive upon this court, since it is the construction put by the highest court of the State of New York upon a statute of that State; that is, a decision as to the relations of a corporation of that State with its trustees.

There being no question of *res judicata*, this court is not bound to follow the decision of the Court of Appeals in the warehouse case.

The defendant is liable for the debts of the warehouse com-

pany, by reason of its failure to file the reports required by section 12 of the manufacturing act, and is therefore liable upon the notes in suit. *Swift* v. *Tyson*, 16 Pet. 1; *Wakefield* v. *Fargo*, 90 N. Y. 213; *Veeder* v. *Mudgett*, 95 N. Y. 295.

Mr. William H. Ingersoll for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The highest court of the State which incorporated the warehouse company and in which it is situated, has ruled, in a direct action against it, that it did not become indebted to the plaintiff by reason of its endorsement. The liability of the defendants is not primary and that of a debtor, but secondary and depends altogether upon a statute of that State of a penal character, which declares that, upon certain omissions of duty on the part of a trustee, he shall become responsible for the debts of the company. Can the Federal Courts ignore the decision of the Court of Appeals and, in face of its unanimous opinion that the warehouse company is not indebted, compel the defendants to pay as a debt of the company that which has been thus decided to be no debt? Or, to state the proposition in another way: a statute of the State imposes a liability on a trustee for the debts of the company, of which he is trustee. The highest court of the State says there is no debt, and therefore no liability. Is it appropriate for this court to hold that there is a debt, and, by reason thereof, a liability? We are asked to enforce a statute of a State penal in its character, so far at least as the trustee is concerned, and, therefore, to be strictly construed, in a case in which its highest court rules that it ought not to be enforced. To the question as thus stated it would seem that there should be but one answer, and that the rulings of the highest court of a State as to liability under such a statute ought to be recognized in every court as at least most persuasive. That this statute is one of a penal character is settled, not merely by various decisions of the Court of Appeals of New York, but also expressly by this court in *Chase* v. *Curtis*, 113 U. S. 452, though as since held not "a penal law in the international sense." *Huntington* v. *Attrill*, 146 U. S. 657.

It is, however, insisted by the plaintiff that there has been no final adjudication in the courts of New York in the action against the warehouse company, the order made by the Court of Appeals being simply to set aside the judgment and grant a new trial; that the question of liability or non-liability of the warehouse company to the plaintiff is, therefore, not *res judicata;* that the plaintiff has a right, if it has not already exercised it, of discontinuing that case, in which event there will be no final judgment either for or against it, and nothing to prevent its commencing a new action either in the courts of New York State or in the courts of any other State in which it can secure service of process on the company; *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121; *Gardner* v. *Michigan Central R. R. Co.*, 150 U. S. 349; that even if a final judgment had been rendered in the action against the warehouse company it would not bar the plaintiff or protect the trustee, for a judgment binds only parties and privies, and the trustee was neither a party to that action nor a privy thereto, *Miller* v. *White*, 50 N. Y. 137; that the question of the liability of the warehouse company to the plaintiff being thus still an open one, and depending not upon any statute or matter of local law but upon principles of general commercial law, this court is free to determine it according to its own judgment, and is not concluded by any opinion or ruling thereon by the state court.

It is further insisted that the Court of Appeals erred in its views of commercial law, and that while the presentation for discount by the maker of negotiable paper thus endorsed may suggest that the discount is for his own benefit, and that the endorsement is an accommodation endorsement, there is no conclusive presumption of law to that effect; that if the party discounting the paper makes no further inquiries, it is a mere matter of negligence, and that according to the rules laid down by this court negligence alone neither vitiates the title of the holder nor relieves any of the parties to the paper from the liability apparently assumed by their signatures thereto. We deem it unnecessary to determine this question. That the presentation for discount by the maker of paper drawn to his own order

and bearing the endorsement of another party does create a presumption that the endorsement is a matter of accommodation, is affirmed by the following among other authorities: *Bloom* v. *Helm*, 53 Mississippi, 21; *Hendrie* v. *Berkowitz*, 37 California, 113; *Stall* v. *Catskill Bank*, 18 Wend. 466; *Overton* v. *Hardin*, 6 Coldwell, 375; *Lemoine* v. *Bank of North America*, 3 Dillon, 44; *Erwin* v. *Schaffer*, 9 Ohio St. 43; 1 Daniel on Neg. Ins. § 365; 1 Edwards on Bills App. 105, § 104. On the other hand, the plaintiff refers to these authorities as tending to show that the presumption arising under such circumstances is not a conclusive one. *Wait* v. *Thayer*, 118 Mass. 473; *Ex parte Estabrook*, 2 Lowell, 547.

Section 12 of the act of 1848 is not in terms reënacted in the charter of the warehouse company. It is, as we have seen, a statutory provision of a penal character, and before any party can be held bound by its provisions it must satisfactorily appear that the legislation of the State has rendered him subject thereto. The contention is that section 9 of the charter of the warehouse company in effect incorporates said section 12 into such charter, but the provision of section 9 is that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under the act of 1848. It is the corporation which is given the powers and privileges and made subject to the liabilities. Does this carry with it an imposition of liability upon the trustee or other officer of the corporation? The officer is not the corporation; his liability is personal, and not that of the corporation, nor can it be counted among the powers and privileges of the corporation. How then can it be contended that a provision in a charter that the corporation thus chartered shall assume all the liabilities imposed by a general statute upon corporations carries with it a further provision of such general statute that the officers of corporations also assume, under certain conditions, the liabilities of the corporation? Does one by becoming an officer of a corporation assume all the liabilities resting upon the corporation; is not his liability of a distinct and independent character and dependent upon other principles? It is said that this is a mere

question of statutory construction which has been settled by the Court of Appeals of New York in conformity with the views of plaintiff, but we do not so understand the scope of those decisions.

Wakefield v. *Fargo*, 90 N. Y. 213, is cited. In that case it appeared that the High Rock Congress Spring Company was organized under an act of 1863, chapter 63, which authorized three or more persons to incorporate in the manner specified in the act of 1848, heretofore referred to. Section 2 provided that "every corporation so formed shall be subject to all the provisions, duties, and obligations contained in the above-mentioned act, (the act of 1848,) and shall be entitled to all the benefits and privileges thereby conferred." Section 18 of the act of 1848 (3 Rev. Stat. 8th ed. 1958) made the stockholders "liable for all debts that may be due and owing to their laborers, servants, and apprentices for services performed for such corporation," and it was held that that provision became incorporated into chapter 63 of the Laws of 1863, and that the defendants, as stockholders in the spring company, were liable accordingly. The matter is not discussed in the opinion, but the conclusion is stated as above. It may be noticed, however, that the act of 1863, under which the spring company was organized, was entitled "An act to extend the operation and effect of the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes;'" and contained but two sections, the first authorizing the organization of three or more persons into a corporation in the manner specified, etc., and the second being as heretofore quoted. And so it may well be that the Court of Appeals considered the act of 1848 as passing bodily into the act of 1863, and that all the "provisions" (in the language of section 2) of the former became part of the latter act. Be that as it may, that decision comes short of meeting the question here. Even if it were conceded that it goes so far as to hold that "corporation," as used in that statute, includes stockholders as component parts thereof, it does not follow that it also includes the trustees, directors, or other officers. But it does not go to

the extent claimed. The opinion expressly says that "a stockholder is not liable for the general debts of the corporation, if the statute creating it has been complied with." The term "corporation" does not include stockholders, and a statute imposing a liability upon the corporation does not thereby impose the same upon the stockholders. Indeed, section 9 of the charter of the warehouse company makes special provision for the liabilities of the stockholders of the company, which was obviously unnecessary, if by the clause quoted all the provisions of the general incorporation act in respect to the liability of stockholders, trustees, and other officers were transferred to and made a part of the charter. We see nothing in the case of *Veeder* v. *Mudgett*, 95 N. Y. 295, to throw any light upon this question. So far then as the decisions of the Court of Appeals go they do not affirm that so much of the act of 1848 as imposes a special liability on trustees and directors was incorporated into the charter of the warehouse company by force of section 9 or otherwise. And in the absence of any controlling decision we are unwilling to hold that a provision of a general statute imposing a personal liability on trustees or other officers is incorporated into a special charter by a clause therein declaring that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under such general act. Something more specific and direct is necessary to burden an officer of the corporation with a penalty for omission of duty.

We are of the opinion that the judgment of the Circuit Court was right, and it is *Affirmed.*

UNITED STATES *v.* SMITH.

SMITH *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 289, 345. Submitted April 10, 1895. — Decided May 20, 1895.

Mileage or travel fees are allowed to a district attorney as a disbursement or commutation of travelling expenses, irrespective of the amount of compensation for services to which he is limited by law.

Counsel for Smith.

Per diem allowances to him for attendance, and charges for special services directed by the Attorney General, are compensation for services, and in law form part of the gross sum therefor, which may not be exceeded.

THESE were cross-appeals from certain allowances and disallowances in the accounts of the claimant, who was district attorney of the United States for the Territory of New Mexico from January 1, 1886, to December 31, 1888.

His accounts for the services performed by him during that time were duly rendered, with vouchers and items, to the proper District Court, and were duly approved by said court in the sum of $19,230.80, as just and according to law. The accounts were afterwards presented to the Treasury Department and certified as correct to the amount $18,605.80, of which $14,266.34 was paid, leaving an unpaid balance of $4339.36.

This balance the accounting officers of the Treasury refused to certify for payment, upon the ground that the claimant had been paid for the three years in question the maximum compensation of $3500 per annum prescribed by the act of April 7, 1882, for the attorney of the United States for New Mexico, and on the further ground, in respect to another item of $595, that it had been disallowed by the Attorney General as being in excess of just compensation.

The unpaid balance of $4339.46 is composed of certain services performed by him in a claimed unofficial capacity under the direction of the Attorney General, of mileage and of per diem compensation.

The Court of Claims rendered judgment in his favor for the mileage, amounting to $1270.80, but disallowed his claim for per diem compensation, amounting to $2843.66, and for special services, $225.

Both parties thereupon appealed to this court.

Mr. Assistant Attorney General Dodge and *Mr. Felix Brannigan* for the United States.

Mr. Eppa Hunton and *Mr. John Altheus Johnson* for Smith.

Opinion of the Court.

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

This case involves the question whether the three items of travel fees, per diems, and extra services should be included in the fee and emolument account of the district attorney, as belonging to the "fees, charges, and emoluments" to which a district attorney is entitled by reason of the discharge of the duties of his office. Rev. Stat. §§ 833 and 834. If these items are included, his compensation would exceed the maximum allowed by law, and he would not be entitled to the excess. The Court of Claims held that he was entitled to his travel fees but not to the other items.

The case depends upon the construction given to certain provisions of chapter 16, title 13, of the Revised Statutes, with respect to the fees of officers of the United States courts. Section 823 provides that "the following and no other *compensation* shall be taxed and allowed to attorneys, solicitors, and proctors of the Courts of the United States, to district attorneys," etc. Section 824 fixes the fees of district attorneys, among which are the following: "For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term." "For travelling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning."

By section 833, every district attorney is required to make a semi-annual return to the Attorney General "of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same;" and by section 834 he is bound to include in such semi-annual return, with the exception of fees in revenue cases, "all other fees, charges, and emoluments to which a dis-

trict attorney . . . may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof." By section 837 the district attorneys and marshals of certain districts were awarded "for the like services, double the fees hereinbefore provided," and by the act of August 7, 1882, 22 Stat. 344, this allowance of double fees was extended to the Territories of New Mexico and Arizona, with a provision that the district attorney should not by fees and salaries together receive more than $3500 per year.

1. The first item relates to the allowance of the claim for mileage. While an allowance for travel fees or mileage is, by section 823, included in the fee bill, we think it was not intended as a compensation to a district attorney for services performed, but rather as a reimbursement for expenses incurred, or presumed to be incurred, in travelling from his residence to the place of holding court, or to the office of the judge or commissioner. The allowance of mileage to officers of the United States, particularly in the military and naval service, when travelling in the service of the government, is fixed at an arbitrary sum, not only on account of the difficulty of auditing the petty items which constitute the bulk of travelling expenses, but for the reason that officers travel in different styles; and expenses, which in one case might seem entirely reasonable, might in another be deemed to be unreasonable. There are different standards of travelling as of living, and while the mileage in one case may more than cover the actual expenses, in another it may fall short of it. It would be obviously unjust to allow one officer a certain sum for travelling from New York to Chicago, and another double that sum, and yet their actual expenses may differ as widely as that. The object of the statute is to fix a certain allowance, out of which the officer may make a saving or not as he chooses, or is able. And while, in some cases, it may operate as a compensation, it is not so intended, and is not a fee, charge, or emolument of his office within the meaning of section 834. It is much like

the arbitrary allowance for the attendance of witnesses and jurors, which may or may not be sufficient to pay their actual expenses, depending altogether upon the style in which they choose to live.

The fact that these travel fees are treated in section 823 as an item of the "compensation" allowed to district attorneys and are enumerated in section 824, under the head of "fees of attorneys, solicitors, and proctors," undoubtedly lends some support to the claim of the government that they were designed to be included in the returns of the district attorneys of the fees, charges, and emoluments of their offices. But we think these facts, though pertinent, are not controlling, if the travel fees were designed, as we think they are, as a reimbursement or commutation of travelling expenses. In this connection there is an apparent inconsistency in the action of the claimant which is not noticed in the opinion of the court below, and is not presented on this record for our revision, although it may have some bearing argumentatively upon the question under consideration. This is the fact, that, while under section 837, and the act of August 7, 1882, allowing to certain district attorneys "double fees" for like services, he charges double mileage (twenty cents) as a "fee," he at the same time claims that such mileage is not to be accounted for as one of "the fees and emoluments of his office." It would seem almost too plain for argument that if such mileage be a fee to be charged for, it is also a fee to be accounted for.

In view of the fact that by section 824 the district attorney is allowed ten cents a mile travel fees each way, it is somewhat singular that, by section 828, the clerk is allowed a travel fee of only five cents each way, although both are allowed a per diem of five dollars. This discrepancy appears to have existed only since the act of February 26, 1853, 10 Stat. 161, inasmuch as by the act of February 28, 1799, 1 Stat. 624, both the clerk and district attorney were allowed travel fees of ten cents per mile from the place of their abode to the place of holding court — one way.

Undoubtedly, however, the strongest argument in favor of the position assumed by the government, that the travel fees

in question were intended as compensation for services, is derivable from the fact that, by section 829 of the same chapter, the marshal is allowed for transporting criminals, ten cents a mile for himself and each prisoner and necessary guard; and for travelling from his residence to the place of holding court, ten cents a mile for going only, while for travelling in going only to serve process, he is allowed six cents a mile, to be computed from the place where the process is returned to the place of service, with a proviso that "when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs." If, however, the writs are not in behalf of the same party, to be served upon the same person, there is no limit to the number upon which the marshal is entitled to mileage. *United States* v. *Fletcher*, 147 U. S. 664. The fact that the amount of mileage which the marshal is entitled to charge for making a certain journey is thus made to have no relation whatever to the amount of his expenses or to the number of writs he has in his possession, indicates very clearly that such mileage is intended as compensation. There is also another proviso to the same effect, namely, that his fees for summoning jurors, including the mileage chargeable for each service, shall never exceed $50 at any term of court; "and in all" other "cases where mileage is allowed to the marshal he may elect to receive the same, or his actual travelling expenses, to be proved on his oath, to the satisfaction of the court."

The other fees allowed to the marshal are substantially only the following: For the service of each writ, $2; for per diems, $5, and a small commission upon property sold and money disbursed for the government. Other allowances are made by section 829, but they are of comparatively small importance.

In view of these provisions, and of the very large proportion which travel fees make in the accounts of the marshal, it is difficult to avoid the conclusion that such fees, except, perhaps, for travel to attend court, which are analogous to the travel fees allowed to district attorneys and clerks, are intended to be included in his account. All such fees, with the above

exception, are taxable as costs in the cause in which the travel is made, and are intended as part of his compensation for services in such cause, while the manifest purpose of travel fees to and from court is a reimbursement of personal expenses. But it does not follow that where, as in the case of district attorneys and clerks, the travel fees or mileage is allowed only to the officer for travel made by him in actually going to and from his place of abode to the place of holding court, such mileage should be regarded in any other light than as a reimbursement for expenses presumed to have been incurred.

2. With regard to per diems the case is somewhat different. They are allowed "for each day of his necessary attendance in a court of the United States or before a judge or commissioner on the business of the United States, when the court is held at his place of abode," as well as for his attendance when the court is held elsewhere, for each day of the term, whether he is actually in attendance or not, since he is presumed to be present at each term for the protection of the interests of the government.

The fact that these per diems are allowed for his attendance at his place of abode, indicates very clearly that they are not intended as reimbursements for personal expenses specially incurred, since every man must live somewhere and must incur some expense in so doing. Reimbursement is only intended in cases where an expense is incurred in the services of the government, which would not be incurred if the claimant were living at his usual place of abode. The per diem in question is evidently intended for the payment of the attendance of the district attorney, when, although he may not be actually engaged in the trying of a case, for which a separate fee is allowed, the duties of his office require that he should be present in court, either waiting for a case to come on or attending to incidental matters, for which no separate provision may be made.

3. The last item relates to fees for special services in certain land and other cases, in which the United States was interested, though not usually a party to the action. The finding in this particular is that the claimant had been directed by the Attorney General to act as counsel for the United States in

these cases, except one, where the appearance was by direction of the court; and although the services required were regarded by both parties either as not pertaining to the office of the attorney for the United States, or as not being provided for by the salary or fee bill, no agreement was entered into as to the amount of compensation to be paid for the services, and no certificate was made by the Attorney General, that the same could not be performed by him or the Solicitor General, or the officers of the Department of Justice, or by the district attorney.

Petitioner's claim in respect to these services amounted to $1910, of which $1310 was allowed by the Attorney General, and $600 disallowed, as being in excess of his just compensation. The accounting officers of the Treasury reduced the disallowances to $595, allowing $5 in one case under the fee bill. Of the amount so allowed by the accounting officers, to wit, $1315, the sum of $1090 is included in the compensation paid to the claimant, and the difference, $225, has not been paid. This amount ($225) is included in the unpaid balance of $4339.46, disallowed as being in excess of the maximum allowance. The $595 above mentioned was disallowed by the Attorney General as being in excess of just compensation. So that petitioner's claim embraces both these items.

It is claimed that these services were no part of the petitioner's official duty, were charged for and allowed without regard to the fee bill, and upon the basis of a *quantum meruit*, and hence they are no proper part of the fees and emoluments of his office. The position of the claimant is that the fees and emoluments of his office are only such as are provided for in the fee bill, section 834, and that services performed outside of this section are neither governed by its provisions nor by the provisions of sections 833 and 835, requiring a return to be made of the fees and emoluments of his office. By section 771 it is not only the duty of the district attorney to prosecute all delinquents for crimes and offences against the Federal laws, but "all civil actions in which the United States are concerned," and there is a finding that the claimant was not only directed by the Attorney General to appear, but that the government was interested either in the prosecution or defence of such

suits, although the direct nature of such interest does not fully appear. We lay no stress upon the fact that, in some of these cases, the government was interested as defendant, and that the petitioner was employed not to prosecute, but to defend, as we think the words "to prosecute all civil actions" should not be interpreted in any technical sense, but should be construed as covering any case in which the district attorneys are employed to prosecute the interests of the government in any civil action, whether such interest be the subject of attack or of defence. This interpretation is strengthened by a reference to section 359, which authorizes the Attorney General, whenever he deems it for the interest of the United States, to conduct and argue any case in any court of the United States, in which the United States is interested, or may direct any officer of the Department of Justice to do so.

In support of his claim petitioner relies upon section 3 of the act of June 20, 1874, 18 Stat. 101, which provides that "no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States, beyond his salary or compensation allowed by law. Provided, that this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees." So far as concerns district attorneys, the salary or compensation allowed by law undoubtedly refers to the compensation provided for by Rev. Stat. § 824. The proviso authorizes the Department of Justice to employ and pay district attorneys, "as now allowed by law," for the performance of services not covered by their salaries or fees. It cannot be presumed, however, that Congress intended thereby to throw the door open to district attorneys to charge what they deemed to be, or what proved to be, a reasonable sum for the performance of such services, as the proviso especially limits them to the cases in which they had heretofore been allowed to be employed and paid by the department for services not covered by their salaries or fees.

The proviso in question was probably designed to be read in

connection with Rev. Stat. § 299, providing that "all accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States . . . where the United States is interested, but is not a party of record, . . . shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party." There is no finding in this case, by which we are enabled to judge what these assimilated fees would be, if taxed upon the basis of the compensation allowed by section 824, but they would doubtless be much less than the amount of petitioner's claim.

But the question in this connection is, not whether the district attorney was lawfully entitled, under the above act, to the amount allowed, but whether, having received it, or at least having been credited with it, he must not account for it as a part of the fees and emoluments of his office. It is possible that he was compellable by law to render this service for the compensation provided for in the fee bill, or for the assimilated fees mentioned in § 299; but, in any case, the compensation was received by him as district attorney, and he is bound to account for it to the government as a part of the emoluments of his office, since by the act of August 7, 1882, 22 Stat. 344, "All fees *or moneys* received by him above said amount" (of $3500 per year) "shall be paid into the Treasury of the United States." As to whether he was compellable to render the services in question for the statutory or assimilated fees above mentioned, we express no opinion, but the fact that the Treasury Department may have allowed him more than he was justly entitled to receive, does not exonerate him from the obligation to return the amount allowed as a part of the emoluments of the office, if it was earned by him in his capacity of district attorney. It can hardly be supposed that Congress could have intended that the Attorney General should not be at liberty to call upon the official representative of the United States in each district to defend, as a part of his official duty, the interests of the government in any suit in which it was interested. It is true, there is a pro-

vision in § 363 that the Attorney General shall, whenever the public interest requires it, employ and retain, in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, but this evidently does not contemplate that the district attorney himself shall be so employed. It is essential to the interests of the government that in all suits, criminal and civil, in which it is interested, the Attorney General shall be at liberty to call upon the district attorney to represent it, and his compensation therefor, whether measured by the fee bill or not, is clearly a part of the fees and emoluments of his office. This disposes not only of the $225 included in the unpaid balance of $4339.46, but also of the $595, which is also subject to the additional defence that it has been disallowed by the Attorney General.

The judgment of the Court of Claims is therefore

Affirmed.

SHIPMAN *v.* STRAITSVILLE CENTRAL MINING COMPANY.

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

No. 306. Argued April 24, 1895. — Decided May 20, 1895.

The fact that no such officer as master commissioner is known to the law does not impair the validity of a reference to a person as such.

The findings of a referee having been ordered to stand as the findings of the court, the only question before this court is whether the facts found by him sustain the judgment.

As the case was not tried by the Circuit Court upon a waiver in writing of a trial by jury, this court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested.

S. and three other parties contracted on the 24th of June, 1879, as follows: "S. agrees to represent the entire interests and sales of the coal of the other three parties aforesaid in the trade that may be denominated the

Statement of the Case.

Detroit trade by rail or by vessel to Detroit, or to and through Detroit, Michigan; that he will confine himself to the use and handling of their coal alone in all his sales of soft coal for whatever use or purpose or market, taking the same from them in equal quantities; that he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines, and that he will take care of all freights and pay them for their coal by the 20th of the month next after each separate month's delivery to him at the mines of said other three parties, and that he will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof, and that he will keep his books, sales, and contracts of coal all open to their inspection at all times. Said other above-named parties agree to sell coal to no one to conflict with the interests of said S. under this agreement, and that they will aid and encourage the trade of said S. in all lawful ways in their power, so long as he shall confine his sales and operations in soft coal to the product of their mines." *Held*,

(1) That the contract was a several one as between S. and the three other parties, and that an action would lie in favor of either of those parties without joining the others;

(2) That the agreement included all contracts and orders which S. then had, whether for the immediate or future delivery of coal, but did not bind the other parties to fill contracts made by him subsequent to June 24, at 70 cents per ton;

(3) That the three parties were bound to furnish S. coal to fill contracts made by him for future delivery, at the market price of coal at Detroit at the time Shipman made such contracts, and not at the market price at the time of the delivery of such coal by the companies to Shipman, from time to time, during the existence of such contracts.

This was a case originally instituted in the Court of Common Pleas of Franklin County, Ohio, by the defendant in error, to recover a balance of $19,564.89, claimed to be due on account of goods sold and delivered. Upon the petition of Shipman, a citizen of Michigan, the case was removed into the Circuit Court of the United States, where an affidavit was filed, admitting payments by defendant, after the commencement of suit, aggregating $13,017.90, leaving still claimed the sum of $6446.90, with interest thereon.

Defendant filed his answer, setting up a counter-claim, and alleging that the plaintiff had agreed to sell and deliver all the coal from its Sugar Creek lower vein, or so much as defendant

should need for his Michigan trade for one year from the date of the contract, May 28, 1879, at certain prices; that defendant needed much more coal than was furnished during that period, and that the price of coal as charged exceeded the contract price by the sum of $4991.64. The answer further alleged that, relying on this contract, he agreed to sell coal in Michigan at prices giving him but a small profit; that he informed plaintiff of these contracts, and plaintiff agreed to furnish enough coal to fill them, but failed to do so, by reason whereof defendant was obliged to purchase of other parties at higher prices than those at which plaintiff had agreed to sell, whereby he suffered damages in the sum of $10,000, in addition to the overpayment above mentioned.

Plaintiff replied to this answer, denying the counter-claims set up by the defendant, and admitting the payment of $13,017.90 since the commencement of suit.

Somewhat more than eighteen months thereafter, defendant filed an amended answer, reiterating his former defences, and increasing the amount claimed for damages and counter-claim to $20,921.11.

Plaintiff filed a reply to this amended answer, claiming that on June 24, 1879, defendant entered into an agreement which abrogated the agreement of May 28, 1879, under which defendant claimed. That this agreement was entered into between Shipman on the one part, the Straitsville Coal Company, the Straitsville Central Mining Company, and J. S. Doe & Co. of the other part; and that it was understood thereby that this contract superseded all other contracts between the parties relating to the coal trade. That, by its terms, plaintiff was to furnish one-third of the coal called for, and no more, at the market price for such coal for the time being at its mines, except so far as the defendant's then present trade and orders were concerned, which were to be filled at the price to him of seventy cents per ton at the mines, each of the parties to the agreement furnishing one-third of the coal necessary therefor.

This contract, the construction of which is the material feature of this case, is as follows:

Statement of the Case.

"O. W. Shipman, Straitsville Coal Co., Straitsville Central Mining Company, and J. S. Doe & Co. agree with each other as follows:

"Shipman agrees to represent the entire interests and sales of the coal of the other three parties aforesaid in the trade that may be denominated the Detroit trade by rail or by vessel to Detroit, or to and through Detroit, Michigan; that he will confine himself to the use and handling of their coal alone in all his sales of soft coal for whatever use or purpose or market, taking the same from them in equal quantities; that he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines, and that he will take care of all freights and pay them for their coal by the 20th of the month next after each separate month's delivery to him at the mines of said other three parties, and that he will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof, and that he will keep his books, sales, and contracts of coal all open to their inspection at all times. Said other above-named parties agree to sell coal to no one to conflict with the interests of said Shipman under this agreement, and that they will aid and encourage the trade of said Shipman in all lawful ways in their power, so long as he shall confine his sales and operations in soft coal to the product of their mines.

"Given under our hands this 24th day of June, A.D. 1879."

[Signed.]

By consent of parties in open court an order was entered June 18, 1883, referring the case for trial to Richard A. Harrison, "a master commissioner of this court," who was directed to report the testimony with his findings of fact and of law, separately stated, to the court.

In December, 1884, the referee made a finding of facts, and propounded to the court five questions of law upon such facts,

Counsel for Defendant in Error.

viz.: (1) Whether the contract of June 24, 1879, superseded that of May 28. (2) Whether such contracts were joint or several. (3) As to the meaning of the clause "that he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines." (4) Whether the three companies were required to furnish defendant coal to fill contracts made by him for future delivery, at the market price of coal in Detroit at the time defendant made such contracts, and not at the market price at the time such coal was actually delivered by the plaintiff to the defendant. (5) Whether the contract was terminable at the will of either party.

Answers were made to these questions by the court, and on May 23, 1886, the referee made his report, applying the law as declared by the court, and awarding the plaintiff the sum of $230.74, with interest from August 1, 1880. In the meantime defendant had filed a second amended answer, to which plaintiff replied, and to a portion of this reply defendant demurred.

Both parties excepted to the findings of the referee. The court passed upon the exceptions, reconsidered the questions of law submitted by the referee, reaffirming the answers given, except to the fourth question, declaring that the former answer to this question was wrong, giving a new answer, and recommitting the case to the referee.

December 13, 1889, the referee filed a supplemental report, applying the interpretation of the contract given by the court to the facts as found, and finding the amount due plaintiff to be $9282.81. This report was approved and confirmed, and it was ordered that the findings of the master stand as the findings of the court. Thereupon the court gave judgment for the plaintiff in the sum of $9282.81, with interest from December 3, 1889. Defendant subsequently procured a bill of exceptions to be settled, and sued out a writ of error from this court.

Mr. Frederic D. McKenney for plaintiff in error. *Mr. Alfred Russell* and *Mr. E. L. DeWitt* were on his brief.

Mr. J. Holdsworth Gordon for defendant in error.

Opinion of the Court.

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

1. This case was referred by consent to Mr. Harrison, a so-called "master commissioner," as referee, with instructions to report the testimony, with the findings of fact and of law, to the court. The fact that no such officer as master commissioner is known to the law does not impair the validity of the reference, as it is perfectly competent for the court to refer a case to a private person. *Heckers* v. *Fowler*, 2 Wall. 123. And, as the court in its judgment ordered his findings to stand as the findings of the court, the only questions before this court are whether the facts found by the referee sustain the judgment. As the case was not tried by the Circuit Court upon a waiver in writing of a trial by jury, this court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested. *Roberts* v. *Benjamin*, 124 U. S. 64; *Boogher* v. *Insurance Co.*, 103 U. S. 90; *Bond* v. *Dustin*, 112 U. S. 604; *Paine* v. *Central Vermont Railroad Co.*, 118 U. S. 152; *Andes* v. *Slauson*, 130 U. S. 435.

There are eighteen assignments of error, but as most of them are taken to the action of the referee, they need not be further noticed.

2. The court below was of opinion that the contract in question was a several one as between Shipman and the three other parties, and hence that an action would lie in favor of either of these parties without joining the others. Three separate actions were in fact brought against him. There is nothing in the contract indicating that the three parties were connected in any way, except that each was to furnish an equal quantity of coal. They are spoken of in the contract as "the other three parties," as if it were intended that each of them should stand for himself. If either of them had failed to furnish his quota of coal, Shipman might have brought an action against him; but it is clear that if he had sued them jointly for such default, the two others might answer that they had done all that they agreed to do, and

could not be held liable for the default of the third. These parties did not agree to furnish any definite amount of coal, but merely that they would ship the defendant the product of their mines in equal quantities. Separate orders were given by Shipman, and separate bills were rendered by the companies for coal shipped upon such orders; and there is nothing to indicate that either of the parties to the contract treated it as involving a joint liability. *Hall* v. *Leigh*, 8 Cranch, 50. If Shipman had settled with plaintiff according to the account rendered by it in this case, it seems to us that it could not be seriously contended that the other parties could not sue him for the coal furnished by them without joining the plaintiff.

3. The principal controversy in this case, however, grows out of that clause of the contract which requires of Shipman "that he will turn in all his present trade and orders on their coal at the price of 70 cents per ton at the mines." In this connection, the referee asked the advice of the court, as to whether this meant that the three companies should furnish coal at 70 cents per ton at the mines, to fill only such orders and contracts as Shipman then had, (June 24, 1879,) for *immediate* delivery of coal; or, that they should furnish it at that price to fill all such contracts and orders, whether for immediate *or future* delivery; or, whether they should furnish it to fill all contracts which Shipman then had, or might thereafter make, before the market price of coal advanced, with parties who had previously been customers of his; and, whether this was limited to those who were previously customers of his or not.

The fourth question put by the referee was whether, viewing all the provisions of the contract, the companies were required to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal in Detroit at the time Shipman made such contracts, and not at the price at the time such coal was actually delivered by the plaintiffs to Shipman from time to time during the existence of such contracts.

The court answered the third question that the clause quoted included all contracts and orders, which Shipman then

had, whether for the *immediate* or *future* delivery of coal, but did not bind the companies to fill contracts made by Shipman subsequent to June 24, at 70 cents per ton. It at first answered the fourth question, that the three companies were bound to furnish Shipman coal to fill contracts made by him for future delivery, at the market price of coal at Detroit at the time Shipman made such contracts, and not at the market price at the time of the delivery of such coal by the companies to Shipman, from time to time, during the existence of such contracts. Upon the basis of these answers, the referee found a balance of $230.74 due from the defendant to the plaintiff, with interest from August 1, 1880.

Exceptions were taken by both parties to the report of the referee, when the court, reaffirming its answers to the first, second, and third questions, reached the conclusion that the answer to the fourth question was wrong, and that the true answer was that, excepting contracts within the designation of "present trade and orders," which the contract of June 24, 1879, required Shipman to turn in at the price of 70 cents per ton at the mine, the three companies named in the contract were not bound to furnish him coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time when Shipman made such contracts, but that they were entitled to the market price at the date of the actual sale of such coal by them to Shipman, less his "fair proportion" of any advance in the price, as specified in the contract.

In determining the correct answer to this question, it is proper to consider the situation of the parties and the surrounding circumstances. For some years prior to June 24, 1879, defendant Shipman had been extensively engaged in the business of buying and selling coal in the Detroit market, and had from time to time purchased considerable coal for that market from the plaintiff. The two other parties to the contract had also, prior to such date, established a coal office in Detroit and competed with Shipman for the Detroit trade. At the date of this written contract, and for some time before and since then, there existed at Detroit a usage or custom

among coal dealers and their larger customers to make contracts for the sale and delivery of coal at a stipulated price for the year next ensuing, and this usage or custom was known to all the parties to this contract when they entered into it. At the date of this contract the price of lump coal was 70 cents, and of nut coal 25 cents per ton, at the mines. After the execution of this contract the three respectively shipped coal to defendant at Detroit, and to his customers on his orders, and separate accounts were kept both by Shipman and the plaintiffs respectively of the coal shipped by each. Monthly bills were rendered by them respectively to defendant, in which they charged for the coal shipped prior to October 1, 1879, at the rate of 70 cents for lump and 25 cents for nut coal, and for all coal, both lump and nut, shipped after October 1, 1879, bills were rendered to defendant at the market price, which was largely in excess of 70 and 25 cents. There appears to have been a slight advance in coal at the mines some time in July or August, and in the account rendered in August by the plaintiff, defendant was charged 75 cents per ton for lump coal. He called the attention of the company to the fact, and the company, in the September account, credited the defendant with the 5 cents per ton overcharge.

As the contract made no mention of the price to be charged, except so far as concerned coal furnished to fill orders in existence at the time of the contract, it would follow that the plaintiff was at liberty to charge the defendant the current market price at the mines at the time of each delivery. In view, however, of the custom of the coal trade at Detroit to make contracts for the sale and delivery of coal at a stipulated price, for the year next ensuing, and in view of the fact that this custom was known to all the parties to this contract at the time they entered into it, it may fairly be presumed that the contract was made with reference to that custom. The fact that the companies reserved to themselves the power to inspect defendant's books, sales, and contracts for coal at all times, while the contract remained in force, is somewhat inconsistent with the idea that they had no interest in any

contracts made by him after June 24, and only contemplated selling him at the market price. The fact that he had agreed to labor to improve the market price of coal, giving the other parties the advantage of whatever improvement might be made in the market, to which the companies were to lend their aid and encouragement, tends to show that the relations between them were different from those between an ordinary vendor and vendee. Indeed, the fact that the contract provides that he was to represent the entire interests and sales of the companies in the Detroit trade; that he could only sell soft coal received from them; that he was to labor for the improvement of the market, and if he succeeded in raising the price, that he was to receive only a fair proportion of such increase, indicates rather the relation of partners or of principal and agent than that of vendor and vendee. If this were the case, the companies would be bound by his contracts, made within the scope of his authority and according to the custom of the Detroit trade. It can hardly be supposed, under this contract, that if Shipman were to make an agreement, say July 1, 1879, to deliver one thousand tons during the next year at a given price, and coal was to rise immediately thereafter, he would be obliged to pay the companies the increased price, and still sell to his customers at the contract price — in other words, to sustain the whole loss himself; inasmuch as he was representing their interests in Detroit, was obliged to submit to them his books and contracts for their inspection, and in case of an improvement in the market was obliged to account to them for their fair proportion of the increase. On the other hand, if coal fell after the contract was made, and it had proved to be a profitable one, it would seem to have been the expectation of the parties that he should only receive his fair proportion of such profit.

It is unnecessary to characterize or define this contract or to say whether it created the relation of vendor and vendee, principal and agent, or a partnership, as it possesses some features characteristic of each of them. But, although it is very ambiguous and indefinite, and was evidently not drawn

by any one learned in the law, we think the answer first given by the court to the fourth question corresponds better with its true meaning and intent, and that the companies were bound to furnish defendant coal to fill contracts for future delivery at the market price of coal in Detroit at the time he made such contracts.

So far as Shipman's "fair proportion" of an increase is concerned, we see no distinction between nut and lump.

This covers all the questions properly raised by the record in this case, and the result is that the judgment of the court below must be

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

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

EBY *v.* KING.

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

No. 336. Argued May 1, 2, 1895. — Decided May 20, 1895.

Reissued letters patents No. 7851, granted August 21, 1877, to Henry H. Eby for an improvement in cob-carriers for corn-shellers are void, as being for a different invention from that described and claimed in the original letters, specification, and claim.

It is doubtful whether the Commissioner of Patents has jurisdiction to consider and act upon an application for a surrender of letters patent and reissue, when there is only the bare statement that the patentee wishes to surrender his patent and obtain a reissue.

Whether, when a patent has been surrendered and reissued, and such reissue is held to be void, the patentee may proceed upon his original patent, is considered and discussed, but is not decided.

This was a bill in equity to recover damages for the infringement of reissued letters patent No. 7851, granted August 21,

1877, to the plaintiff Eby, for an improvement in cob-carriers for corn-shellers.

The object of the invention was stated to be "the production of a cob-carrier for power corn-shellers, to receive the cobs from the spout of the sheller and deliver them in any desired direction, which is adapted to be adjusted both vertically and horizontally upon its supporting-frame and driving mechanism without interfering with or stopping its operation; and the (my) invention therein consists in mounting the carrying-frame upon a revolving block at its inner end and upon adjustable legs at the outer end, and driving the endless belt by cog-gearing applied at the inner end thereof; and further, in the combination, with such parts, of the central vertical shaft and its connections for transmitting power from a pulley to the inner end of the endless belt, all as fully hereinafter described for effecting the purpose before explained."

The device is illustrated by the following drawings:

Fig. 1.

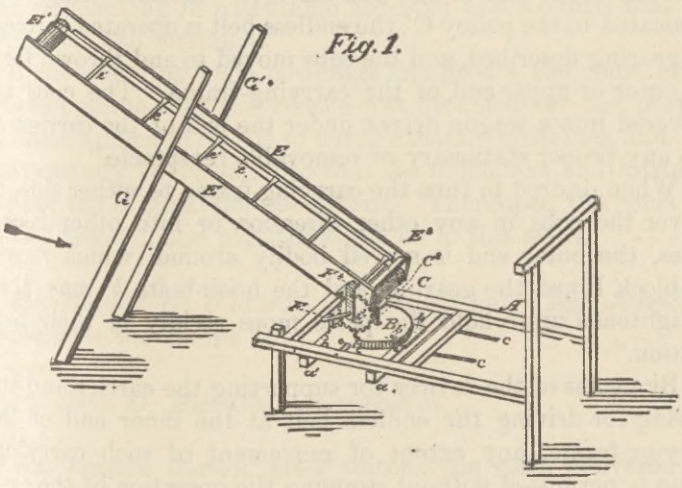


Fig. 3.

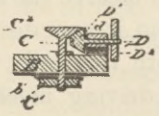


Fig. 2.

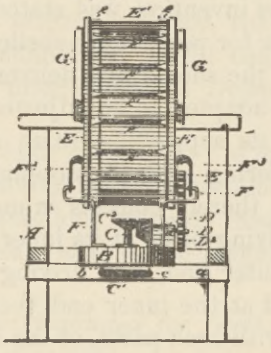
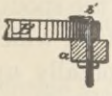


Fig. 4.



The specification further proceeds:

"In operation, the carrying-frame is located with reference to the corn-sheller in such manner that the cobs can be discharged upon the lower end of the endless belt. Motion being communicated to the pulley C', the endless belt is operated through the gearing described, and the cobs moved to and thrown from the outer or upper end of the carrying-frame. The cobs are delivered into a wagon driven under the end of the carrier, or into any proper stationary or removable receptacle."

"When desired to turn the carrying-frame to either side, to deliver the cobs in any other direction or into other receptacles, the outer end is moved bodily around, which moves the block B and the gearing, and the hook-bolts b' may then be tightened up to hold the parts more rigidly in their new position."

"By means of the devices for supporting the carrier and the gearing for driving the endless belt at the inner end of the carrying-frame, any extent of movement of such carrying-frame is permitted without stopping the operation of the endless belt, and this movement is effected with but little inconvenience and delay. The changing of the direction of the carrying-frame both vertically and horizontally could not be performed with as great facility if the endless belt were driven otherwise than at its inner end, where the least move-

ment is made, or if the said carrying-frame were supported by less efficient means than those described."

There were two claims, which read as follows:

"1. A movable independent cob-carrier wherein are combined a supporting and revolving block, a carrying-frame whose inner end is supported upon said block, and whose outer end is supported upon movable legs and gearing applied at the inner end of the carrying-frame and capable of acting continuously, whether the carrying-frame is fixed in position or being swung to a new position, substantially as described.

"2. A movable independent cob-carrier wherein are combined a carrying-frame supported at its inner end upon a revolving block, and the central vertical shaft and its connections, whereby the said carrying-frame can be adjusted vertically and horizontally without stopping the operation of the endless belt, substantially as and for the purposes set forth."

The defences were that the reissue was void; that the invention was lacking in patentable novelty; and a denial that the defendant had infringed.

Upon a hearing upon pleadings and proofs, the court below was of opinion that the reissue was obtained for the purpose of broadening the claims to cover existing machines, and was consequently void; and also that the defendant had infringed neither the original nor the reissue. Thereupon the court dismissed the bill, and plaintiff appealed to this court.

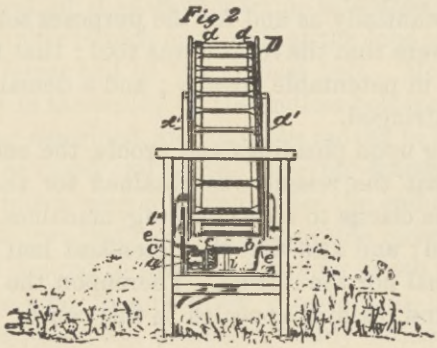
Mr. Harold G. Underwood for appellant. *Mr. Joseph G. Parkinson* was on his brief.

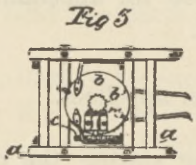
Mr. John G. Manahan for appellees.

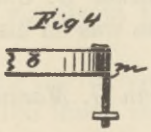
Mr. Justice Brown, after stating the case, delivered the opinion of the court.

As one of the chief defences in this case turns upon the validity of the reissue, it becomes necessary to compare this in some detail with the original patent No. 134,790, which was granted January 14, 1873.

In this patent, figures 2, 3, and 4 of which are here given, it is stated that *b* represents a disk or block, resting upon proper bearings upon the framework *a*, provided with a central orifice through which passes a shaft; that "the inner end of the carrier-frame is pivoted to arms *ee*, rising from the block *b*, as shown," and that "*mm* represent bolts secured in the framework, the upper ends of which are turned over the block *b*, as shown." The specification proceeds: "the carrier may be turned for the purpose of discharging the cobs, in any desired direction, by revolving the block *b*, which supports the carrier-frame, and the main portion of the actuating devices upon its bearings, it being secured in any desired position by means of the hook-bolts *ee*," (evidently meaning the hook-bolts *mm*, Fig. 4).







There were three claims, as follows:

"1. The combination of the block *b*, adapted to revolve as described, and the hook-bolts *ee*, for supporting a carrier, as described.

"2. The combination of the block *b* and the central vertical shaft and its connections, substantially as described."

The third claim covered a combination of the elements of the entire carrier, and is not claimed to be infringed, nor is it necessary to be described.

The description in the first claim, as well as in the specifications of the hook-bolts *ee*, for supporting the carrier, is clearly a mistake. The hook-bolts are lettered *mm*, and are described in the specification as bolts, "secured in the framework, the upper ends of which are turned over the block *b*, as shown," (in figure 4,) while *ee*, which are really hooked *arms*, shown in figure 2, attached to the block *b* at the lower end, and supporting the carrier at the upper end, should have been described as *arms* supporting the carrier.

Had the plaintiff, in his reissue, confined himself to the correction of an error so manifest, we should have found little difficulty in sustaining it; but in his application, which was made four years after the original patent, he makes no claim that his patent "was inoperative or invalid, by reason of a defective or insufficient specification," or by reason of his having claimed "more than he had a right to claim as new," or that any error had arisen "by inadvertence, accident, or mistake," without which the Commissioner has no right to grant a reissue, but simply prays that he may be allowed to surrender his original patent, and that "letters patent may be reissued to him for the same invention, upon the annexed amended specification." He makes no reference at all to the obvious mistake in his first claim, and although the point is not distinctly made in the briefs, we think it a serious question whether the Commissioner of Patents had any jurisdiction, under Rev. Stat. § 4916, to consider the application upon the bare statement that the patentee desired to surrender his patent and obtain a reissue. The Commissioner is authorized to reissue patents in certain specified cases, and if the petition makes no pretence of setting forth facts entitling the patentee to a reissue, it is exceedingly doubtful whether he obtains any jurisdiction to act at all.

Waiving this, however, the patentee annexed to his application a wholly different description and specification of his invention, as well as different drawings, differently lettered, showing

different views, though apparently of the same machine, and making six claims, the fifth and sixth of which correspond with the first and second claims of the original patent, with the mistake above mentioned corrected. All these claims were rejected, and the patentee acquiesced in the rejection of the fifth and sixth, which do not again appear. Two new claims were substituted, and these were also rejected, as having been met by former references. Subsequently a reissue was allowed, with the claims as herein stated.

The hook-bolts *mm* of the original patent, (*b'* of the reissue,) by the loosening of which the block *b* (B of the reissue) was permitted to revolve, are not altogether omitted in the reissue, but are mentioned as "secured in the frame, and having their upper ends turned over the block, which allow it to be revolved easily in either direction." A new feature, however, is introduced in a cross-plate *b*, under the block as a support. The vertical shaft C passes loosely through this plate, and the centre of the block B. This plate is not noticed in the specification, and is not lettered in the drawing of the original patent, although the end of it is indistinctly shown in figure 2. The claims of the reissue, so far from being confined to a combination of the circular block, and the arms for supporting the carrier, or to the combination of the block, and the central vertical shaft and its connections, cover broadly any "movable independent cob-carrier, wherein are combined a supporting and revolving block, a carrying-frame, whose inner end is supported upon said block, and whose outer end is supported upon movable legs, and gearing applied at the inner end of the carrying-frame and capable of acting continuously, whether the carrying-frame is fixed in position, or being moved into a new position, substantially as described." The second claim is even broader.

Meantime, however, defendant had, for more than two years preceding the application for the reissue, been manufacturing and selling cob-carriers substantially the same in construction as that shown in the alleged infringing device. It also appears that plaintiff was unable to obtain royalties, or sell licenses under his original patent, by reason of his claims being too

narrow; but that since he had succeeded in having the patent reissued with broadened claims, other manufacturers had submitted to his demand for royalties.

Under the rulings of this court, it is clear that this reissue cannot be supported. Not only was there no claim of a defective or insufficient specification; none that the patentee had claimed as his own invention more than he had a right to claim as new; none of inadvertence, accident, or mistake; but four years after the original patent was issued, the patentee attempts to secure a reissue, with claims broadened for the purpose of covering that which is presumed to have been once abandoned to the public. All that has ever been said by this court in restraint of the practice of reissuing patents applies with full force to this case. *White* v. *Dunbar*, 119 U. S. 47; *Ives* v. *Sargent*, 119 U. S. 652; *Dunham* v. *Dennison Manufacturing Co.*, 154 U. S. 103.

A further question arises whether, where a patent has been surrendered and reissued, and such reissue is held to be void, the patentee may proceed upon his original patent. In other words, whether the surrender is good, though the reissue be void. As the law stood until 1870, it was held in *Moffitt* v. *Garr*, 1 Black, 273, that the surrender of a patent under the act of 1836 was a legal cancellation of it; that no right could afterward be asserted upon it; and even that suits pending for an infringement of such patent fell with its surrender, because the foundation upon which they were commenced no longer existed. See also *Reedy* v. *Scott*, 23 Wall. 352, 364.

By the act of July 8, 1870, Rev. Stat. § 4916, it was declared that the surrender shall take effect upon the issue of the amended patent; but it was intimated in *Peck* v. *Collins*, 103 U. S. 660, that the effect of an adverse decision on the title of a patentee to the invention would be as fatal to the original letters as to his right to a reissue. In delivering the opinion of the court, Mr. Justice Bradley observed that "since the decision of this case" (*Moffitt* v. *Garr*) "it has been uniformly held that if a reissue is granted, the patentee has no rights except such as grow out of the reissued patent. He has none under the original. That is extinguished.

. . . No damages can be recovered for any acts of infringement committed prior to the reissue. . . . It seems to us equally clear, that as the law stood when that decision was made, . . . a patent surrendered for reissue was cancelled in law as well when the application was rejected, as when it was granted. The patentee was in the same situation as he would have been if his original application for a patent had been rejected. . . . . Surrender of the patent was an abandonment of it, and the applicant for reissue took upon himself the risk of getting a reissue or of losing all. A failure upon the merits, in a contest with other claimants, only gave additional force to the legal effect of the surrender."

In *McMurray* v. *Mallory*, 111 U. S. 97, it was held that the patentee, who had surrendered his patent and taken reissued letters on a new specification and for new claims, could not abandon the reissue and resume the original patent by a disclaimer. "This," said Mr. Justice Woods, "could be done only, if it could be done at all, by surrender of the reissued patent and the grant of another reissue." See also *Gage* v. *Herring*, 107 U. S. 640.

But, even if the patentee were able to fall back upon the original patent, counsel for the appellant, as well as his expert, admits that the combination described in the first claim of such patent was anticipated by certain patents to Brinsmead and Bryan, and that described in the second claim was also anticipated by a patent to one Nimbs. Assuming this to be so, it was clearly incompetent for the patentee to abandon these claims *in toto* and reconstruct his patent upon a different theory, in order to make it salable, or to hold as infringers other manufacturers who, in the meantime, had entered the field, relying upon his original patent as representing what he claimed to have invented and to be his own.

The decree of the court below is, therefore,

Affirmed.

Syllabus.

RICH *v.* BRAXTON.

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

No. 17. Argued November 16, 17, 1893. — Decided May 6, 1895.

C., in his lifetime, was in possession, claiming ownership under divers patents of the Commonwealth of Virginia, of several contiguous tracts of land in West Virginia, described in the several surveys thereof. In September, 1875, they were sold for non-payment of taxes assessed upon them for the year 1874, and, under the operation of the tax laws of that State, the title was suspended for one year, the State being the purchaser, in order to enable the owner to pay the taxes within that year, and thus free the land from the charge. C. died three months before the expiration of the year. After his death and after the expiration of the year, his heirs commenced proceedings under the state statutes, praying for leave to pay all back taxes and to acquire the title to the lands which had then become vested in the State. Decrees were entered giving them permission to redeem, and releasing the lands from the forfeiture and from all former taxes and damages. Under these decrees they made the payments. They then found that an adverse title to the lands was set up by purchasers at tax sales made in 1869 for the non-payment of taxes assessed in 1868, to persons claiming under other alleged surveys, and under other grants from the Commonwealth, and under other tax sales made prior to the separation, which are set forth in detail in the opinion of the court. The heirs of C. thereupon filed their bill in equity against the persons setting up such adverse title, praying for a decree annulling the deeds under which the defendants claimed title, and the removal thereby of the cloud created by them on the plaintiff's title. *Held,*

(1) That the claims of the heirs of C. were sustained, unless overthrown by the evidence adduced by the defendants;

(2) That the examination and review of that evidence by the court showed that the tax sale of 1869 had no validity, and that there was nothing in the case to affect the validity of the claim of the heirs of C.

By the law of Virginia in force prior to the creation of the State of West Virginia, it was the duty of the sheriff or collector, when lands were sold for taxes, to purchase them on behalf of the Commonwealth for the amount of the taxes, unless some person bid that amount; and any lands so purchased and certified to the first auditor vested in the Commonwealth without any deed for that purpose, and could have been redeemed in the mode prescribed by the statute.

Whatever title Virginia had to lands so purchased and not redeemed, and

which were within the territory now constituting West Virginia, passed to the latter State upon its admission to the Union.

The time given by the constitution and laws of West Virginia to redeem lands that had become the property of Virginia by forfeiture or by purchase at sheriff's sale for delinquent taxes, and which had not been released or exonerated in conformity to law, expired June 20, 1868.

By section 3 of Article XIII of the constitution of West Virginia, the title to lands of the character described which were not redeemed, released, or otherwise disposed of, and which was vested in and remained in the State, was transferred to and vested — (1) In any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much thereof as such person shall have had actual, continuous possession of under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the state taxes thereon for any five years during such possession; or (2) if there were no such person, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much of said land as such person shall have title to, regularly derived, mediately or immediately, from or under a grant from the Commonwealth of Virginia, which, but for the title forfeited, would be valid, and who, or those under whom he claims, has or shall have paid all state taxes charged or chargeable thereon for five successive years after the year 1865, or from the date of the grant, if it was issued after that year; or (3) if there were no such person as aforesaid, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much of said land as such person shall have had claim to and actual, continuous possession of, under color of title, for any five successive years after the year 1865, and have paid all state taxes charged or chargeable thereon for said period: and the defendants' case belongs to neither class.

The proceedings instituted by the commissioner of the school fund, under the act of November 18, 1873, for the sale of escheated, forfeited, and unappropriated lands were, in a judicial sense, *ex parte;* neither *in rem* nor *in personam.*

The words in the 13th section of that act — "at any time before the sale of any such land . . . such former owner or any creditor of such former owner of such land, having a lien thereon, may pay . . . all costs, taxes, and interest due . . . and have an order made in the order book . . . which order, so made, shall operate as a release on all former taxes on said land, and no sale thereof shall be made, embrace those — (in this case the heirs of C.) — who in law would have owned the lands, if they had not been sold for taxes, or, if sold, had been redeemed within the prescribed time after the sale at which the State purchased.

In West Virginia it is the settled rule that a court of equity has jurisdiction to set aside an illegal or void tax deed.

According to settled rules, equity will not interfere to remove an alleged

cloud upon title to land, if the instrument or proceeding constituting such alleged cloud is absolutely void upon its face, so that no extrinsic evidence is necessary to show its invalidity; nor will it interfere if the instrument or proceeding is not thus void on its face, but the party claiming, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity and destroy its efficacy.

But equity will interfere where deeds, certificates, and other instruments given on sales for taxes, are made by statute *prima facie* evidence of the regularity of proceedings connected with the assessments and sales.

The case is stated in the opinion.

Mr. John F. Keator and *Mr. John A. Hutchinson* for appellants.

Mr. S. Morris Waln filed a brief for appellants.

Mr. James H. Ferguson for appellees.

Mr. W. Mollonan filed a brief for appellees.

Mr. Justice Harlan delivered the opinion of the court.

The appellees, who were the plaintiffs below, are the children and heirs at law of Allen T. Caperton, who, the bill alleged, was seized and possessed at the time of his death of an estate in fee in various tracts of land in West Virginia which are fully described in the pleadings.

The appellants, who were defendants below, assert ownership of the same lands.

The object of the present suit — which was removed from one of the courts of West Virginia — was to obtain a decree annulling the deeds under which the defendants claim title, and thereby remove the cloud created by them on the title of the plaintiffs. By the final decree those deeds were set aside as inoperative, fraudulent, and void, and as clouds upon the plaintiffs' title, "so far as they and each of them overlap and include any of the lands of the said plaintiffs as laid down and shown upon the map filed with the papers of this cause, marked 'Map of the lands in the suit of Caperton's Heirs *v.* Rich and others, Decree Map.'"

Attention will first be directed to the title asserted by the plaintiffs. They derive title from numerous patents and deeds, as follows :

1. A patent from the Commonwealth of Virginia, dated March 25th, 1795, to Robert Morris for 153,900 acres of land in the county of Greenbrier; a deed from Robert Morris and wife, dated March 13th, 1797, conveying to William Crammond several tracts, including the above tract of 153,900 acres; a deed from William Crammond and wife, dated October 28th, 1814, to Thomas Astley, covering all the above lands conveyed by Morris and wife to William Crammond; a deed dated December 10th, 1840, to Henry Crammond from Littleton Kirkpatrick and wife, (the latter being the only heir at law of Thomas Astley,) and Sarah Astley, the widow of Thomas Astley, embracing the lands covered by the deeds from Morris and wife and William Crammond; a deed by Henry Crammond to John Williams, dated December 21st, 1842, conveying to the latter the tract of 153,900 acres.

2. A deed to Caperton by John Williams and wife, dated February 21st, 1850, conveying to the grantee 77,104 acres of the tract of 153,900 acres named in the Morris patent. Caperton sold and conveyed a part of the land embraced by this deed, so that, at his death, he claimed to own only 41,171½ acres of the above 77,104 acres.

3. A patent from the Commonwealth of Virginia to Abner Cloud, assignee of Lewis Franklin, dated March 10th, 1790, for 5000 acres in Harrison County, on the waters of Gauley River. By a change in the lines of counties this tract was included in the county of Nicholas. It appears from the official records that these 5000 acres were forfeited to that Commonwealth in 1842 for the failure of the owner to enter them upon the books of the commissioner, and for non-payment of taxes. That fact being regularly reported by the commissioners of delinquent and forfeited lands to the Nicholas County circuit superior court, they were ordered by that court to be sold in the manner and upon the terms prescribed by law; and they were sold, John Williams becoming the purchaser. The sale having been confirmed, a deed was made to Williams June 20th, 1843, by the

commissioner of delinquent and forfeited lands for Nicholas County. Subsequently, February 21st, 1850, Williams and wife conveyed to Caperton the above 5000 acres as well as various other tracts that had been sold under the order of court by that officer and purchased by Williams.

4. A patent from the Commonwealth of Virginia to A. C. and D. B. Layne, dated September 1st, 1851, for 2738 acres in what is now Webster County, West Virginia. A. C. Layne and wife, by deed of March 18th, 1856, conveyed their interest to Douglas B. Layne, who, with his wife, by deed of April 12th, 1859, conveyed to Caperton.

5. Patents from the Commonwealth of Virginia to Austin Hollister, one dated November 1st, 1855, for 9330 acres, and the other dated February 1st, 1858, for 5938 acres, both tracts being in Randolph County. By deed of February 12th, 1859, Hollister and wife conveyed both of these tracts to Caperton.

It appears that in 1881 the children and heirs at law of Caperton — he having died in July, 1876 — presented to the circuit court of Webster County, West Virginia, a petition asking that they be allowed to redeem from forfeiture and sale the above tracts of 9330, 5938, 5000, and 2738 acres, as well as a tract of 500 acres, all assessed in the name of Caperton. The petition stated that there were no persons in condition to take the benefit of the forfeiture of those lands or any part of them under the provisions of section three of article thirteen of the constitution of the State, and that they were entitled to redeem the same in the manner provided by the thirteenth section of the act of the legislature of West Virginia, (Acts W. Va. 1872–3, p. 455, c. 134,) providing for the sale of escheated, forfeited, and unappropriated lands for the benefit of the school fund.

The section of Article XIII of the constitution of West Virginia to which reference was made in that petition is in these words:

"3. All title to lands in this State heretofore forfeited, or treated as forfeited, waste, and unappropriated, or escheated to the State of Virginia, or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as for-

feited, or escheated to this State, or purchased by it and become irredeemable, not redeemed, released, or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much thereof as such person has, or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the state taxes thereon for any five years during such possession; or if there be no such person, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees) for so much of said land as such person shall have title or claim to, regularly derived, mediately or immediately from, or under a grant from the Commonwealth of Virginia, or this State, not forfeited, which but for the title forfeited would be valid, and who, or those under whom he claims, has or shall have paid all state taxes charged or chargeable thereon for five successive years, after the year 1865, or from the date of the grant, if it shall have issued since that year; or if there be no such person, as aforesaid, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees) for so much of said land as such person shall have had claim to and actual continuous possession of, under color of title for any five successive years after the year 1865, and have paid all state taxes charged or chargeable thereon for said period."

The statute referred to was that of November 18, 1873, entitled "An act to provide for the sale of escheated, forfeited, and unappropriated lands for the benefit of the school fund."

By that statute the former owner of lands, the title to which was in the State by forfeiture or purchase, and which were ordered to be sold by the proper circuit court for the benefit of the school fund, was allowed, upon proof of title superior to that asserted by any other claimant, to receive the excess over the taxes charged and chargeable thereon,

with interest at twelve per cent — such exhibition and proof of title being made within two years after sale under the order of court. The former owner, or any creditor of such owner having a lien on the land, was also permitted, at any time before sale, to pay into court, with its consent, all costs, taxes, and interest due the State, and obtain an order releasing all former taxes on the land and suspending the sale thereof — such payment, however, not to affect or impair the title to any portion of such lands transferred to and vested in any person in virtue of section three of Article XIII of the state constitution. Acts of W. Va. 1872–3, pp. 449, 454, 455, c. 134.

The commissioner of school lands, whose duty it was to ascertain the quantity of land in his county subject to sale under the above statute, (§§ 1, 2,) reported to the proper circuit court that the taxes and interest charged and chargeable against the tracts of 9330, 5938, 5000, and 2738 acres claimed by the heirs at law of Caperton, amounted to $1785.82; and against the tract of 500 acres, the sum of $18.69. The prayer of the petition was granted. The final order of the court contained these provisions: "The petitioners having exhibited to the court their title papers, showing that they have title to each of the five several tracts of land mentioned in their petition and amended petition aforesaid, regularly derived from the Commonwealth of Virginia, and the court, being of opinion that the petitioners have a good and valid title to said lands, and it not appearing that there is any person in condition to take the benefit of the forfeiture thereof, doth consent and order that petitioners may redeem said lands from forfeiture. And thereupon petitioners, with the consent of the court, paid into court, to the hands of the said Duffy, commissioner of school lands, $1804.51, being the amount of taxes and interest due on said lands at this date, and $4.50 costs of this proceeding. It is therefore adjudged, ordered, and decreed that said several tracts of 2738, 5000, 9330, 5938, and 500 acres of land have been redeemed, and that they be and *stand released from said forfeiture and exonerated and released from all other former taxes and damages*, if any such there be,

and no sale thereof shall be made on account thereof, and said several tracts of land are *hereby reinstated* and directed to be entered and charged on the land books of said county of Webster, commencing with the year 1881, *in the names of the heirs at law of said Allen T. Caperton, deceased.*"

In the circuit court of Nicholas County there were similar proceedings in 1881 for the redemption from forfeiture and sale for non-payment of taxes of the tract of 41,171½ acres and other tracts standing in the name of Caperton. The back taxes, with interest, charged and chargeable upon those lands, were adjudged to be $3100.87. That amount was paid by the heirs of Caperton, and it was adjudged that these tracts "be and are released from such forfeiture and exonerated and released from all other former taxes and damages, if any such there be, and no sale thereof shall be made on account thereof, and the said several tracts of land are each hereby reinstated in all respects as if no such forfeiture had occurred, and the assessor of Nicholas County is ordered and directed to enter said lands in separate tracts on the land books for said county for the year 1881 *in the name of Allen T. Caperton's estate* and charge the same with taxes commencing with the year 1881, *all prior taxes, including the year* 1880, *having been paid as aforesaid.*"

The court below, in the present case, after observing that Caperton's title was regularly deducible from the Commonwealth of Virginia, and that all the lands in controversy were duly entered in his name on the land books of the proper counties, and that the taxes charged thereon were all paid by him up to and including the year 1873, thus correctly summarized the plaintiffs' proofs as to possession: "As to the possession of these lands by said Caperton, the evidence shows that as early as the month of April, 1865, one Solomon Taylor was in the actual possession and occupation of a part of the lands then owned by Caperton, as his tenant, and claiming his possession and occupation thereof as the tenant of Caperton. The lands so possessed and occupied by him were a part of the said Robert Morris tract purchased by Caperton, as above referred to. His improvements thereon consisted of a

log cabin, in which he lived, and a few acres of land enclosed, cleared, and cultivated by him, and had the appearance of being old. He remained on this land as tenant of Caperton until the year 1869, when he purchased from Caperton some 300 acres of the land formerly belonging to Morris, which embraced his said improvements. About the same time, in the spring of 1865, when Taylor was found in possession of said land, a man by the name of Thompson was on the lands acting as the agent of Caperton, locating and surveying them, and exercising supervision over them. In the spring of 1868 Caperton put Samuel Hinkle on that part of his said lands which were formerly a part of the Robert Morris tract, as his tenant and agent, and gave him the general charge of the whole of the lands then owned by him as above stated, with instructions to protect the timber thereon from waste and destruction, and to prevent squatters from settling upon them. Hinkle remained there as such tenant and agent of Caperton until the month of June, 1876, when Caperton died, and from that time to the institution of this suit he remained on said lands as the tenant of the plaintiffs. On the 8th day of July, 1874, George M. Sawyer, as the agent of Caperton, leased a portion of the land in controversy, lying on Williams River, to Mark Hammons, being the place where a man by the name of Mullen had once lived as a squatter, who took possession of the land under his lease, living there until he assigned it to M. J. Stiltner on the 14th day of May, 1875, and on the 21st of September, 1876, Stiltner assigned one-half of his leased premises to R. C. Clevenger, who entered upon the land, holding possession of the same until the spring of 1877, when he and Stiltner sold their tenancy to Peter Hammons, who took possession of the premises under them. The leased premises were afterwards occupied by Jesse Hammons, who derived his right from Peter Hammons, and he sold his right to John Lee, who entered upon the leased premises. All of these persons in law were the tenants of the plaintiffs, and of those under whom they claimed. It will be perceived that the constructive possession of the lands in controversy, under the proofs in this cause, in the absence of an actual, adverse pos-

session, which does not appear, was with the said Caperton up to the time that Taylor became his tenant of the lands mentioned above, and that the said Caperton had the actual possession of all of his said lands, at least from the month of April, 1865, to the time of his death, unless that possession was disturbed by the operations of the defendant, Rich, which commenced on the 10th day of May, 1872, by his lease to Mullens." *Braxton* v. *Rich*, 47 Fed. Rep. 178.

In considering the question of the possession of the various tracts of land claimed by the plaintiffs, as heirs at law of Caperton, the court below proceeded upon the ground that the surveys being coterminous all the tracts should be regarded as one tract. "Upon the question of adversary possession," the Supreme Court of Appeals of Virginia said in *Overton's Heirs* v. *Davisson*, 1 Gratt. 211, 224, "it is immaterial whether the land in controversy be embraced by one, or several coterminous grants of the older patentee; or one or several coterminous grants of the younger patentee: in either case, the lands granted to the same person by several patents, must be regarded as forming one entire tract." The same principle was announced in *Ewing* v. *Burnet*, 11 Pet. 41, 53, and in *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 443.

This is substantially the case made by the plaintiffs. It would seem to be sufficient to sustain their claim to ownership of these lands, unless it has been overthrown by the evidence adduced by the defendants.

We proceed to examine the case made by the defendants, and the grounds upon which they assail the title of the plaintiffs. Certain tax deeds, under which the defendants claim, embrace the lands in dispute. The circumstances under which they were executed will now be stated.

John B. Shreve, a surveyor by occupation, had in his possession what he claimed was the original record of numerous surveys of lands in Randolph County, Virginia, made prior to the beginning of the present century. These lands were afterwards embraced in the present counties of Nicholas and Webster, West Virginia. He was well acquainted with the lines and corners of these old, and, as the evidence clearly

establishes, long abandoned surveys. He was probably the only person, living at the time of the transactions to be presently referred to, who could identify those corners and surveys. He conceived the idea of having the lands supposed to be within those abandoned surveys put on the assessor's book and sold for non-payment of taxes — the lands to be purchased by those who should employ him to identify and mark the lines of the original surveys.

In execution of this plan, but without any authority whatever in the premises from any one interested in the lands, Shreve, in 1868, addressed to the assessor of Webster County, West Virginia, a communication describing various tracts of land, aggregating nearly 700,000 acres, and directing him to put them all on the commissioner's books for purposes of taxation. Among those tracts he named the following:

1. "One tract in the name of William McClary, containing 100,000 acres," lying "on Gauley and Williams Rivers at the lower end of the county," Hally township. It does not appear that any one by the name of McClary ever had title to a tract of 100,000 acres by patent or otherwise, or that any such tract was ever surveyed by or for any person of that name. It does appear that a patent, dated January 21st, 1796, which was subsequent to the date of the Morris patent, was issued to William McCreery.

2. "One tract in the name of George Messingburg, containing 12,500 acres . . . on Gauley, at the upper end of the county, Fort Lick township." The survey for this land was made in 1795, but no patent ever issued to Messingburg or to any assignee. In other documents the name of this person is given as Messingbird.

3. "Fifty-three tracts in the name of Henry Banks, containing 58,500 acres . . . laid off in 53 lots, the most lies east of Addison, Elk and Gauley, Fort Lick township." In 1787 Banks made fifty-three surveys, aggregating 58,500 acres of land, of which only forty-three were filed for patents. Of the surveys so filed, patents were issued for only nine, each covering one thousand acres. But those patents do not embrace any of the lands here in dispute.

4. "One tract in the name of James Welch, containing 105 acres in Fort Lick township."

To the paper sent by Shreve to the assessor was appended this memorandum: "Please place the following tracts on the books and them men will call on you and settle your fees liberally as my son told you. These lands in Webster County is covered sometimes three —— deep. If the owners choose to put them on the books at five cents per acre it will amount to thousands of dollars to the county as well as the State. As my son told you, you will be attended to. J. B. Shreve. P. S. — Leave with Mr. Sawyer what you have put them down at, so that I can write to those men what it is, etc. The rest lives in Pennsylvania."

"Those men," referred to in this postscript, were doubtless the persons residing out of the State, with whom Shreve made the first arrangement for putting on the assessor's books lands to be sold and which would be purchased by them at tax sales. But the arrangement with those persons seems to have been abandoned by them for some reason, and a different one was made with others. The latter arrangement is fully disclosed in the testimony, particularly in the depositions of Albert Owen and Benjamin Rich.

Albert Owen describes himself as a resident of Pennsylvania and a gentleman of leisure, who sometimes bought and sold real estate. It appears from his deposition that he had heard, in casual conversations, of a sale to be made in West Virginia in the autumn of 1869 of large bodies of land for delinquent taxes. And in May of that year he went to West Virginia and met John B. Shreve at the latter's residence in Upshur County. Shreve exhibited to him a large folio book of land surveys made between the years 1780 and 1795, and purporting to have been the work of Edward Jackson, a county surveyor, and his assistants or deputies. From their antiquated appearance they seemed to be the original book of surveys. Shreve claimed to have been shown by Jackson and his successors the original corners and landmarks of most of the surveys. The result of the meeting between Owen and Shreve was a written agreement by which the latter under-

took to assist the former in becoming familiar with the surveys prior to the proposed sale for taxes, and Owen agreed to pay Shreve $2000 for each one hundred thousand acres properly surveyed and identified by him, and purchased by Owen. Having made the above arrangement, Owen returned to his residence in Pennsylvania, and being without any money of his own proposed to some of his friends that if they would "find the expense money" he would attend the sale, make such purchases as he deemed advisable, and divide the profits with them. He made an arrangement with several persons, among whom was the present appellant, Benjamin Rich, that upon being furnished by them with one thousand dollars, he would attend the sale, and deliver to them one-half the proceeds of lands that should be purchased with the money supplied by them. But the parties with whom Owen made this arrangement, except Rich, withdrew from it early in September, 1869. Owen testified: "I think, about the 20th of September I went to Unionville to see these parties and see if they would carry out the arrangement that had been made. Each one would refer me to another, and they declined to furnish the money or to go with me except Benjamin Rich, who said if he could get ready and could raise some money, which he thought he could do, he would go with me and see what there was in the project. I then said to Rich, 'if you will make an effort, raise the money, go with me, and carry out your part of the contract, I will leave it optional with you after the sale to withdraw. I will refund your money and pay your expenses on the trip.' Rich said he would make the effort, but the time was short, but he thought he would go. Our time was limited in which to make the trip, but Rich met me at the train, and we proceeded to West Virginia and to Webster Court-house. We arrived there one or two days prior to the sale. Rich was present. John B. Shreve was present. Granville P. Shreve was present. Land agents and lawyers from many of the surrounding counties were present. The sale was had and was somewhat animated. I purchased a long list of tracts of land, large and small, bidding at random. . . . The amount paid by me, as receipted in this list,

is one hundred and fifty-four dollars and fifty-four cents ($154.54). Benjamin Rich and myself returned home together, and on our way, between Buckhannon and Clarksburg, I asked Rich which option he would take, his interest in the land or his money and expenses refunded. He said he would take his interest in the land. I then said to Rich, 'If you are not satisfied I will refund your money, pay your expenses, and give you ten dollars per day for the time you have lost.' Rich replied, 'If you will give me two thousand dollars I will step out.' That was understood to end the option, as it really did, and it was settled that he was to take his interest in the land."

The circumstances under which the appellant Rich became connected with these transactions were thus detailed by himself in a suit brought against him by Shreve: "I am the defendant in the above stated suit and reside at Unionville, Center County and State of Pennsylvania. I first met John B. Shreve, the plaintiff in the above stated cause, on September —, 1869, at Buckhannon, W. Va. Albert Owen, of Phillipsburg, Penna., introduced me to him. Owen had met Shreve some months before, and, as they both said, had been examining and surveying lands to be sold that fall for taxes. Shreve represented to me that he knew the beginning corners and lines of several large tracts of land that were to be sold in Webster County, West Virginia, that month; that he had the original plats and field-notes of Edward Jackson, the surveyor who made these surveys; that these corners and lines had been shown to him by Henry Jackson, he said, second surveyor of Randolph County, who was along with Edward Jackson when they were made. Shreve said that Henry Jackson was the second surveyor of Randolph County, and that he, Shreve, was deputy surveyor under him, and that he had nearly all of Henry Jackson's field-notes, and that he was the only man living that could show these corners and lines to identify these surveys. He also said that he had had the titles to these several tracts examined by one of the best land lawyers in the State (did not give his name); that he would show these corners and lines of these lands to the county sur-

veyor sufficient to identify any of these tracts and assist him or them in getting deeds and surveying the tracts of land if the party buying them would agree to pay him two cents per acre bonus. Owen had called my attention to these land sales some months before this and showed me a letter from John B. Shreve about the same as I have stated above. This letter and Owen's statement as to the lands, quality and quantity of timber, coal, etc., induced me to go to West Virginia at the time I did. . . . Then Shreve being so positive about his ability and willingness to identify these lands, I agreed to buy one tract, known as 'Col. Wm. McClary,' 100,000 acres; to pay 2000 dollars when I got the deed; corners and lines sufficient to identify it shown to me or county surveyor. I agreed to pay this two thousand dollars to John B. Shreve as a bonus for his information and services, as stated above. Owen, in my presence, agreed to take one tract of 105,000 acres, known as 'James Welch;' one of 187,000 acres, 'Joseph Patterson,' and some others. Shreve went with us to attend the sale. I bought the above tract, 'Col. Wm. McClary;' Owen bought several. In August, 1870, John B. Shreve came to my house in Unionville, Pennsylvania, and got me to take him to Phillipsburg, Pennsylvania, to see Mr. Owen. He said Owen was not paying him as he agreed. After a long talk between them Mr. Shreve agreed if I would take the 'Welch tract of 105,000 acres' he would wait on me for the bonus, $2100, until I could sell the land. I agreed to do that, and Owen assigned the sheriff's memorandum of the said tract to me at that time. I got the deed for the two tracts about the 1st of October, 1870."

On the 24th of September, 1869, there was a sale at the courthouse in Webster County of the lands that Shreve had, for his individual purposes, caused to be put on the assessor's books for taxes for the year 1868. The tract of 58,500 acres, in the name of Henry Banks, was purchased by Owen, Rich, and G. P. Shreve (the latter a son of J. B. Shreve) for $11.20; the Messingbird or Messingburg 12,500 acres, by the same persons for $2.61; the McClary 100,000 acres, by Owen and Rich for $41.82; and the Welch 105,000 acres, by Owen for

$21.97. On the 28th day of September, 1870, James Woodzell, recorder of Webster County, who seems to have been, at that time, Rich's agent in land transactions in Webster County, executed deeds as follows: To Benjamin Rich and Thornton Conrow, assignee of Rich, for the 100,000 acres entered on the assessor's books and sold in the name of William McClary; to Rich and Conrow, assignee of Albert Owen and G. P. Shreve, for the Messingbird 12,500 acres; to Rich and Conrow, assignees of Owen, for the Welch 105,000 acres, and to Rich, assignee of Owen and G. P. Shreve, for the Banks 58,500 acres. It is unnecessary to refer to any deeds subsequently made, for they depend upon the validity of the tax sales of the above lands and upon the deeds made, as just stated, by the recorder of Webster County on the basis of those sales.

Were the tax sales of September 24th, 1869, of any validity whatever? The claims of the several defendants in this suit depend principally on the answer to that question.

The Code of Virginia in force prior to the creation of the State of West Virginia provided:

"§ 24. When any real estate is offered for sale [for taxes] as aforesaid, by the sheriff or collector, and no person present bids the amount to be satisfied from the sale thereof, the sheriff or collector *shall purchase the same on behalf of the Commonwealth for the taxes thereon*, and the interest on the same, and its proportion of the expense of advertising. A list of the real estate so purchased by the Commonwealth shall be made out by the sheriff or collector. After it shall have been verified by him on oath, the court of his county or corporation shall direct its clerk to make out a copy thereof, and deliver it to the commissioner of the revenue, and shall cause the original list to be certified to the first auditor. . . . § 25. The first auditor shall cause all the lists received in his office, under the preceding section, to be recorded in a well-bound book; and all the real estate mentioned in such lists shall, *without any deed for the purpose, stand vested in the Commonwealth.* § 26. The previous owner of any real estate so purchased for the Commonwealth, his heirs or assigns, or any person having a right to charge such real estate for a debt, may, until a further sale

thereof, as hereinafter mentioned, redeem the same by obtaining from the first auditor such certificate, and paying such fee therefor as is mentioned in the first section, and by paying into the treasury the amount for which such real estate was so purchased, with such additional sums as would have accrued for taxes thereon if the same had not been purchased for the Commonwealth, and interest at the rate of ten per centum per annum, on the former amount, from the date of the purchase, and on the additional sums, from the fifteenth of December, in the year in which the same would have so accrued. When real estate so purchased is so redeemed, the first auditor shall certify the fact to the proper commissioner of the revenue." Va. Code 1849, c. 37, §§ 24, 25, 26.

By an act of the general assembly of Virginia, passed February 3d, 1863, it was provided, among other things, that all property, real, personal, and mixed, owned by or appertaining to that Commonwealth, and being within the boundaries of the then proposed State of West Virginia, when the same became one of the United States, should pass to and become the property of West Virginia, without any other assignment, conveyance, transfer, or delivery than was contained in that act. Acts of Va. 1862–3, p. 64, c. 68.

The constitution of West Virginia, adopted in 1863, declared that "such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature." Art. XI, § 8. The effect of this constitutional provision was to make the above sections of the Code of Virginia part of the law of West Virginia from the time of the admission of the latter State into the Union.

The constitution of West Virginia of 1863 directed provision to be made by the legislature for the sale of all lands in that State, theretofore forfeited to Virginia for the non-payment of the taxes charged thereon for the year 1831, or for any year previous thereto, or for the failure of the former owners to have the same entered on the land books of the proper county

and charged with the taxes due thereon for that or for any year previous thereto, under the laws of Virginia, and also of all waste and unappropriated lands, by proceedings in the circuit courts of the county where such lands were situated. Art. IX, § 3. All lands within West Virginia, returned delinquent for non-payment of taxes to Virginia after 1831, when the taxes, exclusive of damages, did not exceed twenty dollars; and all lands forfeited for the failure of the owners to have the same entered on the land books of the proper county, and charged with the taxes chargeable thereon subsequent to 1831, where the tract did not contain more than one thousand acres, were released and exonerated from forfeiture, and from the delinquent taxes and damages charged thereon. Art. IX, § 4.

The fifth section of the same article provided: "§ 5. All lands in this State heretofore vested in the State of Virginia by forfeiture, or by purchase at the sheriffs' sales for delinquent taxes, and not released or exonerated by the laws thereof, or by the operation of the preceding section, may be redeemed by the former owners, by payment to this State of the amount of taxes and damages due thereon at the time of such redemption, within five years from the day this constitution goes into operation; and all such lands not so released, exonerated, or redeemed shall be treated as forfeited, and proceeded against and sold as provided in the third section of this article."

In execution of those provisions the legislature of West Virginia, on the 2d day of March, 1865, passed an act containing, among others, these provisions:

"Sec. 2. All lands in this State heretofore vested in the State of Virginia by forfeiture, or by purchase at the sheriffs' sales for delinquent taxes and not released or exonerated by the laws thereof, or by the operation of the seventh section of the ninth article of the constitution of this State, may be redeemed by the former owners by payment into the treasury of this State, upon the certificate of the auditor, of the amount of taxes and damages due thereon at the time of such redemption, on or before the twentieth day of June, eighteen hundred and sixty-eight.

"SEC. 3. All waste and unappropriated lands within this State, and all lands in this State heretofore vested in the State of Virginia by forfeiture or by purchase at the sheriffs' sales for delinquent taxes, not released and exonerated, or redeemed in the manner prescribed in the second section of this act, shall be sold for the benefit of the school fund, in the manner hereinafter directed." Acts W. Va. 1865, p. 79, c. 92.

From these statutory and constitutional provisions it appears: That by the law of Virginia, in force prior to the creation of the State of West Virginia, it was the duty of the sheriff or collector, when lands were sold for taxes, to purchase them on behalf of the Commonwealth for the amount of taxes, unless some person bid that amount; that any lands so purchased and certified to the first auditor vested in the Commonwealth without any deed for that purpose; that such lands could have been redeemed in the mode prescribed by the statute; that whatever title Virginia had to lands so purchased and not redeemed, and which were within the territory now constituting West Virginia, passed to the latter State upon its admission into the Union; and that the time given by the constitution and laws of West Virginia to redeem lands that had become the property of Virginia by forfeiture or by purchase at sheriffs' sale for delinquent taxes, and which had not been released or exonerated in conformity to law, expired June 20th, 1868.

The result is that the sale of the tract of 100,000 acres, put on the assessor's books in the name of William McClary, for the taxes of 1868, must be held to have been unauthorized by law. And such must be the result even if it be assumed that it was the same tract as that patented by Virginia to William McCreery on the 21st of January, 1796. From the records in the office of the auditor of public accounts of Virginia it appears that the tract of 100,000 acres in the name of William McCreery was charged on the land books of Nicholas County with taxes for the years 1840 to 1850 inclusive, and was returned delinquent for all of those years in the aggregate sum of $297.50, for which it was sold and purchased by the Commonwealth of Virginia in the year 1850. It had not been

redeemed in 1860, and after that year it disappeared from the land books of the county.

The title was in Virginia from and after the sale in 1850 for taxes, and that title passed to West Virginia on the admission of the latter State into the Union. The former owner was given, by the constitution of West Virginia, five years from the day that instrument went into operation to redeem by paying the taxes and damages due the State. That time, as just stated, expired June 20th, 1868. There was no redemption. It was, therefore, beyond the authority of the assessor of Webster County to put the McClary or McCreery tract on the assessor's books as chargeable with taxes for the year 1868. It was then the property of the State of West Virginia, as between the State and all who claimed under the McCreery patent, and as such could neither be assessed nor sold as for taxes due the State. Laws of West Virginia, 1863, p. 161, § 36, Act of December 3, 1863. The assessment and sale were consequently void, and no rights passed to the purchasers.

Some effort was made to protect the claim of Rich and Conrow to own the McClary or McCreery tract of 100,000 acres in virtue of a sale made in 1871 for the taxes of 1870 under an alleged assessment upon this tract as the property of one "Viscount Clifford de Fleury." The deed made by the recorder to Rich and Conrow, dated October 3d, 1872, recited among other things that "the said tract of land was surveyed for Colonel William McClary on the 23d of April, 1795, the same having since been conveyed, as appears by sundry deeds and conveyances now upon record in said county of Webster, showing that the same land was held in fee simple by Viscount Clifford de Fleury, but was sold on the 24th of September, 1869, in the name of William McClary, for the nonpayment of taxes thereon for the year 1868 and previous years, and was purchased by Benjamin Rich, and the same conveyed to said Rich and Thornton Conrow by deed bearing date September 28th, 1870." It is a singular circumstance that not one of the "sundry deeds and conveyances" here referred to was produced in evidence. The proof tends strongly to show that the sale of 1871 for the taxes of 1870

was a fraudulent contrivance to overcome the inherent difficulties that were in the way of sustaining the sale of 1869 for the taxes of 1868. The sale of 1871 could not have legally occurred unless taxes were in fact chargeable on the lands, and the lands entered on the assessor's book for the taxes of 1870. The original land book of 1870 for Webster County upon which such entry would appear, if it was in fact duly made, could not be found at the time the evidence in this cause was taken, and the only book in existence — purporting to be a copy of that book containing the entry of 100,000 acres in the name of de Fleury — was the one in the possession of the state auditor. Upon that copy appeared, for the first time in any land book of Webster County, a tract of 100,000 acres "in the name of Fleury, Viscount Clifford de, for the year 1870." And the entry in that copy was not in its alphabetical order, but out of its natural place, between the letters M and N, and in a different handwriting from the handwriting on the same page, except the footings. The county clerk of Webster County testified that upon examination of the assessor's land book in his office for the year 1870 he could not find any land charged thereon in the name of Viscount Clifford de Fleury. Without further reference to the proofs on this point, it is sufficient to say that, according to the weight of the evidence, this land was never duly entered in the name of de Fleury upon the land books of the proper county preceding the sale in 1871 for the taxes of 1870; that that sale was a mere sham; and that no rights accrued to the purchasers by reason of it.

Nor did any title pass by the purchase at the tax sale of September 24th, 1869, of the Messingbird or Messingburg tract of 12,500 acres. That tract, it is true, appeared to have been surveyed in 1795, but the survey was never filed in the land office of Virginia, and no patent was ever issued. The Welch tract was also surveyed in the same year, but no patent, based on that survey, appears to have been issued. The placing of these tracts, upon the books of Webster County, as the lands of private persons, claiming under the Messingbird and Welch surveys, but having no title to the lands, was, therefore, unau-

thorized by law, and no right to such lands was acquired by the tax sale of 1869. What has been already said in respect to the Banks 58,500 acres tract is sufficient to dispose of that part of the case, namely, that grants were issued for only nine of the forty-three contiguous surveys made in the name of Banks, and that none of the lands claimed by the plaintiffs are within the boundaries of the surveys patented.

In reference to the claim of some of the defendants to own a portion of the Welch tract, in virtue of a tax sale in 1875 of 63,734 acres, in the name of Francis Hyland, the court below found from the evidence that no such survey was ever filed in the land office of Virginia; that no grant was ever issued thereon; and that no such tract was ever charged with taxes on the land books of either State. We perceive no reason to doubt the accuracy of this finding. From such a sale no title could be derived.

But the defendants insist that, independently of any question involving *their* respective claims to the lands in dispute, the plaintiffs themselves have no title that will authorize any decree in their behalf. We have seen that in 1875, in the lifetime of Allen T. Caperton, the lands in dispute, having been returned delinquent for the non-payment of the taxes due thereon, were sold by the proper officer, and purchased by the State of West Virginia, and the title thereto, without deed and by virtue of the statute, vested at once in the State. There was no formal redemption by Caperton, who died within less than a year after such sale; and it is insisted that his *heirs* could not redeem under the laws of West Virginia, at least after the expiration of one year from the purchase by the State. In that view, it is contended that the proceedings hereinbefore referred to, and which were instituted in 1881 in the circuit courts of Webster and Nicholas Counties by the heirs of Caperton, were ineffectual to restore title; in which case his heirs could not claim the lands, nor invoke the aid of a court of equity, whatever might be the invalidity of the claims asserted by the defendants. Let us see whether this contention is justified by any reasonable interpretation of the statutes of West Virginia.

By the constitution of West Virginia, adopted in 1872, Article XIII, it was provided:

"SECTION 4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred, or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall, by proceedings in the Circuit Court of the county in which lands or part thereof are situated, be sold to the highest bidder.

"SECTION 5. The former owner of any such land shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged or chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the Circuit Court that decrees the sale, within two years thereafter."

In order to carry out these constitutional provisions, the legislature of West Virginia passed the act of April 9th, 1873, c. 117, entitled "An act to amend and reënact chapter thirty-one of the Code of West Virginia, concerning the sale of real estate for taxes; forfeiture for non-payment and non-assessment of taxes, and the transfer of title vested in the State." Acts W. Va. 1872–3, p. 308.

This act provides for the sale of lands for taxes, and gives "the owner of any real estate so sold, *his heirs or assigns*, or any person having a right to charge such real estate for a debt," the right to "redeem the same by paying to the purchaser, his heirs or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the tenth section, [being the receipt given by the sheriff or collector to the purchaser,] and such additional taxes thereon as may have been paid by the purchaser, his heirs or assigns, with interest on said purchase money and taxes at the rate of twelve per centum per annum from the time the same may have been so paid." § 15. Infants, married women, insane per-

sons, or persons imprisoned, whose real estate may have been sold during their respective disabilities, were given the right to redeem within one year after such disability was removed. § 30. If no person present at the sale bid the amount to be satisfied to the State, it was made the duty of the sheriff or collector to purchase on behalf of the State for the taxes, with interest and damages due thereon — making out a list of such purchases to be transmitted to the auditor and recorded, and the title vesting in the State, subject, however, to the right of redemption as prescribed in the same statute. §§ 31, 32. The right of redemption was to be exercised, within one year from the sale, by "the previous owner of any real estate so sold and purchased for the State, *his heirs or assigns*, or any person having a right to charge it for a debt." § 33. The statute also prescribes the mode in which the redemption may be effected by "any person having a right to redeem any tract or lot of land purchased by the State at a sale thereof for the non-payment of the taxes thereon." § 34. Another section provides: "When real estate so purchased is so redeemed, the auditor shall certify the fact of such redemption to the proper assessor, and it shall thereupon be the duty of such assessor to reënter the same upon the land books of the county or district in the name of the former owner thereof, or in case the same has been conveyed by deed to any other person, to enter the same in the name of the grantee in such deed. But such redemption shall not prejudice any claimant of such land or any part thereof, who may have acquired the State's right thereto by the constitution or former laws of the State." § 38.

In the same year, November 18th, 1873, was passed the act heretofore referred to, providing for the sale of escheated, forfeited, and unappropriated lands for the benefit of the school fund. That act, which amended and reënacted chapter 105 of the Code of West Virginia, provided:

"Sec. 1. All waste and unappropriated lands within this State, and all lands in this State heretofore vested in the State of Virginia by forfeiture or purchase at the sheriff's or collector's sale for delinquent taxes and not released and exonerated or redeemed within one year according to law; all lands

heretofore or hereafter purchased for this State, at a sale thereof for taxes, and not redeemed within one year, according to law, and all lands forfeited to this State for the failure to have the same entered upon the books of the assessor and charged with the taxes thereon, as provided for by law, shall, so far as the title thereof shall not be vested in junior grantees or claimants under the provisions of the Constitution and laws, be sold for the benefit of the school fund, in the manner hereinafter prescribed. The auditor shall certify to the clerk of the county court a list of all such lands, which, or the greater part of which, lie in his county, within sixty days after the title thereto shall vest in the State." Acts W. Va. 1872–3, c. 134, pp. 449, 450.

It was made the duty of circuit courts to appoint for each county of their respective circuits a commissioner charged with the duty of selling, under the direction of the court, lands of the character named in the statute.

The act further provided: "SEC. 12. The former *owner* of any such land, shall be entitled to recover the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter, as provided in the next section. SEC. 13. Any such *owner* may within the time aforesaid, file his petition in the said circuit court stating his title to such lands, accompanied with the evidences of his title and upon such full and satisfactory proof that at the time the title to said lands vested in the State, he had a good and valid title thereto, legal or equitable, superior to any other claimant thereof. Such court shall order the excess mentioned in the next preceding section to be paid to him; and upon a properly certified copy of such order being presented to the auditor, he shall draw his warrant on the treasury in favor of such owner or his personal representative for such excess. *At any time before the sale* of any such land as hereinbefore mentioned, *such former*

owner or any creditor of such former owner of such land, having a lien thereon, may pay into court by and with the consent of the court, all costs, taxes, and interest due at the time, as provided for in section twelve of this chapter, and have an order made in the order book of such court describing the amount paid in as well as the character of his claim to said land, which order so made shall operate as a release of all former taxes on said land, and no sale thereof shall be made: Provided, That such payment shall in no way affect or impair the title to any portion of such land transferred to and vested in any person, as provided in section three of article thirteen of the constitution." Acts W. Va. 1872–3, pp. 454–5.

It will be observed, from an examination of the acts of April 9th, 1873, and November 16th, 1873: That in the case of real estate sold for taxes, of which the State became the purchaser, the first-named act gives "the *owner* of any real estate . . . his *heirs or assigns* or any person having a right to charge such real estate for a debt," the right to redeem within one year from the sale; and that in the case of proceedings instituted by the school commissioner in the circuit court to sell, for the benefit of the school fund, land of which the State had become the purchaser, the last act gives "the former owner of any such land" the right to recover the excess for which it may be sold "over the taxes charged and chargeable thereon," if his claim be asserted, in such court, by petition filed within two years after any sale under its orders, and accompanied by proof of title. But the latter act also gives to "such former owner or any creditor of such former owner of such land" the right to redeem "*at any time before the sale*" that may be ordered by the circuit court for the benefit of the school fund.

Now the point made by the defendants is that although Caperton, if he had lived, could have redeemed at any time before such sale, his *heirs* could not redeem at all under the act of November 16th, 1873, because that act makes no express reservation for *their* benefit, and does not, in terms, allow any one except the former owner, or some creditor of his having a lien on the land, to take advantage of its provisions.

Opinion of the Court.

We have not been referred to any decision of the Supreme Court of Appeals of West Virginia, placing any such interpretation upon the above statutes. None of the cases cited by counsel for the defendants sustain the proposition that the heirs of the former owners were excluded from the beneficent provisions of the act of November 16th, 1873. *McClure* v. *Maitland*, 24 W. Va. 561, only decides that proceedings instituted under that act, for the benefit of the school fund, were, in a judicial sense, *ex parte*, and were neither *in rem* nor *in personam;* neither against the land nor against the former owners. In that case it was held that as the title had vested absolutely in the State, the right to redeem was simply of grace, and must be exercised in the form prescribed by the statute. This principle was recognized by the Circuit Court of the United States for the District of West Virginia in *De Forest* v. *Thompson*, 40 Fed. Rep. 375, 378, (reported in 32 W. Va. App. p. 1, under the title of *Wakeman* v. *Thompson*,) and subsequently by the United States Court of Appeals for the Fourth Circuit in *Read* v. *Dingess*, 8 C. C. App. 526, 539. The full extent of the decision in *McClure* v. *Maitland* is indicated by the subsequent case of *Waggoner* v. *Wolf*, 28 W. Va. 820, 827, in which the court said: "In *McClure* v. *Maitland*, 24 W. Va. 561, this court decided, that as soon as the title to the land became forfeited and vested in the State, according to the aforesaid provisions of the constitution, the ownership of the State became absolute, and her title perfect, and that the former owner then ceased to have any title, claim, right, or interest whatever in the land as such owner, and that the only right conferred upon him by the said fifth section of the constitution was to be paid the excess of the proceeds of the sale over the amount of the taxes, in the manner therein prescribed. In that case no petition was filed or offer made to redeem the land. The effort there was to have the sale of lands already made set aside at the instance of Maitland, the former owner. Therefore no question was presented or considered in that case as to the right of the former owner to redeem the land before sale by the school commissioner; nor was the power of the legislature to authorize such redemption

before sale either referred to or discussed by the court in its opinion. The question as to such authority is now for the first time presented to this court." Neither of these cases involved any question as to the right of the heirs of the former owner to redeem prior to any sale based on a petition filed by the school commissioner under the act of November 16th, 1873.

In the absence of any direct decision of the state court upon this subject, we are not willing to construe the statutes in question as cutting off the right of the heirs of the former owner — the latter dying before the expiration of the time (one year) allowed for redemption by the act of April 9th, 1873 — to secure the release of his lands from all former taxes, and thereby to prevent such lands from being sold for the benefit of the school fund, as prescribed by the act of November 16th, 1873. It is quite true that upon the sale on the 26th of September, 1875, of the lands here in question (standing on the land records in the name of Caperton) the title, by virtue of the statute, passed to the State upon its purchase of them, and that title became indefeasible upon the expiration of one year without redemption. But it is clear, from the express words of section 33 of the act of April 9th, 1873, that the *heirs* of Caperton, he having died before the expiration of one year, could *within that year* have redeemed in the mode prescribed by that act. If there was no redemption, within the time named, the title remained in the State until the lands were sold under proceedings instituted in the proper circuit court of the county by the school commissioner. Section 13 of the act of November 16th, 1873, was in the direction of liberality and forbearance towards those whose lands had been taken for taxes. And in the condition of the land titles of the State, there was every reason why the State should enable those who, but for the sale at which it purchased, would, under the law, be the owners of the lands, to have them released from "all former taxes," provided they moved in the matter before the lands were actually sold by direction of the Circuit Court in the proceedings instituted by the commissioner of school lands.

The words "former owner" in section 13 of the last act embrace those who, in law, would have owned the lands, upon

the death of such owner, if they had not been sold for taxes, or, if sold, had been redeemed within the prescribed time after the sale at which the State purchased. If the heirs of Caperton had redeemed the lands on the last day of the year within which the State permitted redemption from the original sale for taxes, the title, which vested in the State by its purchase, would, under the act of April 9th, 1873 have been at once reinvested in them without any deed, from the State, or without the execution of any instrument except a certificate showing the payment of what was due the State. And if Caperton had been alive during the proceedings instituted by the school commissioner in the Circuit Court, his right, under the act of November 16th, 1873, to redeem *at any time before a sale under the order of the court*, for the benefit of the school fund, could not be, indeed, is not questioned. It is inconceivable that the legislature intended to deny that privilege to his heirs, who succeeded to whatever rights he had in respect to these lands. What the State wished was the payment of its taxes and all damages due for the failure to pay them at the proper time. No considerations of public policy can be suggested in support of the contention, based upon the mere letter of the statute, that there was a purpose to withhold from the heirs of the former owner the privilege of redemption given to the ancestor. The two statutes of 1873 are *in pari materia*, and must be construed together in order to ascertain the intention of the legislature.

Much stress is placed by the defendants upon the reservations made in the acts of April 9th, 1873, and November 16th, 1873, of the rights previously vested under section 3 of Article XIII of the state constitution. They claim to have had rights of that character at the time these lands were forfeited for the non-payment of taxes by Caperton, and that those rights became complete and unassailable before the redemption by Caperton's heirs in 1881. By that section of the state constitution, hereinbefore set out, the title to lands of the character described which were not redeemed, released or otherwise disposed of, and which was vested in and remained in the State, was transferred to and vested —

1. In any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much thereof as such person shall have had actual, continuous possession of under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the state taxes thereon for any five years during such possession; or,

2. If there were no such person, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much of said land as such person shall have title to, regularly derived, mediately or immediately, from or under a grant from the Commonwealth of Virginia, which, but for the title forfeited, would be valid, and who, or those under whom he claims, has or shall have paid all state taxes charged or chargeable thereon for five successive years after the year 1865, or from the date of the grant, if it was issued after that year; or,

3. If there were no such person as aforesaid, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much of said land as such person shall have had claim to and actual, continuous possession of, under color of title, for any five successive years after the year 1865, and have paid all state taxes charged or chargeable thereon for said period.

The defendants' case cannot be deemed to belong to the first or third of these classes, for the reason, if there were no other, that the evidence fails to show actual, continuous possession for ten years, or for five successive years after 1865, under color or claim of title. We concur with the learned District Judge in holding that the defendants "have failed by any evidence to prove the possession of this land, before the suit was brought, for five consecutive years. The possession attempted to be set up was of such a transitory character as to be utterly unreliable. It was not the actual, continuous possession for five consecutive years contemplated by the constitution." The evidence of the principal witnesses for the defendants was, as the court below well said, "lacking in all of those

essential elements that go to make up a continuous adverse possession or holding."

Nor can the defendants bring themselves within the second of the above classes described in section three of article thirteen of the state constitution. In cases of that class possession is not required; but title, regularly derived, was required. Assuming the correctness of what has been said in reference to the title asserted by the defendants, and which need not be here repeated, it is idle to say that they had title to any part of the lands claimed by the plaintiff, "regularly derived," mediately or immediately, from or under a grant either from Virginia or from West Virginia.

Upon the question of the jurisdiction of a court of equity to give the relief sought by the bill, but little need to be said.

In *Simpson* v. *Edmiston*, 23 W. Va. 675, 678, the court said that it had been repeatedly held that a court of equity has jurisdiction to set aside an illegal tax deed — citing *Forqueran* v. *Donnally*, 7 W. Va. 114; *Jones* v. *Dils*, 18 W. Va. 759; and *Orr* v. *Wiley*, 19 W. Va. 150. And in *Danser* v. *Johnson*, 25 W. Va. 380, 387: "It is fully settled in this State that a court of equity has jurisdiction to set aside a void tax deed." These authorities make it clear that if this case had remained in the state court no objection could have been made to the form of the suit. But as the jurisdiction of the courts of the United States, sitting in equity, cannot be controlled by the laws of the States or the decisions of the state courts — except that the courts of the United States, sitting in equity, may enforce new rights of an equitable nature created by such laws, *Clark* v. *Smith*, 13 Pet. 195; *Holland* v. *Challen*, 110 U. S. 15 — it is proper to say that, according to settled principles, the plaintiffs were entitled to invoke the aid of a court of equity.

The principal ground upon which the contrary view is rested by the appellants is, that the bill assails the tax deeds under which they claim as fraudulent, void, and inoperative. And to support this view several adjudged cases are cited, some of which hold that where the title is merely legal, and where the validity of one title or the invalidity of another

clearly appears on the face of documents that are accessible, and no particular circumstances are stated, showing the necessity for interference by equity, either for preventing suits or other vexation, the remedy is at law. *Hipp* v. *Babin*, 19 How. 271; *Whitehead* v. *Shattuck*, 138 U. S. 146, 156; *Scott* v. *Neely*, 140 U. S. 106, 110; *Smyth* v. *N. O. Canal & Banking Co.*, 141 U. S. 656, 660. The principle is thus stated by Mr. Justice Story: "Where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be cancelled or delivered up, would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury." 1 Eq. Juris. § 700 *a*.

These authorities do not control the present question. It must be remembered that "it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce* v. *Grundy*, 3 Pet. 210, 215; *Drexel* v. *Berney*, 122 U. S. 241, 252; *Allen* v. *Hanks*, 136 U. S. 300, 311. And the applicability of the rule depends upon the circumstances of each case. *Watson* v. *Sutherland*, 5 Wall. 74, 79. In the case now before us it cannot be said that the invalidity of the deeds which the plaintiffs seek to have cancelled appears on their face. It is not clear that their invalidity can be placed beyond question or doubt, without evidence *dehors* those deeds.

Besides, by the laws of West Virginia the tax deeds under which the defendants claim are *prima facie* evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs or assigns, and all other persons who might have redeemed the same within the time prescribed by law, and conclusive evidence against all other persons, that the material facts recited in them are true. Code

of W. Va. 1868, c. 31, § 29; Acts of W. Va. 1872–3, c. 117, § 29; Code of W. Va. 1891, c. 31, § 29. Mr. Pomeroy, in his Treatise on Equity Jurisprudence, while recognizing it to be the general rule, established by the weight of authority, that equity will not interfere to remove a cloud from title "where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity," or "where the instrument or proceeding is not thus void on its face, but the party claiming, in order to enforce it, *must necessarily* offer evidence which will *inevitably* show its invalidity and destroy its efficacy" — which doctrine, he says, often operates to produce a denial of justice — correctly says that equity will interfere where deeds, certificates, and other instruments given on sales for taxes are made by statute *prima facie* evidence of the regularity of proceedings connected with the assessments and sales. 3 Pomeroy's Eq. Jur. § 1399, and note 1, p. 437, and authorities there cited. And this view is sustained by numerous adjudged cases. *Huntington* v. *Central Pacific Railroad*, 2 Sawyer, 503, 514; *Allen* v. *City of Buffalo*, 39 N. Y. 386, 390; *Palmer* v. *Rich*, 12 Michigan, 414, 419; *Marquette, Houghton & Ontonagon Railroad* v. *Marquette*, 35 Michigan, 504; *Milwaukee Iron Co.* v. *Town of Hubbard*, 29 Wisconsin, 51, 58; *Weller* v. *City of St. Paul*, 5 Minnesota, 95; *Pixley* v. *Huggins*, 15 California, 127; *Tilton* v. *O. C. M. R. Co.*, 3 Sawyer, 22. See also 2 Blackwell on Tax Titles, § 1066, and authorities cited. In the present case there are no defects of a controlling character that distinctly appear on the face of the tax deeds under which the defendants claim title. And as those deeds are made by statute *prima facie* evidence of title in the grantees named in them; and as, therefore, the plaintiffs, if sued in ejectment by the defendants, would be compelled, in order to defeat a recovery against them, to resort to extrinsic evidence in support of their title, the deeds in question constitute a cloud upon that title, to remove which the plaintiffs may rightfully invoke the aid of a court of equity.

The decree is *Affirmed.*

CONNORS *v.* UNITED STATES.

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

No. 512. Submitted January 21, 1895. — Decided May 20, 1895.

An indictment under Rev. Stat, § 5511, which charges that the accused, at the time named, did then and there unlawfully and with force and arms seize, carry away, and secrete the ballot box containing the ballots of a voting precinct which had been cast for representative in Congress, and did then and there knowingly aid and assist in the forcible and unlawful seizure, carrying away, and secreting of said ballot box, and did then and there counsel, advise, and procure divers other persons whose names were to the grand jury unknown, so to seize, carry away, and secrete said ballot box, charges but one offence, although it was within the discretion of the trial court, if a motion to that effect had been made, to compel the prosecutor to state whether he would proceed against the accused for having himself seized, carried away, and secreted the ballot box, or for having assisted or procured others to do so.

A suitable inquiry is permissible in order to ascertain whether a juror has any bias, to be conducted under the supervision of the court and to be largely left to its sound discretion; and in this case there was no error in not allowing a juror to be asked, "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against the defendant?"

THE case is stated in the opinion.

Mr. E. T. Wells and *Mr. Mortimer F. Taylor* for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an indictment in the District Court of the United States for the District of Colorado under section 5511 of the Revised Statutes, providing: "If, at any election for Represen-

tative or Delegate in Congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; or does any unlawful act to secure an opportunity to vote for himself, or any other person; or by force, threat, intimidation, bribery, reward or offer thereof, unlawfully prevents any qualified voter of any State, or of any Territory, from freely exercising the right of suffrage, or by any such means induces any voter to refuse to exercise such right, or compels, or induces, by any such means, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means, induces any officer of an election or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote; or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

The indictment charged that on the 4th day of November, 1890, at the county of Arapahoe, State of Colorado, the accused, James Connors, "did unlawfully interfere with the judges of election of the Eighteenth voting precinct in said county of Arapahoe, in the discharge of their duties, which said judges of election were then and there officers of the election for Representative in the Fifty-second Congress of the United States, in accordance with the laws of the State

of Colorado and of the United States, and did then and there unlawfully and with force and arms seize, carry away, and secrete the ballot box containing the ballots of said Eighteenth voting precinct, which on said 4th day of November, in the year aforesaid, at said election, had been cast for said Representative in Congress, and did then and there knowingly aid and assist in the forcible and unlawful seizure, carrying away, and secreting of said ballot box, and did then and there counsel, advise, and procure divers other persons, whose names are to the grand jurors unknown, so to seize, carry away, and secrete said ballot box, thereby, as aforesaid, interfering with said judges of election of said Eighteenth voting precinct, and hindering and preventing them, the said judges of election, from counting the votes which had been cast at said election, and from declaring and certifying the result thereof."

Motions to quash the indictment, to arrest the judgment, and for a new trial were made and overruled, and there was a verdict of guilty, upon which the court sentenced the accused to imprisonment in the House of Correction at Detroit, in the State of Michigan, for the period of fifteen months, to be fed and clothed there as the law directs.

1. The first assignment of error questions the sufficiency of the indictment, in that it charges the accused, as he insists, with three distinct offences in one count, namely: with having unlawfully and with force and arms seized, carried away, and secreted the ballot box containing the ballots cast at the election named; with having aided and assisted in the forcible and unlawful seizure, carrying away, and secreting of such ballot box; and with having counselled, advised, and procured the seizure, carrying away, and secreting of the ballots at said election.

This objection to the indictment is not well taken. The offence charged was that of unlawfully interfering with the officers of the election in the discharge of their duties. Their duty was to ascertain and disclose the result of the election. That duty could not be performed without inspection of the ballots. Seizing, carrying away, and secreting the ballot box containing the ballots cast for Representative in Congress

necessarily interfered with the discharge of that duty. The indictment describes — perhaps with unnecessary particularity — the mode in which the crime charged was committed. If the accused himself unlawfully seized, carried away, and secreted the ballot box, or if he knowingly aided and assisted others in doing so, or if he counselled, advised, and procured others to do so, in either case, he was guilty of the crime of having unlawfully interfered with the officers of election in the discharge of their duties. The verdict of guilty had reference to that crime, whether committed in one or the other of the modes specified in the indictment. Undoubtedly, it was in the discretion of the court to compel the prosecutor to state whether he would proceed against the accused for having himself seized, carried away, and secreted the ballot box, or for having assisted or procured others to do so. But there was no motion to require the prosecutor to make such a statement. If the objection now urged could have been taken by motion to quash the indictment, it is sufficient to say that although the record shows that there was such a motion, the grounds of it are not stated. So far as the record discloses, the specific objection now urged was made for the first time after verdict by a motion in arrest of judgment. But such an objection, not made until after verdict, would not justify an arrest of judgment, and is not available on writ of error. 1 Bish. Crim. Pro. §§ 442, 443; Wharton's Crim. Pl. & Pr. § 255. Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offence charged was committed. Rev. Stat. § 1025. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offence with which he was charged.

2. Another assignment of error relates to the refusal of the court to permit certain questions to be propounded to jurors on their *voir dire*.

It appears from the bill of exceptions that upon the exami-

nation of jurors as to their competency to serve on the trial jury, this question was propounded to one Stewart, called as a juror: "To what political party do you belong and what were your party affiliations in November, A.D. 1890?" The court would not permit this question to be propounded, and announced that the proposed juror could not be called upon to answer any question of similar import, touching his political beliefs or attachments.

At a subsequent stage of the proceedings, the counsel for the accused prepared and submitted in writing a number of questions they desired to propound to jurors. Those questions were as follows:

"Q. Did you take an active part in politics in the general election of A.D. 1890; and if so, on which side?

"Q. Did you take an active part in politics in the general election of A.D. 1890; and if so, with which of the parties did you affiliate, and where?

"Q. Have you been heretofore or are you now strongly partisan in your political belief?

"Q. Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?

"Q. Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe, and State of Colorado, as the committee of one hundred?

"Q. Were you ever at any time a judge or clerk of an election; and, if so, when and where, and by what party were you named and appointed?

"Q. Are you a member of any political club organized for the advancement of the interests of any political party; and, if so, what party?"

These questions and each of them were excluded by the court and an exception duly taken.

The bill of exceptions also states that the questions last above given were submitted to the court while the examination of jurors was in progress; that the presiding judge did not observe the character of the fourth question; and that "if attention had been directed to that question it would have

been allowed." We suppose the particular question thus referred to was, "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?"

It is quite true, as suggested by the accused, that he was entitled to be tried by an impartial jury, that is, by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence. It is equally true that a suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases.

In *Mima Queen & child* v. *Hepburn*, 7 Cranch, 290, 297, in which the plaintiffs asserted their freedom as against the defendant who claimed them as his slaves, a juror was examined on his *voir dire* as to his fitness to serve on the jury. Being questioned, he avowed his detestation of slavery to be such that, in a doubtful case, he would find a verdict for the plaintiffs, and had so expressed himself with regard to that very case. He also stated that if the testimony were equal he should certainly find a verdict for the plaintiff. The court rejected him as a juror, and an exception was taken. Chief Justice Marshall, speaking for this court said: "It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the

case to those who felt no bias either way, and therefore the court exercised a sound discretion in not permitting him to be sworn."

Does the record show that the court below did not exercise a sound discretion in rejecting the above questions propounded or proposed to be propounded to jurors? We think not. It is true that the court below informs us by the bill of exceptions that if its attention had been called to the matter at the time it would have allowed the inquiry whether the political affiliations or party predilections of the juror would in anywise bias his judgment. But the court certainly did not believe that the rejection of that question in itself prejudiced the substantial rights of the accused. If it had so believed, a new trial, we may assume, would have been granted. We cannot, therefore, permit the recital in the bill of exceptions on this subject to control our determination of the question presented by the record.

We are of opinion that the court correctly rejected the question put to the juror Stewart as to his political affiliations. The law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute. So, also, active participation in politics cannot be said, as matter of law, to imply either unwillingness to enforce the statutes designed to insure honest elections and due returns of the votes cast, or inability to do justice to those charged with violating the provisions of those statutes. Strong political convictions are by no means inconsistent with a desire to protect the freedom and purity of elections.

Particular stress is laid upon the refusal of the court to allow the question to jurors, "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?" In the absence of any statement tending to show that there was some special reason or ground for putting that question to particular jurors called into the jury box for examination, it cannot be said that the

court erred in disallowing it. If the previous examination of a juror on his *voir dire* or the statements of counsel, or any facts brought to the attention of the court, had indicated that the juror might, or possibly would, be influenced in giving a verdict by his political surroundings, we would not say that the court could not properly, in its discretion, if it had regarded the circumstances as exceptional, have permitted the inquiry whether the juror's political affiliations or party predilections would bias his judgment as a juror. But no such exceptional circumstances are disclosed by the record, and the court might well have deemed the question — unaccompanied by any statement showing a necessity for propounding it — as an idle one that had no material bearing upon the inquiry as to the qualifications of the juror, and as designed only to create the impression that the interests of the political party to which the accused belonged were involved in the trial. The public should not be taught, by the mode in which trials of this character are conducted, that the prosecution of a crime against the laws securing the freedom and integrity of elections for Representatives in Congress will be regarded by the court as, in effect, a prosecution of a political party to which the accused belongs. If an inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself by his conduct or declarations given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law designed for the protection of the public against frauds in elections.

In respect to the question referring to the Committee of One Hundred in the city of Denver, it is only necessary to say that there is nothing in the record showing any such connection between that committee and this prosecution as would disqualify a member of that organization from sitting as a juror. If that committee was in fact behind the prosecution of the defendant, actively supplying the government with information to convict him of the crime charged, the court

Counsel for Appellants.

without abuse of its discretion might have allowed the question. But the record shows no such state of case.

Other questions have been discussed by counsel, but they are not of sufficient gravity to require notice at our hands.

We perceive no reason to doubt that the accused was fairly tried. No error of law having been committed by the court below, the judgment is

Affirmed.

ABRAHAM *v.* ORDWAY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 274. Submitted April 5, 1895. — Decided May 20, 1895.

Independently of any limitation for the guidance of courts of law, equity, may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked.

This case is peculiarly suited for the application of this principle, as the plaintiffs claim that the lands in dispute became, after the divorce of Elizabeth Abraham from Burnstine, her legal and statutory as distinguished from her equitable separate estate, and that the trust deed to Norris, by sale under which the defendant acquired title, was absolutely void, while it appears that nineteen years elapsed after the execution of that deed before this suit was brought, that Elizabeth Abraham was divorced from her second husband thirteen years before the institution of these proceedings, that she paid interest on the debt secured by the trust deed for about eight years without protest; that she did not pretend to have been ignorant of the sale under the trust deed, nor to have been unaware that the purchaser went into possession immediately, and continuously thereafter received the rents and profits; and on these facts it is held that the plaintiffs and those under whom they assert title have been guilty of such laches as to have lost all right to invoke the aid of a court of equity.

THE case is stated in the opinion.

Mr. H. O. Claughton and *Mr. Franklin H. Mackey* for appellants.

Mr. J. J. Darlington for appellees.

Mr. Justice Harlan delivered the opinion of the court.

On the 22d day of May, 1869, Bernard Burnstine — his wife Elizabeth uniting with him in the deed — conveyed to Levi Abraham certain real estate in the city of Washington in trust for the sole and separate use of the wife, with power in her at any time to dispose of the property in whole or in part, or to encumber it by deed or by will, or by other instrument in the nature of a last will and testament.

The deed provided that the trustee should permit the wife, her executors, administrators, and assigns, to have, hold, use, possess, and enjoy the trust property; to receive its rents, issues, and profits as if she were a *feme sole;* and if she disposed of it the trustee was not to be responsible therefor, nor for the application of its proceeds.

The deed upon its face recites that it was made pursuant to a mutual agreement between the grantors to live separately and apart from each other during their lives.

Subsequently, on the 10th of May, 1870, Mrs. Burnstine obtained a divorce, and shortly thereafter, June 24, 1870, married one Solomon Caro.

On the 24th of September, 1870, Mrs. Caro executed to Harriet Ordway a promissory note for $3000 payable in two years from that date, with interest at 10 per cent. To secure its payment, Levi Abraham, the trustee in the Burnstine deed — Mrs. Caro uniting with him — executed to John E. Norris, trustee, a deed covering the above real estate. This deed recited that the note was given to secure the just indebtedness of Mrs. Caro to Harriet Ordway. But the bill alleges and the demurrer admits that it was, in fact, given for money borrowed from the payee by Solomon Caro. This last deed was in trust that Mrs. Caro, her heirs and assigns, should have, hold, use, and enjoy the premises, and their rents, issues, and profits to take, receive, and apply to her own use until some default or failure occurred in the payment of the debt or some part of the debt due to Mrs. Ordway. It also provided

that upon the written request of the latter, as the legal holder of the above note, the trustee should proceed to sell and dispose of the premises, or so much thereof as might be deemed necessary, at public sale to the highest bidder, upon such terms and conditions as the trustee deemed best for the interest of all parties concerned, giving due notice of sale.

On the 21st of December, 1874, Elizabeth Caro joined with Levi Abraham in a deed conveying the real estate in question to Esther Rebecca Abraham in fee.

Caro having abandoned his wife, she obtained from the Supreme Court of the District of Columbia, on the 20th of October, 1876, a decree of divorce and a restoration of her maiden name of Elizabeth Abraham. The latter paid interest on the above note for about eight years. But having ceased to make such payments, the property was sold at public auction on the 6th of January, 1879, pursuant to the terms of the Norris deed of trust; and on the same day Norris executed to Mrs. Ordway, the purchaser, a deed conveying to her the property in fee. After this purchase, Mrs. Ordway took possession of the property, and received the rents and profits thereof.

Elizabeth Rebecca Abraham, the grantee in the deed of December 21, 1874, died August 10, 1886, intestate, leaving the appellants as her only heirs at law.

Levi Abraham, the trustee, died on the 28th of April, 1876. Norris died on the 4th day of February, 1887.

The appellants brought this suit upon the theory that the above note having been executed by Elizabeth Abraham while she was a married woman, the wife of Caro, was void; that the deed of trust to Norris was, for that reason, of no effect as security for its payment; and that the conveyance by Norris to Mrs. Ordway created a resulting trust for the benefit of the plaintiffs.

The prayer of the bill was for a decree requiring the defendant Harriet Ordway to convey all her right, title, and interest in the estate in question to the plaintiffs, and account to them for rents and profits.

The defendants demurred upon the ground that the plain-

tiffs did not by their bill present a case entitling them to relief in a court of equity. The demurrer was sustained and the bill dismissed. That decree was affirmed in the general term.

After the decree below was perfected, the defendant Harriet Ordway died, and the present appellees are her devisees.

Counsel express gratification that an opportunity is presented in this case for the construction of what is known as the Married Woman's act of April 10, 1869, in force in the District of Columbia, particularly the section providing that "any married woman may contract and sue, and be sued in her own name, in all matters having relation to her sole and separate property, in the same manner as if she were unmarried." Rev. Stat. Dist. Col. § 729.

We do not deem it necessary at this time to consider the scope of that act, nor to determine whether it was correctly interpreted in *Schneider* v. *Garland*, 1 Mackey, 350. The case can be disposed of upon a ground that does not involve the construction of that statute, and which cannot be ignored, whatever conclusion might be reached as to the power of Elizabeth Abraham, while she was the wife of Solomon Caro, to charge the estate in question with the payment of the $3000 note. That ground is, that the plaintiffs and those under whom they assert title have been guilty of such laches as to have lost all right to invoke the aid of a court of equity. Nearly nineteen years elapsed after the execution of the deed to Norris before the present suit was brought. And although the plaintiff Elizabeth was the wife of Caro when that deed was made, she was divorced in 1876, nearly thirteen years before the institution of these proceedings. She paid interest on the debt of $3000 for about eight years, without, so far as the bill discloses, protesting that she was not legally bound to do so. Some of those payments must have been made after her divorce from Caro, and while she was an unmarried woman. She did not pretend to have been ignorant of the public sale, under the Norris deed, at which Mrs. Ordway purchased the property at the price of twenty-seven hundred and fifty dollars. Nor did she pretend to have been unaware,

at the time, of the fact that Mrs. Ordway, after her purchase, went into possession and continuously received the rents and profits of the estate.

It appears also on the face of the bill that in 1874 Levi Abraham and the plaintiff Elizabeth, then Elizabeth Caro, conveyed this property to Esther Rebecca Abraham. Whether this deed was recorded or not the bill does not state. But the grantee in that deed did not die until August 10, 1886, nearly twelve years after the conveyance to her, nearly seventeen years after the date of the deed to Norris, and more than seven years after the sale and conveyance to Mrs. Ordway under that deed. It does not appear that Esther Rebecca Abraham, in her lifetime, ever disputed the title acquired by Mrs. Ordway under the sale made by Norris, trustee. No explanation is given in the bill of her failure to bring suit.

The property in dispute, it may well be assumed, has greatly appreciated in value since Mrs. Ordway's purchase, which was more than ten years prior to this suit. It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law. *Wagner* v. *Baird*, 7 How. 234, 238; *Harwood* v. *Railroad Co.*, 17 Wall. 78, 81; *Sullivan* v. *Portland &c. Railroad*, 94 U. S. 806, 811; *Brown* v. *County of Buena Vista*, 94 U. S. 157, 159; *Hayward* v. *National Bank*, 96 U. S. 611, 617; *Lansdale* v. *Smith*,

106 U. S. 391, 392; *Speidel* v. *Henrici*, 120 U. S. 377, 387; *Richards* v. *Mackall*, 124 U. S. 183, 188.

The present suit is peculiarly one for the application of this principle. The contention of the appellants is that under the Married Woman's act of 1869 the lands in question became, after the divorce of the plaintiff Elizabeth from Burnstine, her legal and statutory, as distinguished from her equitable, separate estate, and that the deed to Norris which secured the $3000 note was absolutely void, because that note was not given by Mrs. Caro in respect of any matter "having *relation* to her sole and separate property." Rev. Stat. Dist. Col. § 729. It is conceded that if that note, in fact, and within the meaning of that act, had "relation" to the estate here in dispute, then the Norris deed was valid as security for the debt evidenced by the note. But whether the debt was of that character depended — unless the recitals in the Norris deed on that point are not in themselves conclusive — upon such proof, in respect to the origin of the debt and its relation to the estate conveyed by that deed, as could be made, after nearly twenty years had elapsed from the date of the deed, and after the death both of Levi Abraham, the grantor, and of Norris, the grantee. One of the grounds upon which courts of equity refuse relief where the plaintiff is guilty of laches is the injustice of imposing upon the defendant the necessity of making proof of transactions long past, in order to protect himself in the enjoyment of rights which, during a considerable period, have passed unchallenged by his adversary, with full knowledge of all the circumstances. The principle has been thus stated by this court: "Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor." *Wagner* v. *Baird*, 7 How. 258.

The appellants insist that, as this suit relates to land, the doctrine of laches, as announced in the above cases, has no application. There is no foundation in the adjudged cases for this suggestion. It is true, as stated by counsel, that in *Wagner* v. *Baird*, just cited, the court says that in many cases courts of equity "act upon the analogy of the limitations at law; as where a legal title would in ejectment be barred by twenty years' adverse possession," and "will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate." But it proceeds to say: "But there is a defence peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations distinctly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. 2 Story Eq. § 1520. A court of equity will not give relief against conscience or where a party has slept upon his rights."

Allore v. *Jewell*, 94 U. S. 506, is also cited by appellants. That was a suit to cancel a conveyance of land upon the ground that the grantor was incapable from mental weakness of comprehending the nature of the transaction. Six years elapsed before suit, and it was objected that the suit could not for that reason be maintained. The court said that there was no statutory bar in the case, and the relief asked was granted because, under the particular circumstances of that case, application for relief must be held to have been seasonably made, and because the facts justified the cancellation of the deed.

Counsel rely with some confidence upon the following observations in *Wehrman* v. *Conklin*, 155 U. S. 314, 326: "If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed. If the statute limits him to twenty years, and he brings his action after the lapse of nineteen years and eleven months, he is as much entitled as matter of law to maintain it as though he had brought it the day after his

cause of action accrued." That this court did not intend to lay down any such rule as the appellants contend for, is quite evident from the following sentences, not quoted by them, but which immediately precede those above quoted: "It is scarcely necessary to say that complainants [in the equity suit] cannot avail themselves *as a matter of law* of the laches of the plaintiff in the ejectment suit. Though a good defence in equity, laches is no defence at law."

The claim of the appellants is without merit, and the decree is

Affirmed.

CUTLER *v.* HUSTON.

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

No. 229. Argued March 27, 1895. — Decided May 27, 1895.

On the 12th of July, 1889, S. executed to C. a chattel mortgage in Michigan to secure his indebtedness to him and to a bank of which he was president, and the mortgage was placed by the mortgagee in his safe. On the 17th of August, 1889, H. having no knowledge of this mortgage, purchased for a valuable consideration a note of S. On the 29th of August, 1889, C. caused the chattel mortgage to be placed on record. On the 5th of August, 1890, H. instituted garnishee proceedings against C. averring that he had possession and control of property of S. by a title which was void as to the creditors of S. The garnishee answered setting up title under the chattel mortgage. The court below held that in consequence of the failure to file the chattel mortgage, and of the fact that H. became a creditor of S. in the interim, the chattel mortgage was void under the laws of Michigan as to H., and gave judgment accordingly. *Held*, That in this that court committed no error.

An unreversed judgment of a circuit court is not a nullity, and cannot be collaterally attacked.

RIGDON HUSTON, who died in May, 1877, left a will, by which bequests were made to several persons, among whom was the testator's son, Theodore Huston, the husband of the defendant in error. The executors appointed by the will were the testator's brother, John Huston, and his sons, Charles R. Huston and the said Theodore Huston.

Statement of the Case.

On November 22, 1888, William Steele purchased cattle of the estate of Rigdon Huston, and in payment therefor gave to the said executors his promissory note, dated the day of the purchase, payable on or before one year after date to their order at the Second National Bank of Ionia, Michigan, for the sum of $9600, with interest at the rate of six per cent per annum, and eight per cent per annum from maturity.

Dwight Cutler, the plaintiff in error, and the First National Bank of Grand Haven, of which Cutler was president, were creditors of Steele in the respective amounts of $8000 and $12,000, and Cutler was liable as accommodation endorser of Steele's paper to the amount of $20,000. Steele requested Cutler to make for him a further endorsement to the amount of $25,000. Cutler refused to do this, but he obtained for Steele a loan of the amount required, Steele executing as security therefor certain mortgages on real estate. At the same time, July 12, 1889, Steele executed to Cutler a chattel mortgage to secure the amount of his other indebtedness to Cutler and to the bank, and to indemnify Cutler as his accommodation endorser. These mortgages, together with a certain deed executed by Steele to his wife, were delivered to Cutler, with the request that the deed should be sent for record when the other papers should be sent, and Cutler placed the papers in his safe.

In August, 1889, the said Theodore Huston desired to obtain a portion of his share of Rigdon Huston's estate, and applied for the same to his coexecutors. He was willing to take the said note executed to the estate by Steele, but the other executors thought that it might not be well to allow him to have so large an amount at that time. It was then agreed that his wife and he should give their joint note to the estate for $5000, and that he should give his receipt to the executors for $5025.60, being the difference between $5000 and the amount of the Steele note, with interest, as for a portion of his distributive share of the estate. On August 17, 1889, Anna B. Huston and Theodore Huston executed the note agreed upon to the estate, and the Steele note was delivered to Theodore Huston, endorsed as follows:

Statement of the Case.

"For value received we assign the within note to Anna B. Huston this 17th day of August, 1889.

"[Signed] JOHN HUSTON,
THEODORE HUSTON,
CHAS. R. HUSTON,
"*Executors of Rigdon Huston's Estate.*"

Theodore Huston, on the same day, gave his receipt to John Huston and Charles R. Huston for $5025.60, to be applied on his distributive share of the estate of Rigdon Huston.

Subsequently, on August 29, 1889, Cutler caused the mortgages executed by Steele on July 12, 1889, including the said chattel mortgage, to be duly recorded in Ionia County, Michigan.

An action was brought on the Steele note, on December 14, 1889, in the name of Anna B. Huston, in the Circuit Court of the United States for the Western District of Michigan. The declaration stated that the plaintiff was a citizen of the State of Illinois, but contained no averment with relation to the citizenship of Steele, the defendant. The action was tried in the said court, and the plaintiff obtained a judgment on the note in the sum of $10,410, and for costs in the sum of $31.80.

On August 5, 1890, Anna B. Huston instituted garnishee proceedings in the said court against Dwight Cutler, by the filing of an affidavit, setting out that the plaintiff was a citizen of the State of Illinois; that Dwight Cutler, the defendant, was a citizen of the State of Michigan, and that the said William Steele was, at the time the said judgment was obtained against him, a citizen of the State of Michigan; alleging the recovery of the said judgment, etc.; and averring the defendant's possession and control of property, money, and credits belonging to William Steele, and property and credits which the defendant held by a conveyance and title that was void as to William Steele's creditors.

To this affidavit the defendant Cutler answered that he had no property, money, or credits whatsoever belonging to William Steele, except the property covered by the said chattel

mortgage, as to which property he made the following statement:

"That on the 13th day of July, 1890, the said William Steele gave a chattel mortgage to the garnishee, Dwight Cutler, to secure the repayment of $40,000, upon 160 head of short-horn Devon and Jersey cattle, fourteen work horses, about fifty sheep, a number of hogs, two stallions, and a quantity of farming utensils, and some logs; that the amount secured to said garnishee by said mortgage was now due to him from said William Steele, and unpaid; that said mortgage has been foreclosed in the Circuit Court for the county of Ionia, in chancery, and a decree rendered therein in favor of the garnishee, as complainant, and against the said William Steele, finding the amount due thereon at over $40,000, and directing a sale of said property under said decree; that the garnishee, Dwight Cutler, now holds said property so authorized to be sold by said decree and is about to sell the same under and by virtue of said mortgage to satisfy said indebtedness."

The defendant further answered that he held no property of the said Steele other than that so mortgaged; that he had held at no time conveyances from Steele in fraud of creditors; and that the security given by Steele was for actual and *bona fide* indebtedness.

Upon the coming on of the case for trial a jury was waived, and the court, having heard the evidence, made a finding of facts of which the statement of facts given above is the substance, and based thereon the following conclusions of law:

"First. Upon the facts as found the plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of § 6193, of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler aforesaid remained unfiled.

"Second. The transfer of the Steele note of $9600 from the estate of Rigdon Huston to the plaintiff was valid as against Steele and Cutler. At most it could only be complained of by some one having an interest in the estate of which it was part of the assets.

"Third. In consequence of the failure to file the chattel mortgage given by Steele to Cutler, and of the plaintiff becoming a creditor of Steele in the interim, the said chattel mortgage was and is void as to her and of no effect.

"Fourth. It appearing that the garnishee had property of the principal defendant at the commencement of these proceedings in his possession of value greater than the amount of plaintiff's judgment, and which he has appropriated for his own use, judgment must be entered in favor of the plaintiff and against said garnishee for the amount of plaintiff's judgment against the principal defendant, Steele, and interest on the damages thereby recovered, in all $11,424.96."

Accordingly, judgment in the amount last named was, on May 20, 1891, duly entered in the said court against the defendant Cutler, and he then sued out a writ of error, bringing the case here.

Mr. George A. Farr for plaintiff in error. *Mr. John C. Fitzgerald* and *Mr. Edmund D. Barry* were on his brief.

Mr. Thomas F. McGarry and *Mr. Edwin F. Uhl* for defendant in error.

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

A statute of Michigan provides that "every mortgage or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as the city clerk, where the mortgagor resides." Howell's Ann. Stats. Mich. § 6193. The main question in the

present case is, whether Anna B. Huston, the defendant in error, is entitled as a creditor of one William Steele to the benefit of this act.

The facts of the case, under a stipulation of the parties, were found by the trial court, and sufficiently appear in the statement heretofore made. Some exceptions to those findings were taken and pressed upon our attention, but they do not relate to the admission or rejection of evidence, nor is any failure alleged of the trial court to pass specifically upon any proposition submitted; and we are therefore bound to accept the facts as found, and are only to inquire whether they support the judgment. *Norris* v. *Jackson*, 9 Wall. 125.

On July 12, 1889, William Steele made and delivered to Dwight Cutler, plaintiff in error, a chattel mortgage covering a large amount of personal property, to secure certain notes and liabilities held and owned by Cutler and a bank of which he was president. Possession of the mortgaged property was not changed, and by an understanding of the parties the mortgage was not filed in the proper clerk's office until August 29, 1889. Between the time of the delivery and the filing of the mortgage, namely, on August 17, 1889, Anna B. Huston became, by assignment, in good faith and without any notice or knowledge of the mortgage, the owner of a promissory note given by Steele, on November 22, 1888, in the sum of $9600, payable in one year from date, to the executors of Rigdon Huston's estate.

Two reasons are given for denying Mrs. Huston's right to assail the validity of Cutler's chattel mortgage.

It is said, in the first place, that she is not a *bona fide* creditor of Steele; that she gave nothing for the note; and that the note really belonged to her husband, Theodore Huston. This contention is sufficiently disposed of by referring to the findings of facts, wherein it is found that, in assigning the Steele note to Mrs. Huston, the executors acted in good faith and in the exercise of competent authority. In so finding we think the court below was clearly warranted by the evidence. It was not pretended that the note had not been given for a valuable consideration to the Huston estate, and

with the action of the executors in assigning the note Cutler plainly had no concern.

Supposing that Mrs. Huston, as the assignee of the note, was a *bona fide* creditor of Steele, it is next objected that, as matter of law, she did not become such creditor, on August 17, 1889, within the meaning and intent of the statute of Michigan making chattel mortgages, not accompanied by change of possession, or not filed in the clerk's office, void as against other creditors of the mortgagor. It is claimed that the statute applies only to creditors who have become such during the interim between the making and the filing of the mortgage, or who have during such interim obtained a lien on the mortgaged property by levy of execution or attachment, or who have during such interim granted extensions or renewals of credit to the mortgagor; and that, as the note which was owned by Mrs. Huston had been issued by Steele before the making of the mortgage, it was not protected by the statute.

Of course, the construction put upon the statute by the courts of the State is to control the Federal courts, in a case like the present, and we have accordingly examined with care the numerous Michigan cases cited by the parties respectively.

In *Waite* v. *Mathews*, 50 Michigan, 392, it is said: "It was distinctly intimated in *Kohl* v. *Lynn*, 34 Michigan, 360, and *Fearey* v. *Cummings*, 41 Michigan, 376, that in order to justify the application of the statute making mortgages, whether honest or not, absolutely void for want of filing or possession, some act must be done, or some detriment sustained, during the interval. As against all such rights, a mortgage, without such possession or filing, is absolutely and not merely presumptively void."

Root v. *Harl*, 62 Michigan, 420, was a case where a chattel mortgage was given in good faith to secure a creditor, who delayed in filing it, and in the interval other creditors gave credits by the way of loans and extensions of payment. The court held the mortgage void, and said: "Any creditors have a right to avoid an unrecorded mortgage who have, during its absence from the record, done anything material which

they may be fairly considered to have done on the basis of its non-existence."

In *Cutler* v. *Steele*, 85 Michigan, 627, where, at the suit of another creditor, this very mortgage was held invalid, it was said: "We are, therefore, of opinion that the term 'creditors' used in the statute includes those who have entered into contracts with parties as indorsers, guarantors, or sureties. Such contracts in the commercial world are everyday transactions. It is impossible to believe the legislature did not enact this statute with a view to protect creditors against all those upon whose promises, whether principal or contingent, they had parted with valuable considerations."

It is evident that, had the mortgage in question been filed of record on July 12, 1889, Theodore Huston would not, on August 17, 1889, have accepted the Steele note as part of his patrimony, nor have caused it to be assigned to the defendant in error.

Another objection urged is found in the fact that in the record of the original case of *Huston* v. *Steele* in the Circuit Court of the United States for the Western District of Michigan, it was not stated that Steele was a citizen of Michigan, and, therefore, it does not appear that the suit was between citizens of different States, and hence, it is contended that the judgment obtained in that case could not be made the basis of an attachment against Cutler.

There are two answers to this position, one, that the proceedings in the present case contain averments that Anna B. Huston, the plaintiff, was a citizen of Illinois, and as such had obtained a judgment against William Steele as a citizen of Michigan, and this averment was not traversed, and hence must be deemed to have been conclusively established, and the defendant cannot be heard to raise such an objection for the first time in an appellate court; the other, that while said judgment remains unreversed it is not a nullity, and cannot be collaterally attacked. This was held in *McCormick* v. *Sullivant*, 10 Wheat. 192, 199. That was a case where, to a bill brought in the Circuit Court of the United States to enforce a claim to real estate, the defendants filed a plea in bar to former proceedings

in a United States court. To this there was a special replication alleging that the proceedings in such former suit were *coram non judice*, because the record did not show that the complainants and defendant in that suit were citizens of different States, and the court, through Mr. Justice Washington, said: "This reasoning proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities." *Evers* v. *Watson*, 156 U. S. 527. Accordingly the decree was held to be a valid bar of the subsequent suit.

In view, then, of the facts as found, and reading the statute of Michigan in the light of the decisions cited, we are of opinion that the court committed no error, and its judgment is

Affirmed.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 263. Argued April 5, 1895. — Decided May 27, 1895.

A statute of Pennsylvania imposing a tax upon the tolls received by the New York, Lake Erie and Western Railroad Company from other railroad companies, for the use by them respectively of so much of its railroad and tracks as lies in the State of Pennsylvania, for the passage over them of trains owned and hauled by such companies respectively, is a valid tax, and is not in conflict with the interstate commerce clause of the Constitution when applied to goods so transported from without the State of Pennsylvania.

The New York, Lake Erie and Western Railroad Company, a corporation of the State of New York, doing business in the State of Pennsylvania, appealed from a settlement of account made by the Auditor General of the latter State, assessing

certain taxes, to the court of common pleas of Dauphin County, Pennsylvania. The case was heard by agreement without a jury, the court finding both the law and the facts.

The following were the findings of fact:

"1. The defendant is a corporation of the State of New York, engaged in the business of transporting freight and passengers. Its railroad runs through the county of Susquehanna, in this State.

"2. It leases and operates as one of its branches, a railroad lying wholly within this State, known as the Jefferson branch, which extends from Carbondale to a connection with the defendant's main line in said county of Susquehanna. At Carbondale the Jefferson branch connects with the railroad of the Delaware and Hudson Canal Company, a corporation engaged in mining and transporting coal, and also in transporting freight and passengers.

"3. The canal company makes use of the Jefferson branch in the manner, for the purposes, and upon the terms specified in an agreement made April 7, 1885. This agreement is made a part of this finding.

"4. Under the eighth clause of said agreement, the canal company paid to the defendant for the transportation of coal and merchandise during the six months ending June 30, 1889, the sum of $69,462.11. Of this amount, $69,100 was in respect of coal and merchandise transported by the canal company over the said Jefferson branch in transit to points in other States; the said coal and merchandise, when taken upon the cars and upon said Jefferson branch, being destined and intended for shipment by continuous transportation upon a single way bill, from points in Pennsylvania to points in other States, and having been actually so transported to, and delivered at, points in other States; and $362.11 was paid in respect of coal and merchandise taken up and put down within the State of Pennsylvania. The canal company has paid to the State a tax upon its gross receipts for the transportation of the coal and merchandise in respect of which it paid to the defendant the said sum of $362.11.

"5. Under the sixteenth clause of said agreement, the canal

company paid to the defendant the sum of $2000, of which $1000 was made up of half fares collected from local passengers taken up and put down within the State of Pennsylvania, and $1000 was in respect of passengers carried interstate by continuous transportation into, out of, or through the State of Pennsylvania.

"6. The defendant also leases and operates, as one of its branches, a railroad known as the Buffalo, Bradford, and Pittsburgh branch, extending from Buttsville or Gilesville, Pennsylvania, to a connection with defendant's main line at Carrollton, in the State of New York. At Crawford Junction, Pennsylvania, a point on this branch, the railroad of the Buffalo, Rochester and Pittsburgh Railway Company (formerly the Rochester and Pittsburgh Railroad Company) connects with said branch. This last-mentioned corporation is engaged in the transportation of freight and passengers.

"7. The Buffalo, Rochester and Pittsburgh Railway Company makes use of part of the Buffalo, Bradford and Pittsburgh branch in the manner, for the purpose, and upon the terms specified in an agreement made October 20, 1882, which agreement is made a part of this finding. The part used lies partly in this State and partly in the State of New York.

"8. Under this agreement the amount paid to the defendant by the Buffalo, Rochester and Pittsburgh Railway Company, during the six months ending June 30, 1889, was $2700, being one semi-annual payment. For the same period the Buffalo, Rochester and Pittsburgh Railway Company paid to the State a tax upon its gross receipts, so far as the same were derived from transportation between points both of which are within the State of Pennsylvania.

"9. This settlement taxes the entire gross receipts of the defendant from its business in Pennsylvania for the six months ending June 30, 1889, under section 7 of the act of 1879, and includes therein the sums paid by the canal company and by the Buffalo, Rochester and Pittsburgh Railway Company.

"10. On February 10, 1890, the defendant paid to the State the whole amount demanded, except the tax upon said sums of $71,462.11 and $2700."

The conclusions of law were as follows:

"1. The rentals paid to the defendant by the canal company and by the Buffalo, Rochester and Pittsburgh Railway Company are 'receipts for tolls' within the meaning of section 7 of the act of 1879.

"2. The taxation of such receipts does not offend against article 9, section 1 of the Pennsylvania constitution, or against the commerce clause of the Federal Constitution.

"3. Such taxation is not, in the case before us, double taxation.

"4. The toll received by the defendant from the Buffalo, Rochester and Pittsburgh Railway Company should be apportioned, and only so much thereof be taxed as represents the sum paid for the use of that part of defendant's branch which lies within the State.

"The sum due the Commonwealth is as follows:

Tax eight-tenths of 1 per cent upon $71,402.11 paid by the Delaware and Hudson Canal Company....	$571 69
And upon $1350 paid by the Buffalo, Rochester and Pittsburgh Railway Company	10 60
Interest	31 63
Attorney General's commission	29 11
Total	$643 03

for which amount judgment is directed to be entered."

Upon exception the court made an additional finding as follows:

"That portion of defendant's railroad, known as the Buffalo, Bradford and Pittsburgh branch, extending from Buttsville or Gilesville, Pennsylvania, to a connection with defendant's main line at Carrollton, in the State of New York, as shown in findings of fact No. 6, is used by the Buffalo, Rochester and Pittsburgh Railway Company for the purposes of interstate transportation exclusively."

Judgment was entered in pursuance of the findings of fact and law, from which an appeal was taken to the Supreme Court of Pennsylvania, and the judgment was by that court

affirmed, and to that judgment a writ of error was sued out from the Supreme Court of the United States.

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

Mr. James A. Stranahan for defendant in error.

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

The legislature of Pennsylvania, by a revenue statute approved June 7, 1879, enacted that certain enumerated classes of companies, including railroad companies, whether incorporated by or under any law of the Commonwealth, or whether incorporated by any other State, doing business in the Commonwealth, and owning, operating, or leasing to or from any other corporation, any railroad, canal, pipe line, slack-water navigation, or street passenger railway, or other device for the transportation of freight or passengers, shall pay to the state treasurer, for the use of the Commonwealth, a tax of eight-tenths of one per centum upon the gross receipts of said company for *tolls and transportation.*

In the leading case of *Boyle* v. *Philadelphia & Reading Railroad Co.*, 54 Penn. St. 310, 314, the Supreme Court of Pennsylvania, through Mr. Justice Strong, then a justice of that court, thus defined the term "tolls," as used in the tax laws of that State: "Toll is a tribute or custom paid for passage, not for carriage — always something taken for a liberty or privilege, not for a service; and such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation, or that they are anything more than an excise demanded and paid for the privilege of using the way."

This definition was subsequently approved in the case of *Pennsylvania Railroad* v. *Sly*, 65 Penn. St. 205, and was followed by the trial court, and the Supreme Court of Pennsylvania, in the present case. A construction or meaning attributed to the terms of a state statute by the courts of

such State will, of course, be adopted by this court when called upon to decide questions arising under such legislation; and we shall accordingly assume in the present case that the moneys received by the New York, Lake Erie and Western Railroad Company from the Delaware and Hudson Canal Company and from the Rochester and Pittsburgh Railroad Company for their use of the railroad of the former company were *tolls* within the meaning of the statute of 1879.

It was found as a fact by the court below that the New York company leased and operated as one of its branches a railroad lying wholly within the State of Pennsylvania, and that under an agreement between it and the Delaware and Hudson Canal Company the latter paid the former for the use of its railroad during the six months ending June 30, 1889, the sum of $69,462.11. This amount became payable under the eighth section of said agreement, which was in the following terms:

"The canal company shall pay to the railroad company trackage on the Jefferson branch of the New York, Lake Erie and Western Railroad to the amount of one-fourth of one cent per ton per mile; but the total amount in any one year shall not be less than $120,000, and the same shall be payable monthly."

The canal company furnished its own cars and locomotives, and the moneys paid to the New York company were tolls or rentals for the use of its railroad. Of the amount paid as aforesaid, the sum of $69,100 was in respect of coal and merchandise destined and transported to points in other States, and $36,210 was paid in respect of coal and merchandise taken up and put down within the State of Pennsylvania.

The precise question, then, for our solution is, whether the State of Pennsylvania can validly impose taxes on tolls paid by one company to another for the use of its railroad, where the company paying the tolls is engaged in the transportation of merchandise from points within the State to points beyond.

It is, of course, obvious that what is objected to is not the payment of the tolls, for they arise by virtue of the contract between the companies, but the imposition of taxes thereon.

It is contended that such taxes tend to increase the rents or tolls demanded and received by the company owning the road, and thus constitute a burthen upon transportation and commerce between the States.

In support of this contention numerous decisions of this court are cited, in which it has been held that state statutes which levy taxes upon gross receipts of railroads for the carriage of freights and passengers into, out of, or through the State put a burthen upon commerce among the States, and are therefore void.

It is needless to review the cases cited, because we regard the proposition they are quoted to sustain as thoroughly established; but is the principle of those cases applicable to this?

Undoubtedly, state taxation of interstate commerce, directly placed upon the articles or subjects of such commerce, or upon the necessary means of their transportation, may be used to restrict or regulate such commerce, and, more than once, this court has been obliged to pronounce invalid state legislation respecting such matters. On the other hand, we have frequently had occasion to show that the existence of Federal supervision over interstate commerce and the consequent obligation upon the Federal courts to protect that right of control from encroachment on the part of the States, are not inconsistent with the power of each State to control its own internal commerce, and to tax the franchises, property, or business of its own corporations engaged in such commerce, nor with its power to tax foreign corporations on account of their property within the State.

Owing to the paramount necessity of maintaining untrammelled freedom of commercial intercourse between the citizens of the different States, and to the fact that so frequently transportation and telegraph companies transact both local and interstate business, it has been found difficult to clearly define the line where the state and the Federal powers meet. That difficulty has been chiefly felt by this court in dealing with questions of taxation, and is shown by the not infrequent dissents by members of the court when the effort has been

made to formulate a general statement of the law applicable to such questions.

It is unnecessary, at this time, to again review the cases, or to undertake to show that, while the facts and circumstances that distinguish one case from another may have led to some difference in the mode of stating the law, there is yet a substantial uniformity in the decisions. It is sufficient for our present purposes to refer to the recent case of *Postal Telegraph Company* v. *Adams*, 155 U. S. 688, 695, where many of the cases were considered, and where the general results reached are thus stated:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

Coming to apply these settled principles to the case in hand we find no difficulty.

The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on.

It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received. The State has not sought to interfere with the agreement between the contracting parties in the matter of establishing the tolls. Their power to fix the terms upon which the one company may grant to the other the right to use its road is not denied or in any way controlled.

It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.

One of the assignments of error is based on the finding that "that portion of defendant's railroad, known as the Buffalo, Bradford and Pittsburgh branch, extending from Buttsville or Gilesville, Pennsylvania, to a connection with defendant's main line at Carrollton in the State of New York, as shown in findings of fact No. 6, is used by the Buffalo, Rochester and Pittsburgh Railway Company for purposes of interstate transportation exclusively," and it is claimed that the court erred in apportioning the tax according to the portions of the railroad within and without the State.

We do not understand that any objection is made as to the fairness of the apportionment, but the claim is that, as all the business done over the road by the lessee party was interstate commerce, it was not competent for the State to tax the tolls received by the company which owned the road. Thus understood, the legal question is the same with that which arose under the contract between the defendant company and the Delaware and Hudson Canal Company, and which is hereinbefore considered.

The fact that the same corporation which owns the track in Pennsylvania owns likewise a track in New York, does not deprive such company of the right to receive tolls for the use of that part of its road that lies in Pennsylvania, nor the State

of its right to tax such portions of the tolls; and this is what the court below decided.

In *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, it was held that a state statute which requires every corporation, person, or association operating a railroad within the State to pay an annual tax, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of a line or system extending beyond the State, the tax shall be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, does not conflict with the Constitution of the United States, and that the tax thereby imposed upon a foreign corporation operating a line of railway, partly within and partly without the State, is one within the power of the State to levy.

So, in the case of *Pittsburgh &c. Railway Co.* v. *Backus*, 154 U. S. 421, the validity of a state tax law, whereby a railroad which traversed several States was valued for the purposes of taxation by taking that part of the value of the entire road which was measured by the proportion of the length of the particular part in that State to that of the whole road, was upheld.

Our conclusion is that the Federal questions involved in the case were properly decided by the court below, and its judgment is accordingly

Affirmed.

Mr. Justice Harlan dissented.

Tioga Railroad Company *v.* Pennsylvania. New York, Lake Erie and Western Coal and Railroad Company *v.* Pennsylvania. New York, Pennsylvania and Ohio Railroad Company *v.* Pennsylvania. Error to the Supreme Court of the State of Pennsylvania. Mr. Justice Shiras delivered the opinion of the court. The foregoing cases, Nos. 264, 265, and 266, October term, 1894, are, so far as the Federal questions involved

are concerned, precisely like case No. 263. They call for no additional consideration, and, for the reasons given in No. 263, the judgment of the court below in the several cases is

Affirmed.

MR. JUSTICE HARLAN dissented.

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

Mr. James A. Stranahan for defendant in error.

BENNETT *v.* HARKRADER.

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

No. 58. Argued March 26, 27, 1895. — Decided May 27, 1895.

The location certificate in this case, though defective in form, was properly introduced for the purpose of showing the time when the possession was taken, and to point out, as far as it might, the property which was taken possession of.

The instructions complained of properly presented to the jury the two ultimate questions to be decided by it.

In Oregon a general verdict for the plaintiff, where the complaint alleges that the plaintiff is entitled to the possession of certain described property which is unlawfully detained by the defendant, and the possession of which the plaintiff prays to recover, is sufficient.

WILLIAM Bennett, for himself and as the administrator of M. Gibbons, deceased, having made application in the United States land office at Sitka, Alaska, for a patent to what is known as the Aurora lode mining claim, the defendant in error, George Harkrader, filed an adverse claim in that office, and subsequently, under the authority of Rev. Stat., § 2326, commenced in the District Court of the United States for the District of Alaska this action in support of such claim. After answer and reply, the case came on for trial and resulted in a verdict and judgment for the plaintiff, to review which judgment the defendant sued out this writ of error. The plaintiff

was the owner of certain mining claims known as the Bulger Hill and Nugget Gulch placer mining claims. The description of the former in the complaint is as follows:

"Commencing at post No. 10 of the U. S. Survey, known and recorded as the Bulger Hill survey, whence United States mineral monument No. 2, duly established by United States survey and recorded as a permanent monument, bears north seventy-six degrees (76°) east eleven hundred and seventy-eight (1178) feet; thence running north thirty-four degrees and forty-five minutes (34° 45′) east one thousand (1000) feet to angle No. 1; thence running south twenty-two degrees (22°) east two hundred (200) feet to angle No. 2; thence south forty-one degrees and thirty minutes (41° 30′) east five hundred and ninety-four (594) feet to angle No. 3; thence running south thirty-seven degrees and thirty minutes (37° 30′) west nine hundred and ninety (990) feet to angle No. 4; thence north thirty-six degrees and fifteen minutes (36° 15′) west seven hundred and thirty-seven (737) feet to place of beginning."

On the trial the plaintiff offered in evidence the following location certificate:

"Notice. — The undersigned claim five hill claims of two hundred feet each frontage and running back one thousand feet, thence running from a stake on the west bank of Ice gulch to a similar stake one thousand feet distant, near the mouth of Quartz gulch.

"April 6th, 1881.

Tom Lineham.
John Olds.
Tom Kernan.
Pete Bulger.
Pat. McGlinchy.

"This company is known as the Bulger Hill Company.

"R. Dixon, *Recorder.*

"April 8th, 1881."

This was objected to as incompetent and void for uncertainty, but the objection was overruled, and the location certificate admitted in evidence.

The court, among other instructions, gave the following:

"You have two ultimate questions to consider and those only, namely:

"(1) Is the plaintiff the owner of the Bulger Hill and the Nugget Gulch placer claims and entitled to the possession of the soil included within them, and are they located on the grounds as he has described them? Or —

"(2) Are the defendants the owners of the Aurora lode and entitled to the possession of the soil embracing it, and is it situated on the ground called for in the description in their answer?"

To the giving of which instructions the defendants duly excepted. The verdict of the jury was in these words: "We, the jury, find for plaintiff, R. S. Belknap, Foreman." The sufficiency of this verdict was challenged, but sustained by the court.

Mr. John H. Mitchell for plaintiff in error. *Mr. M. B. Gerry* and *Mr. D. A. McKnight* were on his brief.

Mr. Samuel F. Phillips for defendant in error. *Mr. H. W. Blair*, *Mr. Oscar Foote* and *Mr. F. D. McKenney* were on his brief.

Mr. Justice Brewer delivered the opinion of the court.

The ruling of the court in admitting the location certificate is the first matter presented for our consideration. The ground of the objection is the uncertainty in the description. Section 2324, Rev. Stat., provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

It is obvious that the description is quite imperfect, and yet it does not follow therefrom that there was error in admitting

the certificate in evidence. The description of the property found in the complaint was evidently prepared with care and is apparently open to no objection. At least none has been suggested by counsel. But the record shows that testimony was introduced on behalf of the plaintiff connecting the description in the certificate with that in the complaint, and tending to show that the property described by the one is that described by the other; and also that the mining claim was located and staked on its boundaries as the law and the miners' rules and regulations of that district required. Conceding the indefiniteness of the description in the certificate, it does not follow that it is absolutely void, for, as said by this court in *Hammer* v. *Garfield Mining Co.*, 130 U. S. 291, 299, after quoting from section 2324: "These provisions, as appears on their face, are designed to secure a definite description — one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. Of course the section means, when such reference can be made. Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification."

But whatever may be thought of its imperfections, the rights claimed by plaintiff by virtue of the attempted location are protected by the legislation of Congress. In 1884, after the location of this mining claim and prior to the commencement of this action, Congress passed an act in reference to Alaska, act of May 17, 1884, c. 53, 23 Stat. 24, in which are the following provisions:

"SEC. 8. That the said District of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka.

* * * * *

"And the laws of the United States relating to mining claims and the rights incident thereto shall from and after the passage of this act be in full force and effect in said district, under the administration thereof herein provided for, subject

to such regulations as may be made by the Secretary of the Interior, approved by the President:

"*Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress;

"*And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid;

* * * * *

"But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

This guarantees not only to parties who have located mining claims under the laws of the United States, but to those who have occupied and improved or exercised acts of ownership over such claims the right to perfect their title. Obviously the purpose of Congress in this act was to secure to those parties who were in actual possession of mineral claims in the Territory of Alaska the privilege of acquiring full title thereto, and this notwithstanding their failure to take all the steps required by the general mining laws of the United States with reference to the location of such claims. It was to be expected that, owing to the primitive condition of things in the territory, in the absence of a government survey, and perhaps of persons competent to make accurate surveys, many irregularities and imperfections would exist, and Congress intended that the possessor should be secured in his possession and be permitted to perfect a title to the property possessed. Such being the clear import of the statute, it was perfectly proper to introduce the location certificate, however defective in form, for the purpose of showing the time when the possession was taken, and to point out so far as it did the property which was taken possession of. The same observations may be made in reference to the other location certificates offered in evidence.

So far as respects the two instructions complained of, it cannot be doubted that they are correct statements of the law. The two ultimate questions for the jury were as stated. Indeed, the argument of defendants' counsel is rather to the effect that other instructions should have been given and the case not left unexplained, as it would seem to be by these. It is sufficient to say in reference to this line of argument that the record does not purport to contain all the instructions. It is to be assumed, if others were needed, as doubtless they were, to fully present to the jury the subordinate questions, that they were given; and, further, if no such instructions were given, it is generally true that a party, who thinks an instruction in respect to any matter ought to be given, must ask for such instruction, and failing to ask for it will not be heard in a reviewing court to allege that there was error in the want of it. The record shows that the defendant did ask some instructions which were refused, but as it is practically conceded by counsel that they contained matter inappropriate to the issue on trial, we need not stop to inquire whether the court committed any error in failing to give them.

The remaining question is as to the verdict, which is simply "for plaintiff." By the seventh section of the act of Congress of May 17, 1884, heretofore referred to, 23 Stat. 24, it is provided that "the general laws of the State of Oregon, now in force, are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or of the laws of the United States." The statute of Oregon (1 Hill's Annotated Laws of Oregon, p. 380, § 320) requires the jury in an action for the possession of real estate to find as follows: "First, if the verdict be for a plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be."

The verdict in this case does not state, in terms, that the plaintiff is entitled to the possession of the property described in the complaint, or any part thereof; neither does it state the

nature or duration of his estate in the property. Hence it is insisted that the verdict was irregular, and that no judgment should be rendered thereon, and in support thereof the cases of *Jones* v. *Snider*, 8 Oregon, 127, and *Pensacola Ice Company* v. *Perry*, 120 U. S. 319, are cited. We do not think the defect, if it be one, is sufficient to vitiate the judgment. Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant and the possession of which the plaintiff prays to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint. Again, in this action, brought under a special statute of the United States in support of an adverse claim, but one estate is involved in the controversy. No title in fee is or can be established. That remains in the United States, and the only question presented is the priority of right to purchase the fee. Hence the inapplicability of a statute regulating generally actions for the recovery of real estate, in which actions different kinds of title may be sufficient to sustain the right of recovery. It would be purely surplusage to find in terms a priority of the right to purchase when that is the only question which can be litigated in such statutory action. If the plaintiff owns the fee he is not called upon to file an adverse claim or commence such an action, and the statute providing therefor has no application. *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286.

These are the only questions presented. In them we find no error, and, therefore, the judgment is

Affirmed.

Statement of the Case.

HARTER *v.* TWOHIG.

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

No. 251. Argued and submitted April 4, 1895. — Decided May 27, 1895.

In 1858 H. loaned to W. a sum of money, receiving from him his note payable in one year with interest. No part of the sum on the note was ever paid, either to H. in his lifetime or to his representatives. Simultaneously with the loan H. conveyed to K. as trustee a tract of land in Nebraska to secure the payment of the note. The remaining interest of W. in the tract subsequently came to T. through sundry mesne conveyances. H. paid the taxes on the property from March, 1862, until his death in 1876. Shortly before his death he gave directions to have the trust deed foreclosed, and proceedings were taken to that end, a judgment was obtained, the property was sold to H., and a deed made to him accordingly. H. verified the petition which was the foundation of these proceedings, but the day before it was filed he died. The deed to him after the sale was delivered to his children, who in good faith filed the same for record and continued to pay taxes on the property, claiming to be owners. During all that time and down to 1888 neither W. nor any one claiming under him except H. and his representatives, ever exercised any right of ownership of the land. Then T. commenced proceedings in a state court of Nebraska, which were removed into the Federal court, to have the tax sale deed set aside and declared void, and to redeem from that sale, and such proceedings were had that a decree was entered allowing redemption. *Held*, that the doctrine of laches was applicable; that the claim was stale; and that no court of equity would be justified in permitting the assertion of an outstanding equity of redemption, after such a lapse of time, and in the entire absence of the elements of good faith and reasonable diligence.

February 27, 1858, Eugene L. Wilbur entered the west half of the northeast quarter of section 33, township 29, range 9 east, situated in Dakota County in the then Territory of Nebraska, paying therefor the sum of $1.25 per acre. On the same day Wilbur executed and delivered a trust deed to Augustus Kountze, as trustee, conveying said land to secure to Isaac Harter, the father of appellants, the payment of a promissory note for one hundred and forty dollars, bearing that date and due one year thereafter, with interest at the rate of four

per cent per month after maturity. No part of the interest or principal due upon this note was ever paid to Isaac Harter or to appellants. On March 2, 1860, Wilbur and wife by a quit-claim deed conveyed the eighty acres to William F. Lockwood, and on February 6, 1861, Lockwood and his wife, Mary A., by warranty deed, conveyed the same to James W. Virtue for a consideration of forty dollars in money and twenty-five dollars in property, who, on February 3, 1863, by warranty deed conveyed an undivided one-half interest to Mary A. Lockwood. Virtue was the witness to the trust deed to Kountze, and it was acknowledged before him as notary public. The record further shows that Isaac Harter, now deceased, paid the taxes on the property from 1862 to the time of his death, which occurred February 27, 1876; that Isaac Harter had placed the trust deed and the notes secured thereby in the hands of his attorney to foreclose the same, and that a petition for such foreclosure had been verified February 21, 1876, and was filed February 28, 1876, in the District Court of Dakota County, Nebraska; that the defendants in the suit were William F. Lockwood, Mary A. Lockwood, his wife, and Augustus Kountze, the trustee; that they were brought in by publication, and constructive service on them having been thus duly obtained, a decree foreclosing the trust deed was entered June 5, 1876, at the June term, 1876, of the court, in favor of Isaac Harter and against William F. Lockwood, Mary A. Lockwood, and Augustus Kountze, and such proceedings were thereupon had that the property in controversy was sold by the sheriff under the decree to Isaac Harter, August 12, 1876. It further appeared that the amount due on the promissory note June 5, 1876, was $1248, and that the property was appraised at $880 before the sheriff's sale. May 10, 1877, the sale having theretofore been approved by the court, a deed to Isaac Harter was duly executed by the sheriff of Dakota County, Nebraska, for the eighty acres in question, and by him delivered to the attorney of Isaac Harter, who delivered the same to appellants, and they, not realizing that there was any irregularity connected with the proceedings, and believing they had a good and sufficient title to the property, filed the same on

June 10, 1877, for record with the county clerk of Dakota County, and thereafter, and until the commencement of this cause, held themselves to be the owners thereof; paid the taxes thereon; offered the same for sale; had correspondence with divers parties concerning the land, and exercised all the rights of property and dominion over the same which was exercised by any person from June 1, 1877, to December 21, 1888, when this action was commenced, the acts of ownership being such that the tract was generally known in the community where it was located as "the Harter land." The land remained of comparatively little value up to the spring of 1887, when a railroad bridge was built across the Missouri River to Sioux City and to South Sioux City, where a town was laid out, and it then rose rapidly in value until, at the time of the commencement of this action, it was worth $100 to $150, and, pending this suit, $200, per acre.

In the summer of 1888, James P. Twohig was the clerk of the District Court of Dakota County, Nebraska, when an affidavit was filed therein by Isaac Harter, one of the appellants, for the purpose of perfecting the title to another piece of real estate in that county, belonging to appellants, and which they were about to sell, which affidavit showed that Isaac Harter, the father of affiant, died February 27, 1876. Thereafter James P. Twohig obtained a quit-claim deed from James W. Virtue of the eighty acres for a consideration of $350, bearing date September 3, 1888, and filed for record September 22, 1888. Twohig then wrote appellant Isaac Harter a letter stating that he had title to the land and demanding a settlement, which was the first information that appellants had of any claim whatever against their title. On December 21, 1888, Twohig filed his petition against appellants in the District Court of Dakota County, Nebraska, which was subsequently duly removed into the Circuit Court of the United States for the District of Nebraska, praying judgment that the decree in favor of Isaac Harter, deceased, of June 5, 1876, and the sheriff's deed based thereon, might be set aside and declared void, and Twohig be allowed to redeem the undivided half of the real estate from the lien of the trust deed to

Opinion of the Court.

Kountze on paying to defendants the amount legally and equitably due them. While the suit was pending and on or about January 28, 1889, Twohig obtained a quit-claim deed from Mary A. Lockwood and William F. Lockwood for an undivided one-half of the land for a consideration of $50, and on November 20, 1890, filed his supplemental petition in the Circuit Court praying the same relief as to the whole of the land.

It appeared that in 1866, William F. Lockwood and his wife, Mary A., left Dakota County, Nebraska, and never returned to that State, and that two years before, James W. Virtue left that county and went to Washington Territory, where he has since resided. Neither Virtue nor Mr. or Mrs. Lockwood, from 1864, ever exercised any rights of ownership whatever over the land in controversy, which land had never been cultivated or fenced, and up to the year 1887 was wild land.

Appellants answered and set up the defences of the statute of limitations; of abandonment; of title by adverse possession; and of laches. On a reference certain findings of fact were made, which have been substantially anticipated in the foregoing statement. Thereupon it was held by the Circuit Court that the decree which ordered a sale of the premises in the suit of Isaac Harter, Sr., was absolutely void; that neither complainant nor defendants were ever in the actual possession of the land, and the statute of limitations did not apply; that Virtue was not a party defendant to the foreclosure case, and in any event his grantee ought to be permitted to redeem; that defendants were entitled to the return of taxes paid with interest, and payment of the indebtedness secured by the trust deed to Kountze with interest; and a final decree was entered allowing redemption on payment of the amount found, from which decree both parties appealed to this court.

Mr. Henry W. Harter, with whom was *Mr. J. H. Swan* on the brief, for appellants.

Mr. W. E. Gantt for appellee submitted on his brief.

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

In respect of the nature of a conveyance in mortgage at common law, the legal title vested in the mortgagee and was forfeited upon default, but equity established the right of redemption after default. And, variously modified, where the common law doctrine prevails, a mortgage is still regarded as a conveyance in fee, although a conveyance as a security, while in many of the States this has been changed, chiefly by statute, so that a mortgage is regarded merely as a pledge. The common law, so far as applicable, and not inconsistent with the Constitution of the United States or the organic law of the Territory, or with any law of the territorial legislature, was adopted and declared to be law within the Territory of Nebraska by act of March 16, 1855, Laws Nebraska, 1855, 328, but by section 30 of an act approved February 21, 1855, (Ib. p. 166,) it was provided that "in the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." Thus, irrespective of the terms of the instrument in particular cases, instead of the mortgagee being entitled to immediate possession of the mortgaged property as an incident of the title, the mortgagor was entitled to possession until foreclosure. The conveyance in this case was, however, a trust deed and not a mortgage, and by section 676 of the law of the Territory, also approved March 16, 1855, Laws Nebraska, 55, 119, it was provided: "Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and sales made in accordance with their terms are valid. Or they may be treated like mortgages, and foreclosed by action in the district court." This recognized the distinction between a trust deed and a mortgage, and while providing that a trust deed might be treated like a mortgage and foreclosed as mortgages might be, did not undertake to deal with the legal title which passed by the conveyance to the trustee. The section was in terms adopted from the Code of Iowa of 1851, (Code Iowa, 1851, c. 118, § 2096; Laws Nebraska, 1855, p. 55,) which Code likewise contained the provision as to the retention of the legal title by the mortgagor above quoted from the law of Nebraska of February 21, 1855 (Code Iowa, 1851, § 1210).

And it has been repeatedly held by the Supreme Court of Iowa that the legal title vests in the trustee under such a deed. *Devin* v. *Hendershott*, 32 Iowa, 192, 194; *Newman* v. *De Lorimer*, 19 Iowa, 244; *Tucker* v. *Silver*, 9 Iowa, 261; *Cook* v. *Dillon*, 9 Iowa, 407.

It is true that in *Webb* v. *Hoselton*, 4 Nebraska, 308, decided at January term, 1876, the Supreme Court of Nebraska held that a conveyance in the form of a deed of trust to secure the payment of a promissory note conditioned, that in case of failure to pay, the trustee shall sell, or, upon payment, reconvey, is in effect only a mortgage. Of course, in many particulars, the attributes of deeds of trust and mortgages with a power of sale are the same. Both are intended as securities; in both, if not controlled by statute, the legal title passes from the grantor, but in equity he is, before foreclosure, considered the actual owner; and in both the grantor has the right to redeem. But that case did not involve the application of the territorial act to which we have referred, and changes had taken place in legislation during the intervening period.

The land in question was unoccupied and wild land, and there being no adverse holding, upon breach of condition, if not before, the legal title which Kountze held drew to it the possession, although in subjection to the right of redemption in Wilbur and his grantees, so that, when this bill was filed to redeem from the trust deed, the question at once arose whether there was then an equity of redemption outstanding which complainant could assert and which a court of equity would recognize.

Although actual possession by a mortgagee, under a claim of ownership, continued for the time required by statute might be requisite to convert a mortgage title into a title absolute, yet, notwithstanding that, in a case such as this, whether or not redemption will be accorded, depends upon the equities between the parties.

Twenty-nine years had elasped after the breach of condition before this bill was filed, but in the meantime the proceedings for foreclosure complained of had been had. This was in 1876, the sheriff's deed being given in 1877, eleven years before

complainant's bill was filed. It is settled law in Nebraska that a judgment rendered against a person or in his favor is reversible after his death if the fact and time of death appear upon the record, or in error *coram nobis*, if the facts must be shown *aliunde;* the judgment is voidable and not void, and cannot be impeached collaterally. *Jennings* v. *Simpson*, 12 Nebraska, 558; *McCormick* v. *Paddock*, 20 Nebraska, 486. Here, however, the petition to foreclose was filed after the death of Isaac Harter, and without pausing to examine the other irregularities relied on, it is sufficient to say that we think the foreclosure decree was void. But if the initiation of those proceedings operated to acknowledge an outstanding right of redemption at that time, their culmination and the deed of the sheriff must be recognized as evidence of the assertion of an extinguishment of such equity.

By section 6 of chapter 57 of the General Statutes of Nebraska of 1873, (Gen. Stat. 525,) it was provided that, "An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages."

In *McKesson* v. *Hawley*, 22 Nebraska, 692, a sale had taken place under a trust deed, and grantees under the purchaser at the trustee's sale, one Hartley, had taken and held adverse possession of the land for more than ten years prior to the commencement of the action, which was brought to redeem from the trust deed on the ground that the proceedings to sale under it were invalid. The Supreme Court of Nebraska held that the provisions of the above section applied; that an action to redeem from a mortgage was barred in the same time an action to foreclose would be, and could not be maintained after ten years from the date when the right of action accrued, which was in that case as soon as adverse possession was taken under the alleged purchase from the trustee; and the court said: "But it is contended by plaintiff that the possession of defendant and her grantors was not adverse; that the title of the trustee was a recognition of the plaintiff's title, and that, as the foreclosure proceedings were void, defendants could hold

only as assignees of the rights of the trustees, and, therefore, not adverse. Such, to our mind, cannot be the law. Notwithstanding the fact that the foreclosure proceedings might have been void, it is clear that the purpose of such proceedings was to cut off and destroy the title of plaintiff; and therefore the conveyance by the trustee to Hartley, had it been legal, would have terminated plaintiff's title. The grantees of Hartley taking and holding the property, or asserting their right to hold it under warranty deeds from him, was clearly adverse to plaintiff. They held as owners and the statute would run in their favor."

Even if in the case in hand the possession may be regarded as constructive merely, yet as the legal title was in the trustee and not in Wilbur, and only a bare right to redeem could be transferred to and by Wilbur's grantees, we hold that the same principle by analogy applied to them and to Twohig, which could only be overcome, if at all, by superior equities on his part. And we do not perceive that any such equities existed.

It appears from the record that from 1867 to 1877, inclusive, the land was assessed and taxed in the name of Isaac Harter; from 1878 to 1885, inclusive, in the name of Isaac Harter, Jr., one of the heirs of Isaac Harter; and from 1886 to 1889, inclusive, in the name of H. W. Harter, another of said heirs; that after the maturity of the trust deed, Isaac Harter paid the annual taxes from and including those of 1861 to the day of his death, and that his heirs, the appellants, paid the annual taxes from that time down to and including those for 1888; that the land was treated during all this time as belonging to Harter and his heirs, and notoriously known as the "Harter land." It further appears that both Lockwood and Virtue knew of the outstanding trust deed, which was indeed acknowledged before Virtue, and the claim of Harter thereunder, and that Lockwood and his wife knew of the pendency of the foreclosure suit; that Mr. and Mrs. Lockwood left the county and State in 1866 and Virtue in 1864, and never returned, except that Virtue paid a temporary visit there in the summer of 1888, when he conveyed to Twohig, and that the Lockwoods and Virtue paid no atten-

tion whatever to the land nor asserted any ownership therein after their departure. The record discloses another fact, that when Virtue left Dakota City he placed his business affairs in the hands of an agent, who attended thereto, and that taxes were paid on certain lands in Dakota City as late as 1877 on behalf of Virtue, while no attention was given to the land in controversy. In the summer of 1888 the affidavit of Isaac Harter, Jr., was filed in the county court, in the course of disposing of other real estate than this, to the effect that Isaac Harter, upon his decease, had left no debts unpaid, and therefrom it also appeared that Isaac Harter died February 27, 1876, whereupon the clerk who had filed the affidavit obtained a quitclaim from Virtue and set up this claim to the land. The land, which was worth perhaps a hundred and twenty dollars in 1858, had suddenly increased in value to about twelve thousand dollars in 1888, chiefly within the year or two preceding.

Under these circumstances we think the doctrine of laches was applicable; that the claim was stale; and that no court of equity would be justified in permitting the assertion of an outstanding equity of redemption after such a lapse of time and in the entire absence of the elements of good faith and reasonable diligence.

Decree reversed and cause remanded with directions to dismiss the bill.

COLVIN *v.* JACKSONVILLE.

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

No. 991. Submitted May 6, 1895. — Decided May 27, 1895.

Where the jurisdiction of the court below is in issue, and the case is certified here for decision, the certificate must be granted during the term at which the judgment or decree is entered.

In a suit in equity to restrain the issue of bonds by a municipal corporation,

brought by a taxpayer, the jurisdiction of the Circuit Court is determined by the amount of the interest of the complainant, and not by the amount of the issue of the bonds.

THIS was a bill filed by John H. Colvin, a citizen of the State of Illinois, on May 8, 1894, against the city of Jacksonville, Florida, and its mayor, in the Circuit Court of the United States for the Northern District of Florida, to enjoin and restrain the issue, sale, delivery, pledge, or other disposition of a certain issue of bonds to the amount of one million dollars.

By the act of Congress entitled "An act to change the boundaries of the judicial districts of the State of Florida," approved July 23, 1894, 28 Stat. 117, c. 149, the county of Duval, in which the city of Jacksonville is situated, was detached from the Northern District of the State and attached to the Southern District thereof.

The bill was dismissed by the Circuit Court, December 4, 1894, for want of jurisdiction, and an appeal prayed and allowed to this court, and, being docketed, the case was dismissed April 1, 1895, because of the absence of a certificate of the Circuit Court in accordance with section 5 of the judiciary act of March 3, 1891. *Colvin* v. *Jacksonville*, 157 U. S. 368. Thereupon plaintiff prayed a second appeal, which was allowed, and a certificate on the question of jurisdiction to this court signed, April 11, 1895, and the cause having been again docketed was submitted as under the thirty-second rule.

Mr. H. Bisbee for appellant.

Mr. A. W. Cockrell for appellees.

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

We are of opinion that where the jurisdiction of the court below is in issue and the case is certified to us for decision the certificate must be granted during the term at which the judgment or decree is entered, by analogy to the statutory provisions on that subject which obtained in relation to certificates

of division of opinion; Rev. Stat. §§ 650, 651, 652, 693, 697; *Maynard* v. *Hecht*, 151 U. S. 324; and in view of the general rule as to the inability of the court to deal with matters of this sort after the expiration of the term; *Hickman* v. *City of Fort Scott*, 141 U. S. 415; *Morse* v. *Anderson*, 150 U. S. 156.

But we assume, though it is somewhat obscure, that the term was still open when this certificate was signed. The certificate is as follows:

"This cause came on to be heard upon a motion for an injunction as prayed for in the bill of complaint and for the appointment of a receiver.

"In the bill and amended bill filed herein complainant alleged that he was a citizen of the State of Illinois; that he owned property within the limits of the city of Jacksonville; that the city was about to issue and sell bonds of said city to the amount of one million dollars; that the amount of taxes that would be assessed upon the property owned by him in the city of Jacksonville, on account of the issue of said bonds, as interest and sinking fund, would exceed two thousand dollars; whereupon he prayed for an injunction and a receiver for any such bonds as may have been issued.

"The answer filed denied that complainant was the owner of taxable property upon which the amount of taxes which would be levied as interest and sinking fund on account of the issue of said bonds would exceed two thousand dollars, but alleged that the only property owned by complainant which would be liable to taxation by said city of Jacksonville was but about $14,000, and the amount of taxes would not exceed $2000, and upon a hearing upon the bills and answer and affidavits in support of the allegations of the same, had upon motion of the complainant, it was contended by the complainant that the property of said complainant would be liable to taxation on account of the issue of said bonds to an amount exceeding $2000, and it was further contended by complainant as a proposition of law that the amount of taxes that the complainant would have to pay was not the amount in controversy, but that the total amount of issue of bonds, one million of dollars, was the amount in controversy which would deter-

mine the jurisdiction of this court, and upon said hearing as aforesaid the court found as a matter of fact that the amount of taxes which the complainant would be obliged to pay as interest and sinking fund on account of the said proposed issue of bonds would not exceed two thousand dollars, and as a matter of law that the interest which the complainant had in the issue of bonds and not the amount of the entire issue thereof was the amount in controversy, and found therefore that this court had no jurisdiction of such controversy, and therefore dismissed said complainant's bill.

"Now, therefore, it is certified that the question of the jurisdiction of this court upon the grounds hereinbefore stated, namely:

"1st. That the amount of the interest of the complainant and not the entire issue of bonds was the amount in controversy; and,

"2d. That having found as a matter of fact upon a hearing had upon motion of the complainant upon bill and answer and affidavits filed by each party that the interest of the complainant did not exceed $2000, it was the duty of the court to dismiss the bill, is the only question of law upon the pleadings and process for the decision of the Supreme Court of the United States."

We are confined in the disposition of the case to the certificate, from which it appears that the case was heard upon a motion for an injunction and for the appointment of a receiver, on the bill and amended bill, answer, and affidavits. And that the court found as matter of fact that the entire amount of taxes which complainant would be obliged to pay as interest and sinking fund on account of the proposed issue of bonds would not exceed $2000, and thereupon dismissed the bill for want of jurisdiction. It was contended by complainant that the amount of taxes he would have to pay was not the amount in controversy, but that the total amount of the issue of bonds was. But this contention was overruled, and if the court did not err in that particular, and assuming, as we must, that complainant's liability did not exceed $2000, the decree of the court was right, since it was its duty, when

it appeared to its satisfaction that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, to proceed no farther, and to dismiss the case. *Morris* v. *Gilmer*, 129 U. S. 315.

This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct.

In *El Paso Water Company* v. *El Paso*, 152 U. S. 157, 159, which was a bill filed by the water company against the city of El Paso for an injunction, it was alleged, among other things, that if certain bonds were issued, the complainant would be compelled to pay taxes on its property for the interest on the bonds and to provide a sinking fund for the principal thereof, but the amount of the tax that would be thereby cast upon complainant's property was not disclosed, and we said upon the question whether there was a sufficient amount in controversy to give this court jurisdiction: "The bill is filed by the plaintiff to protect its individual interest, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5000. So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred." The case is in point and is decisive.

Brown v. *Trousdale*, 138 U. S. 389, 394, is not to the contrary. There several hundred taxpayers of a county in Kentucky, for themselves and others associated with them, numbering about twelve hundred, and for and on behalf of all other taxpayers in the county, "and for the benefit likewise of said county," filed their bill of complaint against the county authorities and certain funding officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection; and an injunction

was also asked as incidental to the principal relief against the collection of a particular tax levied to meet the interest on the bonds. The leading question here was whether the case had been properly removed from the state court, and no consideration was given to the case upon the merits. As to the jurisdiction of this court, we said: "The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was indentical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

Decree affirmed.

LEHIGH VALLEY RAILROAD COMPANY *v.* KEARNEY.

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

No. 314. Argued April 26, 29, 1895. — Decided May 27, 1895.

Reissued letters patent No. 5184, granted to Francis Kearney and Luke F. Tronson December 10, 1872, for an improvement in spark-arresters, are void for want of patentable novelty.

Counsel for Appellees.

THIS was a suit in equity brought in the Circuit Court of the United States for the District of New Jersey by Francis Kearney and Mary F. Tronson, executrix of Luke F. Tronson, deceased, against the Lehigh Valley Railroad Company, for the alleged infringement of reissued letters patent of the United States No. 5184, granted to Francis Kearney and Luke F. Tronson, December 10, 1872, for an improvement in spark-arresters, the original patent having been granted April 20, 1871, No. 113,528. Mary F. Tronson having died since the appeal was taken, Elwood C. Harris was substituted as administrator, etc.

The railroad company relied on these defences: 1. That the reissue was illegal and void because the original patent was not inoperative by reason of a defective or insufficient specification, or any error arising from inadvertence, accident, or mistake; that the scope of the patent had been enlarged so as to cover another and different invention from the original, and that new matter had been introduced into the specification; 2. That the alleged invention covered by the reissue patent was not patentable since the change from prior forms of spark-arresters was not productive of any improved or materially different result; 3. That the reissue patent was void for want of substantial novelty in the subject-matter thereof in view of the prior state of the art as shown in certain enumerated patents; 4. Non-infringement.

The case was heard on bill, answer, and proofs, and resulted in a decree for injunction, and referring the case to a master to take an account of the gains and profits accruing to the company by reason of infringement and of the damages suffered by complainants thereby. The master subsequently reported, and a final decree was rendered against the defendant for the sum of $6235.52, whereupon the case was brought to this court on appeal. The opinion of the Circuit Court will be found reported, 32 Fed. Rep. 320.

Mr. Robert J. Fisher and *Mr. Charles E. Mitchell* for appellant.

Mr. Elwood C. Harris for appellees.

Opinion of the Court.

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

Kearney and Tronson applied January 5, 1871, for letters patent for a certain "improvement in spark-arresters for locomotives," which application was rejected on reference to patent to James L. Vauclain, August 20, 1861, and after various amendments was allowed, and the patent issued April 11, 1871. The following is the specification of the application and of the patent as allowed, the parts stricken out by amendment being in brackets and the parts inserted being in italics:

"The improvement relates to effectually preventing hot coals passing from the chimneys of locomotives, [by a peculiar manner of] arresting them before they get to the chimney.

"On the forward end of a locomotive boiler is an extension, on the top of which is the chimney or smoke-stack. This receptacle of all that passes [from the fire] through the boiler flues to the smoke-stack is technically known as the smoke-head; the pipes from the boiler to the engine pass through the smoke-head, and the steam is exhausted thereinto from the cylinders. In the unoccupied space in this smoke-head we place a grate, [formed either with bars or of netting, or perforated plates; the shape is not material; we make them circular, as being most convenient in ordinary cases. It is best there should be a clear space on all sides or around the grate] *the peculiar features of which are its perpendicular bars with fixed apertures sufficiently fine to stop the sparks that come from the fire, the size of the grate being determined by the area of opening needed for the regular draft and escape of smoke on kindling the fire, or when the engine is not in motion.*

"Upon the top of the grating a tube or pipe is fitted, extending upward a short distance above the top of the smoke-head into the chimney. A space is left around the top of the pipe between the edges of the aperture in the top of the smoke-head and the pipe. This space is covered with netting or grating to prevent sparks or coals from passing through into the chimney.

"In the accompanying drawings, Figure 1 is a view, in sec-

tion, of the front of the smoke-head, with the gratings and pipe in position. Figure 2 is a side view of the end of the boiler and of the smoke-head. A is the boiler. B, the flues. C, the smoke-head. D, the grate. E, the pipe on the top of the grate. F is the netting closing the aperture between the pipe and the smoke-head. G is the chimney or smoke-stack; and I, the exhaust pipes from the engines.

"It will be seen that nothing but smoke and gas can pass the top netting F, and that no coals or dangerous sparks can pass into the chimney, they being arrested by the grate D without having received any impulse from the exhaust pipes. The strong draft created by the exhausting steam up the pipe into the chimney brings the coals and sparks to the grating, against which they strike and fall harmless into the space in the smoke-head. [The force of coals drawn from the fire when impelled by the exhaust steam up the chimney is such as to cut through netting, and even cast iron over a quarter of an inch thick, in two or three months, in any description of spark-arresters located in the smoke-stack.]

"By our arrangement the gases that are returned by contrivances that turn sparks downward in the smoke-stack, and sometimes force open the fire-door, have a clear passage to the atmosphere.

"[What we claim and desire to secure is —

"1. The grate D, pipe E, the net or grate F, as and for the purpose specified and shown.

"2. Combining a spark-arrester with the smoke-head of a locomotive in the manner and for the purpose hereinabove set forth.]

"*We disclaim all draft-regulating contrivances, and also all gratings with lateral adjustable openings. What we do claim as our improvement, and desire to secure, is — The grate D with longitudinal bars, as and for the purposes specified and shown.*"

On June 7, 1872, Kearney and Tronson applied for a reissue, which was rejected on reference to James L. Vauclain, smoke-stack, August 20, 1861; Weideman, Major and Sample, spark-arrester, December 20, 1870; and James Smith, spark-arrester,

March 7, 1871; and after amendment was allowed, and the reissue granted December 10, 1872.

The following is the specification of the application and of the reissue as allowed, the parts stricken out being bracketed and the parts inserted italicized:

"Figure 1 is a vertical cross-section of the smoke-box of a locomotive with our improvements attached, and

"Figure 2 is a vertical longitudinal section of the same, and a portion of the boiler.

"The letters of reference indicate the same parts in both figures.

"A represents a portion of the boiler of a locomotive. B is a space, commonly called the smoke-box. CC are the flues at the point where they enter the smoke-box; E is a pipe extending from within the base of the smoke-stack down into the smoke-box, and commonly termed a 'petticoat pipe;' D is a grating placed at the lower part of the petticoat pipe to prevent any cinders or sparks passing into the same; F is a netting or grating placed around the top of the petticoat pipe so as to cover the annular opening caused by the difference in size of the upper part of the petticoat pipe and the bottom of the smoke-stack G. H is a piece of boiler plate or sheet iron placed at the bottom of the smoke-box in order to provide a flat surface for the grate D to rest upon, and is provided with holes, through which the exhaust pipes II pass.

"Our improvements relate to providing locomotives with a suitable device for preventing live coals, cinders, sparks, and like substances, which may leave the furnace, from passing into or out of the smoke-stack, and to retain them in the smoke-box, from which place they may be removed at pleasure.

"It has heretofore been the practice to cover the tops of smoke-stacks of locomotives with a wire netting or grating, for the purpose of preventing the escape of sparks and cinders; and, in some cases, an inverted metal cone is also placed in the centre of such netting or grating to receive and break the force of the cinders as they are thrown against it.

"In all of these contrivances the cinders receive so much force from the exhausting steam while on their way up the

petticoat pipe and smoke-stack that they very soon destroy the netting or grating placed at the top of the smoke-stack, and where a cone or other device is used to turn the cinders downwards and partially protect the grating the gases are also retarded in their escape.

"In order to overcome these difficulties, we place a grating, D, at or near the lower end of the petticoat pipe E so as to surround the exhaust pipes II, and prevent any cinders or sparks entering the pipe E, while allowing free passage for the smoke and gases. We also place a grating or netting, F, around the top of the petticoat pipe to cover the aperture left between it and the smoke-stack in order to arrest any sparks or cinders that may be drawn to that point.

"[In the construction of the grating E we prefer to use vertical bars as shown in the drawing, but any style or kind of grating may be used that will prevent cinders or sparks from entering the petticoat pipe, such as a perforated surface or a grating formed in any manner desired, and the apertures or perforations may be regulated in size and area of surface covered by the amount of opening required for the regular draught and escape of smoke on kindling the fire or when the engine is not in motion.]" *We construct the grating D with straight vertical bars of iron, placed at small distances apart, but these spaces should be such, in the aggregate, as will be sufficient for the draught and escape of the smoke, on kindling the fire, or when the engine is not in motion.*

"By this arrangement nothing but smoke and gas are allowed to pass the netting F, and no coals or dangerous sparks can pass out of the smoke-box into the petticoat pipe, they being arrested by the grating D before having received any very great impulse by reason of the exhaust pipes. The strong draught up the pipe E and smoke-stack brings the greatest portion of the cinders and sparks to the grating D, against which they strike and fall harmless to the bottom of the smoke-box, while the smoke and gases have free and uninterrupted egress through the petticoat pipe and smoke-stack, they being perfectly clear; and the gratings D and F are not liable to be injured by the cinders striking

against them, as they are arrested before having obtained the force they would have if allowed to pass up into the smoke-stack.

"What we claim as our invention, and desire to secure by letters patent, is —

"[First. Placing a grating in the smoke-box of a locomotive to prevent sparks or cinders entering the petticoat pipe, substantially as described and shown.

"[Second. The combination of the grating D with the netting F, substantially as and for the purposes described and shown.]

"*First. The grating D, with vertical bars placed at the foot of the spark or petticoat pipe E, in the manner and for the purpose substantially as described.*

"*Second. The combination of the grating D with the netting F, in the manner and for the purpose substantially as described.*"

The drawings accompanying the reissue were, with some difference of lettering, practically the same as accompanied the original application, and were as follows:

Fig. 1.

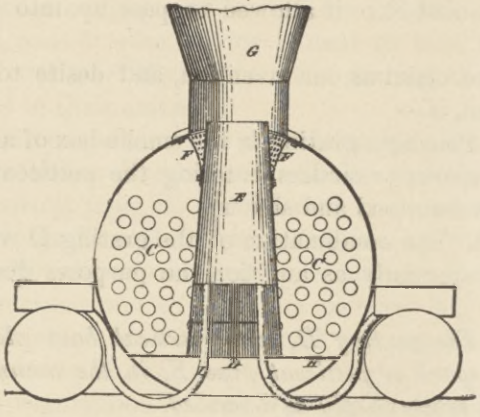
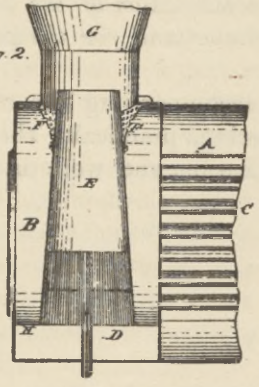


Fig. 2.



As to the original specification, it will be perceived that the application was for a patent spark-arrester placed in the smoke-box of a locomotive in contradistinction to a spark-arrester placed in the smoke-stack, and it was said that the spark-arrester might be "formed either with bars or of netting, or perforated plates; the shape is not material; we make them circular, as being most convenient in ordinary cases;" but after the application was rejected on reference to the Vauclain patent of August 20, 1861, the specification was changed so as to disclaim the construction of Vauclain, and the claim of a combination of "a spark-arrester with the smoke-head of a

locomotive" was altered to a claim for "the grate D with longitudinal bars," the specification being amended accordingly. The construction of the grate "either with bars or of netting, or perforated plates," was changed into "perpendicular bars with fixed apertures, sufficiently fine to stop the sparks which come from the fire," and the clause that "the force of coals drawn from the fire when impelled by the exhaust steam up the chimney is such as to cut through netting, and even cast iron over a quarter of an inch thick, in two or three months, in any description of spark-arresters located in the smoke-stack," was struck out. The claim, taken with the specification and drawings, covered the combination in the smoke-box of a locomotive engine, of a petticoat pipe with a spark-arresting grating composed of longitudinal bars, and as no other form was described or illustrated and the grating was designated by the reference letter, it followed that it must be of the form shown in the drawings, namely, a series of long bars placed vertically with long openings between them extending from the top to the bottom of the grating.

The rule is that where the applicant acquiesces in the rejection of claims by the Patent Office or in a construction which narrows or restricts them, and where the elements which go to make up the combination of the claim are mentioned specifically and by reference letters, leaving no room for question as to what was intended, the claim must be confined and restricted to the particular device described. *Knapp* v. *Morss*, 150 U. S. 221.

We find nothing in the specification to indicate that the use of the vertical bars was patentably different from the netting or perforated plates originally stated to be equivalent devices, and no new result produced by the use of those bars is pointed out. As to the specification of the reissue application, it will have been seen that what was omitted before because rejected by the Patent Office was restored, and it was again stated that the form of the grating was not material, but that any kind of apertures or perforations might be used, though a preference was expressed for the use of vertical bars as shown in the drawing. There was in the reissue a description of a piece of

boiler plate or sheet iron at the bottom of the smoke-box providing a flat surface for the grate to rest on, and having holes for the passage of the exhaust pipe, and this plate, letter H in the reissued drawings, was not described in the original patent, although in the original drawing there was a faint line running across the smoke-box which might be said to be such plate, as the grate could not stand on nothing. The disclaimer was also omitted. The claims of the reissue patent as filed were: 1st. Placing a grating in the smoke-box of a locomotive to prevent sparks or cinders entering the petticoat pipe, substantially as described and shown; 2d. The combination of the grating D with the netting F, substantially as and for the purposes described and shown. These were substantially the same claims as were made on the original application and afterwards abandoned. The reissue application having been rejected, these claims were struck out and two others substituted, the second of which was substantially the same as the original second reissue claim, and the first of which limited the invention to the specific form of grating shown; and the specification was amended by erasing the matter which provided that the form of grating was immaterial, and inserting the paragraph stating the construction of the grating D, with straight vertical bars of iron, placed at small distances apart.

We are of opinion that the patent was limited to a grating composed of vertical bars and the spaces between them, the bars being attached at their upper ends to the bottom of the petticoat pipe.

Ordinarily the tubes for heating water in locomotive boilers lead from the fire-box into the smoke-stack; and smoke, gases and cinders are discharged into the atmosphere through the smoke-stack, propelled by the draft created by the exhaust steam. To arrest the discharge of sparks and cinders, locomotives were provided years before the date of this patent with various devices known as spark-arresters.

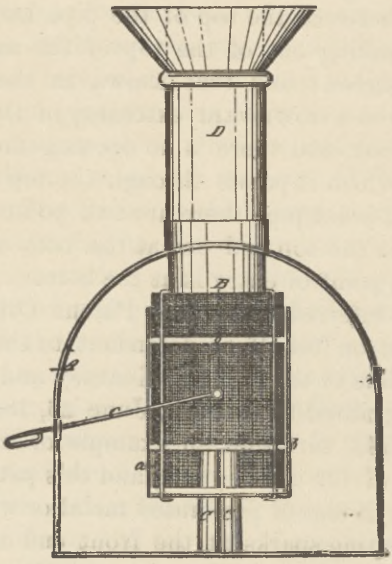
On the hearing, several forms of pipe into which the exhaust steam is discharged through exhaust-nozzles were referred to as long in use; particularly that shown in the Kearney and Tronson patent, technically known as a petticoat pipe, in

which the pipe is greater in diameter at the bottom and an opening is left between the top of the pipe and the opening for the stack leading out of the top of the smoke-box, and guarded by a screen; and that shown in the May patent, where the pipe is a downward extension of the smoke-stack into the smoke-box, and there is no opening around the pipe at the point at which it passes through the top of the smoke-box. In the petticoat pipe there are two points of entry into the stack, one at the top and one at the bottom of the pipe; in the other the point of entry is at the bottom.

The patents referred to by the Patent Office and others were introduced on behalf of defendant to show the state of the art at the time of the grant to Kearney and Tronson.

The patent granted to Hubbell, June 26, 1841, for a spark-arrester, No. 2143, furnishes an example of a spark-arrester below the base of the smoke-stack, and this patent shows that in that year a cylinder of perforated metal or wire gauze could be used for arresting sparks at the front end of a locomotive and within the smoke-box. The patent to May, July 28, 1857, No, 17,884, showed a spark-arrester in a locomotive smoke-box, the two exhaust-nozzles entering a drum made of perforated plates of metal or wire gauze. This drum, at the upper end, is attached to a downward prolongation of the stack into the smoke-box. May's claim was: "My arrangement of the spark-arrester within the smoke-box of the locomotive steam-boiler so that the stack or chimney shall be prolonged down into the smoke-box and made of wire gauze or perforated plates, and otherwise so constructed as specified that the entire track of the smoke shall be through the gauze or perforated plates." He sets forth "the advantages of making the spark-arrester within the smoke-box instead of placing it within the chimney or in a chamber arranged above the smoke-box, and made to communicate therewith by a flue."

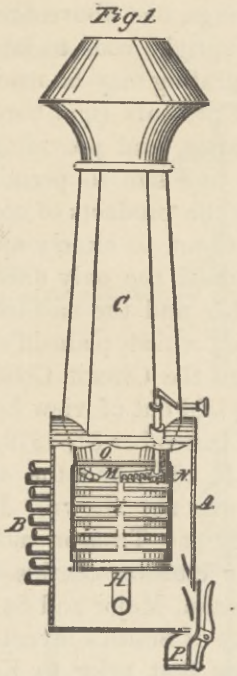
Fig. 1 of May's drawings is as follows:



The patent of Vauclain of August 20, 1861, No. 33,114, has a similar cage or grating to that of May's patent and the same arrangement of downward extension of stack and exhaust nozzles, but there is a screened opening at the top of the cage for the passage of smoke and gases, and the perforations are horizontal. These apertures, as stated in the specification, may consist chiefly or wholly of latitudinal slots, and the drawings show that the perforations are quite elongated.

In the opinion of the Circuit Court it is said that the apertures appear, from the drawing, to be cut out of sheet iron, and that such a screen "could not be said to be made of iron bars, which are the thing patented to the plaintiffs, but it approaches very near to it. The slots and iron strips are also placed horizontally, whilst the plaintiffs' patent is for a grate with vertical bars." But there is no suggestion in the patent that the perforated screen is made of sheet metal. Nothing is said in the specification as to material, and the drawings do not impress us as affording a satisfactory basis for the conclusion that the material was sheet rather than cast iron.

Fig. 1 of this patent is as follows:



In the patent to Sweet, dated June 23, 1863, No. 38,992, the exhaust nozzles enter a hollow cylinder made of wire gauze, and the screens are described as being either in the form of a cylinder or the frustrum of a cone.

In Smith's patent of August 16, 1870, No. 106,515, a device of perforated metal is used. This patent shows the exhaust nozzles as entering the frustrum of a cone formed of perforated metal which at the top unites with a downward extension of the chimney, the perforations extending up to the smoke-arch, and outside of the spark-arrester is a lift pipe which may be made adjustable.

The patent to Weideman, Major and Sample, of December 20, 1870, No. 110,315, shows a spark-arrester of finely-perforated metal, a petticoat pipe, and what is called a draft pipe.

Smith's patent of March 7, 1871, No. 112,506, describes a

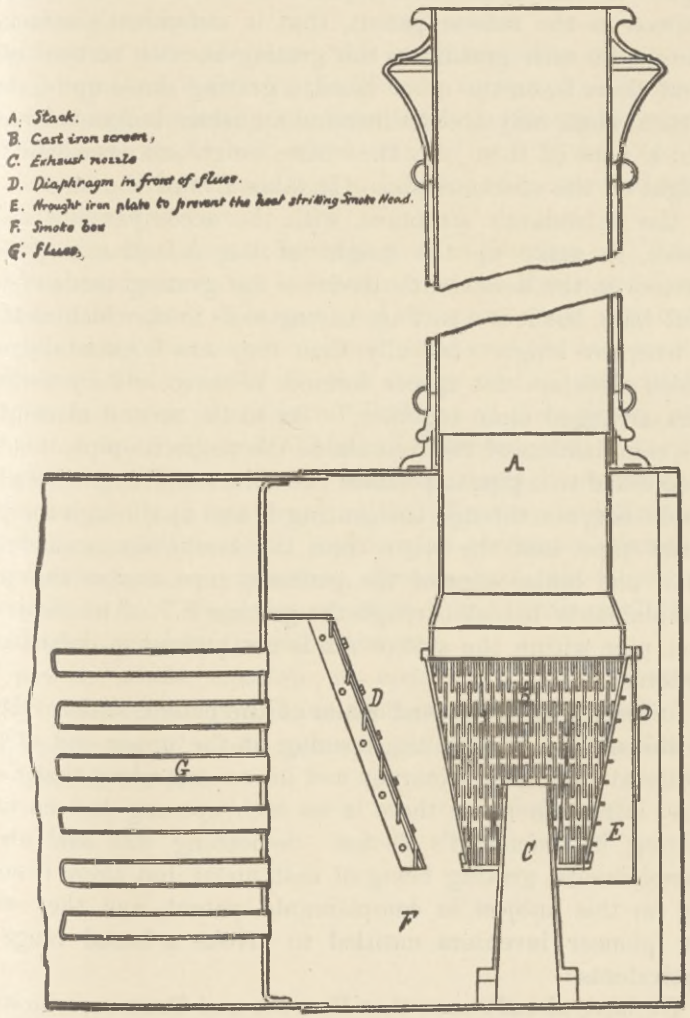
spark-arrester consisting of a grated tubular casing made by a continuous bar of wrought iron coiled spirally in horizontal coils, or of cast-iron rings, one above the other, lying horizontally and strung to upright rods to keep them a proper distance apart, "or, the grating may be made in any other desired manner, providing it presents rigid bars for the hard ignited cinders to strike against, and providing there are openings sufficient in number and size to permit the free escape of lighter particles with the products of combustion." This was held by the Circuit Court to closely approach the invention patented by the plaintiff, the only difference being that the coiled wrought-iron bar and the cast-iron bars or rings were horizontally arranged, whilst plaintiff's patent required the bars to be vertical, but the Circuit Court was of opinion that this patent should be laid out of view because plaintiff's application was sworn to December 31, 1870, and filed in the Patent Office, January 5, 1871, and the time of the filing of Smith's application was not shown. It should, perhaps, be noted that as Kearney and Tronson modified their claims on the reissue upon the citation of this patent with those of Vauclain, and Weideman, Major and Sample, they apparently conceded the seniority of Smith's invention.

These patents show that, prior to Kearney and Tronson's invention, spark-arresters had long been placed at the base of the smoke-stack in connection with a petticoat pipe or a downward extension of the stack; that the advantage of placing a spark-arrester in the smoke-box instead of in the smoke-stack was recognized as early as the May patent, July 28, 1857; that the exhaust nozzles had been led into the base of such arresters, and that such arresters had been made from wire gauze and from perforated metal, the apertures producing in one instance horizontal gratings.

The spark-arrester with vertical slots or perforations, used by defendant, until discontinued upon the commencement of this suit, was devised by its own employés and was used in ignorance of complainants' patent as matter of fact and taken out upon notice of the claim for infringement. This spark-arrester was originally constructed under the patent to Alex-

ander Mitchell, No. 178,181, May 30, 1876, and was provided with round perforations, afterwards changed so that the perforations were elongated.

The device is in substance as follows:



What is claimed is that these apertures are an infringement because they are upright, although conceded that if rectangular they would not infringe.

The defendant's expert testified, correctly as we think, in regard to this device as compared with that described and claimed in the reissue patent, that in defendant's structure there is no such grating as the grating D, with vertical bars, "but there is, on the other hand, a grating made up of short vertical slots, only about three and a quarter inches in length, which none of them run the entire height, or even half the height of the spark-arrester. It takes five of the short slots of the defendant's structure, with the accompanying cross-pieces, to make up the height of the defendant's device. Neither in the defendant's device is the grating made of vertical bars, but it is a casting, having slots in it, which slots, it is true, are longer vertically than they are horizontally, but which slots are not spaces formed between and by vertical bars arranged close together." As to the second element in the combination of the first claim, the petticoat pipe, it is the function of that pipe to produce "two lines of draught from the smoke-box, one through the grating D and up through the petticoat pipe, and the other from the smoke-box around the outer and upper edge of the petticoat pipe, and as shown in complainants' patent through the grating F." And the petticoat pipe within the smoke-box is not present in defendant's structure.

In respect of the second claim of the patent, which relates to the netting F over the opening at the upper end of the petticoat pipe, both Kearney and his expert admit that there is no infringement, as there is no such opening and no such netting in defendant's device. Something was said about complainants' grating being of cast metal, but there is nothing on this subject in complainants' patent, and they were not pioneer inventors entitled to invoke a broad range of equivalents.

We have already seen that Kearney and Tronson, who were experienced and practical railroad men, declared in their original applications for the patent and for the reissue, that the

shape of their grating was not material, and that it might be made either from bars or netting or perforated plates; and if their particular construction of grate with the long vertical bars was a mere equivalent for the grates shown in the prior patents, then it would not be a patentable invention, but a mere change of form.

And we do not understand the specifications to set up any new or improved result by the grating composed of vertical bars, (although the advantage resulting from placing the spark-arrester in the smoke-box, which was old, was shown,) nor do we find from the evidence that the change of form constituted any advance in the art.

It appears that a spark-arrester such as Kearney and Tronson's was used upon a few locomotives on the Morris and Essex Railroad, of which Kearney and Tronson were employés, Tronson being the master mechanic, and that the use was discontinued after a year or so; that it was used experimentally on a locomotive on the Central Railroad of New Jersey, and on one of the Troy and Whitehall Railroad; but a careful consideration of the evidence, which we deem it unnecessary to review in detail, convinces us that Kearney and Tronson originally correctly averred that bars, or perforated plates, or wire nettings, were equivalent devices, and that a grating with vertical bars was not productive of any better result than was accomplished by the prior devices.

Upon the whole, therefore, we conclude that the Kearney and Tronson reissue is void for want of patentable novelty.

Decree reversed and cause remanded with a direction to dismiss the bill.

GREEN *v.* BOGUE.

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

No. 327. Argued May 1, 1895. — Decided May 27, 1895.

In view of Rule 33, which provides that "if upon an issue the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and in equity they ought to avail him," the plaintiffs may properly ask this court to review the decree of the court below, sustaining the sufficiency of the defendants' plea.

Where the facts averred and relied upon in a former suit between the parties which proceeded to final judgment are substantially those alleged in the pending case under consideration, the fact that a different form or measure of relief is asked by the plaintiffs in the later suit does not deprive the defendants of the protection of the prior findings and decree in their favor.

Nor is their right affected by the fact that Mrs. Green did not join in the exceptions, or that Mr. Green, who had joined, withdrew his objections, in view of the fact that the exceptions were brought and sought to be maintained in their interest and by their trustees and privies.

The allegations of fraud, based upon the existence of an outside contract, are satisfactorily disposed of by the Supreme Court of Illinois in *Barling* v. *Peters*, 134 Illinois, 606.

On the 15th day of February, 1890, Hetty H. R. Green and Edward H. Green, citizens of the State of Vermont, filed their bill in the United States Circuit Court for the Northern District of Illinois, against George M. Bogue, Henry W. Hoyt, Hamilton B. Bogue, George W. Smith, Abram M. Pence, and Williard T. Block, all citizens of the State of Illinois, and Henry A. Barling and Edward D. Mandell, trustees, citizens of the city of New York, and William H. Peters, receiver of the Exchange National Bank of Norfolk, Virginia, a citizen of the State of Virginia.

The bill sets out that Hetty H. R. Green is the daughter of Edward Mott Robinson, late of the State of New York, now deceased, and that she is a beneficiary under the last will and testament of the said Edward Mott Robinson, and that Ed-

ward H. Green is the husband of said Hetty H. R. Green, and one of the trustees of the said will; that on or about the 20th day of June, 1864, one Robert W. Hyman, late of Chicago, Cook County, Illinois, now deceased, purchased for the joint account of himself and the said Edward Mott Robinson an undivided one-half of section 21, township 39 north, range 13 east of the third principal meridian, in Cook County, Illinois, the money for which purchase was advanced by the said Edward Mott Robinson; and that on or about the said last mentioned date an agreement in writing was entered into between the said Robert W. Hyman and the said Edward Mott Robinson, setting forth and defining the rights of said Hyman and said Robinson in respect of the said purchase as aforesaid. It is set forth in said agreement, which was executed on the 20th day of June, 1864, that Robert W. Hyman had purchased the undivided half of said section 21 for the joint account of himself and Edward Mott Robinson, and was to pay therefor the sum of $15,000; that the said Edward Mott Robinson had advanced the payments made upon said half of section 21, and had taken the title to the land in himself, subject to certain deferred payments, and had obligated himself to pay the taxes upon the said property, and any further advances that it should become necessary or expedient to make.

It was further agreed that said Hyman should sell the said premises within one year from the date thereof, unless otherwise agreed between the parties thereto, and should make no charge for buying, selling, or attending to the payment of taxes on the premises, and that upon such sale the proceeds should be distributed as follows:

"First. Said Robinson shall be reimbursed all moneys advanced and to be advanced on said premises by him, with interest at the rate of seven per cent per annum.

"Second. The balance of the proceeds of such sale shall be equally divided between the respective parties hereto.

"Third. An account of sales and of proceeds shall be made and rendered by said Hyman to said Robinson within ten days after such sale is made, if made by said Hyman.

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"Fourth. And the said Robert W. Hyman for himself, his heirs, executors, administrators, and assigns, doth covenant and agree hereby to and with the said Edward Mott Robinson, his heirs and assigns, that whenever sale is made of said premises, that he, the said Robinson, or his heirs or his assigns, shall, in any event, be reimbursed the full amount of all advances made and to be made on said lands with interest thereon at the rate of seven per cent per annum."

The bill further alleges that on the 14th day of June, 1865, Edward Mott Robinson died, leaving a last will and testament, which was admitted to probate on the 30th day of June, 1865, before Gideon J. Tucker, surrogate of the county of New York, in the State of New York.

By the terms of the said will (which is set out in full in said bill of complaint) there was devised to Hetty Howland Robinson, the only living child of the said Edward Mott Robinson, absolutely and in fee simple all the real estate situated in the city of San Francisco, California; also the sum of nine hundred and ten thousand dollars to be paid to her, by the executors under the will, in six months from the decease of Edward Mott Robinson.

By the terms of the will, Henry A. Barling, Abner H. Davis, and Edward D. Mandell were made executors and trustees to administer the said estate.

On the 24th day of September, 1867, Robert W. Hyman purchased the remaining half of the section 21, township 39 north, range 13 east of the third principal meridian, in Cook County, Illinois, for the sum of $17,050, which amount was paid by Henry A. Barling and Abner H. Davis as executors of the estate of Edward Mott Robinson, with the consent of Hetty H. R. Green, one of the complainants in this bill. This purchase was made, and the money paid, in pursuance and according to the provisions of a contract executed on the said 24th day of September, 1867, between Henry A. Barling and A. H. Davis, executors, and Robert W. Hyman, and the terms of the purchase were nearly identical with those of the former purchase of the first half of said section 21.

The property was bought by Robert W. Hyman for the

joint account of himself and the estate of Edward Mott Robinson, and the money was advanced by the executors of the said estate.

The last two paragraphs of the said agreement are as follows:

"It is further understood and agreed between the parties that in respect of both said parcels or undivided halves purchased as aforesaid, the executors or trustees under the last will and testament of Edward Mott Robinson have a right at any time, or from time to time, in their discretion, to sell the whole or any part or parts of said premises, for such price as they may deem expedient, and said Hyman shall be bound by the results of such sale.

"It is further agreed in respect of both said purchases, that if within one year from this date there shall not have been enough received from sales of said premises to reimburse said Robinson's estate for his or its advances, with interest, the executors, in making up their eventual account for reimbursements of the estate for its advances and interest, shall be entitled to state the account of advances computed with interest up to the end of a year from this date, the whole principal and interest drawing interest from that time, and so from that time forth state the account with annual rests adding in the accrued interest; provided always that in case of a loss instead of a profit accruing on the purchase, such annual rests shall not be made, but simple interest only for the whole time, without rests, shall be charged."

It is provided that in case of a sale being made at any time of section 21, that the executors of the estate of Edward Mott Robinson shall first be reimbursed the amount of all advances they have made or shall make for or in respect of said purchase, with interest thereon at the rate of seven per cent per annum.

From the 20th day of June, 1864, until the time of his death, Edward Mott Robinson advanced all the money which had been paid on account of the purchase of said undivided half of said section 21, whether for taxes or assessments or improvements charged against the said property, and held the title to the same.

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After his death the other undivided half of said section was bought by the executors and trustees of his estate and all payments and advances of every kind were made by them, and the title taken in them as such trustees.

Robert W. Hyman, as a member of several firms doing business in the city of New York, and in Norfolk, Virginia, became indebted to the Exchange National Bank of Norfolk, Virginia, in a large sum of money, and, in order to secure said bank, procured from the trustees and executors of the estate of Edward Mott Robinson a declaration of trust, and an agreement that they would hold the proceeds, to a certain amount, that might be derived from the sale of said lands, and deliver the same to the Exchange National Bank of Norfolk, Virginia, as security for said indebtedness.

The declaration of trust set forth that Abner H. Davis, together with his co-executor, held the title to six hundred and forty acres of land, being section twenty-one, town of Cicero, Cook County, State of Illinois, under and by virtue of certain agreements made by and between Edward Mott Robinson during his lifetime and Mr. R. W. Hyman, and also between the executors of said Edward Mott Robinson and R. W. Hyman, and that upon the sale of the said property the said R. W. Hyman was to receive one-half the net profits as provided by said agreements.

The said Abner H. Davis therein agreed to hold for the account of the said bank such a sum not exceeding $100,000, as might be found to be due to R. W. Hyman upon the sale of said section twenty-one.

By the said declaration of trust, the said Hyman intended to and did assign to the said Exchange National Bank of Norfolk, as security for his indebtedness to said bank, his interest in the trust arising from the purchase of section twenty-one.

On the 9th day of April, 1885, the Exchange National Bank of Norfolk became insolvent, and under the direction of the Comptroller of the Currency of the United States, William H. Peters was appointed a receiver, and on the 13th day of April, 1885, took charge of the assets of the bank as such receiver.

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On the 15th day of May, 1885, Robert W. Hyman died intestate, and Robert W. Hyman, Jr., was appointed administrator of his estate by the probate court of Cook County, in the State of Illinois, and thereafter duly qualified.

During the year 1887 Abner H. Davis died and Edward H. Green, one of the complainants in the said bill, was duly appointed a trustee in his place.

On the 29th day of August, 1887, the legal title of the said section twenty-one was held by the said Barling, Mandel & Green, as trustees, and the said Peters, as the receiver of the Exchange National Bank of Norfolk, held the assignment of the interest of the said Hyman in said section twenty-one by way of pledge as security for the debt of the bank against the estate of said Robert W. Hyman. On that day William H. Peters, as receiver for the bank, filed his bill on the equity side of the Circuit Court of Cook County, in the State of Illinois, setting forth the facts in relation to the purchase of said section twenty-one, and in reference to the trust under which the same was held by the said trustees, and in reference to the hypothecation by the said Hyman of his interest in the said trust, praying that the amount due to him, the said Peters, as such receiver, might be ascertained and the amount due the said trustee might be likewise ascertained, and that the said premises might be decreed to be sold and the proceeds of such sale distributed in accordance with the rights and equities of the parties.

On the 9th day of April, 1888, a decree was rendered according to the prayer of the bill. It provided, among other things, that the joint adventures entered upon in the lifetime of Robert W. Hyman and Edward Mott Robinson, as evidenced by the contracts of June 20, 1864, and September 24, 1867, be wound up and closed, and that section twenty-one aforesaid should be sold by George Bass, one of the masters of the Circuit Court of Cook County, for the purpose of distributing the proceeds of the sale, in accordance with the findings made. It provided that any of the parties to that suit should be permitted to bid and become purchasers at said sale, and also provided that if said section should not sell for a sum

equal to $600,000, the bill of complaint should be dismissed at complainants' cost.

From this decree the defendants appealed to the Supreme Court of the State of Illinois, by which court the decree was affirmed, and the order affirming said decree was thereafter duly filed in the Circuit Court of Cook County, and it was thereupon by said court ordered that said decree be executed, in pursuance of which order George Bass, one of the masters of said Circuit Court, sold said premises at public vendue, on the 21st day of December, 1889. The sale was made to George M. Bogue, Henry W. Hoyt, and Samuel B. Bogue, who were doing business as real estate brokers in Chicago, under the firm name of Bogue & Hoyt, for the sum of six hundred and two thousand dollars, ($602,000,) which sale was confirmed by the Circuit Court on the 15th day of February, 1890.

The bill in the case at bar charges that Bogue & Hoyt had been for several months prior to said sale in the employment of Peters, the receiver for the Exchange National Bank, endeavoring to negotiate a sale of said premises, and that in pursuance of such employment they began negotiations with one William T. Block, and procured from said Block an agreement to purchase said section 21, through the said Bogue & Hoyt, for a sum of money unknown to the complainant, but which sum is charged in the bill to be in excess of $760,912.26, and they, said Bogue & Hoyt, acting with the said Peters, secretly and unknown to the complainants, made and entered into an agreement in words and figures as follows:

"MEMORANDUM.

"William H. Peters, as receiver of the Exchange National Bank of Norfolk, Virginia, and Bogue & Hoyt, hereby agree, as follows:

"First. The said Peters, receiver, agrees to sell to Bogue & Hoyt all right, title, and interest, and claim which he now has in or to the decree entered on the 9th day of April, 1888, in the Circuit Court of Cook County, in case No. 62,375, entitled *William H. Peters, Receiver &c.* v. *Robert W. Hyman, Jr.*,

Administrator, &c., et al., and which amounts to $83,426.35 with interest from the entry of said decree, no payment having been made thereon.

"Second. The said Bogue & Hoyt agree to pay to said Peters, receiver, therefor the sum of $83,426.35, with interest from the 9th of April, 1888, at the rate of six per cent per annum, of which sum $2000 have been paid and the receipt thereof is hereby acknowledged. The remainder is to be paid as soon as the sale to be made in pursuance of said decree shall have been confirmed by the Circuit Court of Cook County.

"Third. It is understood that unless said Bogue & Hoyt, or a member or representative of said firm, shall become the purchaser of section 21, township 39 north, range 13 east of the third principal meridian, at such sale, and the premises shall be struck off to them, and such sale afterwards confirmed by said court, this agreement shall not be binding upon either of the parties hereto, and the sum of money paid as aforesaid on account of said purchase shall be returned to said Bogue & Hoyt.

"Fourth. In order to secure said property Bogue & Hoyt agree to bid up to the sum of $760,912.96, or so much as may be necessary to have the same struck off to said firm or its representatives, it being understood that said firm shall not be required to bid a larger sum in any event than last mentioned sum.

"Fifth. It is understood that time shall be of the essence of this agreement, and that upon payment of the full sum to be paid to said Peters, receiver, he shall execute and deliver to said Bogue & Hoyt any instrument or instruments of writing which shall reasonably be devised or required for the purpose of giving effect to this agreement in carrying out the intent thereof.

"Witness the hands of said parties this 20th day of December, 1889.

(Signed) "WILLIAM H. PETERS,
"*Receiver of the Exchange National Bank of Norfolk, Va.*
(Signed) "By SMITH & PENCE.
"BOGUE & HOYT."

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The bill further alleges that the amount due the Robinson estate at the time of making the said sale under the provisions of the two contracts before mentioned was $575,568.42, and that the amount due Peters as receiver was $91,921.92, and that in order for section 21 to sell for an amount sufficient to allow Peters to receive the full value of his claim, namely, $91,921.92, it would be necessary for the property to sell for $759,412.26, which amount includes the amount due to the Robinson estate, as advances, and an additional amount due the Robinson estate as profits equal to the $91,921.92, which was due Peters as receiver as profits, and that the master's fee for making such sale amounted to $1500, making a total of $760,912.26, which amount must be realized by a sale of said section 21 in order to allow the receiver to receive the face value of his claim from the proceeds of the sale.

The bill charges that because of the secret agreement made on the 20th day of December, 1889, between Peters as receiver for the bank and Bogue & Hoyt, acting in fact for the Grant Locomotive Works, Peters consented that Bogue & Hoyt need not bid said premises higher than $602,000, provided they should pay to said Peters the sum of $91,921.92, the full face value of Peters' claim, and as a result of such an agreement the premises were in fact bid off at the master's sale for the sum of $602,000.

The bill charges further that the sale was made in the interest of William T. Block, or for the parties whom he represented, and that there was fraudulent collusion between himself and George M. Bogue, Henry W. Hoyt, and Hamilton B. Bogue to secrete from Hetty H. R. Green and from the trustees of the estate of Edward Mott Robinson the fact that any sum in addition to the amount actually bid at the sale was paid on account of the purchase of said property.

It charges also that at the time of the sale the secret agreement before mentioned was unknown to the complainants in this bill, and that the sum of $91,921.92, which by the terms of the said agreement of December 20, 1889, was to have been paid by Bogue & Hoyt to Peters as receiver, has been actually paid in addition to the $602,000, and that the said sum

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is now in the hands of the said Peters, or in the hands of George W. Smith and Abram Pence, his solicitors, or in the hands of some one ready to be paid to said Peters, and that this additional sum of $91,921.92 is a part of the consideration money of said sale, over and above the amount of $602,000, which was actually bid at said sale, and that this additional amount ought to be divided equally between the said Peters and the said Robinson estate as profits under the provisions of the contracts of June 20, 1864, and September 24, 1867, and that in whosesoever hands the said money now is, these parties should be charged with a trust for one-half of the same in favor of the trustees of the Edward Mott Robinson estate.

The bill prays that the defendants may make discovery as to all contracts, agreements, arrangements, and understandings between them, or any two of them, in regard to the purchase of said premises, whether at the master's sale, or with reference to the final adjustment with said Peters, and that the $91,921.92 may be decreed to be held in trust to the extent of one-half thereof, for the benefit of the trustees representing the estate of Edward Mott Robinson and Hetty H. R. Green as *cestui que trust;* and further, that such of the defendants as may have the said $91,921.92 in their possession or under their control may be decreed to account for one-half thereof, and to pay the same over to the trustees of the estate of Edward Mott Robinson for the benefit of Hetty H. R. Green as *cestui que trust.*

On April 3, 1890, the defendants filed a plea in this cause, in which they set forth that the suit mentioned in the bill of complaint as having been brought by said Peters, as receiver for the Exchange National Bank of Norfolk, Virginia, in the Circuit Court of Cook County, was a bar to the proceeding as prayed for in complainants' bill. The plea alleged that Hetty H. R. Green, Henry A. Barling, Edward D. Mandell, and Edward H. Green, with others, were parties defendant in said suit, and that Hetty H. R. Green and Edward H. Green appeared by counsel and filed their answer in said Circuit Court of Cook County, to said bill, and that the said

Mandell and Barling also appeared by counsel and filed their said answer; that said cause was heard in due course by said Circuit Court of Cook County, and on the 9th day of April, 1888, a decree was entered therein; that from said decree the complainants in this bill, together with said Barling and Mandell, prayed an appeal to the appellate court of the State of Illinois, for the First District, which was allowed, and that upon a hearing the appellate court affirmed the decree of the Circuit Court in said cause. That the appeal was then taken to the Supreme Court of the State of Illinois, and that upon a hearing in said court the decree of the Appellate Court was likewise affirmed. That afterwards, in compliance with the decree so entered, the Circuit Court, on the 9th day of April, 1888, through one of its masters in chancery, George Bass, sold the premises known as section 21 as aforesaid for the sum of $602,000. That the said Bass did, on the 10th day of January, 1890, file his report of such sale in the Circuit Court of Cook County, and gave notice to all the parties in interest to file their objections within five days from that date; that on the 15th day of January, 1890, the said Barling, Mandell, and Edward H. Green, as trustees, together with Robert W. Hyman, Jr., as administrator, filed objections to said report and a petition praying that said sale should be set aside; in and by said objections and petition it was among other things alleged that said George M. Bogue was not the real or *bona fide* purchaser under said decree, nor was the sum of $602,000 the entire purchase money agreed to be paid for the premises so sold. That, on the contrary, the said Bogue, although publicly bidding the said sum of $602,000 as and for the entire purchase money of said premises, made such bid under and in accordance with a secret and collusive understanding with said Peters as such receiver, to allow said receiver, out of the actual purchase money of said premises to be paid by said Bogue, a further sum of money sufficient to satisfy the claim of said receiver, and interest up to date of the sale, to wit, the sum of $91,921.92, and that the said receiver had abused the process of the court and availed himself of the salable value of said land in said decree, and secretly sold the

same for a sum greatly in excess of the sum of $602,000, reported by said master.

The plea further sets out that on the 17th day of January, 1890, Peters, as receiver, and Bogue filed their answers in said Circuit Court to the objections and the petition of the objectors. The answer denied all fraud and conspiracy of said objectors, and alleged that said objectors had not offered to bid any sum upon a resale of the property.

The plea further alleges that affidavits in support of the objections and petition, in which the memorandum of December 20, 1889, was set out, and affidavits in support of said answer of said Peters and Bogue, were duly filed in the Circuit Court of Cook County, and that a hearing was had upon the objections and petition, at which hearing the affidavits were read, and that on the 17th day of February, after a full hearing, the court entered a decretal order, which provided, among other things, that upon reading the report of George Bass, one of the masters in chancery of this court, and the objections to the confirmation of the sales so reported by said master, and the petition praying that the sale be set aside, filed herein, said petition being in writing, and on reading the affidavits filed herein in support of said objections, and said petition and counter-affidavits filed on behalf of the complainant, as well as the exhibits attached to all affidavits, and also the answer of the complainant and George M. Bogue to the said objections and petition, and said Edward H. Green as trustee having withdrawn his appearance as objector herein, and the court being fully advised in the premises, doth order, adjudge, and decree that the said report of the said master be and the same is hereby approved and confirmed, and the sale of the premises described in the decree entered herein on the 9th day of April, 1888, for the sum of $602,000, is in all respects approved, ratified, and confirmed.

The plea alleges that from this decretal order Henry A. Barling as executor and Barling and Mandell as trustees and Hyman as administrator, jointly and severally, prayed an appeal to the Supreme Court of the State of Illinois, and that in March, 1890, the case was argued before the Supreme Court,

and taken under advisement, and is now pending therein, and that Bogue has already paid to the said Bass the amount necessary to be advanced upon the sale of the said property, and Bass has executed and delivered to one Grant, the assignee of said Bogue, a deed for the said premises.

The plea further sets out that the Circuit Court of Cook County acquired and had jurisdiction of the subject-matter of the suit which was pending before it and of the parties thereto, and that the complainants in this bill were among the parties in said suit, and that the said Hetty H. R. Green, in respect to the issues sought to be raised in this suit, being a party to said suit in the Circuit Court of Cook County, is bound by the orders and decrees of that court; that the subject-matter of this suit has already been determined and adjudicated by the said Circuit Court of Cook County, and this court has no jurisdiction thereof, by virtue of which the defendants plead the same as a bar to complainants' bill of complaint in this cause.

The plea denies the charges of fraud and combination, and alleges that no fraudulent or secret verbal stipulation was entered into between Peters and Bogue & Hoyt, after the making of the memorandum of December 20, 1889, in relation to the payment by Bogue & Hoyt to Peters of the sum of $91,921.92, or any part of said sum. It also denies that in pursuance of such agreement or arrangement the premises were bid off by Bogue & Hoyt, for the sum of $602,000; or that the further sum of $91,921.92 was paid for said premises. It denies all collusion between the defendants in relation to said sale, and also denies that Bogue paid to Peters the sum of $91,921.92, or any sum whatever, or is to pay any such sum to Peters by virtue of such sale, or that such a sum is in the hands of any of the defendants in this suit for such purpose.

On the 11th day of April, 1890, argument of counsel was had upon the said plea of the defendants, and after a hearing thereon the plea was referred to Henry W. Bishop, master in chancery, to take proof thereon, who reported the same to be true, and upon the 11th day of October, 1890, a decree was entered in pursuance to the master's report, finding that the

defendants' plea was true, and dismissing complainants' bill, from which decree the complainants prayed an appeal to the Supreme Court of the United States, which was allowed.

The plea in the case at bar is based wholly upon the proceedings had in the case of *William H. Peters, Receiver*, v. *Robert W. Hyman, Jr., et al.*, which was tried in the Circuit Court of Cook County, State of Illinois, and from there appealed to the Supreme Court of the State of Illinois, in which court the appeal was pending at the time the plea in this case was filed.

In order then to present the exact questions raised in the case at bar by the plea of the defendants, it will be necessary to review not only the findings and the report of the master in the case of *Peters, Receiver*, v. *Hyman, Jr., et al.*, but the objections filed by the defendants to the confirmation of the master's report and the final decree of the Circuit Court, rendered after a hearing had upon the objections filed.

On the 10th day of January, 1890, George Bass, one of the masters in chancery of the Circuit Court, in pursuance to the decree entered in the case of *Peters, Receiver*, v. *Hyman, Jr., et al.*, on the 9th day of April, 1888, filed his report in the Circuit Court of Cook County, in which he set out that he had advertised the premises known as section 21, aforesaid, as described in the former decree of sale, to be sold on the 21st day of December, 1889, at the east main entrance of the court-house in the city of Chicago, county of Cook, and State of Illinois, to the highest and best bidder for cash. That he, the said George Bass, as master, first offered to sell said section in tracts of twenty, forty, or more acres, as might be desired, and not finding a bidder, then offered in both larger and smaller tracts, but with no greater success, whereupon the whole section was offered, and the sum of $602,000 was bid therefor by George M. Bogue, which was the highest and best bid for said section as a whole, and the premises were accordingly struck off and sold to the said George M. Bogue for the sum of $602,000.

On the 15th day of January, 1890, the following petition with objections was filed in the Circuit Court:

"*To the Honorable Judges of said court in chancery sitting:*

"And now comes the undersigned, who are each defendants in the said cause, and jointly and severally object to the confirmation of the master's report of sale, filed herein on the 10th day of January, 1890, and jointly and severally move and petition the court to reject the bid of $602,000 of George M. Bogue therein mentioned, and disapprove and vacate the sale of section twenty-one, of the town of Cicero, therein reported as having been made to the said Bogue on the 21st day of December, 1889, and to order a resale of said premises in the above case in conformity with the decree of sale entered therein, upon such terms as to the court may appear proper and in accordance with the interests of the parties; and as the ground of said motion and petition the undersigned respectfully show the court that the said George M. Bogue was not a *bona fide* purchaser under said decree, nor was the said sum of $602,000 the entire purchase money agreed to be paid by him for the premises so sold; that, on the contrary, the said Bogue, although publicly bidding the said sum of $602,000 as and for the entire purchase money of said premises, made such bid under and in accordance with a collusive and secret understanding with said receiver, the complainant herein, to allow the said receiver out of the actual purchase money of said premises to be paid by said Bogue, a further large sum of money sufficient to satisfy the claim of said receiver, and interest up to date of the sale, to wit, the sum of $91,921,92, which collusive agreement of the said Bogue with the said receiver the said Bogue and the said receiver will carry out upon the confirmation of the present sale, if the same should be confirmed, so that out of such purchase money and in fraud of the express terms of the decree of sale, and in fraud of the rights of the petitioner herein, the said Bogue is to pay the said receiver his said claim in full, and limit the amount to be received by said Barling from said proceeds in excess of the account for advances and interest to one-half the difference between that amount and the amount of said Bogue's bid, which one-half, after deducting one-half of $1500 for the estimated cost, would equal only the sum of $12,465.79, it being

the intent and purpose of the said Bogue and said receiver and the agreement aforesaid to confine the share and interest of the said Barling and the said trustees in the proceeds of such sale to the amount publicly reported by the said master as the limit to the purchase money to be paid by said Bogue, all of which agreements are fraudulent and contrary to equity, and were knowingly and wilfully kept secret from the undersigned until after the said sale, so that they did not learn of the same until the day following.

"And for that also the said Bogue, although at and up to the time of the said sale, assuming and professing to the undersigned defendants to be an agent of the said receiver for the purpose of furthering a sale to the highest bidder, under and in accordance with the decree of sale in said cause, and undertaking such agency and assuming the duties thereof, was acting under a secret agreement with the Grant Locomotive Works, (or the promoters of the organization of a corporation under the laws of the State of Illinois to bear that name, including said Bogue as one of such promoters,) which agreement had also the consent and coöperation of the said receiver, and was carefully kept from the knowledge of defendants until after the master's sale aforesaid, and was to the effect and substance that the said Bogue, while outwardly professing to the defendants to be the agent of the said receiver in and about the effecting of a sale of said premises under the decree, should secretly represent the said corporation or the promoters thereof hereinafter named, or some of them, as the bidders and purchasers of said property. It was further a part of said agreement that said receiver should also publicly bid at such master's sale as if in competition with the said Bogue, but in reality under prior agreement with the said Bogue, who should be allowed to purchase said premises at as small an advance above the minimum of $600,000, fixed by the decree, as would suffice to secure the said land to the said Bogue and his associates and confederates; and it was further a part of said agreement between said Bogue, as such agent, and said receiver, that the said receiver would not compete with the said Bogue at such sale, and that said Bogue should

be allowed to purchase the said land without competition from said receiver, and as cheaply as he could from the said master, and at a bid to be publicly announced and reported by said master to the court, upon the condition that the said Bogue would pay to the said receiver the claim of the said receiver in full, with interest down to the date of said sale, which had been previously figured over between them and agreed upon at the sum of $91,921.92, which sum is to be paid in pursuance of said agreement, provided the parties thereto can induce this court to confirm said sale and authorize a conveyance of the said land to said Bogue.

"And for that the said receiver has abused the process of this court and availed himself of the salable value of said land under said decree, and thereby has secretly sold said premises for a sum greatly in excess of the sum of $602,000, reported by said master, all which excess he and the said Bogue intend to divert to the purpose of paying said receiver's claim in full, and so to avoid sharing the same with the persons entitled thereto under said decree as aforesaid.

"And for that said premises have been sacrificed, according to the sale reported in said report, at the inadequate sum of $602,000, when the same were worth at least the sum of $800,000, or $850,000, or thereabouts, and when the purchaser thereof is actually to pay, under this agreement aforesaid, the sum of $681,456.13, or thereabouts, instead of the sum of $602,000.

"And said defendants make said George M. Bogue and the complainant respondents to this petition, and also move the court for an order requiring said defendants to answer this petition, but not under oath, by a short day to be fixed by the court, and referring the matter of defendants' objections to said sale and this petition to a master in chancery of this court to hear such proofs as may be submitted by said defendants and said complainants and said Bogue under such order and direction as to the examination of witness and production of papers and documents as to the court may seem meet, but that such order include a direction to said Bogue and complainant to appear for examination and to produce before said

master, for inspection of counsel of defendants, all contracts, memoranda in writing, books, letters in the possession or control of them, or either of them, relating to or connected with the negotiation for section 21 or with the action of said George M. Bogue or H. B. Bogue, of the firm of Bogue & Hoyt, of which firm the said George M. Bogue is the senior partner, or the action or negotiation of said George M. Bogue, or said firm of Bogue & Hoyt with said complainant, and that the said Bogue also produce before said master all letters, papers, and contracts in his possession and control relating to said negotiations and purchase, either with said complainant or any of the promoters of said corporation, especially with E. Y. Jeffery and W. T. Block, and that said master may make due report to this court in that behalf, so that this motion may be heard by this court upon the evidence to be orally taken, with all convenient speed, or that the court, in its discretion, set down the said matters and things before the court for hearing on oral evidence, and that all necessary orders may be entered from time to time by the court which the nature of the petitioner's case may require.

"HENRY A. BARLING, *Ex'or;*
"HENRY A. BARLING,
"EDWARD D. MANDELL, and
"EDWARD H. GREEN, *Trustees*, and
"ROBERT W. HYMAN, JR., *Adm'r*,
"By PADDOCK & WRIGHT, *Sol'rs.*"

On January 17, 1890, the answer of the complainant and George M. Bogue was filed to the petition and objections of the defendants. The answer avers, first, that Barling, as executor, and Barling, Mandell and Green, as trustees, did not have such an interest in the subject-matter of the sale as to entitle them to object thereto, and that Hyman, as administrator, had no real or substantial interest in the subject-matter of the suit. It denied that George M. Bogue was not a *bona fide* purchaser at said sale; denied that $602,000 was not the whole of the purchase money agreed to be paid for the premises; denied that prior to the sale a collusive understanding was entered into between Bogue and Peters to allow Peters,

out of the purchase money of the premises, a further large sum of money, sufficient to satisfy the claim of the receiver and interest up to the date of the sale, or any other sum of money. The answer admits that an agreement in writing, a copy of which has been filed as an exhibit to one of the affidavits filed by the objectors, has been entered into between Peters, the receiver, and the firm of Bogue & Hoyt, but avers that the said writing expressed the whole of the contract between the parties in that behalf. It denies that said agreement was in fact or in intent in fraud of the expressed terms of the decree or in fraud of the objectors. It admits that said agreement was not known to said objectors until after the sale, but denies that there was any obligation on the part of the receiver or of Bogue & Hoyt to disclose the same to them. It denies that up to the time of the sale Bogue professed to the objectors to be an agent of Peters for the purpose of furthering a sale to the highest bidder, and denies that Bogue had at any time been under any duty or obligation to the objectors, or was bound to disclose to them any of his acts or doings in relation to the sale. It admits that Bogue when bidding for said premises was acting for and on behalf of persons engaged in the organization of a corporation to be known as the Grant Locomotive Works, but denies that Peters was a party to such organization, or had any interest in it. It denies that there were any agreements by which it was understood or agreed that Peters as receiver should bid at such sale as if in competition with Bogue; denies that Peters and Bogue have abused the process of the court or been guilty of fraud, collusion, or deceit in any of their acts in relation to the sale, which could have misled the objectors or deprived any one of the opportunity of bidding at the sale. It denies that the said premises were sold for an inadequate price, and avers that the objectors, not having offered to reimburse Bogue as purchaser for his outlays, attorney's fees and expenses, and for interest thereon, and not having offered to pay any sum for said premises in case of resale, are speculators and not entitled to the consideration of the court. It avers that Barling, in respect to said sale, was placed upon more than equal terms with

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Bogue, and had an opportunity to bid at the same on more than equal terms. It further denies all of the allegations of the objectors' petition not expressly admitted, and prays that the sale may be confirmed.

The final decree entered on the 11th day of February, 1890, is as follows:

"On reading the report of George Bass, one of the masters in chancery of this court, heretofore filed herein, and the objections to the confirmation of the sale so reported by the master, and the portion praying that said sale be set aside, filed herein on behalf of Henry A. Barling, as executor under the last will and testament of Edward Mott Robinson, deceased; Henry A. Barling, Edward D. Mandell, Edward H. Green, as trustees under the will of said Robinson, and Robert W. Hyman, Jr., as administrator of the estate of Robert W. Hyman, deceased, by Paddock & Wright, their solicitors, said objections and petition being in writing, and on reading the affidavits filed herein, in support of said objections, and said petition, and counter-affidavits filed on behalf of the complainant, as well as the exhibits attached to all such affidavits, and also the answer of the complainant and George M. Bogue to said objections and petition, and said Edward H. Green, as trustee, having withdrawn his appearance as an objector herein, after hearing Messrs. Paddock & Wright, and Newton A. Partridge, of counsel for said Henry A. Barling as executor, said Henry A. Barling and Edward D. Mandell as trustees, and said Robert W. Hyman as administrator, and also George W. Smith, Abram M. Pence, and David B. Lyman, of counsel for the complainant herein, William H. Peters, as receiver, and said Bogue, and the court, being now fully advised in the premises, doth order, adjudge, and decree that the said report of the said master be, and the same is hereby, approved and confirmed, and the sale of the premises described in the decree, entered herein on the 9th day of April, 1888, to George M. Bogue, for the sum of six hundred and two thousand dollars ($602,000), is in all respects approved, ratified, and confirmed, and it appearing that twenty per cent of said sum of money has been paid by said Bogue, to the master, in accordance with the terms of said decree:

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"It is further ordered, adjudged, and decreed, that upon the payment to said master by said Bogue of the remainder of the price bid by him for said premises, such remainder being four hundred and eighty-one thousand six hundred dollars ($481,600), such payment to be made before the expiration of twenty-five days from the date of the entry of this decretal order, said master shall execute and deliver to said Bogue a deed of said premises in conformity with the terms of said decree.

"And it is further ordered by the court that the amounts asked to be allowed by the master in said report for his charges and disbursements and expenses of sale be, and the same are hereby, allowed, and said master is authorized to retain the same from the moneys which have come, or shall come into his hands, and also to pay out of such moneys any costs of this suit which may remain unpaid.

"And the said master, upon delivering said deed, and after payment of the charges, disbursements, costs, and expenses as aforesaid, is directed to pay to the said Henry A. Barling, as executor as aforesaid, or to Paddock & Wright, his solicitors, out of such purchase moneys, being the net proceeds of said sale, the sum of five hundred and five thousand four hundred and fourteen dollars and six cents ($505,414.06), with interest thereon from January 1, 1888, to April 9, 1888, at seven per cent per annum, and interest on the amount of such principal and interest from April 9, 1888, to February 11, 1890, the date of the entry of this decree, at the rate of six per cent per annum; also to said Barling as such executor or his said solicitors, the further sum of eight thousand and twenty-eight dollars and thirty-nine cents ($8028.39), being for taxes paid, under authority of this court, since April 9, 1888, with interest thereon, and that he pay to said Barling as executor, or his said solicitors, one-half of the remaining proceeds of such sale, and that he pay to the solicitors for the complainant the other one-half.

"In case the purchaser at the sale under said decree shall fail to pay the unpaid part of said purchase money so bid by him at said sale, in full to said George Bass, master to this

court, within the said time so fixed for the payment thereof, the said sale shall thereupon be set aside and a resale had of said premises upon terms to be settled by the court, with liberty to the parties to apply.

"And thereupon the said Henry A. Barling, as such executor, said Barling and Mandell as trustees, and said Hyman as administrator, as aforesaid, jointly and severally pray an appeal to the Supreme Court of this State, and such appeal is allowed by the court as so prayed upon the filing of an appeal bond, conditioned according to law, in the penal sum of one hundred thousand dollars, to the said William H. Peters, receiver, and George M. Bogue, surety, to be approved by the court within twenty days from the entry of this decree, and twenty days is allowed for filing a certificate of evidence.

"And this cause having been heard at the January term, 1890, of this court, and the parties complainant and defendant purchasers and objectors having, by their respective solicitors, agreed at such time, in open court, that such order or decree as this court should enter herein, should be entered as of such term, and of the date of February 11, 1890, it is accordingly ordered that this decree be entered and have effect *nunc pro tunc* as of the 11th day of February, 1890."

From this decree the present appeal was taken.

Mr. L. H. Bisbee for appellants.

Mr. George W. Smith for appellees. *Mr. David B. Lyman* and *Mr. Theodore S. Garnett* were with him on his brief.

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

How far the chancery rule, that if a plaintiff replies to a plea in bar, joining issue upon the facts averred in it, thus putting the defendant to the trouble and expense of proving his plea, he thereby admits the sufficiency of the plea, and that if such facts are found to be true, the bill must be dismissed without reference to the equity arising from any other facts stated in the bill, is affected or modified by rule 33 in

equity, which provides that "if upon an issue the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him," was a question put in the opinion of this court in *Farley* v. *Kittson*, 120 U. S. 315, but its consideration was not deemed necessary to the determination of that case.

In the present case the plaintiffs put down the plea for argument as to its sufficiency, and, after that question had been determined against them, filed a replication, putting in issue the facts averred in the plea, which issue was likewise found against them, and the question now presented is whether, by putting the case upon an issue of fact, instead of abiding by the issue as to the legal sufficiency of the plea, the plaintiffs are precluded from raising the latter question in this court.

Undoubtedly, under the rule in the English Chancery Court, recognized by this court in *Hughes* v. *Blake*, 6 Wheat. 453, 472, and in *Rhode Island* v. *Massachusetts*, 14 Pet. 210, the plaintiffs would be held to have abandoned their right to have the sufficiency of the plea as a defence to the bill again considered. But we think that, in view of rule 33, which has been adopted since those cases were decided, the plaintiffs may properly ask this court to review the decree of the court below in respect to the sufficiency of the plea.

The inequity of having a case turn on the fate of a plea of, perhaps, immaterial facts, doubtless led to the adoption of that rule.

In *Pearce* v. *Rice*, 142 U. S. 28, the effect of the rule was considered, and it was held that under it the court may, upon final hearing, do, at least, what, under the old rule, might have been done when the benefit was saved to the hearing — citing Cooper's Eq. Pl. 233, and Story's Eq. Pl. § 698, to the effect that if, upon argument, the benefit of a plea is saved to the hearing, it is considered, that, so far as appears to the court, it may be a defence; but that there may be matter disclosed in evidence which would avoid it, supposing the matter pleaded to be strictly true; and the court, therefore, will not preclude the question. See also, *Hancock* v. *Carlton*, 6 Gray, 39, 54.

How far, then, do the facts alleged in the plea, and determined in their favor, avail the defendants in law and equity?

The defendants in error make two answers to this question. They say that the proceedings and decree in the state court, which form the subject of the plea, are conclusive of the entire controversy; and they say that, even if such proceedings and decree were not conclusive, yet the facts of the case disclose no equitable grounds for the relief prayed for in the present bill.

Without repeating the facts above particularly stated, it may be briefly said that the proceedings in the state court arose out of a sale of real estate decreed under a bill in equity filed by a pledgee of an undivided interest in the land to enforce his lien. The sale was made by a master, under the directions of the court, and to his return of the fact of the sale and to the confirmation of sale the plaintiffs in error filed exceptions. Those exceptions were based upon a petition containing allegations of fraud on the part of persons concerned in the sale, and especially an allegation that the sum of $602,000, returned as the amount bid, was not the entire purchase money, but that the further sum of $91,921 was part of the actual purchase money the fact of the payment of which had been concealed from the petitioners. The petition asked that the persons named, and particularly George M. Bogue, the purchaser, should be compelled to answer, and that the matter should be referred to a master in chancery to hear the proof of both parties, and to make due report to the court. An answer on the part of Bogue and others was put in, denying the allegations of fraud. The court on February 11, 1890, filed a final decree overruling the petition and exceptions, and confirming the sale. From this decree an appeal was taken to the Supreme Court of Illinois, which was pending undetermined in that court when the present bill was filed in the Circuit Court of the United States. It is, however, stated in the briefs of both parties that the Supreme Court of Illinois has since affirmed the decree of the Cook County Circuit Court.

A comparison of the facts alleged and the charges made in the petition in the Cook County court and in the bill in the

present case has satisfied us that substantially they were the same. It is now contended on the part of the plaintiffs in error that the cases cannot be deemed legally the same, so as to permit a plea of the first proceedings and decree as a bar to the present bill, because the relief asked for in the state court was the setting aside the sale, whereas the relief now sought is to enforce a trust as to a portion of the purchase money, leaving the sale to stand. But the facts averred and relied on in the state court are, as already stated, substantially those now alleged, and we do not deem the fact that a different form or measure of relief is now asked deprives the defendants in error of the protection of the prior findings and decree in their favor. The same matters of fact would have to be passed on, and if the plaintiffs in error are now entitled to an account for a suppressed portion of the purchase money they were so entitled in the proceedings in the state courts even if, for other reasons, those courts refused to set aside the sale.

Gardinier's Appeal, 89 Penn. St. 528, was a case where the defendant in an action of ejectment was, by the terms of the verdict, to hold the land in dispute upon certain conditions, with which he failed to comply. The plaintiff had judgment entered, and issued a writ of *habere facias possessionem*. Subsequently, the court granted a rule to show cause why plaintiff should not be enjoined from issuing said writ, which rule, after a hearing on affidavits and an inspection of the record, was discharged. The defendant afterwards filed a bill in equity to enjoin the plaintiff from proceeding with said writ, the grounds for relief being substantially those on which the rule to show cause was granted, and it was *held* that the question was *res judicata*, and the injunction was properly refused, the court saying: "That the judgment or decree of a court of justice upon a legal or equitable issue within its jurisdiction is binding and conclusive upon all other courts of concurrent power, is a rule founded on the soundest policy, and we are of opinion that we cannot grant the injunction prayed for without violating this rule."

So, in *Frauenthal's Appeal*, 100 Penn. St. 290, it was held

that when the defendant in a judgment obtains a rule to show cause why execution thereon should not be stayed, and, after depositions are taken, the rule is discharged, said defendant cannot subsequently, upon proof of substantially the same facts, obtain relief by injunction in equity — that the principle of *res judicata* applies in such case; and the court said: "Whether the application to enjoin against issuing execution be by motion and rule, or by bill, the relief is sought through the equitable powers of the court alone, and not through the intervention of a jury. The appellee in this case made his election. He submitted his alleged grievance to a court of competent jurisdiction. He had his day in court. The identical matter was adjudged against him." The same principle has been often applied by this court. *Goodrich* v. *The City*, 5 Wall. 566; *Robb* v. *Vos*, 155 U. S. 13.

It is further urged that these two proceedings were not legally identical because the parties were not wholly the same, and that Mrs. Green did not join in the exceptions, and that Edward Green, who had joined, withdrew his objections. But the exceptions were brought and sought to be maintained in their interest and by their trustees and privies. "Parties, in the larger legal sense, are all persons having a right to control the proceedings to make defence, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies." 1 Greenleaf Ev. sec. 535.

"The parties to the suit at law having been parties to the suit in equity, the subject-matter and the defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter.

"No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides." *Thompson* v. *Roberts*, 24 How. 233.

We do not feel called upon to define the nature of Mrs. Green's estate under her father's will, but we are satisfied that

she was adequately represented by the trustees, and that the withdrawal of his exceptions by Edward Green, after issue formed and evidence, must be deemed to have been a final abandonment of such exceptions and an acquiescence in the decree. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683.

Besides pleading the decree of the state court as a bar, under the principle of *res judicata*, the defendants in error contend that, on the facts as found, the plaintiffs in error are entitled to no equitable relief.

The conclusion already reached renders unnecessary any extended consideration of those facts. But we have read the allegations and the evidence contained in this record, and have not been able to find any such state of facts as would have warranted the court below in sustaining the bill, even if the decree of the state court was out of the way.

The principal matter of complaint was based on the existence of the outside contract between Peters and Bogue & Hoyt, whereby the latter agreed to pay Peters, or to bid enough as against any other purchaser, to secure full payment to the receiver, and it is claimed that Peters, as the complainant in the bill, was under some kind of a fiduciary relation to the Green estate which made such an agreement fraudulent as respects that estate. We are unable to see that such was the relation between the parties, or that by such an arrangement Peters abused the process of the court.

We regard the opinion of the Supreme Court of Illinois, in *Barling* v. *Peters*, 134 Illinois, 606, as a satisfactory treatment of this part of the case, and content ourselves with referring to it.

Upon the whole we are satisfied that no wrong was done these appellants by the dismissal of their bill, and accordingly the decree of the court below is

Affirmed.

CLARK *v.* REEDER.

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

No. 262. Argued April 22, 23, 1895. — Decided May 27, 1895.

C. contracted in writing in 1884 with R. to purchase from him about 50,000 acres of land in West Virginia, which had been originally granted by the Commonwealth of Virginia to D. in 1796, and which R. had acquired in 1870 from persons who had purchased it at a sale for non-payment of taxes, made in 1857, after the death of D. The contract was by the acre, at so much per acre. The title was to be examined by F., a lawyer of West Virginia, the attorney of C., and upon his certifying it to be good the first payments were to be made. The total number of acres within the defined limits were agreed to by both parties, but a further survey was to be made at the expense of C., in order to ascertain what tracts and how many acres within those limits were held adversely to B. under a possessory title. F. certified that the title was good, except as to sundry small tracts held adversely, and C. thereupon made the first payment under the contract. Partial surveys having been made, C. declined to carry out his agreements, and filed a bill in equity, setting up that there had been mutual mistakes as to the amount of the conflicting claims, and praying for a rescission of the contract. This bill was met by an answer denying that there had been such mistakes, and by a cross-bill. After sundry other pleadings, and after some evidence was taken, C. filed an amendment charging fraud upon R. and his agent, and setting up that the contract had been induced by fraudulent concealments and representations on their part. Further proof was taken, and a hearing below resulted in a decree in favor of R. In this court, after a careful review of the pleadings and proof, it is *Held*, That the Circuit Court was right in concluding that C. was not entitled to a rescission of the contract.

April 16, 1796, a grant was made by the State of Virginia to Edward Dillon for 50,096 acres of land situated in what was then the county of Montgomery, but, at the time of the transactions involved in this case, partly in the counties of Wyoming, Boone, Raleigh, and Logan. The entry for the land was made April 23, 1795, it was surveyed May 28, 1795, and the land was known and spoken of as the Dillon survey or grant. In 1855, Dillon having died some time before, the land was sold for taxes and charges thereon, and at that sale

was purchased by Lawson and Ward, to whom a deed was made December 22, 1857, by the clerk of the county court of Wyoming County, under the statute. Lawson and Ward subsequently conveyed the land to Simpson, who conveyed to Cox, by whom it was conveyed to Charles Reeder in 1870, who was and always has been a citizen and resident of Maryland.

In 1873 Reeder caused a survey to be made of the Dillon tract by W. T. Sarver, a surveyor. At that time Reeder ascertained that there were a number of persons actually living upon portions of the land embraced in the Dillon survey, who claimed title to the land in their possession adverse to Reeder's title; the number of acres claimed by each being comparatively small. C. C. Watts of West Virginia had been acting as attorney and agent for Reeder in matters connected with the land for some years, when, on January 23, 1884, he obtained from Reeder an option to purchase it at the rate of two dollars per acre at any time before July 1, 1884. February 4, 1884, the previous agreement was modified so that if $25,000 was paid to Reeder in cash within thirty days from February 4, 1884, and an additional $1000 to reimburse him for certain outlays made by him, then the price of the land should be reduced from $2 to $1.50 per acre.

In the same month of January, Bell, acting as the agent of Clark, who was a resident of the city of Philadelphia, had entered into negotiations with Watts for the purchase of the land, in the profits of which purchase, if any, Bell and others were interested. These negotiations were commenced in Philadelphia, and resumed in West Virginia in February, 1884, and as a result thereof the following written contract was entered into on February 29, 1884, between Watts and Bell:

"Agreement made this 29th day of February, 1884, by and between C. C. Watts, of Charleston, W. Va., acting under an agreement in writing between himself and Charles Reeder, of Baltimore, Md., dated the 3d day of February, 1884, and as the agent of said Reeder, of the first part, and H. M. Bell, of Staunton, Va., acting as the agent of E. W. Clark, of Philadelphia, Pa., of the second part, witnesseth:

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"That the party of the first part, acting as aforesaid, has this day sold to the party of the second part, acting as aforesaid, a certain tract or parcel of land lying and being in the counties of Boone, Logan, Wyoming, and Raleigh, in the State of W. Va., containing 50,096 acres, be the same more or less, which tract of land was granted by the Commonwealth of Virginia to Edward Dillon by patent bearing date on the 16th day of April, 1796, and is now claimed and owned by the said Charles Reeder by a regular chain of conveyances, the first being a tax deed for said land executed by the clerk of Wyoming County court to Evermont Ward and Anthony Lawson, bearing date the 22d day of December, 1857, executed, in pursuance of a sale thereof for taxes delinquent thereon in the name of the heirs of Edward Dillon, and the last to the said Reeder from C. C. Cox, dated the 27th day of August, 1870, and for a particular description of said tract of land reference is had to said patent; upon the following terms and conditions, to wit:

"First. Said sale of said land is a sale by the acre and not in gross.

"Second. The party of the second part is to pay for the said land at the rate of one dollar and seventy cents per acre, as follows: Thirty-five thousand dollars to be paid on the day on which James H. Ferguson, a practising attorney of Charleston, W. Va., shall certify the title of said Reeder to said land to be good and valid, which certificate is to be made within 30 days from this date; twenty-five thousand dollars of which sum is to be paid to the said Reeder, and the residue to said Watts. The balance of the said purchase money is to be paid to said Reeder on the 1st day of June, 1884, or as soon thereafter as the necessary surveying can be done to ascertain the quantity of land within the bounds of the said patent to which the said Reeder can make good title. It is understood that the party of the second part is satisfied with the survey already made by Wm. T. Sarver of the exterior bounds of said tract of land, and that the surveying to be done is only such as may become necessary to ascertain what lands within said boundary

are held by a better title than that of the said Reeder, by reason of adverse title and possession, all of which surveying is to be done at the expense of said party of second part.

"Third. When the last of the purchase money is paid, the said Reeder is to convey said land with covenants of special warranty to the said E. W. Clark, or to such person or persons as he may direct.

"Fourth. The balance of said purchase money, after the date of the certificate of said Ferguson, is to bear interest until paid.

"Fifth. In addition to said one $\frac{70}{100}$ dollars per acre, the party of the second part is to pay to said Reeder one thousand dollars as provided for in his contract with said Watts.

"Sixth. This contract is subject to the approval of said Reeder, and is to take effect from the date of such approval, but the same shall then be void if the certificate of said Ferguson is not made within the time specified.

"Witness the following signatures the day and year aforesaid.

"C. C. Watts,
"H. M. Bell,
"*Ag't for E. W. Clark.*

"Approved March 4th, 1884.
"C. Reeder."

If the conditions of the agreement of February 4, 1884, (the date is given in the foregoing contract as February 3,) were not fulfilled, then the only option Watts had was under his agreement with Reeder of January 23, 1884, by which the price was to be $2 per acre, and by the terms of the agreement between Watts and Bell, Ferguson had thirty days from February 29, 1884, within which to pass upon the validity of the title, before the lapse of which time the option from Reeder to Watts to purchase at $1.50 per acre would have expired. The contract price in the contract of February 29 was fixed at $1.70 per acre, and the contract provided that $10,000, that is, twenty cents an acre on the basis of fifty thousand acres, of

the purchase money should be paid to Watts, and if the contract was approved by Reeder, the time for the payment of the $25,000, as provided by the option of February 4, would be extended. The contract of February 29, 1884, was taken to Baltimore by Watts and Bell, and on March 4, 1884, Reeder endorsed his approval thereon.

Ferguson drew the contract of February 29, 1884, as the attorney of Clark, and, acting under it, prepared and delivered a written opinion and certificate, dated March 22, 1884, as follows:

"Abstract of title to the following tract of land known as the Dillon survey.

"1st.

"The Commonwealth of Virginia
to
Edward Dillon.

"Grant or patent for fifty thousand and ninety-six acres, situate in the then county of Montgomery, Virginia, but now principally in the counties of Boone, Raleigh, and Wyoming, in the State of West Virginia, dated April 16, 1796.

"The grantee, Edward Dillon, died some time previous to the year 1855, (it is not known just how long,) and the tract of land was entered on the land books of Wyoming County, where most of the tract is situated, in the name of Edward Dillon's heirs and charged with taxes in that name.

"The taxes so charged on said tract not being paid the land was returned delinquent, as required by law, for the non-payment of said taxes, and the same was sold as required by law in the year 1855 for the said taxes and the charges thereon and the costs of sale, at which sale Anthony Lawson and Evermont Ward became the purchasers of the entire tract of 50,096, and the owners of said tract of land failing to redeem the same within the time required by law the said Lawson and Ward obtained a deed therefor under the statute.

"2d.

"Leroy B. Chambers, clerk of the county court of Wyoming County,
to
Anthony Lawson and Evermont Ward.

"Deed bearing date the 22d day of December, 1857.

"This deed conveys to the said Lawson and Ward, the purchasers of said tract of land at said tax sale, the said tract of land and all the right, title, and interest of the heirs-at-law of Edward Dillon, dec'd, therein, but said deed is defective, and is not sufficient of itself to convey a good title to said tract of land to the grantees therein. It is, however, a good and sufficient color of title to ripen into a good and perfect title by possession of the land thereunder and the payment of the taxes thereon for a sufficient length of time.

"I have made a full and thorough examination and investigation of the matters pertaining to the title to this tract of land and find that as early as the years 1859 and 1860 the said Evermont Ward, acting for himself and said Lawson, placed tenants on said land under an agreement that said tenants should clear and cultivate as much thereof as they saw proper, and at such place or places thereon as they saw fit, and that they should guard and protect the whole of the said tract against trespassers, and that said tenants and others put on said tract of land by and under them have continued on said land as the tenants of said Lawson and Ward from that time to the year 1870, when Charles Reeder became the purchaser of said land, and from that time to this they have held and occupied the said land as the tenants of said Reeder, and still so hold and occupy the same. I also find that quite a number of other persons have held and occupied said land as tenants of Ward and Lawson and of said Reeder for more than ten consecutive years, some of them going back to 1864, and are still holding and occupying the same as the tenants of said Reeder.

"The said Reeder has paid all the taxes charged and chargeable on said tract of land from the date of his said purchase

thereof to the present time and has proper receipts therefor, and there are now no unpaid taxes on said land."

[The third muniment was a power of attorney, Ward to Lawson; the fourth, a deed from Lawson and wife and Ward to Simpson; the fifth, a deed from Simpson to Cox; the sixth, a deed from Cox and wife to Reeder dated August 27, 1870.]

"The deed of Chambers, clerk, to Lawson and Ward, of Lawson and wife and Ward to Simpson, of Simpson to Cox, and of Cox to Reeder are all of record in the office of the clerk of the county court of Wyoming County.

"There are no recorded liens of any sort on said tract of land in any of the counties in which the same is situate, and the said tract of land, so far as the records show, is free and clear of all incumbrances.

"The only title which can be found older than the Dillon patent is a grant from the Commonwealth of Virginia to Rutter and Etting, dated the 9th day of January, 1796. There is, from the best information I can obtain, a small portion of the Rutter and Etting survey embraced within the Dillon survey, but the Rutter and Etting survey was forfeited long prior to 1837, to the State of Virginia for the non-payment of the taxes thereon and for the non-entry thereof on the land books of the proper county, and was sold by the commissioner of delinquent and forfeited lands some forty or more years ago. At the time of that sale the taxes on the Dillon survey had always been paid, and for that reason the title to the whole thereof became good and valid, so far as the Rutter and Etting survey is concerned.

"In the year 1877 an act was passed by the legislature of the State requiring all tracts of land of — acres or more lying in different counties to be assessed for county and district taxation in the several counties and districts in which they were situate, and under this law, in the year 1880, the said tract was for the first time charged with taxes in the counties of Boone and Wyoming, as follows: 9000 acres in the county of Boone and the whole tract in the county of Wyoming, and the taxes were paid thereon as charged by said Reeder. In the year 1881 and since said tract of land was charged with taxes

in the counties of Boone, Raleigh, and Wyoming as follows: 9000 acres in Boone, 5000 acres in Raleigh, and 41,096 acres in Wyoming, making in all 55,096, and said Reeder has paid the taxes so charged on that number of acres from that time to the present.

"There are, so far as I can ascertain without actually going over the whole tract, some 50 persons living on said tract, in part as tenants of said Reeder and in part as claimants of portions of said land. Just what number of acres these claimants can make out a good title to it is, of course, impossible to tell, but I can say with almost a positive certainty that in view of the possession of the said tract by said Reeder and those under whom he claims for nearly 25 years the number of acres to which these junior claimants can make title will be but small comparatively.

"I do therefore certify that in my opinion the title of Charles Reeder to the said Dillon survey is good and valid, except as to such parts of said tract as may be affected by the claims of the occupants aforesaid, which may or may not be superior to the title of said Reeder."

This certificate having been delivered March 25, 1884, to Bell, the agent of Clark, the former drew two drafts on the latter at the city of Philadelphia, one for $10,000 in favor of Watts, and the other for $25,000 in favor of Reeder, and delivered them to Watts, who deposited and cashed his draft on that day, and forwarded the draft for $25,000 to Reeder. Both drafts were paid by Clark, and Ferguson's certificate was sent to him.

The record shows that a surveyor, M. A. Miller, was employed in the spring of 1884 for the purpose of ascertaining what number of acres within the exterior boundaries of the Dillon tract were held by persons who were in the actual possession thereof, claiming to hold them by title adverse to Reeder, but no report of the result of his survey was made to Reeder until some time in November, 1884. In this report Miller said: "There are a large number of small tracts, held under junior patents, lying within the Dillon survey, aggregating, approximately, 2500 acres. Most of these, perhaps all,

are held by occupant claimants who have had them in undisturbed, continuous possession, under their junior patent titles, for many years."

Reeder testified that: "This general statement of persons holding better title by reason of adverse title and possession is the only information looking to a compliance with that clause of the contract which relates to surveying that has been furnished to me by E. W. Clark or his agents, but no survey or exact determination, as the contract requires, has ever been furnished me." The report of Miller was dated October 29, 1884, and in it he set forth that a large part of the land embraced in the Dillon survey was embraced in the land covered by the grant made by the State of Virginia to Rutter and Etting, January 9, 1796, on an entry made by William Duval, May 13, 1795, for whom it was surveyed May 30, 1795. The report also contained the names of parties in possession, who claimed, or were supposed to claim, the title to portions of the land embraced within the interlock of the two surveys, under the Rutter and Etting title.

In the spring of 1885 Reeder applied to Clark to comply with the terms of the contract of February 29, 1884, which Clark declined to do.

August 1, 1885, Clark filed his bill of complaint in the Circuit Court of Boone County, West Virginia, against Reeder, which was subsequently removed on Reeder's application to the United States court for the District of West Virginia.

The bill alleged that at the time the agreement of February 29, 1884, was entered into, it was understood and believed by all the parties that the title of Reeder to much the greater part the land was good and valid, and that not more than ten thousand acres could be held by others than Reeder by any other claim or title whatever, and that it was with this understanding that complainant made the purchase and paid the $35,000; that upon a survey it was found to the great surprise of Clark that the entire Dillon survey, with the exception of about 5000 acres, was within the outlines of the Rutter and Etting patent; that the Rutter and Etting tract was claimed by a large number of persons asserting their title

to be superior to the title of Reeder, and that complainant could not safely pay any more of the purchase money under the contract while the cloud thus created hung over the title to the land; that he had unsuccessfully endeavored to settle with Reeder; that he had offered to bring actions of ejectment against those claiming under the Rutter and Etting title in Reeder's name, and had asked Reeder to do so, but without avail; and that Reeder required him to pay for the whole number of acres after deducting the number of acres held by actual settlers, amounting to some five or six thousand acres, and to take the risk of the Rutter and Etting title, which he, complainant, had refused to do; that the contract was entered into by complainant without any knowledge of the conflict created by the Rutter and Etting patent, and that he believed Reeder was equally ignorant of any such conflict, and that the agreement was therefore the result of mutual mistake as to conflicting claims to the land which was the subject of the agreement; that he would not have entered into the agreement had he known of the existence of the conflict of title, at least until all questions as to such conflict had been settled and determined; and that he would not have paid the $35,000, or any part thereof, until such settlement; that Reeder derived his title mediately through a tax sale of the Dillon land, and there was a question as to the validity of the tax deed and the subsequent claim under it, and it was this claim that Ferguson was appointed to report on, it being understood by both parties that if this title was declared by Ferguson to be good, there was nothing in the smaller surveys aforesaid to interfere with the title of Reeder to the whole Dillon tract; hence it was stipulated in the agreement that Reeder was to convey the land to complainant with covenants of special warranty, complainant taking the risk of the Dillon title held by Reeder; that by reason of the older and apparently the better title complainant could not make his purchase available; and as he could not bring ejectment and Reeder would not, and especially in view of the mutual mistake before mentioned, complainant prayed a rescission of the contract and a repayment of the $35,000.

Statement of the Case.

To this bill Reeder filed an answer and a cross-bill. The answer denied that when the agreement of February 29, 1884, was entered into there was any understanding other than or different from that embodied in the agreement itself, or that there was any understanding between the parties as to what number of acres might be held by others than Reeder, or what number might be excluded under the agreement. The claim of right of any person under the Rutter and Etting patent was denied, and it was averred that any title which might have once existed under that grant was long since forfeited, and it was further averred that complainant was advised to this effect in the certificate of opinion; and it was denied that the fact that there were persons who claimed under the Rutter and Etting title constituted any cloud on the title to the land purchased by complainant from defendant, or furnished any excuse for complainant's neglecting to carry out his contract. Defendant further averred that the contract of February 29, 1884, was entered into by himself and complainant with full knowledge that the whole question of title was to be passed on by Ferguson, complainant's selected attorney, before the money should be paid and before the contract should take any practical effect, and that one of the matters considered by the attorney and reported on by him was the supposed conflict of the Rutter and Etting patent with the Dillon patent, and this was before complainant paid any money under the contract; that complainant's agent was apprised of the supposed conflict, and that the Rutter and Etting patent had long since been forfeited. Defendant denied that it was the validity of his tax title that Ferguson was ordered to report on, but on the whole title; and declared that ample time was given by the agreement for the examination of all matters connected with the title, and if the examination did not show the title to be good, the agreement was to be null and void. Defendant admitted that he had refused to bring or authorized to be brought in his name any actions for ejectment against persons claiming title to the land, not only because this was no part of the agreement, but because, before the agreement was entered into, the agent of the complainant

was distinctly informed that defendant would not agree to bring any action of ejectment against any persons in possession of or claiming title to any portion of the land, and was distinctly informed before the agreement was entered into that defendant would convey the land with a covenant of special warranty only, the agreement expressly so providing. Defendant further stated that though he had demanded of complainant that he should ascertain by survey the number of acres within the boundaries of the Dillon tract, held by better title than that of Reeder by reason of adverse title and possession, complainant had altogether refused and failed to comply therewith; and defendant averred thereupon that he was entitled to have the land sold under the decree of the court for the payment of the purchase money. Defendant also denied that there was any mutual mistake in the execution of the contract.

The cross-bill averred that at the time the agreement of February 29, 1884, was executed, there were certain persons in possession of some portions of the land embraced within the boundaries of the Dillon tract, claiming title thereto under junior claims, and these persons, irrespective of the validity of their claims, Reeder was unwilling to disturb, and therefore the provision was inserted in the agreement that surveys should be made at the expense of Clark to ascertain the number of acres within the outlines of the tract which were held by a better title than that of Reeder by reason of adverse title and possession; and the cross-bill, after averring that Reeder had waited for more than a year before demanding payment of the balance of the purchase money, the amount of which could not be known until the survey had been made, yet that Clark had altogether refused and failed to furnish Reeder a list of the persons holding lands within the boundaries of the tract by better title than Reeder by reason of adverse possession and title, and had refused to pay the balance of the purchase money, alleging as a reason that claims were set up to some portions of the land, but not pretending that any person making such claim had better title than Reeder by reason of "adverse title and possession," prayed that a decree might be passed for a sale of the

land for the payment of the unpaid balance of the purchase money.

This cross-bill was filed May 5, 1886, and on May 14 Clark filed an amended and supplemental bill to the effect that one Rockey was cutting timber on a part of the land and should be restrained; and also that actions of ejectment should be brought against persons in possession of the land claiming adversely to Reeder; and asking for the appointment of a receiver or receivers. Before this bill was actually filed, the court directed an injunction against Reeder and appointed a receiver with directions to bring such suits as he should be advised to bring by counsel for Reeder or Clark against all persons holding or claiming to hold adversely to Reeder. On July 28, 1886, Reeder filed his answer to this supplemental and amended bill, objecting to the appointment of a receiver and moving for his discharge. Rockey also answered the bill and filed a number of exhibits with his answer. November 13, 1886, Clark filed his answer to the cross-bill of Reeder, restating the matters set forth in the original bill, and relying on them and the knowledge that the facts revealed by the Miller survey as to the Rutter and Etting title had been known to Reeder.

On December 4, 1886, Watts, who had been in the meantime made a party, filed his answer to the original and amended and supplemental bills of Clark, setting up substantially the same matters and things as those set forth in Reeder's answer and cross-bill, and also stating all the facts and circumstances connected with the making of the agreement of February 29, 1884, the furnishing of the certificate of opinion of Ferguson, and the payment of the $35,000 on March 25, 1884. Watts averred that during the negotiations between Clark's agent and himself leading up to the making of the contract, the fact of an interlock between the Dillon survey and the Rutter and Etting survey was made known by him to Clark's agent, though not knowing the extent of the interlock he did not state it; and he also said on the occasion of the payment of the $35,000 on March 25, 1884, the fact of this interlock was again the subject of conversation, and Clark's agent said that

in view of Ferguson's opinion this was immaterial. On February 19, 1887, Clark filed a second amended and supplemental bill, stating, in addition to the reiteration of the allegations of the original bill, that neither at the time of the execution of the contract or its approval by Reeder did Clark, his agent, or Ferguson, his counsel, know that there was any interlock between the Dillon and Rutter and Etting surveys, nor was any intimation given thereof by Reeder or Watts; that it was not until after the signing and approval of the contract and after an examination and investigation by Ferguson of the claims of the junior claimants and occupants and of the possession of the land by Reeder and by Ward and Lawson, his predecessors in the ownership thereof, that anything was said by Watts about the Rutter and Etting patent or its interference with the Dillon survey, and that when he did speak of it he spoke of it as a small and unimportant interference which would not seriously affect the land sold to Clark; that though Ferguson had for many years been acquainted with the Dillon survey and had always regarded it as good and valid and the title unquestionable, and had long known of the Rutter and Etting survey, and the sale thereof as forfeited for delinquent taxes by proceedings for the purpose, yet that he had never heard that the Rutter and Etting survey covered any portion of the Dillon survey, and the fact only came to his knowledge after the approval of the agreement of February 29, 1884, and after the examination and investigation aforesaid he, as far as was possible, looked into the matter and was satisfied that if there were any interference it was so small and unimportant as not seriously to impair the value of the Dillon survey even if it should prove a better title, and that in this belief he gave the information and opinion in regard to it, to be found in his certificate; that before the agreement was reduced to writing the whole matter was fully discussed, and it was the distinct understanding of Bell and Ferguson and of Watts, as they understood him, that the Dillon patent was the oldest patent covering all embraced within it, and that there would not be any adverse claim set up to any of the land except some junior grantee of some parts of the land,

which holdings would not exceed 5000 acres, and probably not be more than 2500, the quantity when ascertained to be deducted from the 50,096 acres, and it was to ascertain the number of acres so held that the survey mentioned in the agreement was provided for. This bill propounded certain interrogatories to Reeder and to Watts, as to their knowledge of the interference and its extent, and called for answers under oath. It was further averred that when the original bill was filed it was with the belief by Clark that Watts and Reeder were altogether ignorant when the contract was executed that the Rutter and Etting survey interfered with the Dillon survey, and therefore, he had alleged that there was a mutual mistake, but that if the existence of the Rutter and Etting survey and its interference with the Dillon survey had in any way come to the knowledge of Watts and Reeder, or if they suspected such interference, their failure to make known the interference before the contract was executed was a fraud on Clark, whether so intended or not, and made the contract null and void, and entitled Clark to a rescission thereof and the repayment of the $35,000.

On March 18, 1887, Reeder filed his separate answer under oath to this second supplemental and amended bill, and on March 19, 1887, Watts also filed his separate answer thereto likewise under oath. The answer of Reeder was that the whole question of title to the Dillon survey was to be passed on by Ferguson, and was so passed on by him; that whether Clark, his agent or attorney, did or did not know at the time of the execution of the agreement or its approval by Reeder of any interference by the Rutter and Etting survey was altogether immaterial, as the agreement specifically provided for a period of thirty days after the date of said contract, in which the counsel of Clark was to investigate the survey as to the validity of the title, and if he did not then report the title to be good and valid, the contract would be wholly void; the report of the attorney was that he was well aware of a conflict or interference between the two surveys, though not what may have been its extent; and thereupon, Clark was advised of the conflict or interference before he made any payment,

and if he had any objection to make to the title on that ground, he should have made it before making the payment; and, not having done so, it was now too late for him to make such a defence. That defendant had no knowledge of what representations were made at the time of the making of the contract; that he was not present and had no knowledge of what had taken place, and approved the agreement of February 29, 1884, when presented to him, relying on the terms thereof as embodying the contract between the parties. And he set forth the facts connected with his knowledge of the Rutter and Etting patent.

The answer of Watts specifically denied the allegations of the bill in reference to what took place at the time of the preparation of the agreement of February 29, 1884, and rehearsed all that did take place on this subject, reiterating the statement made in his previous answer that while he knew at the time the agreement was made that there was an interlock between the two surveys, he did not know the extent, and gave Clark's agent and Ferguson all the information he had on the subject.

After the filing of these answers, and after the testimony had been taken, Clark filed an amendment on November 26, 1887, under which he charged that both Reeder and Watts, at the time of the execution of the agreement, knew of the interlock between the two tracts, and nearly the extent of it, and fraudulently withheld such knowledge, and thereby fraudulently induced the agent and attorney of Clark to make the contract while they were in utter ignorance of the facts, and that Watts fraudulently represented that there was no older title at the time the contract was executed than the Dillon title to any of the land embraced in the latter patent, and that the only claim that could be set up adversely to the Reeder title would be under junior patents; and that Clark's agent and attorney entered into the contract believing the representations, which they would not otherwise have done; and that the contract was procured by said fraudulent concealments and representations.

The case was heard in the Circuit Court of the United

States for the District of West Virginia before Mr. Justice Harlan, acting under a special assignment for that circuit, and District Judge Jackson, and Mr. Justice Harlan filed an opinion, in which the District Judge concurred, October 31, 1889, which is reported in 40 Fed. Rep. 513.

On December 4, 1889, an interlocutory decree was entered making the opinion part of the record; referring the case to a special master to ascertain and report all the tracts of land, if any, within the exterior boundaries of the Dillon survey, as run by Sarver, which were shown to be in the possession of persons whose right thereto was better, by reason of adverse title and possession, than the title of Reeder; to indicate in the report all the portions of the land in the possession of the junior patentees holding by a better title than Reeder; and what lands, if any, within the survey so made by Sarver were also in the Rutter and Etting survey, held by a better title than that of Reeder, by reason of adverse title and possession.

The court reserved, until the coming in of the master's report, the question whether the matter of the title and possession of any one, whom complainant might allege to have a better right to any part of the lands than defendant Reeder, should be determined upon the proofs then in the case with such as might be submitted with the master's report, or should be determined by actions of ejectment. The master proceeded to discharge the duties imposed on him, and made a report of his findings and also a supplemental report, and thereupon, after exceptions by both parties to the reports, the court, on May 30, 1891, passed a final decree in the case. By this decree the court adjudicated that the contract contained in the agreement of February 29, 1884, was binding on Clark and Reeder; and that under it there was due from Clark to Reeder $1.70 per acre for the number of acres included within the boundaries of the Dillon survey as run by Sarver, after deducting from the whole number of acres the amount held by persons who held said lands by a better title than that of Reeder by reason of adverse title and possession; that the total number of acres within said exterior boundaries was 54,970, and that the number of acres within the boundaries held by

persons by better title than that of Reeder by reason of adverse title and possession was 7397, leaving as the number of acres to be paid for at $1.70 per acre, 47,572. The decree then fixed the amount due by Clark to Reeder at $70,064, that amount including in addition to the unpaid purchase money for the 47,572 acres of land, charges for taxes, interest, and the $1000 mentioned in the fifth clause of the agreement of February 29, 1884; and decreed that upon payment of said sum of $70,064, with accruing interest, Reeder, his wife joining, should convey the land to Clark in a deed by special warranty, and that on failure by Clark to pay the money the land should be sold by special commissioners named in the decree. And it was further decreed that Clark do not have the relief prayed for in the original bill, and in his supplemental and amended bills, and as to Watts that the bills be dismissed.

The decree further ordered that all actions of ejectment theretofore brought by the receiver be dismissed and the receiver discharged. The case was then brought by appeal to this court.

Mr. Joseph S. Clark and *Mr. Richard C. Dale* for appellant.

Mr. James McColgan and *Mr. Bernard Carter* for appellee.

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

The theory of the original bill was that the complainant was entitled to a rescission of the contract of February 29, 1884, on the ground of a mutual mistake of himself and Reeder in regard to the alleged fact that the larger part of the land embraced in the Dillon survey was covered by the Rutter and Etting survey; but any such mistake was denied by the defendant, and was not sustained by the evidence; and by his amendment to his second supplemental bill complainant in effect abandoned the ground of mutual mistake and asked for the rescission of the contract on the ground of fraud only. The charge of fraud is that before and at the time of making and executing the agreement, Reeder and Watts knew of the existence of the Rutter and Etting survey,

of its location with reference to the Dillon survey, of the interlock between the surveys and very nearly the extent of such interlock, and that the Rutter and Etting survey was the older of the two; that they, and each of them, intentionally and with intent to defraud Clark, withheld and concealed from him and from his agent and from his attorney knowledge or information of these matters, and thereby fraudulently induced the agent and attorney to make and execute the agreement on behalf of Clark; that Watts on his own behalf and as the agent of Reeder, with intent to defraud Clark, falsely represented to Clark's agent and attorney at the time of the making of the agreement that there was no older title than the Dillon patent to any part of the land embraced therein, and that the only claims that could or would be set up adversely to Reeder's title would be grants for parts of the lands junior to the Dillon patent; and that the agent and attorney, believing the statements to be true, entered into and executed the contract on behalf of Clark, which they would not have done except for the statements and their belief in their truth; and that the agreement was procured to be made and executed by and through the alleged fraudulent concealments and false representations, but for which the contract would not have been made.

In entering into the contract, Watts assumed to act not only for himself but for Reeder, and we accept the ruling of the Circuit Court that in approving the contract Reeder assented to Watts' agency, and in taking the benefit of the contract would be bound by any conduct on his agent's part which might entitle Clark to a rescission.

In *Farrar* v. *Churchill*, 135 U. S. 609, 615, we said: "The general principles applicable to cases of fraudulent representations are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the

sole cause if it were proximate, immediate, and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representation." And in *Farnsworth* v. *Duffner*, 142 U. S. 43, 47: "This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained. . . . But if the neglect to make reasonable examination would preclude a party from rescinding a contract on the ground of false and fraudulent representations, *a fortiori* is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations." In the latter case, the syllabus of *Ludington* v. *Renick*, 7 W. Va. 273, was quoted as follows: "A party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied."

The contract was that Reeder agreed to sell and convey, with covenants of special warranty, a tract of land containing 50,096 acres, more or less, which tract was granted by Virginia to Edward Dillon by patent dated April 16, 1796, and claimed and owned by Reeder by regular chain of title, the first being a tax deed to Ward and Lawson, dated December 22, 1857; the sale to be a sale by the acre and not in gross; that the amount of the purchase money was to be $1.70 per acre; that from the number of acres within the boundaries of the grant as it had been surveyed by Sarver, with which survey Clark was satisfied, should be deducted such number of

acres as should be ascertained by actual survey to be held by persons by better title than that of Reeder, by reason of adverse title and possession; and it was further provided that the contract of sale should be void unless James H. Ferguson should within thirty days from the date of the agreement "certify the title of said Reeder to said land to be good and valid," and if within the thirty days Ferguson should certify that the title was good and valid, then $35,000 of the purchase money was to be paid and the remainder as soon thereafter as the surveys needed to ascertain what lands within the boundaries were held by a better title than that of Reeder, by reason of adverse title and possession, were made. The question submitted to Ferguson and to be determined by him was whether Reeder had a good and valid title to all of the land which by the patent had been granted to Dillon, except those parts which should afterwards be found to be in the actual possession of persons who denied Reeder's title, so that Ferguson was to examine into the validity of the title and his certificate was to be conclusive as to that. The amendment setting up the fraud relied on to set aside the contract did not allege that the certificate as to the title was given because of the reliance on the silence of Watts and Reeder as to the interlock between the two surveys, or reliance on any affirmative representations of Watts, and if Ferguson before giving the certificate was aware of the fact of the interlock, what he believed when the contract was made would furnish in itself no sufficient ground for rescission. The certificate stated that Ferguson had made a full examination of the matter pertaining to the title to this tract of land, and that "The only title which can be found older than the Dillon patent is a grant from the Commonwealth of Virginia to Rutter and Etting, dated the 9th day of January, 1796. There is from the best information I can obtain a small portion of the Rutter and Etting survey embraced within the Dillon survey, but the Rutter and Etting survey was forfeited long prior to 1837 to the State of Virginia for the non-payment of taxes thereon and for the non-entry thereon in the land books of the proper county, and was sold by the commis-

sioner of delinquent and forfeited lands some forty or more years ago. At the time of that sale, the taxes on the Dillon survey had always been paid, and for that reason the title to the whole thereof became good and valid, so far as the Rutter and Etting survey is concerned." And the certificate concluded with these words: "I therefore do certify that in my opinion the title of Charles Reeder to the said Dillon survey is good and valid, except as to such parts of said tract of land as may be affected by the claims of the occupants aforesaid, which may or may not be superior to the title of said Reeder." It thus appears that Ferguson had ascertained that at least a part of the land was included in the older grant, and that he nevertheless certified that the title to the land covered by the Dillon survey was good and valid because he knew and declared that the Rutter and Etting grant had been forfeited long prior to 1837, and determined that because of the forfeiture and the fact that the taxes on the Dillon land had always been paid, the title had become vested in the holder of the Dillon grant. It is true that Ferguson testified that he obtained the information that a portion of the land covered by the Dillon grant was included within the Rutter and Etting grant from Watts between the time of the execution of the agreement and the giving of his certificate, and that Watts represented the interference as but small; yet it would seem that if Ferguson considered the question of the existence of the interference material he would have examined into its extent, and his certificate shows that he considered the Rutter and Etting grant altogether null and void, and that by its forfeiture the Dillon title had become perfected, so that, knowing as he did that there was an interlock, it cannot be assumed that Ferguson was affected by the failure of Watts and Reeder to tell him of its existence or by the assertion of Watts that no older title interfered with the Dillon grant. Moreover, it does not appear that Watts had any particular information as to the extent of the interference which was not open to every one, and probably reliable information upon the subject depended upon the surveys of the two tracts.

The record shows that Mr. Ferguson had had a large ex-

perience in the examination of land titles in West Virginia, their forfeiture and validity, the overlapping of different grants for the same land, and the construction of the laws of Virginia and West Virginia in regard to land titles; and that he had practised many years in the counties where the land was situated. He testified that when he first commenced to practise in that locality these surveys were in the counties of Fayette and Logan as he now understood their boundaries, and that, in the course of his practise in Logan County, he became acquainted with the existence of both of the surveys and with the fact that the Rutter and Etting survey had been sold as forfeited and delinquent by General Albert Beckley, commissioner of delinquent and forfeited lands for Fayette County. That sale took place in 1840, and the report of General Beckley, made to the Circuit Court of Fayette County, stated that the Rutter and Etting grant had been carefully resurveyed, and that the survey showed that within the boundaries of said Rutter and Etting grant nearly the whole of the 50,096 acres patented to Edward Dillon was included. The matter of such a claim was of record then as early as 1840, and the certificate refers to the sale, so that no matter what was the opinion about it expressed by Watts, if the question of the extent of the interlock was material, a survey might well have been had before the certificate was given.

The record further discloses that copies of both the Dillon and the Rutter and Etting grants were sent to Watts by Reeder and delivered to Clark's agent for Ferguson, and Clark says in his second amended and supplemental bill that he is informed by his said counsel that when the fact that the Rutter and Etting survey covered a portion of the Dillon survey came to his knowledge after the execution and approval of the contract and after examination and investigation, he, as far as was then possible, looked into the matter and was satisfied that if there was any interference between the two surveys it was so small and unimportant as not to seriously impair the value of the Dillon survey even if it should prove the better title, and in this belief he gave his certificate; a statement

quite different from asserting that he acted on the statements of Watts as to the extent of the interference.

Apart from all this, we cannot consistently hold that the evidence sustains the amendment to the second supplemental bill to the effect that Reeder and Watts knew of the extent of the interference of the Rutter and Etting grant, and that it included the larger part of the Dillon grant, and wilfully and fraudulently withheld the information, because they believed that if known to Clark or his agent or attorney it would prevent the sale of the land, or that Watts affirmatively represented that there had never been any older grant which affected the Dillon grant.

We entirely concur with the statement of Mr. Justice Harlan in his opinion on the circuit, that: "I am satisfied that no one connected with this business knew the full extent of this interlock." It is not pretended that Reeder made any representation to Clark or his agent or attorney, and his testimony shows that in the course of the survey of 1873 by Sarver, the survey which by the agreement was declared to be taken as ascertaining satisfactorily the boundaries of the land, Sarver discovered that there was some interference between the two surveys, and pointed out the place where the south line of the Rutter and Etting survey crossed the western line of the Dillon survey; and Reeder testified that "exactly how much land was embraced in the interlock was not known, and I did not consider it important to know, as I was advised, by my counsel, and had other good authority for believing, that the Dillon title would unquestionably hold as against the Rutter and Etting, and consequently as against titles derived from the Rutter and Etting." And he said in his answer to the interrogatories of the second supplementary bill: "I did not then nor do I now know to what extent the Rutter and Etting survey laps on the Dillon, nor do I think that any one else knows, because from the facts which have come to my knowledge I do not think that any more than the first line of the Rutter and Etting survey was ever run by the surveyor originally." There appears in the record a letter from Watts to Reeder under date of November 8, 1873, in reply to one from Reeder

enclosing him a sketch from the Sarver survey, which sketch showed that the larger part of the Dillon tract was included in the Rutter and Etting grant, (also called the Duval, Duval having made the original entry,) in which Watts not only gave his own reasons for believing that the sketch did not truly represent the relations of the two tracts, and that in his judgment it would be impossible for the Duval to lap on the Dillon survey, but advised Mr. Reeder that he had showed Judge Ward the sketch and plats Reeder had sent, and Judge Ward told him the Dillon survey was perfect, the best in West Virginia; and that the Duval had never been run; and Watts added that he was satisfied that this was true, and that the Duval was only gotten up for a speculation. We think it does not admit of reasonable doubt that Mr. Reeder believed that there was nothing in the Rutter and Etting grant which impaired his title to the Dillon grant, although, nevertheless, he sent, with all his title-papers, the copies of the surveys of both tracts to Watts at the time a sale of the land was contemplated "for examination, and in order that it should be a full and thorough examination."

And notwithstanding a serious conflict of evidence, we are not persuaded that the specific statements of Watts in his answers, and his testimony, as to his knowledge of the extent of the interlock, and as to what he communicated to Ferguson and Bell, in denial of any fraudulent concealment or fraudulent representation, can properly be treated as overcome, the documentary and undisputed evidence being considered, and due regard being had to the infirmities of human memory. It was known at the time the certificate was given that the Rutter and Etting patent was older than the Dillon patent, and that there was an interlock, but the parties had agreed to take the exterior boundaries of the Dillon survey as made by Sarver, and Clark was given the right by a survey at his own expense to ascertain what lands within those boundaries were held by a better title than Reeder's, by reason of adverse title and possession. And if the Rutter and Etting survey had been forfeited long prior to 1837, and the title to the Dillon survey had become good and valid so far as the Rutter and

Etting survey was concerned, or this was believed to be so by all parties, it is not extraordinary when afterwards the extent of the interlock was raised as an objection to complying with the contract, that there might be a want of precision of recollection as to exactly what did pass in reference to that particular matter. It is remarkable that nowhere in the pleadings or in the testimony is it alleged or suggested that the Rutter and Etting title is good and valid as against Reeder under the Dillon title. The result of the report of the special master was that the only portion of the whole of the Dillon survey now in the possession of persons claiming title adverse to Reeder was 7397.75 acres, out of a total of 54,907.5 acres, and 7379.75 was by the final decree adjudged to be the number of acres actually held by better title than that of Reeder by reason of adverse title and possession, and for this Clark was not required to pay; and in relation to this matter we cannot do better than to quote from the opinion of the Circuit Court, as follows: "The utmost shown is that most of the Dillon survey is within the lines of the Rutter and Etting survey; but, as already said, this might be true, and yet Reeder's right be the better in law. Can it be a sufficient ground to set aside the contract for the plaintiff to show that a large part of the lands in question are within the lines of a patent older than the one under which Reeder claims and that they are claimed adversely to Reeder, especially when Reeder only agreed to convey with special warranty, and when the plaintiff agreed to pay for all the lands covered by the Sarver survey, except such as were shown by a survey, had at his expense, to be held 'by adverse title and possession,' constituting a better title than Reeder's? I think not."

We are of opinion that the Circuit Court was right in concluding that complainant was not entitled to a rescission of the contract.

By the interlocutory decree the court directed the ascertainment of the number of acres of land within the exterior boundaries of the Dillon grant as run by Sarver to which there was shown to be a better title than Reeder's, "by reason of adverse title and possession," and this included any who were

in adverse possession claiming title under the Rutter-Etting patent, and who by reason of such adverse title and possession had a better title than Reeder; and, this having been done, the final decree on the cross-bill adjudged and decreed the amount to be paid to Reeder by Clark, and on failure of Clark so to do, the sale of the land. We see no reason to question the correctness of that course. The Circuit Court held, and we have arrived at the same conclusion, that Clark was not entitled to rescind the contract on the ground of fraud; and this involved holding that Clark was bound by the contract according to its terms, and consequently to pay for the number of acres embraced within the exterior bounds of the Dillon grant, as surveyed by Sarver, less the number of acres within those boundaries held by a better title than that of Reeder by reason of adverse title and possession. This being so, and the number of acres having been ascertained in accordance with that contract, Reeder was entitled to a decree for a sale of the land for the sum due him as the balance of the purchase money.

A court of equity may sometimes refuse to decree specific performance in favor of one party when it would also refuse to rescind in favor of the other. But this is not a case to which that principle is applicable. Nor is it a case in which a vendor asks the court to compel a purchaser to accept a doubtful title. It is a case where the decree gives to the purchaser what he purchased, in accordance with the terms of his contract, and the vendor is entitled to have the property devoted to the payment of the purchase price if the purchaser declines to pay.

Decree affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

In re QUARLES AND BUTLER, Petitioners.

In re McENTIRE AND GOBLE, Petitioners.

ORIGINAL.

Nos. 14 and 15. Original. Submitted April 22, 1895. — Decided May 20, 1895.

It is the right of every private citizen of the United States to inform a marshal of the United States, or his deputy, of a violation of the internal revenue laws of the United States; this right is secured to the citizen by the Constitution of the United States; and a conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right, or because of his having exercised it, is punishable under section 5508 of the Revised Statutes.

THESE were two motions for leave to file petitions for writs of *habeas corpus* to Samuel C. Dunlop, marshal of the United States for the Northern District of Georgia. The first motion was in behalf of John M. Quarles and David Butler; and the case was as follows:

At March term, 1895, of the Circuit Court of the United States for that district, an indictment was returned against the petitioners and several other persons, the fourth count of which alleged that within that district, on April 7, 1894, the defendants conspired "to injure, oppress, threaten and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and because of his having exercised the same, in that he, the said Henry Worley," on March 19, 1894, "had reported and informed William J. Duncan, a United States deputy marshal in and for said Northern District of Georgia, that George Terry did," on that day, and within that district, "violate the internal revenue laws of the United States, by carrying on the business of a distiller without having given bond as required by law;" and that the conspiracy hereinbefore charged was formed by the defendants, "for the purpose of

injuring, oppressing, threatening and intimidating the said Henry Worley, because of his having exercised said right and privilege secured to him as aforesaid, in reporting and informing said William J. Duncan, deputy marshal as aforesaid, of the violation of the internal revenue laws as aforesaid by the said George Terry; and in furtherance of said conspiracy so formed as aforesaid, and for the purpose aforesaid, and to effect the object thereof," the defendants, on April 7, 1894, within the district, in the night time and in disguise, went to Worley's house, and took him from his house and beat, bruised and otherwise ill-treated him, and shot at him with guns and pistols, with intent to kill and murder him, because he had reported to said Duncan, deputy marshal as aforesaid, said Terry for having violated the revenue laws of the United States as aforesaid; "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 first, second and third counts of the indictment were like the fourth, except as to the persons against whom the information was given.

The defendants demurred to each of the four counts, "because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States;" "because there is no such right and privilege secured to the citizens of the United States, as such citizens, as that set out in the said count;" and "because there is no offence charged in the said count, of which the courts of the United States can have or take cognizance." The demurrer was overruled.

The defendants then pleaded not guilty, and were tried and convicted by a jury, and moved in arrest of judgment for the following reasons:

"1. Because in said indictment there is no allegation that William J. Duncan was an officer of the United States, and charged with the enforcement of the internal revenue laws; nor is there any allegation that the said William J. Duncan was authorized to take information upon such subject, or to employ persons for the service of the United States.

"2. Because there is no allegation that Henry Worley was in the service or employment of the United States.

"3. Because there is no such official as a United States deputy marshal, as charged in the indictment.

"4. Because there is no such right and privilege secured by the Constitution and laws of the United States, within the meaning of sections 5508 and 5509 of the Revised Statutes of the United States, as that set out in the indictment.

"5. Because there is no crime or offence charged in the said bill of indictment, of which the courts of the United States have jurisdiction."

The motion in arrest of judgment was overruled, and the defendants were sentenced to imprisonment in a penitentiary for the term of five years.

The second case was upon a motion in behalf of James McEntire and John H. Goble, and was similar to the first, except that no further proceedings had been taken upon the indictment, after the overruling of the demurrer.

Upon the filing of these motions, the Solicitor General suggested to the court, as reasons for exercising jurisdiction in this form, that the prisoners were in jail, and were too poor to pay the expenses of writs of error; and that it was important to settle, as soon as possible, the question whether they should be prosecuted in the courts of the United States, or in those of the State. And he joined with their counsel in requesting the court to allow the petitions to be filed, and to pass upon the merits of the questions involved.

Mr. W. C. Glenn and *Mr. D. W. Rountree* for the petitioners.

Mr. Solicitor General opposing.

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

These cases are governed by the principles declared and affirmed in *Logan* v. *United States*, 144 U. S. 263, 283–295, and in the earlier decisions there reviewed, the result of which may be summed up as follows:

The United States are a nation, whose powers of government, legislative, executive and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object. *United States* v. *Logan*, 144 U. S. 293.

Section 5508 of the Revised Statutes provides for the punishment of conspiracies "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

Among the rights and privileges, which have been recognized by this court to be secured to citizens of the United States by the Constitution, are the right to petition Congress for a redress of grievances; *United States* v. *Cruikshank*, 92 U. S. 542, 553; and the right to vote for presidential electors or members of Congress; *Ex parte Yarbrough*, 110 U. S. 651; and the right of every judicial or executive officer, or other person engaged in the service, or kept in the custody, of the United States, in the course of the administration of justice, to be protected from lawless violence. There is a peace of the United States. *In re Neagle*, 135 U. S. 1, 69; *United States* v. *Logan*, above cited.

It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and con-

fidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government. *Vogel* v. *Gruaz*, 110 U. S. 311; *United States* v. *Moses*, 4 Wash. C. C. 726; *Worthington* v. *Scribner*, 109 Mass. 487.

The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. *United States* v. *Logan*, 144 U. S. 294. Both are, within the concise definition of the Chief Justice in an earlier case, "privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States." *In re Kemmler*, 136 U. S. 436, 448.

The right of the private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice, stand upon the same ground, just as do the rights of citizens voting and of officers elected, of which Mr. Justice Miller, speaking for this court, in *Ex parte Yarbrough*, above cited, said: "The power in either case arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both cases, it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." 110 U. S. 662.

To leave to the several States the prosecution and punish-

ment of conspiracies to oppress citizens of the United States, in performing the duty and exercising the right of assisting to uphold and enforce the laws of the United States, would tend to defeat the independence and the supremacy of the national government. As was said by Chief Justice Marshall, in *McCulloch* v. *Maryland*, and cannot be too often repeated, "No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." 4 Wheat. 316, 424.

The suggestions made in the Circuit Court, and renewed in this court, "that there is no such official as a United States deputy marshal," and that the marshal and his deputies have nothing to do with enforcing the internal revenue laws, are sufficiently answered by referring to the statutes. The Revised Statutes provide that every marshal may appoint one or more deputies, removable from office by the District Judge or by the Circuit Court; and who take the like oath as the marshal; and for the faithful performance of whose duties the marshal is responsible upon his official bond. Rev. Stat. §§ 780, 782, 783. And by the act of March 1, 1879, c. 125, § 9, any marshal or deputy marshal may arrest any person found within his district in the act of operating an illegal distillery, and take him before a judicial officer. 20 Stat. 341, 342.

The necessary conclusion is, that it is the right of every private citizen of the United States to inform a marshal of the United States, or his deputy, of a violation of the internal revenue laws of the United States; that this right is secured to the citizen by the Constitution of the United States; and

Counsel for Appellees.

that a conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right, or because of his having exercised it, is punishable under section 5508 of the Revised Statutes.

According to the agreement of counsel, and in order that the judgment of this court may appear in regular form upon its records, leave is given to file the petitions. But, for the reasons above stated, the

Writs of habeas corpus are denied.

Mr. Chief Justice Fuller dissented.

LEM MOON SING *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 946. Argued April 18, 19, 1895. — Decided May 27, 1895.

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that respect enforced exclusively through executive officers without judicial intervention, having been settled by previous adjudications, it is now decided that a statute passed in execution of that power is applicable to an alien who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reënter it.

Lau Ow Bew v. *United States*, 144 U. S. 47, distinguished from this case.

No opinion is expressed upon the question whether, under the facts stated in the application for the writ of *habeas corpus*, Lem Moon Sing was entitled, of right, under some law or treaty to reënter the United States.

The case is stated in the opinion.

Mr. Maxwell Evarts for appellant.

Mr. Assistant Attorney General Dickinson for appellees.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

Lim Lung, on behalf of the appellant, Lem Moon Sing, presented to the District Court of the United States for the Northern District of California an application in writing for a writ of *habeas corpus*, directed to one D. D. Stubbs, and to the collector of the port of San Francisco, requiring them to produce the body of the appellant and abide by such order as the court might make in the premises.

The grounds set forth in the application for the writ were substantially as follows:

The appellant was a person of the Chinese race, born in China, and never naturalized in the United States.

At and before the passage of the general appropriation act of Congress, approved August 18, 1894, he was a Chinese merchant having a permanent domicil in the United States at San Francisco and lawfully engaged in that city in mercantile pursuits, and not otherwise. That domicil had never been surrendered or renounced by him.

On the 30th day of January, 1894, while conducting his business as a merchant at San Francisco, being a member of the firm of Kee Sang Tong & Co., wholesale and retail druggists in that city, he went on a temporary visit to his native land, with the intention of returning and of continuing his residence in the United States, in the prosecution of that business. He was so engaged for more than two years before his departure for China, and during that time performed no manual labor except as was necessary in the conduct of his business as a druggist.

During his temporary absence in China the appropriation act of August 18, 1894, was passed. That act contained these provisions:

"*Enforcement of the Chinese Exclusion Act:* To prevent unlawful entry of Chinese into the United States, by the appointment of suitable officers to enforce the laws in relation thereto, and for expenses of returning to China all Chinese persons found to be unlawfully in the United States, including the cost of imprisonment and actual expense of conveyance of

Chinese persons to the frontier or seaboard for deportation, and for enforcing the provisions of the act approved May fifth, eighteen hundred and ninety-two, entitled 'An act to prohibit the coming of Chinese persons into the United States,' fifty thousand dollars.

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." Act of August 18, 1894, c. 301, 28 Stat. 390.

The appellant returned to the United States, November 3, 1894, on the steamer Belgic, belonging to the Occidental and Oriental Steamship Company, of which D. D. Stubbs was secretary and manager. Upon his arrival here he applied to John H. Wise, collector of customs at San Francisco, to be permitted to land and enter the United States on the ground that he was formerly engaged in this country as a merchant. He submitted to the collector the testimony of two credible witnesses other than Chinese, showing that he conducted business as a merchant here for one year previous to his departure, as above stated, from the United States, and that during that period he was not engaged in the performance of any manual labor except such as was necessary in conducting his business as a merchant. His application to enter the United States was denied, and consequently he was detained, confined, and restrained of his liberty by Stubbs as secretary and manager of the steamship company.

In addition to the above facts, the application for the writ of *habeas corpus* alleged that Lem Moon Sing had not been apprehended and was not detained by virtue of the judgment, order, decree, or other judicial process of any court, or under any writ or warrant, but under the authority alleged to have been given to the collector of the port of San Francisco by the above act of August 18, 1894; that Lem Moon Sing was not at the date of the passage of that act nor for more than one year prior to the date of his departure for China for temporary purposes, and is not now, an alien excluded from

admission into the United States under any law or treaty now existing; and that said D. D. Stubbs and said John H. Wise, collector of the port, are without jurisdiction to restrain the said Lem Moon Sing of his liberty.

The petitioner also alleged that if Lem Moon Sing should not be allowed to enter the United States and to resume his residence and mercantile business therein, and be sent back to China, he would sustain great and irreparable loss, and his business be wholly destroyed, whereby he would be denied "that equal right granted to him by the Constitution and the laws of the United States, and by the treaties made and existing between the United States and the Chinese Empire, of which he is a subject."

It was further alleged that the detention and restraint of the liberty of Lem Moon Sing were without jurisdiction, void, and unconstitutional, and "without due process of law and against his rights under the Constitution and the laws of the United States and the treaties made between the United States of America and the Chinese Empire, and wrongfully and unlawfully under and by color of the authority of the United States asserted and exercised by the said John H. Wise, collector of the port of San Francisco."

The writ of *habeas corpus* was denied by the court below because in its judgment the application on its face showed that Lem Moon Sing was detained and restrained of his liberty by the collector of the port of San Francisco, under the act of Congress approved August 18, 1894, and consequently that jurisdiction over the petitioner was with the collector of the port of San Francisco. From this judgment an appeal has been prosecuted to this court.

The present case is, in principle, covered by the former adjudications of this court.

In the *Chinese Exclusion Case*, 130 U. S. 581, 603, this court said: "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of

its independence. If it could not exclude aliens it would be to that extent subject to the control of another power." That case involved the validity of the act of Congress of October 1, 1888, c. 1064, 25 Stat. 504, making it unlawful, from or after that date, for any Chinese laborer who had theretofore been, or was then or might become, a resident within the United States, *and* had departed, or should depart from this country before the passage of that act, "to return to, or remain in, the United States." The same act annulled all certificates of identity issued under the previous act of May 6, 1882, c. 120, 22 Stat. 58.

The case of *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 653, 659, 660, arose under the act of March 3, 1891, c. 551, 26 Stat. 1084, excluding from admission into the United States, in accordance with acts then in force regulating immigration, (other than those concerning Chinese laborers,) all idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease; persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, etc. That act made provision for the appointment, by the President, by and with the advice and consent of the Senate, of a superintendent of immigration, who should be an officer of the Treasury, and to whom was committed, under the control and supervision of the Secretary of the Treasury, the execution of the act. It was further declared by that act that "all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury."

Nishimura Ekiu, a female subject of the Emperor of Japan, was denied the right to land in the United States, and was held in custody to be sent back to her country, as the statute required in such cases. She sued out a writ of *habeas corpus*. The Circuit Court of the United States confirmed the action of the inspection officer and remanded the petitioner to his custody.

Opinion of the Court.

This court, observing that, according to the accepted maxims of international law, every sovereign nation has the power, inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe, said: "In the United States this power is vested in the national government to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof." "The supervision of the admission of aliens into the United States may be entrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority." Again: "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." It was further said that Congress could, if it saw fit, as in the statutes in question in *United States* v. *Jung Ah Lung*, 114 U. S. 621, authorize the courts to investigate and ascertain the facts on which the right to land

depends. "But, on the other hand," the court proceeded, "the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine or controvert the sufficiency of the evidence on which he acted" — citing *Martin* v. *Mott*, 12 Wheat. 19, 31; *Philadelphia & Trenton Railroad* v. *Stimpson*, 14 Pet. 448, 458; *Benson* v. *McMahon*, 127 U. S. 457; *In re Oteiza*, 136 U. S. 330. The judgment was that the act of 1891 was constitutional; that the inspector of immigration was duly appointed; that his decision was within the authority conferred upon him by that act; and as no appeal was taken to the superintendent of immigration, that decision against the petitioner's right to land in the United States was final and conclusive.

These questions were again elaborately examined in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, 714, which arose under the act of May 5, 1892, c. 60, 27 Stat. 25, prohibiting the coming of Chinese persons into the United States. Those were cases of Chinese laborers arrested and held by the marshal of the United States under that act, the sixth section of which made it the duty of all Chinese laborers, within the limits of the United States at the time of the passage of the act, and who were entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after that time, for a certificate of residence; and any Chinese laborer, within the limits of the United States, who should neglect, fail, or refuse to comply with the provisions of that act, or who, after one year from its passage, should be found within the jurisdiction of the United States without such certificate of residence, should be deemed and adjudged to be unlawfully within the United States, and subject to be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a

United States judge, whose duty it was to order his deportation from the United States, unless he established clearly, to the satisfaction of the judge, that by reason of accident, sickness, or other unavoidable cause he had been unable to secure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act; further, that if, upon the hearing it should appear that he was so entitled to a certificate, it should be granted, upon his paying the cost. If it appeared that the Chinaman had secured a certificate that had been lost or destroyed, he was to be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it. Any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, and desiring such certificate as evidence of such right, could apply for and receive the same without charge.

The petitioners having assailed the validity of that section, this court said: "In *Nishimura Ekiu's case*, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reëxamine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 600. The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power. The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain,

has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides."

An effort is made to distinguish the case before us from those cited by the circumstance that the petitioner, Lem Moon Sing, had, before the passage of the act of 1894, lawfully acquired a domicil as a merchant in the United States, and at the time of his departure from this country, for the purpose merely of visiting his native land, he was actually engaged in mercantile pursuits at San Francisco. The right of domicil, thus acquired, could not, it is earnestly insisted, be legally taken from him, nor its exercise obstructed by any action of executive officers of the government under whatever authority they proceeded; and that to give conclusive effect to the acts of such officers, when enforcing the statute of 1894, would deny to the appellant that due process of law which is required by the Constitution of the United States.

We do not understand the appellant to deny — indeed, it could not, consistently with the cases above cited, be denied — that if the appellant had attempted, after the passage of the act of 1894, for the first time, to enter the United States for the purpose of engaging in mercantile pursuits, his right to "admission into the United States under any law or treaty" could be constitutionally committed for final determination to subordinate immigration or other executive officers, with the right of appeal (if the decision be adverse to him) only to the Secretary of the Treasury, thereby excluding judicial interference so long as such officers acted within the authority conferred upon them by Congress.

The contention is that while, generally speaking, immigration officers have jurisdiction under the statute to exclude an alien who is not entitled under some statute or treaty to come into the United States; yet if the alien is entitled, of right, by some law or treaty, to enter this country, but is nevertheless excluded by such officers, the latter exceed their jurisdiction; and their illegal action, if it results in restraining the alien of his liberty, presents a judicial question for the decis-

ion of which the courts may intervene upon a writ of *habeas corpus*.

That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the *class* entitled by some law or treaty to come into the country, or to a *class* forbidden to enter the United States. Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be *final*, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value.

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in execution of that power any less applicable to an alien, who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reënter it? We think not. The words of the statute are broad and include "every case" of an *alien*, at least every Chinese alien, who, at the time of its passage, is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicil in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has

voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reënter the United States in violation of the will of the government as expressed in enactments of the law-making power. He cannot, by reason merely of his domicil in the United States for purposes of business, demand that his claim to reënter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the government in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution.

It is supposed that the claim of the appellant is sustained by *Lau Ow Bew* v. *United States*, 144 U. S. 47. But that is a mistake. That case arose under the sixth section of the act of May 6, 1882, c. 126, 22 Stat. 58, as amended by the act of July 5, 1884, c. 220, 23 Stat. 115. It presented the question whether that section applied to Chinese merchants, already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, sought to reënter it and resume their business. The question was raised by writ of *habeas corpus* in the Circuit Court of the United States for the Northern District of California, which adjudged that Lau Ow Bew was not entitled to enter the United States. This court, upon *certiorari* to the United States Court of Appeals for the Ninth Circuit, reversed the judgment below, and held that the statutes there in question did not apply to Lau Ow Bew, and that he had the right to return to the United States. Now the difference between that case and the present one is that, by the statutes in force when the former was decided, the action of executive officers charged with the duty of enforcing the Chinese Exclusion Act of 1882, as amended in 1884, could be reached and controlled by the courts when necessary for the protection of rights given or secured by some statute or treaty relating to Chinese. But, by the act of 1894, the decision of the appropriate immigration or cus-

toms officers excluding an alien "from admission into the United States under any law or treaty," is made final in every case, unless, on appeal to the Secretary of the Treasury, it be reversed.

Nor is the claim of appellant supported by *In re Panzara*, 51 Fed. Rep. 275. That case was decided in 1892, and, therefore, did not involve the act of 1894. So, also, was the case of *Gee Fook Sing* v. *United States*, 7 U. S. App. 27, decided by the Circuit Court of Appeals for the Ninth Circuit.

The remedy of the appellant was by appeal to the Secretary of the Treasury from the decision of his subordinate, and not to the courts. If the act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under existing laws or treaties, and was improperly excluded. But when Congress went further, and declared that in every case of an alien excluded by the decision of the appropriate immigration or customs officers "from admission into the United States under any law or treaty," such decision should be final, unless reversed by the Secretary of the Treasury, the authority of the courts to review the decision of the executive officers was taken away. *United States* v. *Rogers*, 65 Fed. Rep. 787. If the act of 1894, thus construed, takes away from the alien appellant any right given by previous laws or treaties to reënter the country, the authority of Congress to do even that cannot be questioned, although it is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction. *Chew Heong* v. *United States*, 112 U. S. 536, 539, 559; *Head Money Cases*, 112 U. S. 580, 599; *Whitney* v. *Robertson*, 124 U. S. 190, 195; *Chinese Exclusion Case*, 130 U. S. 581, 600. There is no room in the language of the act of 1894 to doubt that Congress intended that it should be interpreted as we have done in this case.

To avoid misapprehension, it is proper to say that the court does not now express any opinion upon the question whether,

under the facts stated in the application for the writ of *habeas corpus*, Lem Moon Sing was entitled, of right, under some law or treaty, to reënter the United States. We mean only to decide that that question has been constitutionally committed by Congress to named officers of the executive department of the government for final determination.

The judgment of the court below denying the application for the writ of habeas corpus is affirmed.

Mr. Justice Brewer dissented.

BABE BEARD *v.* UNITED STATES.

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

No. 842. Submitted March 13, 1895. — Decided May 27, 1895.

A man assailed on his own grounds, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control; and so long as there is no intent on his part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his own life, is not guilty of murder or manslaughter if death results to his antagonist from a blow given him under such circumstances.

The case is stated in the opinion.

Mr. John H. Rogers and *Mr. Ira D. Oglesby* for plaintiff in error.

Mr. Assistant Attorney General Dickinson for the United States.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff in error, a white man and not an Indian, was indicted in the Circuit Court of the United States for the

Western District of Arkansas for the crime of having killed and murdered in the Indian country, and within that District, one Will Jones, also a white person and not an Indian.

He was found guilty of manslaughter and, a motion for a new trial having been overruled, it was adjudged that he be imprisoned in Kings County Penitentiary, at Brooklyn, New York, for the term of eight years, and pay to the United States a fine of five hundred dollars.

The record contains a bill of exceptions embodying all the evidence, as well as the charge of the court to the jury, and the requests of the accused for instructions. To certain parts of the charge, and to the action of the court in refusing instructions asked by the defendant, exceptions were duly taken.

The principal question in the case arises out of those parts of the charge in which the court instructed the jury as to the principles of the law of self-defence.

There was evidence before the jury tending to establish the following facts:

An angry dispute arose between Beard and three brothers by the name of Jones — Will Jones, John Jones, and Edward Jones — in reference to a cow which a few years before that time, and just after the death of his mother, was set apart to Edward. The children being without any means for their support were distributed among their relatives, Edward being assigned to Beard, whose wife was a sister of Mrs. Jones. Beard took him into his family upon the condition that he should have the right to control him and the cow as if the lad were one of his own children, and the cow his own property. At the time Edward went to live with Beard he was only eight or nine years of age, poorly clad, and not in good physical condition.

After remaining some years with his aunt and uncle, Edward Jones left the Beard house, and determined, with the aid of his older brothers, to take the cow with him, each of them knowing that the accused objected to that being done.

The Jones brothers, one of them taking a shot-gun with him, went upon the premises of the accused for the purpose of taking the cow away, whether Beard consented or not.

But they were prevented by the accused from accomplishing that object, and he warned them not to come to his place again for such a purpose, informing them that if Edward Jones was entitled to the possession of the cow, he could have it, provided his claim was successfully asserted through legal proceedings instituted by or in his behalf.

Will Jones, the oldest of the brothers, and about 20 or 21 years of age, publicly avowed his intention to get the cow away from the Beard farm or kill Beard, and of that threat the latter was informed on the day preceding that on which the fatal difficulty in question occurred.

In the afternoon of the day on which the Jones brothers were warned by Beard not again to come upon his premises for the cow unless attended by an officer of the law, and in defiance of that warning, they again went to his farm, in his absence — one of them, the deceased, being armed with a concealed deadly weapon — and attempted to take the cow away, but were prevented from doing so by Mrs. Beard, who drove it back into the lot from which it was being taken.

While the Jones brothers were on the defendant's premises in the afternoon, for the purpose of taking the cow away, Beard returned to his home from a town near by — having with him a shot-gun that he was in the habit of carrying, when absent from home — and went at once from his dwelling into the lot, called the orchard lot, a distance of about 50 or 60 yards from his house and near to that part of an adjoining field or lot where the cow was, and in which the Jones brothers and Mrs. Beard were at the time of the difficulty.

Beard ordered the Jones brothers to leave his premises. They refused to leave. Thereupon Will Jones, who was on the opposite side of the orchard fence, ten or fifteen yards only from Beard, moved towards the latter with an angry manner and in a brisk walk, having his left hand (he being, as Beard knew, left-handed) in the left pocket of his trousers. When he got within five or six steps of Beard, the latter warned him to stop, but he did not do so. As he approached nearer the accused asked him what he intended to do, and he replied: "Damn you, I will show you," at the same time making a

movement with his left hand as if to draw a pistol from his pocket; whereupon the accused struck him over the head with his gun and knocked him down.

"Believing," the defendant testified, "from his demonstrations just mentioned that he intended to shoot me, I struck him over the head with my gun to prevent him killing me. As soon as I struck him his brother John, who was a few steps behind him, started towards me with his hands in his pocket. Believing that he intended to take part in the difficulty and was also armed, I struck him and he stopped. I then at once jumped over the fence, caught Will Jones by the lapel of the coat, turned him rather to one side, and pulled his left hand out of his pocket. He had a pistol, which I found in his pocket, grasped in his left hand, and I pulled his pistol and his left hand out together. My purpose in doing this was to disarm him, to prevent him from shooting me, as I did not know how badly he was hurt. My gun was loaded, having ten cartridges in the magazine. I could have shot him, but did not want to kill him, believing that I could knock him down with the gun and disarm him and protect myself without shooting him. After getting his pistol, John Jones said something to me about killing him, to which I replied that I had not killed him and did not try to do so, for if I had I could have shot him. He said my gun was not loaded; thereupon I shot the gun in the air to show him that it was loaded."

Dr. Howard Hunt, a witness on behalf of the government, testified that he called to see Will Jones soon after he was hurt, and found him in a serious condition; that he died from the effects of a wound given by the defendant; that the wound was across the head, rather on the right side, the skull being crushed by the blow. He saw the defendant soon after dressing the wound, and told him that the deceased's condition was serious, and that he, the witness, was sorry the occurrence had happened. The witness suggested to the accused that perhaps he had better get out of the way. The latter replied that he was sorry that it had happened, but that he acted in self-defence and would not go away. Beard seemed

a little offended at the suggestion that he should run off, and observed to the witness that the latter could not scare him, for he was perfectly justified in what he did. This witness further testified that he had known the defendant four or five years, was well acquainted in the neighborhood in which he lived, and knew his general reputation, which was that of a peaceable, law-abiding man.

The account we have given of the difficulty is not in harmony, in every particular, with the testimony of some of the witnesses, but it is sustained by what the accused and others testified to at the trial; so that, if the jury had found the facts to be as we have detailed them, it could not have been said that their finding was contrary to the evidence. At any rate, it was the duty of the court to tell the jury by what principles of law they should be guided, in the event they found the facts to be as stated by the accused.

Assuming then that the facts were as we have represented them to be, we are to inquire whether the court erred in its charge to the jury. In the view we take of the case, it will be necessary to refer to those parts only of the charge relating to the law of self-defence.

The court stated at considerable length the general rules that determine whether the killing of a human being is murder or manslaughter, and, among other things, said to the jury: "If these boys, or young men, or whatever you may consider them, went down there, and they were there unlawfully — if they had no right to go there — you naturally inquire whether the defendant was placed in such a situation as that he could kill for that reason. Of course, he could not. He could not kill them because they were upon his place. . . . And if these young men were there in the act of attempting the larceny of this cow and calf and the defendant killed because of that, because his mind was inflamed for the reason that they were seeking to do an act of that kind, that is manslaughter; that is all it is; there is nothing else in it; that is considered so far provocative as that it reduces the grade of the crime to manslaughter and no farther. If they had no intent to commit a larceny; if it was a bare, naked trespass; if they were there

under a claim of right to get this cow, though they may not have had any right to it, but in good faith they were exercising their claim of that kind, and Will Jones was killed by the defendant for that reason, that would be murder, because you cannot kill a man for bare trespass — you cannot take his life for a bare trespass — and say the act is mitigated."

After restating the proposition that a man cannot take life because of mere fear on his part, or in order that he may prevent the commission of a bare trespass, the court proceeded: "Now, a word further upon the proposition that I have already adverted to as to what was his duty at the time. If that danger was real, coming from the hands of Will Jones, or it was apparent as coming from his hands and as affecting this defendant by some overt act at the time, was the defendant called upon to avoid that danger *by getting out of the way* of it if he could? The court says he was. The court tells you that he was. There is but one place where he need not retreat any further, where he need not go away from the danger, and that is in his dwelling-house. He may be upon his own premises, and if a man, while so situated and upon his own premises, can do that which would reasonably put aside the danger short of taking life, if he can do that, I say, he is called upon to do so by retreating, *by getting out of the way* if he can, by avoiding a conflict that may be about to come upon him, and the law says that he must do so, and *the fact that he is standing upon his own premises* away from his own dwelling-house does not take away from him the exercise of the duty of avoiding the danger if he can with a due regard to his own safety *by getting away from there* or by resorting to some other means of less violence than those resorted to. Now, the rule as applicable to a man of that kind upon his own premises, upon his own property, *but outside of his dwelling-house*, is as I have just stated." Again: "You are to bear in mind that the first proposition of the law of self-defence was that the defendant in this case was in the lawful pursuit of his business — that is to say, he was doing what he had a right to do at the time. If he was not he deprives himself of the right of self-defence, and, no matter what his adversary may do, if he

by his own conduct creates certain conditions by his own wrongful conduct he cannot take advantage of such conditions created by his own wrongful act or acts. . . . Again, going to the place where the person slain is with a deadly weapon *for the purpose of provoking a difficulty or with the intent of having an affray.* Now, if a man does that, he is in the wrong, and he is cut off from the right of self-defence, no matter what his adversary may do, because the law says in the very language of these propositions relating to the law of self-defence that he must avoid taking life if he can with due regard to his own safety. Whenever he can do that he must do it; therefore, if he has an adversary and he knows that there is a bitter feeling, that there is a state of feeling that may precipitate a deadly conflict between himself and his adversary, while he has a right to pursue his usual daily avocations that are right and proper, going about his business, to go and do what is necessary to be done in that way, yet if he knows that condition I have named to exist and he goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray if it comes up, he is there to have it, and he acts for that purpose, the law says there is no self-defence for him. . . . If he went to the place where that young man was, armed with a deadly weapon, even if it was upon his own premises, with the purpose of provoking a difficulty with him, in which he might use that deadly weapon, or of having a deadly affray with him, it does not make any difference what was done by the young man, there is no self-defence for the defendant. The law of self-defence does not apply to a case of that kind, because he cannot be the creator of a wrong, of a wrong state of case, and then act upon it. Now, if either one of these conditions exist, I say, the law of self-defence does not apply in this case."

Later in the charge, the court recurred to the inquiry as to what the law demanded of Beard before striking the deceased with his gun, and said: "If at the time of this killing it be true that the deceased was doing an act of apparent or real deadly violence and that state of case existed, and yet that

the defendant at the time could have avoided the necessity of taking his life by the exercise of any other reasonable means and he did not do that, because he did not exercise other reasonable means that would have with equal certainty saved his life, but resorted to this dernier remedy, under those facts and circumstances the law says he is guilty of manslaughter. Now, let us see what that requires. It requires, first, that the proof must show that Will Jones was doing an act of violence or about to do it, or apparently doing it or about to do it, but that it was an act that the defendant could have escaped from by doing something else other than taking the life of Jones, *by getting out of the way of that danger*, as he was called upon to do, as I have already told you, *for he could not stand there as he could stand in his own dwelling-house*, and he must have reasonably sought to avoid that danger before he took the life of Jones, and if he did not do that, if you find that to be Jones' position from this testimony, and he could have done so, but did not do it, the defendant would be guilty of manslaughter when he took the life of Jones, because in that kind of a case the law says that the conduct of Jones would be so provocative as to reduce the grade of crime; yet, at the same time, it was a state of case that the defendant could have avoided without taking his life, and because he did not do it he is guilty of the crime of manslaughter." Further: "If it be true that Will Jones at the time he was killed was exercising deadly violence, or about to do so, or apparently exercising it, or apparently about to do so, and the defendant could have paralyzed the effect of that violence without taking the life of Jones, but he did not do it, but resorted to this deadly violence when he could have protected his own life without resorting to that dernier remedy — if that be the state of case, the law says he is guilty of manslaughter, because he is doing that which he had no right to do. This great law of self-defence commands him at all times to do that which he can do under the circumstances, to wit, exercise reasonable care to avoid the danger *by getting out of the way of it*, or by exercising less violence than that which will produce death and yet will be equally effective to secure his own life. If either of

these propositions exist, and they must exist to the extent I have defined to you, and the defendant took the life of Jones under these circumstances, the defendant would be guilty of manslaughter."

We are of opinion that the charge of the court to the jury was objectionable, in point of law, on several grounds.

There was no evidence tending to show that Beard went from his dwelling-house to the orchard fence *for the purpose* of provoking a difficulty, or with *the intent* of having an affray with the Jones brothers or with either of them. On the contrary, from the outset of the dispute, he evinced a purpose to avoid a difficulty or an affray. He expressed his willingness to abide by the law in respect to his right to retain the cow in his possession. He warned the Jones brothers, as he had a legal right to do, against coming upon his premises for the purpose of taking the cow away. They disregarded this warning, and determined to take the law into their own hands, whatever might be the consequences of such a course. Nevertheless, when Beard came to where they were, near the orchard fence, he did nothing to provoke a difficulty, and prior to the moment when he struck Will Jones with his gun he made no demonstration that indicated any desire whatever on his part to engage in an affray or to have an angry controversy. He only commanded them, as he had the legal right to do, to leave his premises. He neither used, nor threatened to use, force against them.

The court several times, in its charge, raised or suggested the inquiry whether Beard was in the lawful pursuit of his business, that is, doing what he had a right to do, when, after returning home in the afternoon, he went from his dwelling-house to a part of his premises near the orchard fence, just outside of which his wife and the Jones brothers were engaged in a dispute — the former endeavoring to prevent the cow from being taken away, the latter trying to drive it off the premises. Was he not doing what he had the legal right to do, when, keeping within his own premises and near his dwelling, he joined his wife who was in dispute with others, one of whom, as he had been informed, had already threatened to take

the cow away or kill him? We have no hesitation in answering this question in the affirmative.

The court also said: "The use of provoking language, or, it seems, resorting to any other device in order to get another to commence an assault so as to have a pretext for taking his life, agreeing with another to fight him with a deadly weapon, either one of these cases, if they exist as the facts in this case, puts the case in such an attitude that there is no self-defence in it." We are at a loss to understand why any such hypothetical cases were put before the jury. The jury must have supposed that, in the opinion of the court, there was evidence showing that Beard sought an opportunity to do physical harm to the Jones boys, or to some one of them. There was not the slightest foundation in the evidence for the intimation that Beard had used provoking language or resorted to any device in order to have a pretext to take the life of either of the brothers. Much less was there any reason to believe that there was an agreement to fight with deadly weapons.

But the court below committed an error of a more serious character when it told the jury, as in effect it did by different forms of expression, that if the accused could have saved his own life and avoided taking the life of Will Jones by retreating from and getting out of the way of the latter as he advanced upon him, the law made it his duty to do so; and if he did not, when it was in his power to do so without putting his own life or body in imminent peril, he was guilty of manslaughter. The court seemed to think if the deceased had advanced upon the accused while the latter was in his dwelling-house and under such circumstances as indicated the intention of the former to take life or inflict great bodily injury, and if, without retreating, the accused had taken the life of his assailant, having at the time reasonable grounds to believe, and in good faith believing, that his own life would be taken or great bodily harm done him unless he killed the accused, the case would have been one of justifiable homicide. To that proposition we give our entire assent. But we cannot agree that the accused was under any greater obligation, when on his own premises, near his dwelling-house, to retreat or run away

from his assailant, than he would have been if attacked within his dwelling-house. The accused being where he had a right to be, on his own premises, constituting a part of his residence and home, at the time the deceased approached him in a threatening manner, and not having by language or by conduct provoked the deceased to assault him, the question for the jury was whether, without fleeing from his adversary, he had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did, namely, strike the deceased with his gun, and thus prevent his further advance upon him. Even if the jury had been prepared to answer this question in the affirmative — and if it had been so answered the defendant should have been acquitted — they were instructed that the accused could not properly be acquitted on the ground of self-defence if they believed that, by retreating from his adversary, by "getting out of the way," he could have avoided taking life. We cannot give our assent to this doctrine.

The application of the doctrine of "retreating to the wall" was carefully examined by the Supreme Court of Ohio in *Erwin* v. *State*, 29 Ohio St. 186, 193, 199. That was an indictment for murder, the defendant being found guilty. The trial court charged the jury that if the defendant was in the lawful pursuit of his business at the time the fatal shot was fired, and was attacked by the deceased under circumstances denoting an intention to take life or to do great bodily harm, he could lawfully kill his assailant provided he used all means "*in his power*" otherwise to save his own life or prevent the intended harm, "such as retreating as far as he can, or disabling his adversary, without killing him, *if it be in his power;*" that if the attack was so sudden, fierce, and violent that a retreat would not diminish but increase the defendant's danger, he might kill his adversary without retreating; and further, that if from the character of the attack there was reasonable ground for defendant to believe, and he did honestly believe, that his life was about to be taken, or he was to suffer great bodily harm, and that he believed honestly that he would be in equal danger

by retreating, then, if he took the life of the assailant, he was excused. Of this charge the accused complained.

Upon a full review of the authorities and looking to the principles of the common law, as expounded by writers and courts of high authority, the Supreme Court of Ohio held that the charge was erroneous, saying: "It is true that all authorities agree that the taking of life in defence of one's person cannot be either justified or excused, except on the ground of *necessity;* and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question then is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the sole ground that he failed to fly from his assailant when he might safely have done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm. Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him; still the jury could not have acquitted if they found he had failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. In this case we think the law was not correctly stated."

In *Runyan* v. *State*, 57 Indiana, 80, 84, which was an indictment for murder, and where the instructions of the trial court involved the present question, the court said: "A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which

requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence. The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable. . . . It seems to us that the real question in the case, when it was given to the jury, was, was the defendant, under all the circumstances, justified in the use of a deadly weapon in repelling the assault of the deceased? We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm? On that question the law is simple and easy of solution, as has been already seen from the authorities cited above."

In East's Pleas of the Crown, the author, considering what sort of an attack it was lawful and justifiable to resist, even by the death of the assailant, says: "A man may repel force by force, in defence of his person, habitation or property, against one who manifestly intends or endeavors, *by violence or surprise*, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged *to retreat*, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing it is called justifiable self-defence; as, on the other hand, the killing by such felon of any person so lawfully defending himself will be murder. But a bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant in killing that other by way of prevention. There must be an actual danger at the time." p. 271. So in Foster's Crown Cases: "In the case of justifiable self-defence, the injured party may repel force with force in defence of his person,

habitation, or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable." c. 3, p. 273.

In Bishop's New Criminal Law, the author, after observing that cases of mere assault, and of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books, that one cannot justify the killing of another, though apparently in self-defence, unless he retreat to the wall or other interposing obstacle before resorting to this extreme right, says that "where an attack is made with murderous intent, the person attacked is under no duty to fly; he may stand his ground, and if need be, kill his adversary. *And it is the same where the attack is with a deadly weapon*, for in this case the person attacked may well assume that the other intends murder, whether he does in fact or not." Vol. 1, § 850. The rule is thus expressed by Wharton: "A man may repel force by force in the defence of his person, habitation, or property, against any one or many who manifestly intend and endeavor by violence or surprise to commit a known felony on either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if in the conflict between them he happen to kill him, such killing is justifiable." 2 Wharton on Crim. Law, § 1019, 7th rev. ed. Phila. 1874. See also *Gallagher* v. *State*, 3 Minnesota, 270, 273; *Pond* v. *People*, 8 Michigan, 150, 177; *State* v. *Dixon*, 75 N. C. 275, 295; *State* v. *Sherman*, 16 R. I. 631; *Fields* v. *State*, 32 N. E. Rep. 780; *Eversole* v. *Commonwealth*, 26 S. W. Rep. 816; *Haynes* v. *State*, 17 Georgia, 465, 483; *Long* v. *State*, 52 Mississippi, 23, 35; *Tweedy* v. *State*, 5 Iowa, 433; *Baker* v. *Commonwealth*, 19 S. W. Rep. 975; *Tingle* v. *Commonwealth*, 11 S. W. 812; 3 Rice's Ev. § 360.

In our opinion, the court below erred in holding that the accused, while on his premises, outside of his dwelling-house, was under a legal duty to get out of the way, if he could, of

his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused. The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

As the proceedings below were not conducted in accordance with these principles, the judgment must be reversed and the cause remanded with directions to grant a new trial.

Other objections to the charge of the court are raised by the assignments of error, but as the questions which they present may not arise upon another trial, they will not be now examined.

Judgment reversed.

IN RE DEBS, Petitioner.

ORIGINAL.

No. 11. Original. Argued March 25, 26, 1895. — Decided May 27, 1895.

The order of the Circuit Court finding the petitioners guilty of contempt, and sentencing them to imprisonment, was not a final judgment or decree.

The government of the United States has jurisdiction over every foot of soil within its territory, and acts directly upon each citizen.

While it is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers, among which are the

Statement of the Case.

power over interstate commerce and the power over the transmission of the mails.

The powers thus conferred are not dormant, but have been assumed and put into practical exercise by Congressional legislation.

In the exercise of those powers the United States may remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails.

While it may be competent for the government, through the executive branch and in the use of the entire executive power of the Nation, to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and the character of any of them, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain them, the jurisdiction of courts to interfere in such matters by injunction being recognized from ancient times and by indubitable authority.

Such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law, or by the fact that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; as the penalty for a violation of such injunction is no substitute for, and no defence to, a prosecution for criminal offences committed in the course of such violation.

The complaint filed in this case clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue, and under it the Circuit Court had power to issue its process of injunction.

Such an injunction having been issued and served upon the defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Rev. Stat. § 725, and to enter the order of punishment complained of.

The Circuit Court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court.

The court enters into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, on which the Circuit Court mainly relied to sustain its jurisdiction; but it must not be understood that it dissents from the conclusions of that court in reference to the scope of that act, but simply that it prefers to rest its judgment on the broader ground discussed in its opinion, believing it important that the principles underlying it should be fully stated and fully affirmed.

On July 2, 1894, the United States, by Thomas E. Milchrist, district attorney for the Northern District of Illinois, under the direction of Richard Olney, Attorney General, filed their

bill of complaint in the Circuit Court of the United States for the Northern District of Illinois against these petitioners and others. This bill set forth, among other things, the following facts: It named twenty-two railroad companies, and it alleged that they were engaged in the business of interstate commerce and subject to the provisions of the act of Congress of February 4, 1887, known as "the Interstate Commerce Act," and all other laws of the United States relating to interstate transportation of passengers and freight; that the number of passengers annually carried by them into the city of Chicago from other States than Illinois, and out of Chicago into other States than Illinois, was more than twelve millions, and in like manner that the freight so carried into and out of the city of Chicago, from and into other States than Illinois, amounted to many millions of tons; that each of the roads was under contract to carry, and in fact carrying, the mails of the United States; that all were by statute declared post roads of the government; that many were by special acts of Congress required at any and all times to carry the troops and military forces of the United States, and provisions, munitions, and general supplies therefor; and that two of them were in the hands of receivers appointed by the courts of the United States. It stated at some length the necessity of the continued and uninterrupted running of such interstate railroads for the bringing into the city of Chicago supplies for its citizens and for the carrying on of the varied industries of that city.

The bill further averred that four of the defendants, naming them, were officers of an association known as the American Railway Union; that in the month of May, 1894, there arose a difference or dispute between the Pullman Palace Car Company and its employés, as the result of which a considerable portion of the latter left the service of the car company; that thereafter the four officers of the railway union combined together, and with others, to compel an adjustment of such dispute, by creating a boycott against the cars of the car company; that, to make such boycott effective, they had already prevented certain of the railroads running out of Chicago from operating their trains, and were combining to extend

such boycott against Pullman sleeping cars by causing strikes among employés of all railroads attempting to haul the same. It charged knowledge on the part of the defendants of the necessity of the use of sleeping cars in the operation of the business of the railroads as common carriers, of the contracts for such use between the railroad companies and the car company, of the contracts, laws, and regulations binding the railway companies and the receivers to the carrying of the mails; also of the fact that sleeping cars were and of necessity must be carried upon the trains of said carriers with cars containing the mails; that with this knowledge they entered into a combination and conspiracy to prevent the railroad companies and the receivers, and each of them, from performing their duties as common carriers of interstate commerce, and in carrying into execution that conspiracy did induce various employés of the railway companies to leave the service of the companies, and prevent such companies and the receivers from securing other persons to take their places; that they issued orders, notifications, etc., to the members of the railway union to leave the service of the companies and receivers, and to prevent the companies and receivers from operating their trains; that they had asserted that they could and would tie up, paralyze, and break down any and every of said railway companies and receivers which did not accede to their demands; that in pursuance of the instructions, commands, and requests of said officers large numbers of the employés of the railway companies and receivers left their service.

Then followed these allegations:

"And your orator further charges that said defendants aimed and intended and do now aim and intend in and by the said conspiracy and combination, to secure unto themselves the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of the other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial or commercial enterprises save according to the will and with the consent of the defendants.

"Your orator further avers that in pursuance of said combination and conspiracy and to accomplish the purpose thereof as hereinbefore set forth, the said defendants Debs, Howard, Rogers, Keliher and others, officers of said American Railway Union, issued or caused to be issued the orders and directions as above set forth, and that in obedience of such orders and in pursuance of said conspiracy and combination, numerous employés of said railroad companies and receivers unitedly refused to obey the orders of said employers or to perform the usual duties of such service, and many others of such employés quit such service with the common purpose, and with the result of preventing said railroad companies and receivers from operating their said railroads and from transporting the United States mails, and from carrying on or conducting their duties as common carriers of interstate traffic.

"Your orator further avers that, pursuant to said combination and conspiracy, and under the direction as aforesaid of said officers and directors of said American Railway Union, said other defendants and other persons whose names are to your orator unknown, proceeded by collecting together in large numbers, by threats, intimidation, force and violence at the station grounds, yards and right of way of said railroad companies, respectively, in the State of Illinois, to prevent said railroad companies from employing other persons to fill the vacancies aforesaid; to compel others still employés of said railroad companies to quit such employment and to refuse to perform the duties of their service, and to prevent the persons remaining in such service and ready and willing to perform the duties of the same, from doing so.

"Your orator further avers that said defendants, in pursuance of said combination and conspiracy, acting under the direction of said officers and directors of said American Railway Union, did with force and violence at divers times and places within said State of Illinois and elsewhere, stop, obstruct and derail and wreck the engines and trains of said railroad companies, both passenger and freight, then and there engaged in interstate commerce and in transporting United States mails, by locking the switches of the railroad of said

railroad companies, by removing the spikes and rails from the track thereof, by turning switches and displacing and destroying signals, by assaulting and interfering with and disabling the switchmen and other employés of said railroad companies having charge of the signals, switches and tracks of said companies, and the movement of trains thereon, and in other manners by force and violence, depriving the employés of said railroad companies in charge of such trains of the control and management of the same, and by these and other unlawful means attempted to obtain and exercise absolute control and domination over the entire operations of said railroads."

The bill further set forth that there had become established in the city of Chicago a business conducted under the name of the Union Stock Yards, at which for many years immense numbers of live stock from States and Territories beyond the State of Illinois had been received, slaughtered, and converted into food products, and distributed to all quarters of the globe, and that all the large centres of population in the United States were in a great degree dependent upon those stock yards for their food supply of that character; that for the purpose of handling such live stock and the product thereof the company conducting such business operated certain railroad tracks, and that in pursuance of the combination and conspiracy aforesaid the four defendants, officers of the railway union, issued orders directing all the employés handling such railroad tracks to abandon such service.

To this was added the following:

"And your orator further alleges that in pursuance of the like combination and unlawful conspiracy, the said defendants and others combining and conspiring with them for the purpose of still further restraining and preventing the conduct of such business, have by menaces, threats and intimidation prevented the employment of other persons to take the place of the employés quitting the service of said company so operating said Union Stock Yards.

"And your orator further charges that by reason of said unlawful combination and conspiracy and the acts and doings aforesaid thereunder, the supply of coal and fuel for consump-

tion throughout the different States of the Union and of grain, breadstuffs, vegetables, fruits, meats and other necessaries of life, has been cut off, interrupted and interfered with, and the market therefor made largely unavailable, and dealers in all of said various products and the consumers thereof have been greatly injured, and trade and commerce therein among the States has been restrained, obstructed and largely destroyed."

The bill alleged that the defendants threatened and declared that they would continue to restrain, obstruct, and interfere with interstate commerce, as above set forth, and that they "will if necessary to carry out the said unlawful combination and conspiracy above set forth tie up and paralyze the operations of every railway in the United States, and the business and industries dependent thereon." Following these allegations was a prayer for an injunction. The bill was verified.

On presentation of it to the court an injunction was ordered commanding the defendants "and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following named railroads," (specifically naming the various roads named in the bill,) "as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the States; and from in any manner interfering with, hindering or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the States; and from in any manner interfering with, injuring or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce or the carriage of

the mails of the United States or the transportation of passengers or freight between or among the States; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the States, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the States; and from injuring or destroying any part of the tracks, roadbed, or road, or permanent structures of said railroads; and from injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads; and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the States, or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence any of the employés of any said railroads who are employed by such railroads, and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the States,

to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force, or violence from entering the service of any of said railroads and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the States; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the States; and from ordering, directing, aiding, assisting, or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

"And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the service upon them respectively of the writ of subpœna herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting or printing, and after service of subpœna upon any of said defendants named herein shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction."

This injunction was served upon the defendants — at least upon those who are here as petitioners. On July 17 the district attorney filed in the office of the clerk of said court an information for an attachment against the four defendants, officers of the railway union, and on August 1 a similar information against the other petitioners. A hearing was had before the Circuit Court, and on December 14 these petitioners were found guilty of contempt, and sentenced to

imprisonment in the county jail for terms varying from three to six months. 64 Fed. Rep. 724. Having been committed to jail in pursuance of this order they, on January 14, 1895, applied to this court for a writ of error and also one of *habeas corpus*. The former was, on January 17, denied, on the ground that the order of the Circuit Court was not a final judgment or decree. The latter is now to be considered.

Mr. Lyman Trumbull for petitioners.

I. The extraordinary proceeding under which the prisoners were deprived of liberty, was commenced by the filing of a bill in equity in the name of the United States, by a district attorney, under the direction of the Attorney General. The bill is unsigned by any one, and has attached to it an affidavit of George Q. Allen, an unknown person, having no connection, so far as the record shows, with the case, stating that he has read the bill, and "believes the statements therein contained are true." The bill was filed July 2. The same day an injunction was issued, without notice to anybody, against the prisoners and unknown persons, and the next day was served on some of the prisoners. The bill states that twenty-two railroads and railroad companies, and among them the Union Stock Yard and Transit Company, were chartered and organized for the purpose of continuously doing the business of common carriers of passengers and freight generally, and were doing such business among different States. So far from having such power as alleged, the Union Stock Yard and Transit Company, one of the roads named, was organized for the purpose of locating and conducting stock yards and connecting them by rail with railroads entering Chicago on the south side, and transporting between said cattle yards, "cattle and live stock and persons accompanying the same," and by the 11th section of its charter it is declared: "Nothing in this act contained shall be taken or construed as conferring upon the company hereby created any power or authority to maintain or operate a railroad for the conveyance of passengers or freight within the city of Chicago."

A large part of the bill is devoted to a statement of the amount of business done at the Union Stock Yards, the quitting of work by the employés of the company, the handling of live stock and its conversion into food, etc.

The bill states that the prisoners are officers and members of an organization known as the American Railway Union; that in May, 1894, a dispute arose between the Pullman Palace Car Company and its employés which resulted in the employés leaving the service of the company; that the prisoners, officers of the American Railway Union combining together, and with others unknown, with the purpose to compel an adjustment of the said difference and dispute between said Pullman Co. and its employés, caused it to be given out through the newspapers of Chicago, generally, that the American Railway Union would at once create a boycott against the cars manufactured by said Pullman Palace Co., and that in order to make said boycott effective, the members of the American Railway Union who were some of them employed as trainmen or switchmen, or otherwise, in the service of the railroads mentioned, which railroads or some of them are accustomed to haul the sleeping cars manufactured by the Pullman Palace Car Co., would be directed to refuse to perform their usual duties for said railroad companies and receivers in case said railroad companies thereafter attempted to haul Pullman sleeping cars.

Such is the gist of the bill. All that is subsequently alleged as to what was done by the prisoners, was for the purpose of compelling an adjustment of the difference between the Pullman Company and its employés. To accomplish this, the American Railway Union called upon its members to quit work for the companies which had persisted in hauling the Pullman cars. Was there anything unlawful in this? If not, then the prisoners and the members of the American Railway Union were engaged in no unlawful combination or conspiracy. The allegation that the prisoners, officers and directors of the American Railway Union did issue and promulgate certain orders and requests to the members of the union in the service of certain railway companies in pursuance of said

unlawful purpose or conspiracy, did not make the purpose unlawful, when the facts stated in the bill show that the purpose was not unlawful. All that the prisoners are charged with threatening to do, or having done, was for the purpose, primarily, of bringing about an adjustment of the differences between the Pullman Company and its employés. It is only incidentally in pursuit of this lawful purpose that prisoners are charged with obstructing commerce.

The boycott of the Pullman sleepers was, as the bill shows, not to obstruct commerce, but for an entirely different purpose.

It was not unlawful for the American Railway Union to call off the members of the organization, although it might incidentally affect the operation of the railroads. Refusing to work for a railroad company is no crime, and though such action may incidentally delay the mails or interfere with interstate commerce, it being a lawful act, and not done for that purpose, is no offence.

II. In the proceeding now before the court the main question is whether the bill states a case over which a court of equity has jurisdiction; if not, then the injunction was void and the prisoners are entitled to their discharge.

This court has often said that equity jurisdiction of the Federal courts is such as was exercised by the high court of chancery of England at the time of the adoption of the Constitution, or has been conferred upon them by Congress. *Mills* v. *Cohn*, 150 U. S. 202.

This is not a bill by the owner of property to prevent an irreparable injury. The government does not own the railroads. It is a bill by the government to prevent interference with the private property of the citizen, lest such interference restrain commerce among the States.

It was said by this court, (*License Tax Cases*, 5 Wall. 470,) alluding to the internal commerce or domestic trade of the States: "Over this commerce Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of

powers clearly granted to the legislature." *Genesee Chief*, 12 How. 443, 452; *Veazie* v. *Moor*, 14 How. 568.

The chancery court of England entertained no such jurisdiction when the Constitution was adopted.

If the prisoners were guilty of an offence against the United States by any acts which interfered with the transportation of the mails, the laws provide for their punishment; but equity has no jurisdiction to grant an injunction to stay proceedings in a criminal matter. "If they did," said Chief Justice Holt, "the court of Queen's Bench would break it, and protect any that would proceed in contempt of it." Accordingly, in the case of *Lord Montague* v. *Dudman*, Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a mandamus issued to compel the lord of a manor to hold a court. "The court," he said, "has no jurisdiction to grant an injunction to stay proceedings on a mandamus, or on an indictment, or an information, or a writ of prohibition." 3 Perkins' ed. Daniell's Ch. Pr. 1721.

III. It is not in the power of Congress to confer upon a court of equity jurisdiction unless of an equitable nature, which jurisdiction over crimes is not. The Constitution recognizes and confers upon the judicial department jurisdiction in certain cases in law and equity, and provides that trial of all crimes, except in cases of impeachment, shall be by jury, and in common law cases preserves the right of trial by jury. It is not competent for Congress to break down this distinction between law and equity by conferring upon courts of equity, jurisdiction of criminal and common law cases and thereby deny parties the right to a jury trial.

The act to protect trade and commerce against unlawful restraints and monopolies does not apply to the case stated in the bill. If it does, then it is unconstitutional. If a court of equity is authorized to restrain and prevent persons from the commission of crimes or misdemeanors prohibited by law, it must have the power to enforce its restraining order. In this case some of the parties are sentenced to imprisonment for six months, and for what? For doing some of the things forbidden by a criminal statute. If they have done none of the

things forbidden, they have not violated the injunction, for it could only restrain them from doing what the law forbade. It follows that by indirection a court of equity under its assumed jurisdiction to issue injunctions and punish for contempts, is made to execute a criminal statute and deprive persons of their liberty without a jury trial. This a court of equity has no power to do, nor is it competent for Congress to confer such a power on a court of equity.

Mr. Assistant Attorney General Whitney for the United States.

Mr. S. S. Gregory for the petitioners.

Mr. Edwin Walker for the United States.

Mr. Attorney General for the United States.

Mr. C. S. Darrow for the petitioners.

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

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty.

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

"No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 424.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." Chief Justice Chase in *Lane County* v. *Oregon*, 7 Wall. 71, 76.

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to

it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.'" Mr. Justice Bradley in *Ex parte Siebold*, 100 U. S. 371, 395. See also, *Schooner Exchange* v. *McFaddon*, 7 Cranch, 116, 136; *Cohens* v. *Virginia*, 6 Wheat. 264, 413; *Legal Tender Cases*, 12 Wall. 457, 555; *Tennessee* v. *Davis*, 100 U. S. 257; *The Chinese Exclusion Case*, 130 U. S. 581; *In re Neagle*, 135 U. S. 1; *Logan* v. *United States*, 144 U. S. 263; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *In re Quarles*, *ante*, 532.

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. Article I, section 8, of the Constitution provides that "the Congress shall have power. . . . Third, to regulate commerce with foreign nations and among the several States, and with the Indian tribes. . . . Seventh, to establish post offices and post roads."

Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by for the present all that legislation in respect to commerce by water, and considering only that which bears upon railroad interstate transportation, (for this is the specific matter involved in this case,) these acts may be noticed: First, that of June 15, 1866, c. 124, 14 Stat. 66, carried into the Revised Statutes as section 5258, which provides:

"Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore, *Be it enacted by the*

Senate and House of Representatives of the United States of America in Congress assembled, That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

Second. That of March 3, 1873, c. 252, 17 Stat. 584, (Rev. Stat. §§ 4386 to 4389,) which regulates the transportation of live stock over interstate railroads. Third. That of May 29, 1884, c. 60, § 6, 23 Stat. 31, 32, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4, 1887, c. 104, 24 Stat. 379, with its amendments of March 2, 1889, c. 382, 25 Stat. 855, and February 10, 1891, c. 128, 26 Stat. 743, known as the "interstate commerce act," by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the sixteenth section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1, 1888, c. 1063, 25 Stat. 501, providing for arbitration between railroad interstate companies and their employés; and, sixth, the act of March 2, 1893, c. 196, 27 Stat. 531, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions.

Under the power vested in Congress to establish post offices and post roads, Congress has, by a mass of legislation, established the great post office system of the country, with all its detail of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the prices of carriage, and also prescribing penalties for all offences against it.

Obviously these powers given to the national government over interstate commerce and in respect to the transportation

of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offences against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "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." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation

of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. In *Stamford* v. *Stamford Horse Railroad Co.*, 56 Connecticut, 381, an injunction was asked by the borough to restrain the company from laying down its track in a street of the borough. The right of the borough to forcibly remove the track was insisted upon as a ground for questioning the jurisdiction of a court of equity, but the court sustained the injunction, adding: "And none the less so because of its right to remove

the track by force. As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. In some cases of nuisance and in some cases of trespass the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter."

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. *Searight* v. *Stokes*, 3 How. 151, 169, arose upon a compact between the United States and the State of Pennsylvania in respect to the Cumberland Road, which provided, among other things, "that no toll shall be

received or collected for the passage of any wagon or carriage laden with the property of the United States;" the question being whether a carriage employed in transporting the mails of the United States was one "laden with the property of the United States," and it was held that it was, the court, by Chief Justice Taney, saying: "The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of Congress, consists of communications to or from the officers of the executive departments, or members of the legislature, on public service, or in relation to matters of public concern. . . . We think that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact."

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court. In *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 285, was presented an application of the United States to cancel and annul a patent for land on the ground that it was obtained by fraud or mistake. The right of the United States to maintain such a suit was affirmed, though it was held that if the controversy was really one only between individuals in respect to their claims to property the government ought not to be permitted to interfere, the court saying: "If it be a question of property a case must be made in which the court can afford a remedy in

regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

This language was relied upon in the subsequent case of *United States* v. *Bell Telephone Company*, 128 U. S. 315, 367, which was a suit brought by the United States to set aside a patent for an invention on the ground that it had been obtained by fraud or mistake, and it was claimed that the United States, having no pecuniary interest in the subject-matter of the suit, could not be heard to question the validity of the patent. But this contention was overruled, the court saying, in response to this argument, after quoting the foregoing language from the *San Jacinto case:* "This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded

from the jurisdiction of the court by want of interest in the government of the United States."

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.

As said in *Gilman* v. *Philadelphia*, 3 Wall. 713, 724: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."

See also the following authorities in which at the instance of

the State, or of some municipality thereof within whose limits the obstructed highway existed, a like power was asserted: *Stamford* v. *Stamford Horse Railroad Co.*, 56 Connecticut, 381; *People* v. *Vanderbilt*, 28 N. Y. 396; *State* v. *Dayton & Southeastern Railroad*, 36 Ohio St. 434; *Springfield* v. *Connecticut River Railroad*, 4 Cush. 63; *Attorney General* v. *Woods*, 108 Mass. 436; *Easton and Amboy Railroad Co.* v. *Greenwich*, 25 N. J. Eq. 565; *Stearns County* v. *St. Cloud, Mankato and Austin Railroad*, 36 Minnesota, 425; *Rio Grande Railroad Co.* v. *Brownsville*, 45 Texas, 88; *Philadelphia* v. *13th & 15th Street Passenger Railway Co.*, 8 Phil. 648. Indeed, the obstruction of a highway is a public nuisance, 4 Bl. Com. 167,* and a public nuisance has always been held subject to abatement at the instance of the government. *Attorney General* v. *Tudor Ice Co.*, 104 Mass. 239, 244 *Attorney General* v. *Jamaica Pond Aqueduct Corporation*, 133 Mass. 361; *Village of Pine City* v. *Munch*, 42 Minnesota, 342; *State* v. *Goodnight*, 70 Texas, 682.

It may not be amiss to notice a few of the leading cases. *City of Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, 98, was a bill filed by the plaintiff to restrain the construction of an aqueduct across the Potomac River. While under the facts of that case the relief prayed for was denied, yet, the jurisdiction of the court was sustained. After referring to the right to maintain an action at law for damages, it was said:

"Besides this remedy at law, it is now settled, that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the Attorney General. This jurisdiction seems to have been acted on with great caution and hesitancy. . . . Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it."

State of Pennsylvania v. *Wheeling Bridge Co.*, 13 How. 518, was a bill filed by the State of Pennsylvania to enjoin the erection of a bridge over the Ohio River within the limits of the State of Virginia. As the alleged obstruction was not within the State of Pennsylvania, its right to relief was only that of an individual in case of a private nuisance, and it was said, on page 564 :

"The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

"Such a proceeding is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And, in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the State of Virginia. The Ohio being a navigable stream, subject to the commercial power of Congress, and over which that power has been exerted, if the river be within the State of Virginia, the commerce upon it, which extends to other States, is not within its jurisdiction; consequently, if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it could afford no justification to the bridge company."

Coosaw Mining Co. v. *South Carolina*, 144 U. S. 550, was a bill filed by the State in one of its own courts to enjoin the digging, mining, and removing phosphate rock and deposits in the bed of a navigable river within its territories. The case was removed by the defendant to the Federal court, and in that court the relief prayed for was granted. The decree of the Circuit Court was sustained by this court, and in the opinion by Mr. Justice Harlan, the matter of equity jurisdiction is discussed at some length, and several cases cited, among them *Attorney General* v. *Richards*, 2 Anstr. 603; *Attorney*

General v. *Forbes*, 2 My. & Cr. 123; *Gibson* v. *Smith*, 2 Atk. 182; *Attorney General* v. *Jamaica Pond Aqueduct Corporation*, 133 Mass. 361. From *Attorney General* v. *Forbes* was quoted this declaration of the Lord Chancellor: "Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbors; and the Court of Exchequer, as well as this court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbors and public roads; and, in short, generally to prevent public nuisances." And from *Attorney General* v. *Jamaica Pond Aqueduct* these words of the Supreme Court of the State of Massachusetts: "There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. . . . If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the Attorney General to restrain and prevent the mischief." An additional case, not noticed in that opinion, may also be referred to, *Attorney General* v. *Terry*, L. R. 9 Ch. 423, in which an injunction was granted against extending a wharf a few feet out into the navigable part of a river, Mellish, L. J., saying: "If this is an indictable nuisance there must be a remedy in the Court of Chancery, and that remedy is by injunction," and James, L. J., adding: "I entirely concur. Where a public body is entrusted with the duty of being conservators of a river, it is their duty to take proceedings for the protection of those who use the river."

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to

waterways — the natural highways of the country — and not over artificial highways such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. Perhaps the first act in the course of such legislation is that heretofore referred to, of June 14, 1866, but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce. The national government has no separate dominion over a river within the limits of a State; its jurisdiction there is like that over land within the same State. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. The great case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 197, in which the control of Congress over inland waters was asserted, rested that control on the grant of the power to regulate commerce. The argument of the Chief Justice was that commerce includes navigation, "and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" In order to fully regulate commerce with foreign nations it is essential that the power of Congress does not stop at the borders of the nation, and equally so as to commerce among the States:

"The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies."

See also *Gilman* v. *Philadelphia*, 3 Wall. 713, 725, in which it was said: "Wherever 'commerce among the States' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent

years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

It is said that seldom have the courts assumed jurisdiction to restrain by injunction in suits brought by the government, either state or national, obstructions to highways, either artificial or natural. This is undoubtedly true, but the reason is that the necessity for such interference has only been occasional. Ordinarily the local authorities have taken full control over the matter, and by indictment for misdemeanor, or in some kindred way, have secured the removal of the obstruction and the cessation of the nuisance. As said in *Attorney General* v. *Brown*, 24 N. J. Eq. (9 C. E. Green) 89, 91: "The jurisdiction of courts of equity to redress the grievance of public nuisances by injunction is undoubted and clearly established; but it is well settled that, as a general rule, equity will not interfere, where the object sought can be as well attained in the ordinary tribunals. *Attorney General* v. *New Jersey Railroad*, 2 C. E. Green, (17 N. J. Eq.,) 136; *Jersey City* v. *City of Hudson*, 2 Beasley, (13 N. J. Eq.,) 420, 426; *Attorney*

General v. *Heishon*, 3 C. E. Green, (18 N. J. Eq.,) 410; *Morris & Essex Railroad* v. *Prudden*, 5 C. E. Green, (20 N. J. Eq.,) 530, 532; High on Injunctions, § 521. And because the remedy by indictment is so efficacious, courts of equity entertain jurisdiction in such cases with great reluctance, whether their intervention is invoked at the instance of the attorney general, or of a private individual who suffers some injury therefrom distinct from that of the public, and they will only do so where there appears to be a necessity for their interference. *Rowe* v. *The Granite Bridge Corporation*, 21 Pick. 340, 347; *Morris & Essex Railroad* v. *Prudden*, *supra*. The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. 3 Daniell's Ch. Pr. 3d ed. Perkins's, 1740." Indeed, it may be affirmed that in no well-considered case has the power of a court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of the particular case. Story's Eq. Jur. §§ 921, 923, 924; Pomeroy's Eq. Jur. § 1349; High on Injunctions, §§ 745 and 1554; 2 Daniell's Ch. Pl. and Pr. 4th ed. p. 1636.

That the bill filed in this case alleged special facts calling for the exercise of all the powers of the court is not open to question. The picture drawn in it of the vast interests involved, not merely of the city of Chicago and the State of Illinois, but of all the States, and the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all the powers of the courts. If ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations.

The difference between a public nuisance and a private nui-

sance is that the one affects the people at large and the other simply the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. Of course, circumstances may exist in one case, which do not in another, to induce the court to interfere or to refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance. True, many more suits are brought by individuals than by the public to enjoin nuisances, but there are two reasons for this. First, the instances are more numerous of private than of public nuisances; and, second, often that which is in fact a public nuisance is restrained at the suit of a private individual, whose right to relief arises because of a special injury resulting therefrom.

Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the theatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. Thus, in *Cranford* v. *Tyrrell*, 128 N. Y. 341, an injunction to restrain the defendant from keeping a house of ill-fame was sustained, the court saying, on page 344: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner." And in *Mobile* v. *Louisville & Nashville Railroad*, 84 Alabama, 115, 126, is a similar declaration in these words: "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable

injury which will result from the failure or inability of a court of law to redress such rights."

The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offences which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defence to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here, the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offences alleged in the bill of complaint, of derailing and wrecking engines and trains, assaulting and disabling employés of the railroad companies, it will be no defence to such prosecution that they disobeyed the orders of injunction served upon them and have been punished for such disobedience.

Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that "it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts," and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, that "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And

this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. In the *Case of Yates*, 4 Johns. 314, 369, Chancellor Kent, then Chief Justice of the Supreme Court of the State of New York, said: "In the *Case of The Earl of Shaftesbury*, 2 St. Trials, 615; *S. C.* 1 Mod. 144, who was imprisoned by the House of Lords for 'high contempts committed against it,' and brought into the King's Bench, the court held that they had no authority to judge of the contempt, and remanded the prisoner. The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of the *Queen* v. *Paty and others*, and of the *King* v. *Crosby*." And again, on page 371, "Mr. Justice Blackstone pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of Parliament, and the courts of Westminster Hall, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof belonged exclusively, and without interfering, to each respective court." In *Watson* v. *Williams*, 36 Mississippi, 331, 341, it was said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it." In *Cart-*

wright's Case, 114 Mass. 230, 238, we find this language: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." See also *United States* v. *Hudson*, 7 Cranch, 32; *Anderson* v. *Dunn*, 6 Wheat. 204; *Ex parte Robinson*, 19 Wall. 505; *Mugler* v. *Kansas*, 123 U. S. 623, 672; *Ex parte Terry*, 128 U. S. 289; *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36, in which Mr. Justice Miller observed: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it;" *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 488. In this last case it was said "surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury."

In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.

Further, it is said by counsel in their brief:

"No case can be cited where such a bill in behalf of the sovereign has been entertained against riot and mob violence, though occurring on the highway. It is not such fitful and temporary obstruction that constitutes a nuisance. The strong hand of executive power is required to deal with such lawless demonstrations.

"The courts should stand aloof from them and not invade executive prerogative, nor even at the behest or request of the executive travel out of the beaten path of well-settled judicial authority. A mob cannot be suppressed by injunction; nor can its leaders be tried, convicted, and sentenced in equity.

"It is too great a strain upon the judicial branch of the

government to impose this essentially executive and military power upon courts of chancery."

We do not perceive that this argument questions the jurisdiction of the court, but only the expediency of the action of the government in applying for its process. It surely cannot be seriously contended that the court has jurisdiction to enjoin the obstruction of a highway by one person, but that its jurisdiction ceases when the obstruction is by a hundred persons. It may be true, as suggested, that in the excitement of passion a mob will pay little heed to processes issued from the courts, and it may be, as said by counsel in argument, that it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late civil war. It is doubtless true that *inter arma leges silent*, and in the throes of rebellion or revolution the processes of civil courts are of little avail, for the power of the courts rests on the general support of the people and their recognition of the fact that peaceful remedies are the true resort for the correction of wrongs. But does not counsel's argument imply too much? Is it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil process of the courts? We find in the opinion of the Circuit Court a quotation from the testimony given by one of the defendants before the United States Strike Commission, which is sufficient answer to this suggestion:

"As soon as the employés found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work.

. . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, . . . not by the army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of our employés."

Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decisions. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and States.

It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tended to show that the defendants were engaged in such obstructions.

A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defence of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson

which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the coöperation of a mob, with its accompanying acts of violence.

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of

injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail — an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Revised Statutes, which grants power "to punish, by fine or imprisonment, . . . disobedience, . . . by any party . . . or other person, to any lawful writ, process, order, rule, decree or command," and enter the order of punishment complained of; and, finally, that, the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Terry*, 128 U. S. 289, 305; *In re Swan*, 150 U. S. 637; *United States* v. *Pridgeon*, 153 U. S. 48.

We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.

The petition for a writ of *habeas corpus* is

Denied.

POLLOCK *v.* FARMERS' LOAN AND TRUST COMPANY. (Rehearing.)

HYDE *v.* CONTINENTAL TRUST COMPANY. (Rehearing.)

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

Nos. 893, 894. Argued May 6, 7, 8, 1895. — Decided May 20, 1895.

Hylton v. *United States*, 3 Dall. 171, further considered, and, in view of the historical evidence cited, shown to have only decided that the tax on carriages involved was an excise, and was therefore an indirect tax.

In distributing the power of taxation the Constitution retained to the States the absolute power of direct taxation, but granted to the Federal government the power of the same taxation upon condition that, in its exercise, such taxes should be apportioned among the several States according to numbers; and this was done, in order to protect to the States, who were surrendering to the Federal government so many sources of income, the power of direct taxation, which was their principal remaining resource.

It is the duty of the court in this case simply to determine whether the income tax now before it does or does not belong to the class of direct taxes, and if it does, to decide the constitutional question which follows accordingly, unaffected by considerations not pertaining to the case in hand.

Taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Taxes on personal property, or on the income of personal property, are likewise direct taxes.

The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

THESE cases were decided on the 8th of April, 1895, 157 U. S. 429. Thereupon the appellants filed a petition for a rehearing as follows, entitled in the two cases:

Rehearing.

To the Honorable the Justices of the Supreme Court of the United States:

Charles Pollock and Lewis H. Hyde, the appellants in these causes, respectfully present their petition for rehearing, and submit the following reasons why their prayer should be granted:

I. The question involved in these cases was as to the constitutionality of the provisions of the tariff act of August 15, 1894, (sections 27 to 37,) purporting to impose a tax upon incomes. The court has held that the same are unconstitutional, so far as they purport to impose a tax upon the rent or income of real estate and income derived from municipal bonds. It has, however, announced that it was equally divided in opinion as to the following questions, and has expressed no opinion in regard to them:

(1) Whether the void provisions invalidate the whole act.

(2) Whether, as to the income from personal property as such, the act is unconstitutional as laying direct taxes.

(3) Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity.

The court has reversed the decree of the Circuit Court and remanded the case, with directions to enter a decree in favor of complainant in respect only of the voluntary payment of the tax on the rents and income of defendant's real estate and that which it holds in trust, and on the income from the municipal bonds owned or so held by it.

While, therefore, the two points above stated have been decided, there has been no decision of the remaining questions regarding the constitutionality of the act, and no judgment has been announced authoritatively establishing any principle for interpretation of the statute in those respects. *Etting* v. *Bank of the United States*, 11 Wheat. 59, 78; *Durant* v. *Essex Co.*, 7 Wall. 107, 113.

This court, having been established by the Constitution, and its judicial power extending to all cases in law and equity arising under the Constitution and laws of the United States, must necessarily be the ultimate tribunal for the determination of these questions. In all cases in which such questions

may arise, there can, therefore, be no authoritative decision in reference to the same except by this court.

II. The court early in its history adopted the practice of requiring, if practicable, constitutional questions to be heard by a full court in order that the judgment in such case might, if possible, be the decision of the majority of the whole court.

In *Briscoe* v. *Commonwealth Bank*, 8 Pet. 118, and *City of New York* v. *Miln*, 8 Pet. 120, 122, this rule was announced by Chief Justice Marshall in the following language:

"The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

The same cases were again called at the next term of the court, and the Chief Justice said the court could not know whether there would be a full court during the term; but as the court was then composed, the constitutional cases would not be taken up (9 Pet. 85). In a note to the cases upon that page, it is stated that during that term, the court was composed of six judges, the full court at the time being seven; there was then a vacancy occasioned by the resignation of Mr. Justice Duval, which had not yet been filled.

The rule laid down by Chief Justice Marshall has been frequently followed. Reference may be made to the case of *Home Insurance Company* v. *New York*, 119 U. S. 129, 148. Mr. Chief Justice Waite there announced that the judgment of the Supreme Court of the State of New York was affirmed by a divided court. At the time, Mr. Justice Woods was ill and absent during the whole of the term, and took no part in any of the cases argued at that term. There were, therefore, only eight members of the court present. A petition for reargument was presented upon the ground that the principle announced by Mr. Chief Justice Marshall should be followed,

and that the constitutional question involved was sufficiently important to demand a decision concurred in by a majority of the whole court. The petition was granted, 122 U. S. 636, and the case was not reargued until the bench was full. 134 U. S. 594, 597. This practice is recognized as established in Phillips' Practice, at page 380.

III. It is respectfully submitted that no case could arise more imperatively requiring the application of the rule than the present. The precise question involved is the constitutionality of an act of Congress affecting the citizens of the country generally. That act has been held unconstitutional in important respects; its constitutionality has not been authoritatively decided as to the remaining portions. These complainants and appellants may well urge, that these serious constitutional questions should be finally decided before their trustee expends their funds in voluntary payment of the tax. In addition, it is manifest that, until some decision is reached, the courts will be overwhelmed with litigation upon these questions, and the payment and collection of the tax will be most seriously embarrassed.

Every tax payer to any considerable extent will pay the tax under protest and sue to recover the same back, and if necessary sue out his writ of error to this court. The court will of necessity be burdened with rearguments of these questions without number until they are finally settled. Still further, as the matter now stands, it has been decided that a tax upon the income of land is unconstitutional, while the court has made no decision as to the validity of the tax upon income of personal property. Serious questions have, therefore, already arisen as to what is, in fact, to be deemed the income of real estate, and what is the income of real and what of personal property, in cases where both are employed in the production of the same income.

Your petitioners, therefore, respectfully pray that these cases be restored to the docket and a reargument be ordered as to the questions upon which the court was evenly divided in opinion. In case, however, this motion should be denied, your petitioners pray that the mandate be amended by order-

ing a new trial in the court below, so that the court below may now determine the questions (1) whether or not the invalidity of the statute in the respects already specified renders the same altogether invalid, and (2) whether or not the act is constitutional in the respects not decided by this court.

The undersigned, members of the bar of this honorable court, humbly conceive that it is proper that the appeals herein should be reheard by this court, if this court shall see fit so to order, and they therefore respectfully certify accordingly.

Washington, April 15, 1895.

JOSEPH H. CHOATE, WILLIAM D. GUTHRIE,
CLARENCE A. SEWARD, DAVID WILLCOX,
BENJAMIN H. BRISTOW, CHARLES STEELE,
Of counsel for appellants.

To this petition *Mr. Attorney General* made the following suggestion on the part of the United States:

The United States respectfully represents that, if a rehearing is granted in the above-entitled cases, the rehearing should cover all the legal and constitutional questions involved, and not merely those as to which the court are equally divided.

I. Whether a tax on incomes generally, inclusive of rents and interest or dividends from investments of all kinds, is or is not a direct tax within the meaning of the Federal Constitution is a matter upon which, as an original question, the government has really never been heard.

Its position at the argument was that the question had been settled — by an exposition of the Constitution practically contemporaneous with its adoption — by a subsequent unbroken line of judicial precedents — by the concurring and repeated action of all the departments of the government — and by the consensus of all text writers and authorities by whom the subject has heretofore been considered.

II. The importance to the government of the new views of its taxing power, announced in the opinion of the Chief Justice, can hardly be exaggerated.

First. Pushed to their logical conclusion, they practically

exclude from the direct operation of the power all the real estate of the country and all its invested personal property. They exclude it because, if realty and personalty are taxable only by the rule of apportionment, the inevitable inequalities resulting from such a plan of taxation are so gross and flagrant as to absolutely debar any resort to it.

That such inequalities must result is practically admitted, the only suggestion in reply being that the power to directly tax realty and personalty was not meant for use as an ordinary, every-day power; that the United States was expected to rely for its customary revenues upon duties, imposts, and excises; and that it was meant it should impose direct taxes only in extraordinary emergencies and as a sort of *dernier resort.*

It is submitted that a construction of the Constitution of such vital importance in itself and requiring in its support an imputation to its framers of a specific purpose which nothing in the text of the Constitution has any tendency to reveal, cannot be too carefully considered before being finally adopted.

Second. Though of minor consequence, it is certainly relevant to point out that, if the new exposition of the Constitution referred to is to prevail, the United States has under previous income-tax laws collected vast sums of money which on every principle of justice it ought to refund, and which it must be assumed that Congress will deem itself bound to make provision for refunding by appropriate legislation.

Respectfully submitted.

RICHARD OLNEY,
Attorney General.

Thereupon the following announcement was made, May 6, 1895.

THE CHIEF JUSTICE. In these cases appellants made application for a rehearing as to those propositions upon which the court was equally divided, whereupon the Attorney General presented a suggestion that if any rehearing were granted it should embrace the whole case. Treating this suggestion as amounting in itself to an application for a rehearing, and not desiring to restrict the scope of the argument, we set down

both applications to be heard to-day before a full bench, which the anticipated presence of our brother Jackson, happily realized, enabled us to do. No further argument will be desired. We were obliged, however, to limit the number of counsel to two on each side; but as to the time, we await the suggestions of counsel.

Five hours were then granted to each side in the argument of these cases, on motion of *Mr. Joseph H. Choate* for the appellants.

Mr. William D. Guthrie and *Mr. Joseph H. Choate* for appellants. *Mr. Clarence A. Seward*, *Mr. Benjamin H. Bristow*, *Mr. David Willcox*, *Mr. Victor Morawetz*, and *Mr. Charles Steele* were on their brief, which contained the following historical matter, not on the former briefs:

I. *Early Laws of the Colonies and States showing the Subjects of Taxation.*

New Hampshire. — The assessors were directed to take the estimated produce of the land as a basis; while mills, wharves, and ferries were valued at one-twelfth of their yearly net income, after deducting repairs. Act of February 22, 1794, Laws of N. H. 1793, p. 471.

Massachusetts. — New Plymouth Colony, in 1643, instructed the assessors to rate all the inhabitants of that colony "according to their estates or families, that is, according to goods, lands and improved faculties and personal abilities." Records of Colony of New Plymouth, Pulsifer's ed. XI, 42.

The Massachusetts Bay Company, by its order of 1646 (Colonial Records of Massachusetts Bay, II, 173, 213, and III, 88), assessed "laborers, artificers, and handicraftsmen, and for all such persons as by advantage of their arts and trades are more enabled to help bear the public charges than the common laborers and workmen, as butchers, bakers, brewers, victuallers, smiths, carpenters, tailors, shoemakers, joiners, barbers, millers and masons, with all other manual persons and artists, such are to be rated for returns and gains proportionable unto other men, for the produce of their estates."

The law thus remained and was gradually extended to other forms of earnings than merely of "manual persons and artists." In 1706, the tax was imposed on "incomes by any trade or faculty." In 1738, the act was amended by adding the words "business or employment." The act of 1777, which was continued by the state constitution, levied the tax on "incomes from any profession, faculty, handicraft, trade or employment." This still remains the law, except that the word "faculty" has been omitted since 1821, and the word "handicraft" since 1849.

All estates, real and personal, were to be rated in 1692 "at a quarter part of one year's value or income thereof." In 1693 it was provided that "all houses, warehouses, tan-yards, orchards, pastures, meadows and lands, mills, cranes and wharves be estimated at seven years' income as they are or may be let for." A. R. P., M. B. I., 29, 92, 413.

Rhode Island. — In 1774, the statute directed "that the assessors in all and every rate shall consider all persons who make profit by their faculties and shall rate them accordingly." Acts and Laws of Rhode Island, Newport, 1845, p. 295. The rate makers were "to take a narrow inspection of the lands and meadows and to judge of the yearly profit at their wisdom and discretion." Colonial Records of R. I., III, 300.

Connecticut. — A faculty tax was placed on all manual persons and artists, following the Massachusetts law of 1646, and these provisions were frequently repeated in the laws of the seventeenth century. 1 Colonial Records, 548; see, too, Laws of Connecticut, published in 1769.

New York. — In 1743 the assessors took an oath to estimate the property by the product — a shilling for every pound. Oath of Assessors, Laws of 1743, sec. 13; Van Schaack's Laws, 1691–1773.

New Jersey. — Not only property owners, but "also all other persons within this province who are freemen and are artificers or follow any trade or merchandizing, and also all innkeepers, ordinary keepers and other persons in places of profit within this province," shall be liable to be assessed for

the same according to the discretion of the assessors. Laws of New Jersey, 1664–1701, Jenning and Spicer, pp. 494, 1684.

Pennsylvania. — The statute of March 27, 1782, provided among other things that "all offices and posts of profit, trades, occupations and professions (excepting ministers and schoolmasters), shall be rated at the discretion of the township, ward or district assessors, and two assistant freeholders of the proper township, ward or district having due regard to the profits arising from them." 2 Dallas' Digest, 8.

Delaware. — Even after 1796, real estate was still valued according to the rents arising therefrom. State Papers, 1 Finance, 439.

Maryland. — In 1777, a law was passed which imposed an assessment of one-quarter of one per cent on "the amount received yearly by every person for any public office or profit of an annuity or stipend, and on the clear yearly profit of every person practising law or physic, every hired clerk acting without commission, every factor, agent or manager trading or using commerce in this State." Maryland Laws of 1777, chap. 22, §§ 5–6.

Virginia. — In 1786, a tax was imposed upon attorneys, merchants, physicians, surgeons and apothecaries. 12 Henning's Statutes, 283; 13, 114.

In 1793, the tax on city property was "five-sixths of one per cent of the ascertained or estimated yearly rent or income." Act of 1793, Shepherd's Stat. at Large, Va., 1792, 1806, 1, 224; American State Papers, 1 Finance, 481.

South Carolina. — In 1701, a law was enacted which imposed a tax on the citizens according to their estates, stocks and liabilities or the profits that any of them do make off or from any public office or employment. Two years later this tax was extended so as to assess individuals on "their estates, merchandises, stocks, abilities, offices and places of profit of whatever kind or nature soever." Cooper Stat. at Large, S. S. 2, 36, 183.

II. *Report of Oliver Wolcott, Jr., Secretary of the Treasury to the House of Representatives on Direct Taxes, December 14, 1796.*

This report (7 American State Papers, 1 Finance, 414–431) was made in obedience to a resolution of the House of Representatives, passed on the 4th day of April, 1796. The report says: "The duty enjoined is to 'report a plan for laying and collecting *direct taxes* by apportionment among the several States agreeably to the rule prescribed by the Constitution; adapting the same as nearly as may be to such objects of direct taxation and such modes of collection, as may appear by the laws and practice of the States respectively to be most eligible in each,'" recommends a *direct tax* of $1,484,000, and states the apportionment thereof among the States. The report states among the articles taxed in States in addition to land as follows:

Vermont. — Cattle and horses, *money on hand or due*, and obligations to pay money. Assessments proportioned to the profits of all lawyers, traders and owners of mills, according to the judgment or discretion of the listers or assessors (p. 418).

New Hampshire. — Stock in trade, *money* on hand or *at interest* more than the owner pays interest for, and all *property in public funds*, estimated at its real value; *mills, wharves and ferries at one-twelfth part of their yearly net income, after deducting repairs.*

Massachusetts. — Vessels, stock in trade, securities, *all moneys* on hand or *placed out at interest* exceeding the sum due on interest by the individual creditor; silver plate, *stock owned by stockholders in any bank*, horses, cattle and swine (p. 420).

Rhode Island. — Polls and the collective mass of property, both real and personal (p. 422).

Connecticut. — Stock, carriages, plate, clocks and watches, *credits on interest* exceeding the debts due on interest by the individual creditors; assessments apportioned to the estimated gains or profits arising from any and all lucrative professions, trades and occupations (p. 423).

New Jersey. — Ferries, fisheries, vessels, carriages, personal taxes on shopkeepers, single men and slaves (p. 426).

New York. — Assessments in the towns determined by a

discretionary estimate of the collective and individual wealth of corporations and individuals (p. 425).

Pennsylvania. — Prior to 1789, the time of servitude of bound servants, slaves, horses and cattle, plate, carriages; ferries, all offices and posts of profit, trades, occupations and professions, with reference to their respective profits. Subsequently ground rents, slaves, horses, cattle, provisions, trades and callings (pp. 427, 428).

Delaware. — Taxes have been hitherto collected of the estimated annual income of the inhabitants of the State, with reference to specific objects. A statute has been passed during the past year declaring that all real and personal property shall be taxed; provision is made for ascertaining the stock of merchants, traders, mechanics and manufacturers for the purpose of regulating assessments upon such persons, proportioned to their gains and profits; *ground rents are estimated at one hundred pounds for every eight pounds of rent. Rents of houses and lots in cities, towns and villages at one hundred pounds for every twelve pounds of rent reserved* (p. 429).

Maryland. — Taxes are imposed on the mass of property in general, there are licenses for attorneys at law for admission to the bar £3, and the like sum annually during his continuance to practise; licenses to retail spirituous liquors; to keep taverns; for marriage (p. 430).

Virginia. — *A tax on lots and houses in towns, and the tenant or proprietor was required to disclose on oath or affirmation the amount of rent paid or received by them respectively;* ordinary licenses; slaves, stud horses and jackasses, ordinary licenses, billiard tables, legal proceedings (pp. 431, 432).

North Carolina. — Slaves, stud horses, licensed ordinaries and houses for retailing spirituous liquors in small quantities, legal proceedings, billiard tables (pp. 433, 434).

South Carolina. — On every £100 of stock in trade, factorage, employment, faculties and professions, slaves, auction sales (p. 425).

Georgia. — Stock-in-trade, funded debt of the United States, slaves, all professors of law or physic and all factors and brokers, billiard tables (p. 436).

The report continues: "*Lands in Massachusetts and New Hampshire are taxed according to their produce or supposed annual rent or profit.*"

Stock employed in trade or manufactures and *moneys loaned on interest* are taxed on different principles in different States.

Assessments at discretion on the supposed property or income of individuals are permitted in various degrees and under different modifications in some States. In other States all taxes attach to certain defined objects at prescribed rates.

It is assumed as a principle that all objects of income, whether consisting of *skilled labor* or capital, bear certain relations to each other, *which may be defined to be their natural value.*

The value, therefore, is determined by the degree of labor, skill and expense necessary to be bestowed on the subject (p. 437).

Taxes on stock employed in trade and manufactures *and on moneys loaned at interest. It is believed that direct taxes on these subjects, except in extraordinary and temporary emergencies, are impolitic, unequal and delusive* (p. 439).

Taxes on lands. *Taxes proportioned to the value of improved lands, and taxes proportioned to their produce or actual income or rent are nearly, if not entirely, alike in principle* (p. 439).

As the Constitution has established a rule of apportionment, there appears to be no necessity that the principles of valuation should be uniform in all the States (p. 441).

In the schedule annexed to the report, under the head of "The objects of taxation," are the following, among others:

New Hampshire. — *Money* on hand or *at interest;* three-quarters per cent (p. 442).

Massachusetts. — *Funded securities. Securities of the State* or United States; *money at interest;* money on hand (p. 437).

Connecticut. — *Amount of money at interest;* assessments on lawyers, shop-keepers, surgeons, physicians, merchants, etc. (p. 455).

Virginia. — Ordinary licenses (p. 459).

South Carolina. — On faculties, &c. (p. 464).

It should be observed that while the secretary discusses in

much detail the advantages and disadvantages of levying a direct tax upon the various kinds of personal properties, there is not a suggestion of doubt that they could constitutionally be taxed directly.

Mr. Attorney General and *Mr. Assistant Attorney General Whitney* for the United States.

Their briefs and argument on the rehearing contained among other things the following new matter bearing upon the direct tax question, and in particular upon the question relating to the income of real and personal property:

I. *Historical discussion.* The tax clauses of the Constitution, when they left the committee on style, were worded with great care and with reference to some standard classification which it was assumed would solve all difficulties. The classification was as follows: direct taxes by apportionment; capitation taxes by apportionment; duties, imposts and excises by uniformity. The classification of capitation taxes among the direct taxes came in at the last moment by an amendment. The phrase "direct" tax had then no legal meaning. It was borrowed from political economy; and with some economists included only land taxes (Locke and Mercier de la Rivière), while with others it included also capitation taxes, but not taxes on the profits of money or industry, etc. (Turgot). The word "duties" had, however, a legal signification which was appealed to by Mr. Wilson (afterwards Mr. Justice Wilson) speaking in the Constitutional Convention for the Committee on Detail (5 Elliott's Debates, 432). He evidently referred to the familiar English use of the term found in Blackstone (1 Bl. Com. c. VIII) and in the English statute books. These duties, as summed up in Mr. Pitt's consolidated fund act of 1787, (27 Geo. III. c. 13,) included the "duties on customs, excises and stamps" and also the duties on hackney coaches and chairs; on hawkers and pedlars; on houses, windows and lights; on inhabited houses; on salaries and pensions; on shops; on coaches, etc. The stamp duties, as shown by the famous stamp act of 1765, (5 Geo. III. c. 12,) included

duties on bonds for securing payment of money; on grants or deeds of land; on leases, conveyances, mortgages, records of deeds, etc. Pitt's famous act of 1799 levied a *duty* on incomes. The only "tax" levied in Great Britain during that century (capitation taxes being obsolete) was that known as the "land tax." In fact, in Great Britain the words "tax" and "duty" had had legal definitions for a century, exclusive of each other, settled and unvarying in their statutory use. A tax was laid upon all property, or upon all real property, at a valuation, and always by a rule of apportionment. Everything that was not a tax in this restricted sense was a duty. No duties were laid by any system of apportionment; all were laid by a rule of uniformity. There was an accuracy and consistency in the statutory phraseology which is very rare to find. This is the more remarkable, as in colloquial parlance the words were used very loosely.

In taxation there was no uniform system or approach to a uniform system among the States. The terminology differed in different States; and there was nowhere a recognized definition of "duties" to which Mr. Wilson's explanation can have referred. For this reason, and for the reason that the English classification was well settled, familiar to American lawyers, and based on the distinction between the system of apportionment and the system of uniformity, it is believed that the word "duties" in the Constitution is used in the broad English sense. This theory is entirely consistent with the *Hylton*, *Pacific Insurance*, *Veazie Bank*, *Scholey* and *Springer cases*. It also explains why the debate turned not upon what taxes should be apportioned, but upon how the apportionment should be made; not upon what duties should be laid by the rule of uniformity, but whether they might be local (like the English duty upon hackney coaches in London and vicinity), or must extend throughout the United States. It is also to be noticed that a general property tax in a large State or nation, if laid by valuation, must necessarily be apportioned. This is because the valuing must be done by local people. Each assessor endeavors to favor his own locality by a low rating. Each of the three great English systems of

general property taxes (the "fifteenths and tenths," the "subsidies" and the land tax of William and Mary) very quickly reached the stage of a permanent apportionment, for the same reason that such taxes in America have usually been executed by means of periodical valuations or an annual equalization by a board of state officers.

Hence, by the words "direct tax," as distinguished from duties, the delegates had in mind a general apportioned tax upon property by valuation. As some of the American systems included all personalty as well as land in such a tax, doubts afterwards arose whether a general personalty tax by valuation was a direct tax. There is no sufficient foundation for the theory that any specific duties, whether upon real or personal property, were included in the term, and the then unknown general income tax remained to be classed by analogy when it should be discovered.

The proceedings of the state conventions of 1788 are not competent evidence upon this point. *Aldridge* v. *Williams*, 3 How. 1, 24; *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79; *Taylor* v. *Taylor*, 10 Minnesota, 107. Few are reported at all; and those not fully. The most important part of the debates is often omitted. 2 Elliott's Debates, 101, 104, 109. The controversial literature of that time is also incompetent; nor do these proceedings and literature afford any evidence against our theory, except from Madison and a few others, whose own theories were squarely overruled by the *Hylton case.*

The departmental reports and the proceedings and acts of Congress during the first decade after the Constitution confirm our theory of the case. They show that the word "duty" was used in the broad English sense and applicable to specific indirect taxes upon real and personal property, such as taxes on conveyances, successions, auction sales, etc.; and also that there was no principle forbidding such duties, or direct taxation of any kind, in times of peace. Acts of March 3, 1791, c. 15; June 9, 1794, c. 65; July 6, 1797, c. 11; Report of Ways and Means Committee, Annals of Congress, 1796, p. 791; and see other debates and reports in Annals of Congress 1789–98

Mr. Madison seems to have been the only prominent member of the Constitutional Convention who took a different view.

II. *Personal property taxes.* There was never any doubt that taxes on choses in action were indirect taxes or duties. They were "stamp duties" as shown by the famous English stamp act of 1765 and the other similar acts of that century, and by the United States stamp act of 1797. See also 1 Elliott's Debates, pp. 368–9. The question debated in the *Hylton case* concerned duties on choses in possession.

III. *Rentals.* Rentals actually collected can be subjected to a duty laid by the rule of uniformity for the following reasons: A specific tax on a specific class of real property, laid by the rule of uniformity, as on houses or windows, was a duty under the legal definitions of the last century; such a tax cannot have been intended to be apportioned; it has no relation to either the quantity or the valuation of the land; it is a tax not resting on the land, but placed on the landlord or ex-landlord with respect to the land. See Platt on Covenants, pp. 222–3, 215; *Jeffrey's Case*, 5 Rep. 66 *b*; *Theed* v. *Starkey*, 8 Mod. 314; *Case* v. *Stephens*, Fitzgibbon, 297; *Palmer* v. *Power*, 4 Irish C. L. (1854) 191; *Van Rensselaer* v. *Dennison*, 8 Barb. 23; it is not a direct tax in political economy, as a tax on house rent falls largely on the occupier, 2 Mill's Political Economy, ed. 1864, pp. 429–431; Seligman on Shifting and Incidence of Taxation; Secretary Wolcott's Report, 1796, 7 American State Papers; it is less direct than a succession tax, and therefore within the *Scholey case.*

It is said that what cannot be done directly cannot be done indirectly. This is undoubtedly true when correctly interpreted. It cannot mean in a broad sense that whatever is taxed directly cannot be taxed indirectly, because the very distinction under consideration is one between direct and indirect taxation. The correct application of this rule, as we understand it, is that no tax can be laid under the rule of uniformity which in its actual incidence is substantially or approximately the same as the tax which the Constitution intends should be levied by the rule of apportionment. There is no such identity between a tax on rents actually collected, and a

general land tax by valuation. If it could be separately considered, it would be analogous not to a property tax, but to an occupation duty.

It is not, however, a tax on rentals at all. It is not a tax measured by anything present. It is measured simply by the taxpayer's ability to pay as indicated by his income for the previous year. The rentals have become moneys inextricably mingled with the other funds of the taxpayer.

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

Whenever this court is required to pass upon the validity of an act of Congress as tested by the fundamental law enacted by the people, the duty imposed demands in its discharge the utmost deliberation and care, and invokes the deepest sense of responsibility. And this is especially so when the question involves the exercise of a great governmental power, and brings into consideration, as vitally affected by the decision, that complex system of government, so sagaciously framed to secure and perpetuate "an indestructible Union, composed of indestructible States."

We have, therefore, with an anxious desire to omit nothing which might in any degree tend to elucidate the questions submitted, and aided by further able arguments embodying the fruits of elaborate research, carefully reëxamined these cases, with the result that, while our former conclusions remain unchanged, their scope must be enlarged by the acceptance of their logical consequences.

The very nature of the Constitution, as observed by Chief Justice Marshall, in one of his greatest judgments, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." "In considering this question, then, we must never forget, that it is *a Constitution* that we are expounding." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407.

As heretofore stated, the Constitution divided Federal taxa-

tion into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.

The words of the Constitution are to be taken in their obvious sense, and to have a reasonable construction. In *Gibbons* v. *Ogden*, Mr. Chief Justice Marshall, with his usual felicity, said: "As men, whose intentions require no concealment, generally employ the words which most directly and aptly

express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said." 9 Wheat. 1, 188. And in *Rhode Island* v. *Massachusetts*, where the question was whether a controversy between two States over the boundary between them was within the grant of judicial power, Mr. Justice Baldwin, speaking for the court, observed: "The solution of this question must necessarily depend on the words of the Constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several States; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the Constitution." 12 Pet. 657, 721.

We know of no reason for holding otherwise than that the words "direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified.

And, passing from the text, we regard the conclusion reached as inevitable, when the circumstances which surrounded the convention and controlled its action and the views of those who framed and those who adopted the Constitution are considered.

We do not care to retravel ground already traversed; but some observations may be added.

In the light of the struggle in the convention as to whether or not the new Nation should be empowered to levy taxes directly on the individual until after the States had failed to respond to requisitions — a struggle which did not terminate until the amendment to that effect, proposed by Massachusetts and concurred in by South Carolina, New Hampshire, New York, and Rhode Island, had been rejected — it would seem beyond

reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio might be retained, while the mode of collection was changed.

This is forcibly illustrated by a letter of Mr. Madison of January 29, 1789, recently published,[1] written after the ratification of the Constitution, but before the organization of the government and the submission of the proposed amendment to Congress, which, while opposing the amendment as calculated to impair the power, only to be exercised in extraordinary emergencies," assigns adequate ground for its rejection as substantially unnecessary, since, he says, "every State which chooses to collect its own quota may always prevent a Federal collection, by keeping a little beforehand in its finances, and making its payment at once into the Federal treasury."

The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power or levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition

[1] By Mr. Worthington C. Ford in The Nation, April 25, 1895; republished in 51 Albany Law Journal, 292.

and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. If, in the changes of wealth and population in particular States, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the States, however small, in the Senate, was stipulated for. The Constitution ordains affirmatively that each State shall have two members of that body, and negatively that no State shall by amendment be deprived of its equal suffrage in the Senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, in *McCulloch* v. *Maryland*, "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." 4 Wheat. 428. And they retained this security by providing that direct taxation and representation in

the lower house of Congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another.

Cooley (On Taxation, p. 3) says that the word "*duty*" ordinarily "means an indirect tax imposed on the importation, exportation or consumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In the Constitution, the words "duties, imposts and excises" are put in antithesis to direct taxes. Gouverneur Morris recognized this in his remarks in modifying his celebrated motion, as did Wilson in approving of the motion as modified. 5 Ell. Deb. (Madison Papers) 302. And Mr. Justice Story, in his Commentaries on the Constitution, (§ 952,) expresses the view that it is not unreasonable to presume that the word "duties" was used as equivalent to "customs" or "imposts" by the framers of the Constitution, since in other clauses it was provided that "No tax or duty shall be laid on articles exported from any State," and that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and he refers to a letter of Mr. Madison to Mr. Cabell, of September 18, 1828, to that effect. 3 Madison's Writings, 636.

In this connection it may be useful, though at the risk of repetition, to refer to the views of Hamilton and Madison as

thrown into relief in the pages of the Federalist, and in respect of the enactment of the carriage tax act, and again to briefly consider the *Hylton case*, 3 Dall. 171, so much dwelt on in argument.

The act of June 5, 1794, c. 45, 1 Stat. 373, laying duties upon carriages for the conveyance of persons, was enacted in a time of threatened war. Bills were then pending in Congress to increase the military force of the United States, and to authorize increased taxation in various directions. It was, therefore, as much a part of a system of taxation in war times, as was the income tax of the war of the rebellion. The bill passed the House on the twenty-ninth of May, apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers on that day reported in the Annals. "Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it." Mr. Ames said: "It was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last. In Massachusetts, this tax had been long known; and there it was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so." Annals, 3d Cong. 730.

On the first of June, 1794, Mr. Madison wrote to Mr. Jefferson: "The carriage tax, which only struck at the Constitution, has passed the House of Representatives." 3 Madison's Writings, 18. The bill then went to the Senate, where, on the third day of June, it "was considered and adopted," Annals, 3d Cong. 119, and on the following day it received the signature of President Washington. On the same third day of June the Senate considered "an act laying certain duties upon snuff and refined sugar;" "an act making further provisions for securing and collecting the duties on foreign and domestic distilled spirits, stills, wines, and teas;" "an act for the more effectual protection of the Southwestern frontier;" "an act laying additional duties on goods, wares and merchandise, etc.;" "an act laying duties on licenses for selling wines and foreign distilled spirituous liquors by retail;" and "an act laying duties on property sold at auction."

It appears then that Mr. Madison regarded the carriage tax bill as unconstitutional, and accordingly gave his vote against it, although it was to a large extent, if not altogether, a war measure.

Where did Mr. Hamilton stand? At that time he was Secretary of the Treasury, and it may therefore be assumed, without proof, that he favored the legislation. But upon what ground? He must, of course, have come to the conclusion that it was not a direct tax. Did he agree with Fisher Ames, his personal and political friend, that the tax was an excise? The evidence is overwhelming that he did.

In the thirtieth number of the Federalist, after depicting the helpless and hopeless condition of the country growing out of the inability of the confederation to obtain from the States the moneys assigned to its expenses, he says: "The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission, by a distinction between what they call *internal* and *external* taxations. The former they would reserve to the state governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the Federal head." In the thirty-sixth number, while still adopting the division of his opponents, he says: "The taxes intended to be comprised under the general denomination of internal taxes, may be subdivided into those of the *direct* and those of the *indirect* kind. . . . As to the latter, *by which must be understood duties and excises on articles of consumption*, one is at a loss to conceive, what can be the nature of the difficulties apprehended." Thus we find Mr. Hamilton, while writing to induce the adoption of the Constitution, *first*, dividing the power of taxation into *external* and *internal*, putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and, *second*, dividing the latter into *direct* and *indirect*, putting into the latter, duties and excises on articles of consumption.

It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time all internal taxes, except duties and

excises on articles of consumption, fell into the category of direct taxes.

Did he, in supporting the carriage tax bill, change his views in this respect? His argument in the *Hylton case* in support of the law enables us to answer this question. It was not reported by Dallas, but was published in 1851 by his son in the edition of all Hamilton's writings except the Federalist. After saying that we shall seek in vain for any legal meaning of the respective terms "direct and indirect taxes," and after forcibly stating the impossibility of collecting the tax if it is to be considered as a direct tax, he says, doubtingly: "The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on lands and buildings. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be considered as indirect taxes." "*Duties, imposts and excises* appear to be contradistinguished from *taxes*." "If the meaning of the word *excise* is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an *excise*." "Where so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." 7 Hamilton's Works, 848. Mr. Hamilton therefore clearly supported the law which Mr. Madison opposed, for the same reason that his friend Fisher Ames did, because it was an excise, and as such was specifically comprehended by the Constitution. Any loose expressions in definition of the word "direct," so far as conflicting with his well-considered views in the Federalist, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject. He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution. And Mr. Hamilton in his report on the public credit, in referring to contracts with citizens of a foreign country, said: "This principle, which seems critically correct,

would exempt as well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction, without the beneficial use of it? In many cases, indeed, the *income* or *annuity* is the property itself." 3 Hamilton's Works, 34.

We think there is nothing in the *Hylton case* in conflict with the foregoing. The case is badly reported. The report does not give the names of both the judges before whom the case was argued in the Circuit Court. The record of that court shows that Mr. Justice Wilson was one and District Judge Griffin of Virginia was the other. Judge Tucker in his appendix to the edition of Blackstone published in 1803, (Tucker's Blackstone, vol. 1, part 1, p. 294,) says: "The question was tried in this State, in the case of *United States* v. *Hylton*, and the court being divided in opinion, was carried to the Supreme Court of the United States by consent. It was there argued by the proposer of it, (the first Secretary of the Treasury,) on behalf of the United States, and by the present Chief Justice of the United States, on behalf of the defendant. Each of those gentlemen was supposed to have defended his own private opinion. That of the Secretary of the Treasury prevailed, and the tax was afterwards submitted to, universally, in Virginia."

We are not informed whether Mr. Marshall participated in the two days' hearing at Richmond, and there is nothing of record to indicate that he appeared in the case in this court; but it is quite probable that Judge Tucker was aware of the opinion which he entertained in regard to the matter.

Mr. Hamilton's argument is left out of the report, and in place of it it is said that the argument turned entirely upon the point whether the tax was a direct tax, while his brief shows that, so far as he was concerned, it turned upon the point whether it was an excise, and therefore not a direct tax.

Mr. Justice Chase thought that the tax was a tax on expense, because a carriage was a consumable commodity, and in that view the tax on it was on the expense of the owner. He expressly declined to give an opinion as to what were the

direct taxes contemplated by the Constitution. Mr. Justice Paterson said: "All taxes on expenses or consumption are indirect taxes; a tax on carriages is of this kind." He quoted copiously from Adam Smith in support of his conclusions, although it is now asserted that the justices made small account of that writer. Mr. Justice Iredell said: "There is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax, in all cases. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the Constitution."

What was decided in the *Hylton case* was, then, that a tax on carriages was an excise, and, therefore, an indirect tax. The contention of Mr. Madison in the House was only so far disturbed by it, that the court classified it where he himself would have held it constitutional, and he subsequently as President approved a similar act. 3 Stat. 40. The contention of Mr. Hamilton in the Federalist was not disturbed by it in the least. In our judgment, the construction given to the Constitution by the authors of the Federalist (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded.

The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a

totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed."

Personal property of some kind is of general distribution; and so are incomes, though the taxable range thereof might be narrowed through large exemptions.

The Congress of the Confederation found the limitation of the sources of the contributions of the States to "land, and the buildings and improvements thereon," by the eighth article of July 9, 1778, so objectionable that the article was amended April 28, 1783, so that the taxation should be apportioned in proportion to the whole number of white and other free citizens and inhabitants, including those bound to servitude for a term of years and three-fifths of all other persons, except Indians not paying taxes; and Madison, Ellsworth, and Hamilton in their address, in sending the amend-

ment to the States, said: "This rule, although not free from objections, is liable to fewer than any other that could be devised." 1 Ell. Deb. 93, 95, 98.

Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived.

This was the view entertained by Mr. Pitt, as expressed in his celebrated speech on introducing his income tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the fund holder had no reason to complain. And this, said Mr. Gladstone, fifty-five years after, was the rational construction of the pledge. Financial Statements, 32.

The dissenting justices proceeded in effect upon this ground in *Weston* v. *Charleston*, 2 Pet. 449, but the court rejected it. That was a state tax, it is true; but the States have power to

lay income taxes, and if the source is not open to inquiry, constitutional safeguards might be easily eluded.

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution.

In England, we do not understand that an income tax has ever been regarded as other than a direct tax. In Dowell's History of Taxation and Taxes in England, admitted to be the leading authority, the evolution of taxation in that country is given, and an income tax is invariably classified as a direct tax. 3 Dowell, (1884,) 103, 126. The author refers to the grant of a fifteenth and tenth and a graduated income tax in 1435, and to many subsequent comparatively ancient statutes as income tax laws. 1 Dowell, 121. It is objected that the taxes imposed by these acts were not, scientifically speaking, income taxes at all, and that although there was a partial income tax in 1758, there was no general income tax until Pitt's of 1799. Nevertheless, the income taxes levied by these modern acts, Pitt's, Addington's, Petty's, Peel's, and by existing laws, are all classified as direct taxes; and, so far as the income tax we are considering is concerned, that view is concurred in by the cyclopædists, the lexicographers, and

the political economists, and generally by the classification of European governments wherever an income tax obtains.

In *Attorney General* v. *Queen Insurance Co.*, 3 App. Cas. 1090, which arose under the British North America act of 1867, (30 and 31 Vict. c. 3, § 92,) which provided that the provincial legislatures could only raise revenue for provincial purposes within each province, (in addition to licenses,) by direct taxation, an act of the Quebec legislature laying a stamp duty came under consideration, and the judicial committee of the Privy Council, speaking by Jessel, M. R., held that the words "direct taxation" had "either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or the other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language." And considering "their meaning either as words used in the sense of political economy, or as words used in jurisprudence of the courts of law," it was concluded that stamps were not included in the category of direct taxation, and that the imposition was not warranted.

In *Attorney General* v. *Reed*, 10 App. Cas. 141, 144, Lord Chancellor Selbourne said, in relation to the same act of Parliament: "The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their lordships, it cannot, in this view, be called direct taxation within the meaning of the second section of the ninety-second clause of the act in question."

In *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, 582, the Privy Council, discussing the same subject, in dealing with the argument much pressed at the bar, that a tax to be strictly direct must be general, said that they had no hesitation in rejecting it for legal purposes. "It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a

direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature."

At the time the Constitution was framed and adopted, under the systems of direct taxation of many of the States, taxes were laid on incomes from professions, business, or employments, as well as from "offices and places of profit;" but if it were the fact that there had then been no income tax law, such as this, it would not be of controlling importance. A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed. As Chief Justice Marshall said in the *Dartmouth College case:* "It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception." 4 Wheat. 518, 644.

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real and personal property and the income of all persons in the State, and collect the same if the State does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this, as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798, c. 75, 1 Stat. 597? Inconveniences might pos-

sibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable.

In the disposition of the inquiry whether a general unapportioned tax on the income of real and personal property can be sustained, under the Constitution, it is apparent that the suggestion that the result of compliance with the fundamental law would lead to the abandonment of that method of taxation altogether, because of inequalities alleged to necessarily accompany its pursuit, could not be allowed to influence the conclusion; but the suggestion not unnaturally invites attention to the contention of appellants' counsel, that the want of uniformity and equality in this act is such as to invalidate it. Figures drawn from the census are given, showing that enormous assets of mutual insurance companies; of building associations; of mutual savings banks; large productive property of ecclesiastical organizations; are exempted, and it is claimed that the exemptions reach so many hundred millions that the rate of taxation would perhaps have been reduced one-half, if they had not been made. We are not dealing with the act from that point of view; but, assuming the data to be substantially reliable, if the sum desired to be raised had been apportioned, it may be doubted whether any State, which paid its quota and collected the amount by its own methods, would, or could under its constitution, have allowed a large part of the property alluded to to escape taxation. If so, a better measure of equality would have been attained than would be otherwise possible, since, according to the argument for the government, the rule of equality is not prescribed by the Constitution as to Federal taxation, and the observance of such a rule as inherent in all just taxation is purely a matter of legislative discretion.

Elaborate argument is made as to the efficacy and merits of an income tax in general, as on the one hand, equal and just, and on the other, elastic and certain; not that it is not open to abuse by such deductions and exemptions as might make taxation under it so wanting in uniformity and equality as in

substance to amount to deprivation of property without due process of law; not that it is not open to fraud and evasion and is inquisitorial in its methods; but because it is preëminently a tax upon the rich, and enables the burden of taxes on consumption and of duties on imports to be sensibly diminished. And it is said that the United States as "the representative of an indivisible nationality, as a political sovereign equal in authority to any other on the face of the globe, adequate to all emergencies, foreign or domestic, and having at its command for offence and defence and for all governmental purposes all the resources of the nation," would be "but a maimed and crippled creation after all," unless it possesses the power to lay a tax on the income of real and personal property throughout the United States without apportionment.

The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution, which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to state lines, and in such manner that the States cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports, and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare.

Differences have often occurred in this court — differences

exist now — but there has never been a time in its history when there has been a difference of opinion as to its duty to announce its deliberate conclusions unaffected by considerations not pertaining to the case in hand.

If it be true that the Constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment. In no part of it was greater sagacity displayed. Except that no State, without its consent, can be deprived of its equal suffrage in the Senate, the Constitution may be amended upon the concurrence of two-thirds of both houses, and the ratification of the legislatures or conventions of the several States, or through a Federal convention when applied for by the legislatures of two-thirds of the States, and upon like ratification. The ultimate sovereignty may be thus called into play by a slow and deliberate process, which gives time for mere hypothesis and opinion to exhaust themselves, and for the sober second thought of every part of the country to be asserted.

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren* v. *Charlestown*, 2 Gray, 84, is

applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." Or, as the point is put by Mr. Justice Matthews in *Poindexter* v. *Greenhow*, 114 U. S. 270, 304: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." And again, as stated by the same eminent judge in *Spraigue* v. *Thompson*, 118 U. S. 90, 95, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation em-

bodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

Rehearing. Dissenting Opinion: Harlan, J.

MR. JUSTICE HARLAN dissenting.

At the former hearing of these causes it was adjudged that, within the meaning of the Constitution, a duty on incomes arising from rents was a direct tax on the lands from which such rents were derived, and, therefore, must be apportioned among the several States on the basis of population, and not by the rule of uniformity thoroughout the United States, as prescribed in the case of duties, imposts, and excises. And the court, eight of its members being present, was equally divided upon the question whether *all* the other provisions of the statute relating to incomes would fall in consequence of that judgment.

It is appropriate now to say that however objectionable the law would have been, after the provision for taxing incomes arising from rents was stricken out, I did not then, nor do I now, think it within the province of the court to annul the provisions relating to incomes derived from other specified sources, and take from the government the entire revenue contemplated to be raised by the taxation of incomes, simply because the clause relating to rents was held to be unconstitutional. The reasons for this view will be stated in another connection.

From the judgment heretofore rendered I dissented, announcing my entire concurrence in the views expressed by Mr. Justice White in his very able opinion. I stated at that time some general conclusions reached by me upon the several questions covered by the opinion of the majority.

In dissenting from the opinion and judgment of the court on the present application for a rehearing, I alluded to particular questions discussed by the majority, and stated that in a dissenting opinion to be subsequently filed I would express my views more fully than I could then do as to what, within the meaning of the Constitution, and looking at the practice of the government, as well as the decisions of this court, was a "direct" tax to be levied only by apportioning it among the States according to their respective numbers.

By section 27 of the act of August 28, 1894, known as the

Wilson Tariff act, and entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," it was provided: "That from and after the first day of January eighteen hundred and ninety-five, and until the first day of January nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States."

Section 28 declares what shall be included and what excluded in estimating the gains, profits, and income of any person.

The Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." Art. I, Sec. 8.

The only other clauses in the Constitution, at the time of its adoption, relating to taxation by the general government, were the following:

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and

within every subsequent term of ten years, in such manner as they shall by law direct." Art. I, Sec. 2.

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." Art. I, Sec. 9.

"No tax or duty shall be laid on articles exported from any State." Art. I, Sec. 9.

The Fourteenth Amendment provides that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

It thus appears that the primary object of all taxation by the general government is to pay the debts and provide for the common defence and general welfare of the United States, and that with the exception of the inhibition upon taxes or duties on articles exported from the States, no restriction is in terms imposed upon national taxation, except that direct taxes must be apportioned among the several States on the basis of numbers, (excluding Indians not taxed,) while duties, imposts and excises must be uniform throughout the United States.

What are "direct taxes" within the meaning of the Constitution? In the convention of 1787, Rufus King asked what was the precise meaning of *direct* taxation, and no one answered. Madison Papers, 5 Elliott's Debates, 451. The debates of that famous body do not show that any delegate attempted to give a clear, succinct definition of what, in his opinion, was a direct tax. Indeed, the report of those debates, upon the question now before us, is very meagre and unsatisfactory. An illustration of this is found in the case of Gouverneur Morris. It is stated that on the 12th of July, 1787, he moved to add to a clause empowering Congress to vary representation according to the principles of "wealth and numbers of inhabitants," a proviso "that taxation shall be in proportion to representation." And he is reported to have remarked, on that occasion, that while some objections lay against his motion, he supposed "they would be removed by restraining the rule to *direct* taxation." 5 Elliott's Debates, 302. But, on the 8th of August, 1787, the work of the Committee on Detail being before

the convention, Mr. Morris is reported to have remarked, "let it not be said that direct taxation is to be proportioned to representation." 5 Elliott's Debates, 393.

If the question propounded by Rufus King had been answered in accordance with the interpretation now given, it is not at all certain that the Constitution, in its present form, would have been adopted by the convention, nor, if adopted, that it would have been accepted by the requisite number of States.

A question so difficult to be answered by able statesmen and lawyers directly concerned in the organization of the present government, can now, it seems, be easily answered, after a reëxamination of documents, writings, and treatises on political economy, all of which, without any exception worth noting, have been several times directly brought to the attention of this court. And whenever that has been done the result always, until now, has been that a duty on incomes, derived from taxable subjects, of whatever nature, was held not to be a direct tax within the meaning of the Constitution, to be apportioned among the States on the basis of population, but could be laid, according to the rule of uniformity, upon individual citizens, corporations, and associations without reference to numbers in the particular States in which such citizens, corporations, or associations were domiciled. Hamilton, referring to the distinction between direct and indirect taxes, said it was "a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution," and that it would be vain to seek "*for any antecedent settled legal meaning to the respective terms.*" 7 Hamilton's Works, (orig. ed.,) 845.

This court is again urged to consider this question in the light of the theories advanced by political economists. But Chief Justice Chase, delivering the judgment of this court in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 542, observed that the enumeration of the different kinds of taxes that Congress was authorized to impose was probably made with very little reference to the speculations of political economists, and that there was nothing in the great work of Adam Smith, published shortly before the meeting of the convention of 1787, that

gave any light on the meaning of the words "direct taxes" in the Constitution.

From the very necessity of the case, therefore, we are compelled to look at the practice of the government after the adoption of the Constitution as well as to the course of judicial decision.

By an act of Congress, passed June 5, 1794, c. 45, 1 Stat. 373, specified duties were laid "upon all carriages for the conveyance of persons," that should be kept by or for any person for his use, or to be let out to hire, or for the conveying of passengers. The case of *Hylton* v. *United States*, 3 Dall. 171, decided in 1796, distinctly presented the question whether the duties laid upon carriages by that act was a direct tax within the meaning of the Constitution. If it was a tax of that character, it was conceded that the statute was unconstitutional, for the reason that the duties imposed by it were not apportioned among the States on the basis of numbers. As the case involved an important constitutional question, each of the Justices who heard the argument delivered a separate opinion. Chief Justice Ellsworth was sworn into office on the day the decision was announced, but, not having heard the whole of the argument, declined to take any part in the judgment. It can scarcely be doubted that he approved the decision; for, while a Senator in Congress from Connecticut, he voted more than once for a bill laying duties on carriages, and, with Rufus King, Robert Morris, and other distinguished statesmen, voted in the Senate for the act of June 5, 1794. Annals of Congress, 3d Sess., 1793–5, pp. 120, 849.

It is well to see what the Justices who delivered opinions in the *Hylton case* said as to the meaning of the words "direct taxes" in the Constitution.

Mr. Justice Chase said: "As it was incumbent on the plaintiff's counsel in error, so they took great pains to prove that the tax on carriages was a direct tax; but they did not satisfy my mind. I think at least it may be doubted, and if I only doubted I should affirm the judgment of the Circuit Court. The deliberate decision of the national legislature (who did not consider a tax on carriages a direct tax, but

thought it was within the description of a duty) would determine me, if the case was doubtful, to receive the construction of the legislature. But I am inclined to think that a tax on carriages is not a direct tax, within the letter or meaning of the Constitution. The great object of the Constitution was to give Congress a power to lay taxes adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts, or excises, and the rule of apportionment according to the census, when they laid any direct tax." "The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the *census*. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax should be laid by that rule. It appears to me that a tax on carriages cannot be laid by the rule of apportionment without very great inequality and injustice. For example, suppose two States, equal in census, to pay $80,000 each, by a tax on carriages of eight dollars on every carriage; and in one State there are 100 carriages and in the other 1000. The owners of carriages in one State would pay ten times the tax of owners in the other. A in one State would pay for his carriage eight dollars, but B, in the other State, would pay for his carriage eighty dollars." "I think an annual tax on carriages for the conveyance of persons may be considered as within the power granted to Congress to lay duties. The term *duty* is the most comprehensive next to the general term *tax*, and practically in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.) embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only." "I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax, simply, without

regard to property, profession, or any other circumstance, and a tax on land. I doubt whether a tax, by a general assessment of personal property within the United States is included within the term 'direct tax.'"

Mr. Justice Paterson: "What is the natural and common or technical and appropriate meaning of the words 'duty' and 'excise,' it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms. It was, however, obviously the intention of the framers of the Constitution that Congress should possess full power over every species of taxable property, except exports. The term 'taxes' is generical, and was made use of to vest in Congress plenary authority in all cases of taxation. The general division of taxes is into direct and indirect. Although the latter term is not to be found in the Constitution, yet the former necessarily implies it. Indirect stands opposed to direct. There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts, or excises; in such case it will be comprised under the general denomination of taxes; for the term 'tax' is the *genus*, and includes: 1. Direct taxes. 2. Duties, imposts, and excises. 3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads. The question occurs, how is such tax to be laid, uniformly or apportionately? The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned. What are direct taxes within the meaning of the Constitution? The Constitution declares that a capitation tax is a direct tax, and, both in theory and practice, a tax on land is deemed to be a direct tax. In this way the terms direct taxes and capitation and other direct tax are satisfied." "I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land. Local considerations and the particular circumstances and relative situation of the States naturally lead to this view of the subject. The provision was made

in favor of the Southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. Congress, in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers. On the part of the plaintiff in error it has been contended that the rule of apportionment is to be favored rather than the rule of uniformity, and, of course, that the instrument is to receive such a construction as will extend the former and restrict the latter. I am not of that opinion. The Constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction. Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence." "If a tax upon land, where the object is simple and uniform throughout the States, is scarcely practicable, what shall we say of a tax attempted to be apportioned among, and raised and collected from, a number of dissimilar objects? The difficulty will increase with the number and variety of the things proposed for taxation. We shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary and nothing certain. There will be no rule to walk by. The rule of uniformity, on the con-

trary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and thing unite, and of course there can be no imposition. The truth is, that the articles taxed in one State should be taxed in another; in this way the spirit of jealousy is appeased, and tranquillity preserved; in this way the pressure on industry will be equal in the several States, and the relation between the different objects of taxation duly preserved. Apportionment is an operation on States, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to States, and is at once easy, certain, and efficacious. All taxes on expenses or consumption are indirect taxes."

Mr. Justice Iredell: "1. All direct taxes must be apportioned. 2. All duties, imposts, and excises must be uniform. If the carriage tax be a direct tax, within the meaning of the Constitution, it must be apportioned. If it be a duty, impost, or excise, within the meaning of the Constitution, it must be uniform. If it can be considered as a tax, neither direct within the meaning of the Constitution, nor comprehended within the term 'duty, impost, or excise' there is no provision in the Constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case I should presume the tax ought to be uniform, because the present Constitution was particularly intended to affect individuals, and not States, except in particular cases specified; and this is the leading distinction between the articles of Confederation and the present Constitution. As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution. That this tax cannot be apportioned is evident." "Such an arbitrary method of taxing different States differently is a suggestion

altogether new, and would lead, if practised, to such dangerous consequences, that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the Constitution, with which at present I deem it utterly irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the Constitution are founded, so far as the condition of the United States will admit." "Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the Constitution can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances." "It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform. I am clearly of opinion this is not a direct tax in the sense of the Constitution, and, therefore, that the judgment ought to be affirmed."

Mr. Justice Wilson: "As there were only four judges, including myself, who attended the argument of this cause, I should have thought it proper to join in the decision, though I had before expressed a judicial opinion on the subject, in the Circuit Court of Virginia, did not the unanimity of the other three judges relieve me from the necessity. I shall now, however, only add, that my sentiments, in favor of the constitutionality of the tax in question, have not been changed."

The scope of the decision in the *Hylton case* will appear from what this court has said in later cases to which I will hereafter refer.

It is appropriate to observe, in this connection, that the importance of the *Hylton case* was not overlooked by the statesmen of that day. It was argued by eminent lawyers, and we may well assume that nothing was left unsaid that was necessary to a full understanding of the question involved. Edmund Pendleton, of Virginia, concurring with Madison that a tax on carriages was a direct tax, within the meaning of the Constitution, prepared a paper on the subject, and

enclosed it to Mr. Giles, then a Senator from Virginia. Under date of February 7, 1796, Madison wrote to Pendleton: "I read with real pleasure the paper you put into the hands of Mr. Giles, which is unquestionably a most simple and lucid view of the subject, and well deserving the attention of the court which is to determine on it. The paper will be printed in the newspapers, *in time for the judges to have the benefit of it.* I did not find that it needed any of those corrections which you so liberally committed to my hand. It has been thought unnecessary to prefix your name; but Mr. Giles will let *an intimation* appear, along with the remarks, that they proceed *from a quarter that claims attention to them.* . . . There never was a question on which my mind was more satisfied, and yet I have very little expectation that it will be viewed by the court in the same light it is by me." 2 Madison's Writings, 77. And on March 6, 1796, two days before the *Hylton case* was decided, Madison wrote to Jefferson: "The court has not given judgment yet on the carriage tax. It is said the Judges will be unanimous for its constitutionality." 2 Madison's Writings, 87. Mr. Justice Iredell, in his Diary, said: "At this term Oliver Ellsworth took his seat as Chief Justice. The first case that came up was that of *Hylton* v. *The United States.* This was a very important cause, as it involved a question of constitutional law. The point was the constitutionality of the law of Congress of 1794, laying *duties* upon carriages. If a *direct tax*, it could only be laid in proportion to the census, which has not as yet been taken. The counsel of Hylton, Campbell and Ingersoll, contended that the tax was a *direct tax*, and were opposed by Lee and Hamilton. The court *unanimously* agreed that the tax was constitutional, and delivered their opinions 'seriatim.'" Again: "The day before yesterday Mr. Hamilton spoke in our court, attended by the most crowded audience I ever saw there, both Houses of Congress being almost deserted on the occasion. Though he was in very ill health, he spoke with astonishing ability and in a most pleasing manner, and was listened to with the profoundest attention. His speech lasted about three hours. It was on the question whether the car-

riage tax, as laid, was a constitutional one." 2 McRee's Life of Iredell, 459, 461.

Turning now to the acts of Congress passed after the decision in the *Hylton case*, we find that by the acts of July 14, 1798, c. 75, 1 Stat. 597; August 2, 1813, c. 37, 3 Stat. 53; January 9, 1815, c. 21, 3 Stat. 164; and March 5, 1816, c. 24, 3 Stat. 255, *direct* taxes were assessed upon *lands*, *improvements*, *dwelling-houses*, and *slaves*, and apportioned among the several States. And by the act of August 5, 1861, c. 45, 12 Stat. 294, 297, entitled "An act to provide increased revenues from imports, to pay interest on the debt, and for other purposes," a *direct* tax was assessed and apportioned among the States on *lands*, *improvements*, and *dwelling-houses* only.

Instances of duties upon tangible personal property are found in the act of January 18, 1815, c. 22, 3 Stat. 180, imposing duties upon certain goods, wares, and merchandise, manufactured or made for sale within the United States or the Territories thereof, namely, upon pig iron, castings of iron, bar iron, rolled or slit iron, nails, brads or sprigs, candles of white wax, mould candles of tallow, hats, caps, umbrellas and parasols, paper, playing and visiting cards, saddles, bridles, books, beer, ale, porter, and tobacco; and also in the act of January 18, 1815, c. 23, 3 Stat. 186, which laid a duty graduated by value upon "all household furniture kept for use," and upon gold and silver watches.

It may be observed, in passing, that the above statutes, with one exception, were all enacted during the administration of President Madison, and were approved by him.

Instances of duties upon intangible personal property are afforded by the Stamp Act of July 6, 1797, c. 11, 1 Stat. 527, which, among other things, levied stamp duties upon bonds, notes, and certificates of stock. Similar duties had been made familiar to the American people by the British Stamp Act of 1765, 5 Geo. 3, c. 12, 26 Pickering's Statutes at Large, 179, and were understood by the delegates to the Convention of 1787 to be included among the duties mentioned in the Constitution. 1 Elliott's Deb. 368; 5 Id. 432.

The reason slaves were included in the earlier acts as proper

subjects of direct taxation is thus explained by this court in *Veazie Bank* v. *Fenno*, above cited: "As persons, slaves were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were, by the laws of some, if not most of the States, classed as real property, descendible to heirs. Under the first view, they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years as realty. That the latter view was that taken by the framers of the acts after 1798, becomes highly probable, when it is considered that in the States where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those States than in States where there were no slaves; for the proportion of tax imposed on each State was determined by population, without reference to the subjects on which it was to be assessed. The fact, then, that slaves were valued, under the act referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purpose of taxation, as realty." 8 Wall. 543.

Recurring to the course of legislation it will be found that, by the above act of August 5, 1861, c. 45, Congress not only laid and apportioned among the States a direct tax of $20,000,000 upon lands, improvements, and dwelling-houses, but it provided that there should be "levied, collected, and paid upon the annual *income* of every person residing in the United States, whether such income is derived *from any kind of property*, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, *or from any source whatever*, if such annual income exceeds the sum of eight hundred dollars, a tax of three per centum on the amount of such excess of each income above eight hundred dollars," etc. 12 Stat. 292, 309.

Subsequent statutes greatly extended the area of taxation. By the act of July 1, 1862, c. 119, a duty was imposed on

the gross amount of all receipts for the transportation of passengers by railroads, steam vessels, and ferry boats; on all dividends in scrip or money declared due or paid by banks, trust companies, insurance companies, and upon "the annual gains, profits, or income of every person residing in the United States, whether derived *from any kind of property*, *rents*, interest, dividends, salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, *or from any source whatever*," etc. 12 Stat. 432, 473. The act of June 30, 1864, c. 173, as did the previous act of 1862, imposed a duty on gains, profits, or income from whatever kind of property or from whatever source derived, including "rents." 13 Stat. 223, 281. The act of March 3, 1865, c. 78, increased the amount of such duty. 13 Stat. 479. All subsequent acts of Congress retained the provision imposing a duty on income derived from rents and from every kind of property. Act of March 10, 1866, c. 15, 14 Stat. 4, 5; act of March 2, 1867, c. 169, 14 Stat. 471, 477, 480; act of July 14, 1870, c. 255, 16 Stat. 256.

What has been the course of judicial decision touching the clause of the Constitution that relates to direct taxes? And, particularly, what, in the opinion of this court, was the scope and effect of the decision in *Hylton* v. *United States?*

In *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 446, the question was presented whether the duty imposed by the act of June 30, 1864, as amended by that of July 13, 1866, on the dividends and undistributed sums, that is, on the incomes, from whatever source, of insurance companies, was a direct tax that could only be laid by apportionment among the States. The point was distinctly made in argument that "an income tax is, and always heretofore has been, regarded as being a direct tax, as much so as a poll tax or a land tax. If it be a direct tax, then the Constitution is imperative that it shall be apportioned." Mr. Justice Swayne, delivering the unanimous judgment of this court, said "what are *direct* taxes was elaborately argued and considered by this court in *Hylton* v. *United States*, decided in the year 1796. . . . The views expressed in this [that] case are adopted by Chancellor Kent and Justice

Story in their examination of the subject." "The taxing power is given in the most comprehensive terms. The only limitations imposed are: That *direct* taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions the exercise of the power is, in all respects, unfettered. If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges." "The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition. To the question under consideration it must be answered that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it."

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, 543, 544, 546, the principal question was whether a tax on state bank notes issued for circulation was a direct tax. On behalf of the bank it was contended by distinguished counsel that the tax was a direct one, and that it was invalid because not apportioned among the States agreeably to the Constitution. In explanation of the nature of direct taxes they relied largely (so the authorized report of the case states) on the writings of Adam Smith, and on other treatises, English and American, on political economy. In the discussion of the case reference was made by counsel to the former decisions in *Hylton* v. *United States*, and *Pacific Ins. Co.* v. *Soule*. Chief Justice Chase, delivering the judgment of the court, after observing (as I have

already stated) that the works of political economists gave no valuable light on the question as to what, in the *constitutional* sense, were direct taxes, entered upon an examination of the numerous acts of Congress imposing taxes. That examination, he announced on behalf of this court, showed "that *personal property*, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of *direct* tax." "It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes. And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed and of the conventions which ratified the Constitution." Referring to certain observations of Madison, King, and Ellsworth in the convention of 1787, he said: "All this doubtless shows uncertainty as to the true meaning of the term 'direct tax'; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the States at that time usually raised their principal supplies. This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*." The case last referred to was *Hylton* v. *United States*. After a careful examination of the opinions in that case, Chief Justice Chase proceeded: "It may be safely assumed, therefore, as the unanimous judgment of the court, [in the *Hylton case*] that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words 'direct taxes,' as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States. It follows necessarily that *the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must*

be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on *incomes* of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company* v. *Soule*, 7 Wall. 433, held *not to be a direct tax.*"

In *Scholey* v. *Rew*, 23 Wall. 331, 346, 347, the question was, whether a duty laid by the act of June 30, 1864, as amended, 14 Stat. 140, 141, upon successions was a direct tax within the meaning of the Constitution of the United States. The act provided that the duty shall be paid at the time when the successor, or any person in his right or on his behalf, shall become *entitled in possession* to his succession, or to the receipt of the income and profits thereof. The act further provided that "the term 'real estate' should include 'all lands, tenements, and hereditaments, corporeal and incorporeal,' and that the term 'succession' should denote 'the *devolution of title* to any real estate.'" Also: "That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person entitled by reason of any such disposition, a 'succession;'" and that "the interest of any successor in moneys to arise from the sale of real estate, under any trust for the sale thereof, shall be deemed to be a succession chargeable with duty under this act, and the said duty shall be paid by the trustee, executor, or other person having control of the funds." It is important also to observe that this succession tax was made a *lien* on the land "in respect whereof" it was laid, and was to be "collected by the same officers, in the same manner, and by the same processes as direct taxes upon lands, under the authority of the United States." A duty was also imposed by the same act on legacies and distributive shares of personal property.

It would seem that this case was one that involved directly

the meaning of the words "direct taxes" in the Constitution. In the argument of that case it was conceded by the counsel for the taxpayer that the opinions in the *Hylton case* recognized a tax on land and a capitation tax to be the *only direct* taxes contemplated by the Constitution. But counsel said: "The present is a tax *on land*, if ever one was. No doubt it is to be paid by the owner of the land, if he can be made to pay it; but that is true of any tax that ever was or ever can be imposed on property. And as if to prove how directly the property, and not the property owner, is aimed at, the duty is made a specific lien and charge upon the land 'in respect whereof' it is assessed. More than this: as if to show how identical, in the opinion of Congress, this duty was with the avowedly direct tax upon lands which it had levied but a year or two before, it enacts that this *succession tax alone*, out of a great revenue system, should be collected by the same officers, in the same manner, and by the same processes as direct taxes upon lands under the authority of the United States."

This interpretation of the Constitution was rejected by every member of this court. Mr. Justice Clifford, delivering the unanimous judgment of the court, said: "Support to the first objection is attempted to be drawn from that clause of the Constitution which provides that direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers; and also from the clause which provides that no capitation or other direct tax shall be laid unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare. Such a tax or duty is neither a tax on land nor a capitation exaction, as subsequently appears from the language of the section imposing the tax or duty, as well as from the preceding section, which provides that the term 'succession' shall denote the devolution

of real estate; and the section which imposes the tax or duty also contains a corresponding clause, which provides that the term 'successor' shall denote the person so entitled, and that the term 'predecessor' shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived." Again: "Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term *does not include* the tax *on income*, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy. *Insurance Co.* v. *Soule*, 7 Wall. 446; *Veazie Bank* v. *Fenno*, 8 Wall. 546; *Clark* v. *Sickel*, 14 Int. Rev. Rec. 6. Neither duties nor excises were regarded as direct taxes by the authors of The Federalist, No. 36, p. 161; Hamilton's Works, 847; *License Tax Cases*, 5 Wall. 462." "Exactions for the support of the government may assume the form of duties, imposts, or excises, or they may also assume the form of license fees for permission to carry on particular occupations or to enjoy special franchises, or they may be specific in form, as when levied upon corporations in reference to the amount of capital stock or to the business done or profits earned by the individual or corporation. Cooley Const. Lim. 495*; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Bank* v. *Apthorp*, 12 Mass. 252. Sufficient appears in the prior suggestions to define the language employed and to point out what is the true intent and meaning of the provision, and to make it plain that the exaction is not a tax upon the land, and that it was rightfully levied, if the findings of the court show that the plaintiff became entitled, in the language of the section, or acquired the estate or the right to the income thereof by the devolution of the title to the same, as assumed by the United States."

The meaning of the words "direct taxes" was again the subject of consideration by this court in *Springer* v. *United States*, 102 U. S. 586, 599, 600, 602. A reference to the printed arguments in that case will show that this question was most

thoroughly examined, every member of the court participating in the decision. The question presented was as to the constitutionality of the act of June 30, 1864, c. 172, 13 Stat. 218, as amended by the act of March 3, 1865, c. 78, 13 Stat. 469, so far as it levied a duty upon gains, profits, and income derived from every kind of property, and from every trade, profession, or employment. The contention of Mr. Springer was, that such a tax was a direct tax that could not be levied except by apportioning the same among the States, on the basis of numbers. In support of his position he cited numerous authorities, among them, all or most of the leading works on political economy and taxation. Mr. Justice Swayne, again delivering the unanimous judgment of this court, referred to the proceedings and debates in the convention of 1787, to The Federalist, to all the acts of Congress imposing taxation, and to the previous cases of *Hylton* v. *United States*, *Pacific Ins. Co.* v. *Soule*, *Veazie Bank* v. *Fenno*, and *Scholey* v. *Rew*. Among other things he said: "It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight." Alluding to the observations by one of the Judges in the *Hylton case* as to the evils of an apportioned tax on specific personal property, he said: "It was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes are few and small, *it would be intolerably oppressive*." After examining the cases above cited, he concludes, speaking for the entire court: "All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error. The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject. Mr. Justice Story says

that all taxes are usually divided into two classes — those which are *direct* and those which are *indirect* — and that 'under the former denomination are included taxes on land or real property, and, under the latter, taxes on consumption.' 1 Story Const. § 950. Chancellor Kent, speaking of the case of *Hylton* v. *United States*, says: 'The better opinion seems to be that the direct taxes contemplated by the Constitution were only two, viz., a capitation or poll tax and a tax on land.' 1 Kent Com. 257. See also Cooley, Taxation, p. 5, note 2; Pomeroy, Const. Law, 157, p. 230, 9th ed.; Sharwood's Blackstone, 308, note; Rawle, Const. 30; Sergeant, Const. 305. We are not aware that any writer, since *Hylton* v. *United States* was decided, has expressed a view of the subject different from that of these authors. Our conclusions are, that *direct* taxes, within the meaning of the Constitution, are *only* capitation taxes, as expressed in that instrument, *and taxes on real estate*, and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

One additional authority may be cited — *Clarke* v. *Sickel etc.*, reported in 14 Int. Rev. Rec. 6, and referred to in the opinion of this court in *Scholey* v. *Rew*. It was decided by Mr. Justice Strong at the circuit in 1871. That case involved the validity of a tax on income derived from an annuity bequeathed by the will of the plaintiff's husband, *and charged* (as the record of that case shows) *upon his entire estate, real and personal.* The eminent jurist who decided the case said: "The pleadings in all those cases raise the question whether the act of Congress of June 30, 1864, c. 171, and its supplements, so far as they impose a tax upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, are within the power conferred by the Constitution upon Congress. If it be true, as has been argued, that the income tax is a 'capitation or other direct tax' within the meaning of the Constitution, it is undoubtedly prohibited by the first and ninth sections of the first article, for it is not 'apportioned among the States.' But I am of opinion that it is not a 'capitation or other direct tax' in the sense in which the

framers of the Constitution and the people of the States who adopted it understood such taxes." The significance of this language is manifest when the fact is recalled that the act of 1864 provided, among other things, that (with certain specified exceptions) a tax should be levied, collected, and paid annually upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from *any kind of property*, *rents*, interest, dividends, salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or *from any other source whatever*. 13 Stat. 281.

From this history of legislation and of judicial decisions it is manifest —

That, in the judgment of the members of this court as constituted when the *Hylton case* was decided — all of whom were statesmen and lawyers of distinction, two, Wilson and Paterson, being recognized as great leaders in the convention of 1787 — the only taxes that could certainly be regarded as direct taxes, within the meaning of the Constitution, were capitation taxes and taxes on lands;

That, in their opinion, a tax on real estate was properly classified as a direct tax, because, in the words of Justice Iredell, it was "a tax on something inseparably annexed to the soil," "something capable of apportionment," though, in the opinion of Mr. Justice Paterson, apportionment even of a tax on land was "scarcely practicable;"

That while the *Hylton case* did not, in terms, involve a decision in respect of lands, what was said by the judges on the subject was not, strictly speaking, *obiter dicta*, because the principle or rule that would determine whether a tax on carriages was a direct tax would necessarily indicate whether a tax on lands belonged to that class;

That, in the judgment of all the judges in the *Hylton case*, no tax was a direct one, that could not be apportioned among the States, on the basis of numbers, with some approach to justice and equality among the people of the several States who owned the property or subject taxed, for the reason, in

the words of Mr. Justice Chase, that the framers of the Constitution cannot be supposed to have contemplated taxation by a rule that "would evidently create great inequality and injustice;" or, in the words of Mr. Justice Paterson, would be "absurd and inequitable;" or, in the words of Mr. Justice Iredell, would lead, if practised, to "dangerous consequences," and be "altogether destructive of the notion of a common interest, upon which the very principles of the Constitution are founded;"

That by the judgment in the *Hylton case*, a tax on specific personal property, owned by the taxpayer and used or let to hire, was not a direct tax to be apportioned among the States on the basis of numbers;

That from the foundation of the government, until 1861, Congress following the declarations of the judges in the *Hylton case*, restricted direct taxation to real estate and slaves, and in 1861 to real estate exclusively, and has never, by any statute, indicated its belief that personal property, however assessed or valued, was the subject of "direct taxes" to be apportioned among the States;

That by the above two acts of January 18, 1815, the validity of which has never been questioned, Congress by laying duties, according to the rule of uniformity, upon the numerous articles of personal property mentioned in those acts, indicated its belief that duties on personal property were not direct taxes to be apportioned among the States on the basis of numbers, but were duties to be laid by the rule of uniformity, and without regard to the population of the respective States;

That in 1861 and subsequent years Congress imposed, without apportionment among the States on the basis of numbers, but by the rule of uniformity, duties on *income* derived *from every kind of property, real and personal*, including income derived from *rents*, and from trades, professions, and employments, etc.; and, lastly,

That upon every occasion when it has considered the question whether a duty on *incomes* was a direct tax within the meaning of the Constitution, this court has, *without a dissent-*

ing voice, determined it in the negative, always proceeding on the ground that capitation taxes and taxes on land were the only direct taxes contemplated by the framers of the Constitution.

The view I have given of *Hylton* v. *United States* is sustained by Mr. Justice Story's statement of the grounds upon which the court proceeded in that case. He says: "The grounds of this decision, as stated in the various opinions of the judges, were, first, the doubt whether any taxes were direct in the sense of the Constitution, but capitation and land taxes, as has been already suggested; secondly, that in cases of doubt the rule of apportionment ought not to be favored, because it was matter of compromise, and in itself radically indefensible and wrong; thirdly, the monstrous inequality and injustice of the carriage tax, if laid by the rule of apportionment, which would show that no tax of this sort could have been contemplated by the convention, as within the rule of apportionment; fourthly, that the terms of the Constitution were satisfied by confining the clause respecting direct taxes to capitation and land taxes; fifthly, that accurately speaking, all taxes on expenses or consumption are *indirect* taxes, and a tax on carriages is of this kind; and, sixthly, (what is probably of most cogency and force, and of itself decisive,) that no tax could be a direct one, in the sense of the Constitution, which was not capable of apportionment according to the rule laid down in the Constitution." 1 Story Const. 705, § 956.

If the above summary as to the practice of the government, and the course of decision in this court, fairly states what was the situation, legislative and judicial, at the time the suits now before us were instituted, it ought not to be deemed necessary, in determining a question which this court has said was "exclusively in American jurisprudence," to ascertain what were the views and speculations of European writers and theorists in respect of the nature of taxation and the principles by which taxation should be controlled, nor as to what, on merely economic or scientific grounds, and under the systems of government prevailing in Europe, should be deemed direct

taxes, and what indirect taxes. Nor ought this court to be embarrassed by the circumstance that statesmen of the early period of our history differed as to the principles or methods of national taxation, or as to what should be deemed direct taxes to be apportioned among the States and what indirect taxes, duties, imposts, and excises, that must be laid by some rule of uniformity applicable to the whole country without reference to the relative population of particular States. Undoubtedly, as already observed, Madison was of opinion that a tax on carriages was a direct tax within the meaning of the Constitution, and should be apportioned among the States on the basis of numbers. But this court, in the *Hylton case*, rejected his view of the Constitution, sustained that of Hamilton, and, subsequently, Madison, as President, approved acts of Congress imposing taxes upon personal property without apportioning the same among the States. The taxes which, in the opinion of Hamilton, ought to be apportioned among the States were not left by him in doubt; for in a draft of the Constitution prepared by him in 1787, it was provided that "taxes on lands, houses, and other real estate, and capitation taxes, shall be proportioned in each State by the whole number of free persons, except Indians not taxed, and by three-fifths of all other persons." Art. VII, Sec. 4. 2 Hamilton's Works, 406. The practice of a century, in harmony with the decisions of this court, under which uncounted millions have been collected by taxation, ought to be sufficient to close the door against further inquiry, based upon the speculations of theorists, and the varying opinions of statesmen who participated in the discussions, sometimes very bitter, relating to the form of government to be established in place of the Articles of Confederation under which, it has been well said, Congress could declare everything and do nothing.

But this view has not been accepted in the present cases, and the questions involved in them have been examined just as if they had not been settled by the long practice of the government, as well as by judicial decisions covering the entire period since 1796 and giving sanction to that practice. It seems to me that the court has not given to the maxim of *stare decisis*

the full effect to which it is entitled. While obedience to that maxim is not expressly enjoined by the Constitution, the principle that decisions, resting upon a particular interpretation of that instrument, should not be lightly disregarded where such interpretation has been long accepted and acted upon by other branches of the government and by the public, underlies our American jurisprudence. There are many constitutional questions which were earnestly debated by statesmen and lawyers in the early days of the Republic. But having been determined by the judgments of this court, they have ceased to be the subjects of discussion. While, in a large sense, constitutional questions may not be considered as finally settled, unless settled rightly, it is certain that a departure by this court from a settled course of decisions on grave constitutional questions, under which vast transactions have occurred, and under which the government has been administered during great crises, will shake public confidence in the stability of the law.

Since the *Hylton case* was decided this country has gone through two great wars under legislation based on the principles of constitutional law previously announced by this court. The recent civil war, involving the very existence of the nation, was brought to a successful end, and the authority of the Union restored, in part, by the use of vast amounts of money raised under statutes imposing duties on incomes derived from every kind of property, real and personal, not by the unequal rule of apportionment among the States on the basis of numbers, but by the rule of uniformity, operating upon individuals and corporations in all the States. And we are now asked to declare — and the judgment this day rendered in effect declares — that the enormous sums thus taken from the people, and so used, were taken in violation of the supreme law of the land. The supremacy of the nation was reëstablished against armed rebellion seeking to destroy its life, but, it seems, that that consummation, so devoutly wished, and to effect which so many valuable lives were sacrificed, was attended with a disregard of the Constitution by which the Union was ordained.

The policy of the government in the matter of taxation for its support, as well as the decisions of this court, have been in harmony with the views expressed by Oliver Ellsworth, before he became the Chief Justice of this court. In the Connecticut Convention of 1788, when considering that clause of the proposed constitution giving Congress power to lay and collect taxes, duties, imposts, and excises, in order to pay the debts and provide for the common defence and general welfare of the United States, that far-seeing statesman — second to none of the Revolutionary period, and whom John Adams declared to be the firmest pillar of Washington's administration in the Senate — said: "The first objection is, that this clause extends to all the objects of taxation." "The state debt, which now lies heavy upon us, arose from the want of powers in the Federal system. Give the necessary powers to the National Government, and the State will not be again necessitated to involve itself in debt for its defence in war. It will lie upon the National Government to defend all the States, to defend all its members from hostile attacks. The United States will bear the whole burden of war. It is necessary that the power of the general legislature should extend to all the objects of taxation; that government should be able to command all the resources of the country; because no man can tell what our exigencies may be. Wars have now become rather wars of the purse than of the sword. Government must, therefore, be able to command the whole power of the purse; otherwise, a hostile nation may look into our Constitution, see what resources are in the power of government, and calculate to go a little beyond us; thus they may obtain a decided superiority over us, and reduce us to the utmost distress. A government which can command but half its resources is like a man with but one arm to defend himself." Flanders' Chief Justices, 150, 2d Series.

Let us examine the grounds upon which the decision of the majority rests, and look at some of the consequences that may result from the principles now announced. I have a deep, abiding conviction, which my sense of duty compels me to express, that it is not possible for this court to have

rendered any judgment more to be regretted than the one just rendered.

Assuming it to be the settled construction of the Constitution that the general government cannot tax *lands, eo nomine*, except by apportioning the tax among the States according to their respective numbers, does it follow that a tax on *incomes* derived from *rents* is a *direct* tax *on the real estate* from which such rents arise?

In my judgment a tax on *income* derived from real property ought not to be, and until now has never been, regarded by any court as a direct tax on such property within the meaning of the Constitution. As the great mass of lands in most of the States do not bring any rents, and as incomes from rents vary in the different States, such a tax cannot possibly be apportioned among the States on the basis merely of numbers with any approach to equality of right among taxpayers, any more than a tax on carriages or other personal property could be so apportioned. And, in view of former adjudications, beginning with the *Hylton case* and ending with the *Springer case*, a decision now that a tax on income from real property can be laid and collected only by apportioning the same among the States, on the basis of numbers, may, not improperly, be regarded as a judicial revolution, that may sow the seeds of hate and distrust among the people of different sections of our common country.

The principal authorities relied upon to prove that a tax on rents is a direct tax on the lands from which such rents are derived, are the decisions of this court holding that the States cannot, *in any form, directly or indirectly*, burden the exercise by Congress of the powers committed to it by the Constitution,[1] and those which hold that the national government cannot, *in any form, directly or indirectly*, burden the agencies

[1] *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Weston* v. *Charleston*, 2 Pet. 449; *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435; *Almy* v. *California*, 24 How. 169; *Railroad Company* v. *Jackson*, 7 Wall. 262; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Leloup* v. *Mobile*, 127 U. S. 640; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688.

or instrumentalities employed by the States in the exercise of their powers.[1] No one of the cases of either class involved any question as to what were "direct taxes" within the meaning of the Constitution. They were cases in which it was held that the governmental power in question could not be burdened or impaired *at all* or in any mode, directly or indirectly, by the government that attempted to do so. Every one must concede that those cases would have been decided just as they were decided, if there were no provision whatever in the Constitution relating to direct taxes or to taxation in any other mode. All property in this country, except the property and the agencies and instrumentalities of the States, may be taxed, in some form, by the national government in order to pay the debts and provide for the common defence and general welfare of the United States; some, by direct taxation apportioned among the States on the basis of numbers; other kinds, by duties, imposts, and excises, under the rule of uniformity applicable throughout the United States to individuals and corporations, and without reference to population in any State. Decisions, therefore, which hold that a State can neither directly nor indirectly obstruct the execution by the general government of the powers committed to it, nor burden with taxation the property and agencies of the United States, and decisions that the United States can neither directly nor indirectly burden nor tax the property or agencies of the State, nor interfere with the governmental powers belonging to the States, do not even tend to establish the proposition that a duty which, by its indirect operation, may affect the value or the use of particular property, is a direct tax on such property, within the meaning of the Constitution.

In determining whether a tax on income from rents is a direct tax, within the meaning of the Constitution, the inquiry is not whether it may in some way indirectly affect the land or the land owner, but whether it is a *direct* tax *on the thing*

[1] *Collector* v. *Day*, 11 Wall. 113; *United States* v. *Railroad Co.*, 17 Wall. 322, 332; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 178; *Mercantile Bank* v. *New York*, 121 U. S. 138, 162.

taxed, the land. The circumstance that such a tax may possibly have the effect to diminish the value of the use of the land is neither decisive of the question nor important. While a tax *on the land* itself, whether at a fixed rate applicable to all lands without regard to their value, or by the acre or according to their market value, might be deemed a direct tax within the meaning of the Constitution as interpreted in the *Hylton case*, a duty on rents is a duty on something distinct and entirely separate from, although issuing out of, the land.

At the original hearing of this cause we were referred on this point to the statement by Coke to the effect that "if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*, the whole land itself doth pass. For what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, all whatsoever, parcel of that land doth pass." Co. Lit. 45. (4 *b.*) 1 Har. & But. ed. § 1.

Of course, a grant, without limitation as to time, to a particular person and his *heirs*, of the *profits* of certain lands, accompanied by *livery of seizin*, would be construed as passing the lands themselves, unless a different interpretation were required by some statute. In this connection Jarman on Wills (Vol. 1, 5th ed. 798*) is cited in support of the general proposition that a devise of the rents and profits or of the income of lands passes the land itself both at law and equity. But the editor, after using this language, adds: "And since the act 1 Vict. c. 26 such a devise carries a fee simple; but before that act it carried no more than an estate for life unless *words of inheritance were added.*" Among the authorities cited by the editor, in reference to devises of the incomes of lands, are *Humphrey* v. *Humphrey*, 1 Sim. (N. S.) 536, 540, and *Mannox* v. *Greener*, L. R. 14 Eq. 456, 462. In the first of those cases, the court held that "an *unlimited* gift of the income of a fund" passed the capital; in the other, that "a gift of the income of the land, *unrestricted*, is simply a gift of the fee simple of the land." So, in *Fox* v. *Phelps*, 17 Wend. 393, 402, Justice Bronson, speaking for the court, said: "An

unlimited disposition of rents and profits or income of an estate will sometimes carry the estate itself. *Kerry* v. *Derrick*, Cro. Jac. 104; *Phillips* v. *Chamberlaine*, 4 Ves. 51. In *Newland* v. *Shepard*, 2 P. Wms. 194, a devise of the produce and interest of the estate to certain grandchildren for a limited period was held to pass the estate itself. But the authority of this case was denied by Lord Hardwicke in *Fonereau* v. *Fonereau*, 3 Atk. 315. The rule cannot apply where, as in this case, the rents and profits are only given *for a limited period*. *Earl* v. *Grim*, 1 Johns. Ch. 494." But who will say that a devise of rent already due, or profits already earned, is a devise of the land itself? Or who would say that a devise of rents, profits, or income of land for any period expressly limited, would pass the fee or the ownership of the land itself? The statute under examination in these causes expires by its own terms at the end of five years. It imposes an annual tax on the income of lands *received* the preceding year. It does not touch the lands themselves, nor interfere with their sale at the pleasure of the owner. It does not apply to lands from which no rent is derived. It gives no lien upon the lands to secure the payment of the duty laid on rents that may accrue to the landlord from them. It does not apply to rents due and payable by contract, and not collected, but only to such as are received by the taxpayer. But whether a grant or devise, with or without limitation or restriction, as to time, of the rents and profits or of the income of land passes the land itself, is wholly immaterial in the present causes. We are dealing here with questions relating to taxation for public purposes of income from rents, and not with any question as to the passing of title, by deed or will, to the real estate from which such rents may arise.

It has been well observed, on behalf of the government, that rents have nothing in common with land; that taking wrongful possession of land is trespass, while the taking of rent may, under some circumstances, be stealing; that the land goes to the heir while the rent-money goes to the personal representative; one has a fixed *situs*; that of the other may be determined by law, but generally is that of the owner;

that one is taxed, and can be taxed only, by the sovereignty within which it lies, while the other may be taxed, and can be taxed only, by the sovereignty under whose dominion the owner is; that a tax on land is generally a *lien* on the land, while that on personalty almost universally is not; and that, in their nature, lands and rents arising from land have not a single attribute in common. A tax on land reaches the land itself, whether it is rented or not. The citizen's residence may be reached by a land tax, although he derives no rent from it. But a duty on rents will not reach him, unless he rents his residence to some one else and receives the rent. A tax with respect to the money that a landlord receives for rent is personal to him, because it relates to his revenue from a designated source, and does not, in any sense — unless it be otherwise provided by statute — rest on the land. The tax in question was laid without reference to the land of the taxpayer; for the amount of rent is a subject of contract, and is not always regulated by the intrinsic value of the source from which the rent arises. In its essence it is a tax with reference only to income received.

But the court, by its judgment just rendered, goes far in advance not only of its former decisions, but of any decision heretofore rendered by an American court. Adhering to what was heretofore adjudged in these cases in respect of the taxation of income arising from real estate, it now adjudges, upon the same grounds on which it proceeds in reference to real estate and the income derived therefrom, that a tax "on personal property," or on the yield or income of personal property, or on capital in personalty held for the purpose of income or ordinarily yielding income, and on the income therefrom, or on the income from "*invested* personal property, bonds, stocks, investments of all kinds," is a direct tax within the meaning of the Constitution, which cannot be imposed by Congress unless it be apportioned among the States on the basis of population.

I cannot assent to the view that visible tangible personal property is not subject to a national tax under the rule of uniformity, whether such uniformity means only territorial uni-

formity, or equality of right among all taxpayers of the same class. When direct taxes are restricted to capitation taxes and taxes on land, taxation, in either form, is limited to subjects always found wherever population is found, and which cannot be consumed or destroyed. They are subjects which can always be seen and inspected by the assessor, and have immediate connection with the country and its soil throughout its entire limits. Not so with personal property. In *Veazie Bank* v. *Fenno*, above cited, it was said that personal property had never been regarded by Congress as subject to "direct taxes," although it was said that, in the opinion of some statesmen at the time of the adoption of the Constitution, direct taxes "*perhaps*" included such as might be levied "by valuation and assessment of personal property upon *general lists*," or, as expressed by Hamilton in his argument in the *Hylton case*, "general assessments, whether on the whole property of individuals, or on their whole real or personal estate." 7 Hamilton's Works, 848. The statute now before us makes no provision for the taxation of personal property by valuation and assessment upon general lists.

In the *Hylton case* this court — proceeding, as I think, upon a sound interpretation of the Constitution, and in accordance with historical evidence of great cogency — unanimously held that an act imposing a specific duty on carriages for the conveyance of persons was a valid exercise of the power to lay and collect *duties*, as distinguished from direct taxes. The majority of the court now sustain the position taken by Madison, who insisted that such a duty was a direct tax within the meaning of the Constitution. So much pains would not have been taken to bring out his view of direct taxes, unless to indicate this court's approval of them, notwithstanding a contrary interpretation of the Constitution had been announced and acted upon for nearly one hundred years. It must be assumed, therefore, that the court, as now constituted, would adjudge to be unconstitutional not only any act like that of 1794 laying specific duties on carriages without apportioning the same among the States, but acts similar to those of 1815, laying duties, according to the rule of uniformity, upon

specific personal property owned or manufactured in this country.

In my judgment — to say nothing of the disregard of the former adjudications of this court, and of the settled practice of the government — this decision may well excite the gravest apprehensions. It strikes at the very foundations of national authority, in that it denies to the general government a power which is, or may become, vital to the very existence and preservation of the Union in a national emergency, such as that of war with a great commercial nation, during which the collection of all duties upon imports will cease or be materially diminished. It tends to reëstablish that condition of helplessness in which Congress found itself during the period of the Articles of Confederation, when it was without authority by laws operating directly upon individuals, to lay and collect, through its own agents, taxes sufficient to pay the debts and defray the expenses of government, but was dependent, in all such matters, upon the good will of the States, and their promptness in meeting requisitions made upon them by Congress.

Why do I say that the decision just rendered impairs or menaces the national authority? The reason is so apparent that it need only be stated. In its practical operation this decision withdraws from national taxation not only all incomes derived from real estate, but tangible personal property, "*invested* personal property, bonds, stocks, investments of all kinds," and the income that may be derived from such property. This results from the fact that by the decision of the court, all such personal property and all incomes from real estate and personal property, are placed beyond national taxation otherwise than by *apportionment* among the States *on the basis* simply *of population*. No such apportionment can possibly be made without doing gross injustice to the many for the benefit of the favored few in particular States. Any attempt upon the part of Congress to apportion among the States, upon the basis simply of their population, taxation of personal property or of incomes, would tend to arouse such indignation among the freemen of America that it would never

be repeated. When, therefore, this court adjudges, as it does now adjudge, that Congress cannot impose a duty or tax upon personal property, or upon income arising either from rents of real estate or from personal property, including invested personal property, bonds, stocks, and investments of all kinds, except by apportioning the sum to be so raised among the States according to population, it *practically* decides that, *without an amendment of the Constitution* — two-thirds of both Houses of Congress and three-fourths of the States concurring — such property and incomes can never be made to contribute to the support of the national government.

But this is not all. The decision now made may provoke a contest in this country from which the American people would have been spared if the court had not overturned its former adjudications, and had adhered to the principles of taxation under which our government, following the repeated adjudications of this court, has always been administered. Thoughtful, conservative men have uniformly held that the government could not be safely administered except upon principles of right, justice, and equality — without discrimination against any part of the people because of their owning or not owning visible property, or because of their having or not having incomes from bonds and stocks. But, by its present construction of the Constitution the court, for the first time in all its history, declares that our government has been so framed that, in matters of taxation for its support and maintenance those who have incomes derived from the renting of real estate or from the leasing or using of tangible personal property, or who own invested personal property, bonds, stocks and investments of whatever kind, have privileges that cannot be accorded to those having incomes derived from the labor of their hands, or the exercise of their skill, or the use of their brains. Let me illustrate this. In the large cities or financial centres of the country there are persons deriving enormous incomes from the renting of houses that have been erected, not to be occupied by the owner, but for the sole purpose of being rented. Near by are other persons, trusts, combinations, and corporations, possessing vast quantities of personal property, including bonds and

stocks of railroad, telegraph, mining, telephone, banking, coal, oil, gas, and sugar-refining corporations, from which millions upon millions of income are regularly derived. In the same neighborhood are others who own neither real estate, nor invested personal property, nor bonds, nor stocks of any kind, and whose entire income arises from the skill and industry displayed by them in particular callings, trades, or professions, or from the labor of their hands, or the use of their brains. And it is now the law, as this day declared, that under the Constitution, however urgent may be the needs of the Government, however sorely the administration in power may be pressed to meet the moneyed obligations of the nation, Congress cannot tax the personal property of the country, nor the income arising either from real estate or from invested personal property, except by a tax apportioned among the States, on the basis of their population, while it *may* compel the merchant, the artisan, the workman, the artist, the author, the lawyer, the physician, even the minister of the Gospel, no one of whom happens to own real estate, invested personal property, stocks or bonds, to contribute directly from their respective earnings, gains, and profits, and under the rule of uniformity or equality, for the support of the government.

The Attorney General of the United States very appropriately said that the constitutional exemption from taxation of incomes arising from the rents of real estate, otherwise than by a direct tax, apportioned among the States on the basis of numbers, was a new theory of the Constitution, the importance of which to the whole country could not be exaggerated. If any one has questioned the correctness of that view of the decision rendered on the original hearing, it ought not again to be questioned, now that this court has included in the constitutional exemption from the rule of uniformity, the personal property of the country and incomes derived from invested personal property. If Congress shall hereafter impose an income tax in order to meet the pressing debts of the nation and to provide for the necessary expenses of the government, it is advised, by the judgment now rendered, that it cannot touch the income from real estate nor the income from personal property, in-

vested or uninvested, except by apportionment among the States on the basis of population. Under that system the people of a State, containing 1,000,000 of inhabitants, who receive annually $20,000,000 of income from real and personal property, would pay no more than would be exacted from the people of another State, having the same number of inhabitants, but who receive income from the same kind of property of only $5,000,000. If this new theory of the Constitution, as I believe it to be, if this new departure from the safe way marked out by the fathers and so long followed by this court, is justified by the fundamental law, the American people cannot too soon amend their Constitution.

It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich, and by much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of socialism. With the policy of legislation of this character, this court has nothing to do. That is for the legislative branch of the government. It is for Congress to determine whether the necessities of the government are to be met, or the interests of the people subserved, by the taxation of incomes. With that determination, so far as it rests upon grounds of expediency or public policy, the courts can have no rightful concern. The safety and permanency of our institutions demand that each department of government shall keep within its legitimate sphere as defined by the supreme law of the land. We deal here only with questions of law. Undoubtedly, the present law contains exemptions that are open to objection, but, for reasons to be presently stated, such exemptions may be disregarded without invalidating the entire law and the property so exempted may be reached under the general provisions of the statute. *Huntington* v. *Worthen*, 120 U. S. 97, 102.

If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich, because of their wealth, the court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of *taxation*, but was repugnant to those

principles of natural right upon which our free institutions rest, and, therefore, was legislative spoliation, under the guise of taxation. But it is not of that character. There is no foundation for the charge that this statute was framed in sheer hostility to the wealth of the country. The provisions most liable to objection are those exempting from taxation large amounts of accumulated capital, particularly that represented by savings banks, mutual insurance companies, and loan associations. Surely such exemptions do not indicate sympathy on the part of the legislative branch of the government with the pernicious theories of socialism, nor show that Congress had any purpose to despoil the rich.

In this connection, and as a ground for annulling the provisions taxing incomes, counsel for the appellant refers to the exemption of incomes that do not exceed $4000. It is said that such an exemption is too large in amount. That may be conceded. But the court cannot for that reason alone declare the exemption to be invalid. Every one, I take it, will concede that Congress, in taxing incomes, may rightfully allow an exemption in some amount. That was done in the income tax laws of 1861 and in subsequent laws, and was never questioned. Such exemptions rest upon grounds of public policy, of which Congress must judge, and of which this court cannot rightfully judge; and that determination cannot be interfered with by the judicial branch of the government, unless the exemption is of such a character and is so unreasonably large as to authorize the court to say that Congress, under the pretence merely of legislating for the general good, has put upon a few persons burdens that, by every principle of justice and under every sound view of *taxation*, ought to have been placed upon all or upon the great mass of the people. If the exemption had been placed at $1500 or even $2000, few, I think, would have contended that Congress, in so doing, had exceeded its powers. In view of the increased cost of living at this day, as compared with other times, the difference between either of those amounts and $4000 is not so great as to justify the courts in striking down all of the income tax provisions. The basis upon which such exemptions rest is that

the general welfare requires that in taxing incomes, such exemption should be made as will fairly cover the annual expenses of the average family, and thus prevent the members of such families becoming a charge upon the public. The statute allows corporations, when making returns of their net profits or income, to deduct actual operating and business expenses. Upon like grounds, as I suppose, Congress exempted incomes under $4000.

I may say, in answer to the appeals made to this court to vindicate the constitutional rights of citizens owning large properties and having large incomes, that the real friends of property are not those who would exempt the wealth of the country from bearing its fair share of the burdens of taxation, but rather those who seek to have every one, without reference to his locality, contribute from his substance, upon terms of equality with all others, to the support of the government. There is nothing in the nature of an income tax *per se* that justifies *judicial* opposition to it upon the ground that it illegally discriminates against the rich or imposes undue burdens upon that class. There is no tax which, in its essence, is more just and equitable than an income tax, if the statute imposing it allows only such exemptions as are demanded by public considerations and are consistent with the recognized principles of the equality of all persons before the law, and, while providing for its collection in ways that do not unnecessarily irritate and annoy the taxpayer, reaches the earnings of the entire property of the country, except governmental property and agencies, and compels those, whether individuals or corporations, who receive such earnings, to contribute therefrom a reasonable amount for the support of the common government of all.

We are told in argument that the burden of this income tax, if collected, will fall, and was imposed that it might fall, almost entirely upon the people of a few States, and that it has been imposed by the votes of Senators and Representatives of States whose people will pay relatively a very small part of it. This suggestion, it is supposed, throws light upon the construction to be given to the Constitution, and consti-

tutes a sufficient reason why this court should strike down the provision that Congress has made for an income tax. It is a suggestion that ought never to have been made in a court of justice. But it seems to have received some consideration; for, it is said that the grant of the power to lay and collect direct taxes was, in the belief of the framers of the Constitution, that it would not be exercised "unfairly and discriminately, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden." It is cause for profound regret that it has been deemed appropriate to intimate that the law now before us had its origin in a desire upon the part of a majority in the two Houses of Congress to impose undue burdens upon the people of particular States.

I am unable to perceive that the performance of our duty should depend, in any degree, upon an inquiry as to the residence of the persons who are required by the statute to pay this income tax. If, under the bounty of the United States, or the beneficent legislation of Congress, or for any other reason, some parts of the country have outstripped other parts in population and wealth, that surely is no reason why people of the more favored States should not share in the burdens of government alike with the people of all the States of the Union. Is a given body of people in one part of the United States, although owning vast properties, from which many millions are regularly derived, of more consequence in the eye of the Constitution or of the judicial tribunals than the like number of people in other parts of the country who do not enjoy the same prosperity? Arguments that rest upon favoritism by the law-making power to particular sections of the country and to mere property, or to particular kinds of property, do not commend themselves to my mind; for, they cannot but tend to arouse a conflict that may result in giving life, energy, and power as well to those in our midst who are eager to array section against section as to those, unhappily not few in number, who are without any proper idea of our free institutions, and who have neither respect for the rights of property nor any conception of what is liberty regulated by law.

It is said that if the necessity exists for the general government to raise by direct taxation a given sum of money, in addition to the revenue from duties, imposts, and excises, the quota of each State can be apportioned on the basis of the census, and the government can proceed to assess the amount to be raised on all the real and personal property, as well as the income, of all persons in the State, and collect the tax, if the State does not in the meantime pay its quota, and reimburse itself, by collecting the amount paid by it, according to its own system and in its own way. Of course, it is not difficult to understand that a direct tax, when assessed, may be collected by the general government without waiting for the States to pay the sum apportioned to their people, or that time may be given to the States to pay such amounts. But that view does not meet the argument that the assessment and collection of a direct tax on incomes — such tax being apportioned on the basis merely of numbers in the respective States — was never contemplated by the framers of the Constitution. Whether such a tax be collected by the general government through its own agents, or by the State, from such of the people *as have incomes subject to the tax imposed*, is immaterial to the discussion. In either case, the gross injustice that would result would be the same.

If Congress should lay a tax of a given aggregate amount on *incomes* (above a named sum) from every taxable source, and apportion the same among the States on the basis of numbers, could any State be expected to assume and pay the sum assigned to it, and then proceed to reimburse itself by taxing *all* the property, real and personal, within its limits, thereby compelling those who have no taxable incomes to contribute from their means to pay taxes assessed upon those who have taxable incomes? Would any State use money belonging to all of its people for the purpose of discharging taxes due from, or assessed against, a part of them? Is it not manifest that a national tax laid on incomes or on specific personal property, if apportioned among the States on the basis of population, might be ruinous to the people of those States in which the number having taxable incomes, or

who owned that particular kind of property, were relatively few when the entire population of the State is taken into account? So diversified are the industries of the States composing the Union that, if the government should select particular subjects or products for taxation and apportion the sum to be raised among the States, according to their population, the amount paid by some of the States would be out of all proportion to the quantity or value of such products within their respective limits.

It has been also said, or rather it is intimated, that the framers of the Constitution intended that the power to lay direct taxes should only be exercised in time of war, or in great emergencies, and that a tax on incomes is not justified in times of peace. Is it to be understood that the courts may annul an act of Congress imposing a tax on incomes, whenever in their judgment such legislation is not demanded by any public emergency or pressing necessity? Is a tax on incomes permissible in a time of war, but unconstitutional in a time of peace? Is the judiciary to supervise the action of the legislative branch of the government upon questions of public policy? Are they to override the will of the people, as expressed by their chosen servants, because, in their judgment, the particular means employed by Congress in execution of the powers conferred by the Constitution are not the best that could have been devised, or are not absolutely necessary to accomplish the objects for which the government was established?

It is further said that the withdrawal from national taxation, except by apportionment among the States on the basis of numbers, of personal property, bonds, stocks, and investments of all kinds, and the income arising therefrom, as well as the income derived from real estate, is intrinsically just, because all such property and all such incomes can be made to bear, and do bear, their share of the burdens that come from state taxation. But those who make this argument forget that *all* the property which, by the decision now rendered, remains subject to national taxation by the rule of uniformity is, also, subject to be taxed by the respective

States. Incomes arising from trades, employments, callings, and professions can be taxed, under the rule of uniformity or equality, by both the national government and the respective state governments, while incomes from property, bonds, stocks, and investments cannot, under the present decision, be taxed by the national government except under the impracticable rule of apportionment among the States according to population. No sound reason for such a discrimination has been or can be suggested.

I am of opinion that with the exception of capitation and land taxes, and taxes on exports from the States and on the property and instrumentalities of the States, the government of the Union, in order to pay its debts and provide for the common defence and the general welfare, and under its power to lay and collect taxes, duties, imposts, and excises, may reach, under the rule of uniformity, all property and property rights in whatever State they may be found. This is as it should be, and as it must be, if the national government is to be administered upon principles of right and justice, and is to accomplish the beneficent ends for which it was established by the People of the United States. The authority to sustain itself, and, by its own agents and laws, to execute the powers granted to it, are the features that particularly distinguish the present government from the Confederation which Washington characterized as "a half-starved, limping government," that was "always moving upon crutches and tottering at every step." The vast powers committed to the present government may be abused, and taxes may be imposed by Congress which the public necessities do not in fact require, or which may be forbidden by a wise policy. But the remedy for such abuses is to be found at the ballot-box, and in a wholesome public opinion which the representatives of the people will not long, if at all, disregard, and not in the disregard by the judiciary of powers that have been committed to another branch of the government.

I turn now to another part of these cases. The majority having decided that the income tax provisions of the statute in question are unconstitutional in so far as they impose a tax on

income derived from rents, or on income derived from personal property, including invested personal property, the conclusion has been reached that *all* the income tax provisions of the statute, those that are valid as well as those held to be invalid, must be held inoperative and void. And so the judgment now to be entered takes from the government the entire revenue that Congress expected to raise by the taxation of incomes. This revenue, according to all the estimates submitted to us in argument, would not have been less than $30,000,000. Some have estimated that it would amount to $40,000,000 or $50,000,000.

The ground upon which the court now strikes down all the provisions of the statute relating in anywise to incomes is, that it cannot be assumed that Congress would have provided for an income tax at all, if it had been known or believed that the provisions taxing incomes from rents and from invested personal property were unconstitutional and void.

In *Allen* v. *Louisiana*, 103 U. S. 80, 84, this court said that it was an elementary principle "that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected." "The point to be determined in all such cases," the court further said, "is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

A leading case on this subject is *Huntington* v. *Worthen*, 120 U. S. 97, 102. The constitution of Arkansas of 1874 provided that all property subject to taxation should be taxed according to its value, to be ascertained in such manner as the general assembly might direct, making the same equal and uniform throughout the State, and that no one species of property from which a tax may be collected should be taxed higher than another species of property of equal value. The constitution of the State further declared that all laws exempting property from taxation other than as provided in that instrument should be void. No part of the property of rail-

road companies was exempted by the constitution from taxation. A subsequent statute provided for the taxation of the property of railroad companies, excepting, however, from the schedule of property required to be returned "embankments, turnouts, cuts, ties, trestles, or bridges." This court held that the exemption of these items of railroad property was invalid, and the question arose whether the statute could be enforced. This court said: "The unconstitutional part of the statute was separable from the remainder. The statute declared that, in making its statement of the value of its property, the railroad company should omit certain items; that clause being held invalid, the rest remained unaffected, and could be fully carried out. An exemption, which was invalid, was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other — as when the two things provided are necessary parts of one system — the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected."

It should be observed that the legislature of Arkansas evinced a purpose not to tax embankments, turnouts, cuts, ties, trestles, or bridges, and yet their exemption of those items was disregarded and such property was taxed. The same rule could be applied to the present statute.

The opinion and judgment of the court on the original hearing of these cases annulled only so much of the statute as laid a duty on incomes derived from rents. The opinion and judgment on this rehearing annuls also so much of the statute as lays a duty on the yield or income derived from personal property, including invested personal property, bonds, stocks, investments of all kinds. I recognize that with all these parts of the statute stricken out, the law would operate unequally and unjustly upon many of the people. But I do not feel at liberty to say that the balance of the act relating to incomes from other and distinct sources must fall.

It seems to me that the cases do not justify the conclusion

that *all* the income tax sections of the statute must fall because some of them are declared to be invalid. Those sections embrace a large number of taxable subjects that do not depend upon, and have no necessary connection whatever with, the sections or clauses relating to income from rents of land and from personal property. As the statute in question states that its principal object was to reduce taxation and provide revenue, it must be assumed that such revenue is needed for the support of the government, and, therefore, its sections, so far as they are valid, should remain, while those that are invalid should be disregarded. The rule referred to in the cases above cited should not be applied with strictness where the law in question is a general law providing a revenue for the government. Parts of the statute being adjudged to be void, the injustice done to those whose incomes may be reached by those provisions of the statute that are not declared to be, in themselves, invalid, could, in some way, be compensated by subsequent legislation.

If the sections of the statute relating to a tax upon incomes derived from other sources than rents and invested personal property are to fall because and only because those relating to rents and to income from invested personal property are invalid, let us see to what result such a rule may logically lead. There is no distinct, separate *statute* providing for a tax upon incomes. The income tax is prescribed by certain sections of a general statute known as the Wilson Tariff act. The judgment just rendered defeats the purpose of Congress by taking out of the revenue not less than thirty millions, and possibly fifty millions of dollars, expected to be raised by the duty on incomes. We know from the official journals of both Houses of Congress that taxation on imports would not have been reduced to the extent it was by the Wilson act, except for the belief that that could be safely done if the country had the benefit of revenue derived from a tax on incomes. We know, from official sources, that each House of Congress distinctly refused to strike out the provisions imposing a tax on incomes. The two Houses indicated in every possible way that it *must* be a part of any scheme for

the reduction of taxation and for raising revenue for the support of the government, that (with certain specified exceptions) incomes arising from every kind of property and from every trade and calling should bear some of the burdens of the taxation imposed. If the court knows, or is justified in believing, that Congress would not have provided an income tax that did not include a tax on incomes from real estate and personal property, we are more justified in believing that no part of the Wilson act would have become a law, without provision being made in it for an income tax. If, therefore, all the income tax sections of the Wilson act must fall because some of them are invalid, does not the judgment this day rendered furnish ground for the contention that the entire act falls when the court strikes from it all of the income tax provisions, without which, as every one knows, the act would never have been passed?

But the court takes care to say that there is no question as to the validity of any part of the Wilson act, except those sections providing for a tax on incomes. Thus something is saved for the support and maintenance of the government. It, nevertheless, results that those parts of the Wilson act that survive the new theory of the Constitution evolved by these cases, are those imposing burdens upon the great body of the American people who derive no rents from real estate, and who are not so fortunate as to own invested personal property, such as the bonds or stocks of corporations, that hold within their control almost the entire business of the country.

Such a result is one to be deeply deplored. It cannot be regarded otherwise than as a disaster to the country. The decree now passed dislocates — principally, for reasons of an economic nature — a sovereign power expressly granted to the general government and long recognized and fully established by judicial decisions and legislative actions. It so interprets constitutional provisions, originally designed to protect the slave property against oppressive taxation, as to give privileges and immunities never contemplated by the founders of the government.

If the decision of the majority had stricken down all the income tax sections, either because of unauthorized exemptions, or because of defects that could have been remedied by subsequent legislation, the result would not have been one to cause anxiety or regret; for, in such a case, Congress could have enacted a new statute that would not have been liable to constitutional objections. But the serious aspect of the present decision is that by a new interpretation of the Constitution, it so ties the hands of the legislative branch of the government, that without an amendment of that instrument, or unless this court, at some future time, should return to the old theory of the Constitution, Congress cannot subject to taxation — however great the needs or pressing the necessities of the government — either the invested personal property of the country, bonds, stocks, and investments of all kinds, or the income arising from the renting of real estate, or from the yield of personal property, except by the grossly unequal and unjust rule of apportionment among the States. Thus, undue and disproportioned burdens are placed upon the many, while the few, safely entrenched behind the rule of apportionment among the States on the basis of numbers, are permitted to evade their share of responsibility for the support of the government ordained for the protection of the rights of all.

I cannot assent to an interpretation of the Constitution that impairs and cripples the just powers of the National Government in the essential matter of taxation, and at the same time discriminates against the greater part of the people of our country.

The practical effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless.

I dissent from the opinion and judgment of the court.

Mr. Justice Brown dissenting.

If the question what is, and what is not, a direct tax, were now, for the first time, presented, I should entertain a grave doubt whether, in view of the definitions of a direct tax given by the courts and writers upon political economy, during the present century, it ought not to be held to apply not only to an income tax, but to every tax, the burden of which is borne, both immediately and ultimately, by the person paying it. It does not, however, follow that this is the definition had in mind by the framers of the Constitution. The clause that direct taxes shall be apportioned according to the population was adopted, as was said by Mr. Justice Paterson, in *Hylton* v. *United States*, to meet a demand on the part of the Southern States, that representatives and direct taxes should be apportioned among the States according to their respective numbers. In this connection he observes: "The provision was made in favor of the Southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled and in a high state of cultivation. The Southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. Congress, in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union at the same rate or measure; so much a head in the first instance, and so much an acre in the second. To guard them against imposition, in these particulars, was the reason for introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the States according to their respectives numbers." 3 Dall. 177.

In view of the fact that the great burden of taxation among the several States is assessed upon real estate at a valuation, and that a similar tax was apparently an important part of the revenue of such States at the time the Constitution was

adopted, it is not unreasonable to suppose that this is the only undefined direct tax the framers of the Constitution had in view when they incorporated this clause into that instrument. The significance of the words "direct taxes" was not so well understood then as it is now, and it is entirely probable that these words were used with reference to a generally accepted method of raising a revenue by tax upon real estate.

That the rule of apportionment was adopted for a special and temporary purpose, that passed away with the existence of slavery, and that it should be narrowly construed, is also evident from the opinion of Mr. Justice Paterson, wherein he says that "the Constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule ought not, therefore, to be extended by construction. Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. There is another reason against the extension of the principle, laid down in the Constitution."

But, however this may be, I regard it as very clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population. It cannot be supposed that the convention could have contemplated a practical inhibition upon the power of Congress to tax in some way all taxable property within the jurisdiction of the Federal government, for the purposes of a national revenue. And if the proposed tax were such that in its nature it could not be apportioned according to population, it naturally follows that it could not have been considered a direct tax, within the meaning of the clause in question. This was the opinion of Mr. Justice Iredell in the *Hylton case*, wherein he shows at considerable length the fact that the tax upon carriages, in question in that case, was not such as could be apportioned, and, therefore, was not a direct tax in the sense of the Constitution. "Suppose," he said, "ten dol-

lars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the States be computed at 105 — the number of Representatives in Congress — this would produce in the whole one thousand and fifty dollars; the share of Virginia, being $\frac{19}{105}$ parts, would be $190; the share of Connecticut, being $\frac{1}{105}$ parts, would be $70; then suppose Virginia had fifty carriages, Connecticut two, the share of Virginia being $190, this must of course be collected from the owners of carriages, and there would, therefore, be collected from each carriage $3.80; the share of Connecticut being $70, each carriage would pay $35." In fact, it needs no demonstration to show that taxes upon carriages or any particular article of personal property, apportioned to the population of the several States, would lead to the grossest inequalities, since the number of like articles in such State respectively might bear a greatly unequal proportion to the population. This was also the construction put upon the clause by Mr. Justice Story, in his work upon the Constitution, §§ 955, 956.

Applying the same course of reasoning to the income tax, let us see what the result would be. By the census of 1890 the population of the United States was 62,622,250. Suppose Congress desired to raise by an income tax the same number of dollars, or the equivalent of one dollar from each inhabitant. Under this system of apportionment, Massachusetts would pay $2,238,943. South Carolina would pay $1,151,149. Massachusetts has, however, $2,803,645,447 of property, with which to pay it, or $1252 *per capita*, while South Carolina has but $400,911,303 of property, or $348 to each inhabitant. Assuming that the same amount of property in each State represents a corresponding amount of income, each inhabitant of South Carolina would pay in proportion to his means three and one-half times as much as each inhabitant of Massachusetts. By the same course of reasoning, Mississippi, with a valuation of $352 *per capita*, would pay four times as much as Rhode Island, with a valuation of $1459 *per capita*. North Carolina, with a valuation of $361 *per capita*, would pay about four times as much, in proportion to her means, as New York,

with a valuation of $1430 *per capita;* while Maine, with a *per capita* valuation of $740, would pay about twice as much. Alabama, with a valuation of $412, would pay nearly three times as much as Pennsylvania, with a valuation of $1177 *per capita.* In fact, there are scarcely two States that would pay the same amount in proportion to their ability to pay.

If the States should adopt a similar system of taxation, and allot the amount to be raised among the different cities and towns, or among the different wards of the same city, in proportion to their population, the result would be so monstrous that the entire public would cry out against it. Indeed, reduced to its last analysis, it imposes the same tax upon the laborer that it does upon the millionaire.

So also, whenever this court has been called upon to give a construction to this clause of the Constitution, it has universally held the words "direct taxes" applied only to capitation taxes and taxes upon land. In the five cases most directly in point it was held that the following taxes were not direct, but rather in the nature of duty or excise, viz., a tax upon carriages, *Hylton* v. *United States*, 3 Dall. 171; a tax upon the business of insurance companies, *Pacific Insurance Co.* v. *Soule*, 7 Wall. 443; a tax of ten per cent upon the notes of state banks held by national banks, *Veazie* v. *Fenno*, 8 Wall. 533; a tax upon the devolution of real estate, *Scholey* v. *Rew*, 23 Wall. 331; and, finally, a general income tax was broadly upheld in *Springer* v. *United States*, 102 U. S. 586. These cases, consistent and undeviating as they are, and extending over nearly a century of our national life, seem to me to establish a canon of interpretation, which it is now too late to overthrow, or even to question. If there be any weight at all to be given to the doctrine of *stare decisis*, it surely ought to apply to a theory of constitutional construction, which has received the deliberate sanction of this court in five cases, and upon the faith of which Congress has enacted two income taxes at times when, in its judgment, extraordinary sources of revenue were necessary to be made available.

I have always entertained the view that, in cases turning upon questions of jurisdiction, or involving only the rights

of private parties, courts should feel at liberty to settle principles of law according to the opinions of their existing members, neither regardless of, nor implicitly bound by, prior decisions, subject only to the condition that they do not require the disturbance of settled rules of property. There are a vast number of questions, however, which it is more important should be settled in some way than that they should be settled right, and once settled by the solemn adjudication of the court of last resort, the legislature and the people have a right to rely upon such settlement as forever fixing their rights in that connection. Even "a century of error" may be less pregnant with evil to the State than a long deferred discovery of the truth. I cannot reconcile myself to the idea that adjudications thus solemnly made, usually by a unanimous court, should now be set aside by reason of a doubt as to the correctness of those adjudications, or because we may suspect that possibly the cases would have been otherwise decided, if the court had had before it the wealth of learning which has been brought to bear upon the consideration of this case. Congress ought never to legislate, in raising the revenues of the government, in fear that important laws like this shall encounter the veto of this court through a change in its opinion, or be crippled in great political crises by its inability to raise a revenue for immediate use. Twice in the history of this country such exigencies have arisen, and twice has Congress called upon the patriotism of its citizens to respond to the imposition of an income tax — once in the throes of civil war, and once in the exigency of a financial panic, scarcely less disastrous. The language of Mr. Justice Baldwin, in *Grignon's Lessee* v. *Astor*, 2 How. 319, 343, though referring to a different class of cases, seems to me perfectly apposite to the one under consideration. "We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the State have followed, and this court has never departed from

them. They are rules of property upon which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own."

It must be admitted, however, that in none of these cases has the question been directly presented as to what are taxes upon land within the meaning of the constitutional provision. Notwithstanding the authorities cited upon this point by the Attorney General, notably, *Jeffrey's Case*, 5 Coke, 67; *Theed* v. *Starkey*, 8 Mod. 314; *Case* v. *Stephens*, Fitzgibbon, 297; *Palmer* v. *Power*, 4 Irish C. L. (1854) 191; and *Van Rensselaer* v. *Dennison*, 8 Barb. 23, to the effect that a tax upon a person with respect to his land, or the profits of his land, is not a tax upon the land itself, I regard the doctrine as entirely well settled in this court, that a tax upon an incident to a prohibited thing is a tax upon the thing itself, and, if there be a total want of power to tax the thing, there is an equal want of power to tax the incident. A summary of the cases upon this point may not be inappropriate in this connection. Thus, in *Brown* v. *Maryland*, 12 Wheat. 419, a license tax upon an importer was held to be invalid as a tax upon imports; in *Weston* v. *Charleston*, 2 Pet. 449, a tax upon stock for loans to the United States was held invalid as a tax upon the functions of the government; in *Dobbins* v. *Commissioners*, 16 Pet. 435, a state tax on the salary of an office invalid, as a tax upon the office itself; in the *Passenger Cases*, 7 How. 283, a tax upon alien passengers arriving in ports of the State was held void as a tax upon commerce; in *Almy* v. *California*, 24 How. 169, a stamp tax upon bills of lading was held to be a tax upon exports; in *Crandall* v. *Nevada*, 6 Wall. 35, a tax upon railroads and stage companies for every passenger carried out of the State, was held to be a tax on the passenger for the privilege of passing through the State; in *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, a tax upon Pullman cars running between different States was held to be bad as a tax upon interstate commerce; and in *Leloup* v. *Mobile*, 127 U. S. 640, a similar ruling was made with regard to a license tax

for telegraph companies; and finally, in *Cook* v. *Pennsylvania*, 97 U. S. 566, a tax upon the sales of goods was held to be a tax upon the goods themselves. Indeed, cases to the same effect are almost innumerable. In the light of these cases, I find it impossible to escape the conclusion that a tax upon the rents or income of real estate is a tax upon the land itself.

But this does not cover the whole question. To bring the tax within the rule of apportionment, it must not only be a tax upon land, but it must be a *direct* tax upon land. The Constitution only requires that direct taxes be laid by the rule of apportionment. We have held that direct taxes include among others taxes upon land; but it does not follow from these premises that every tax upon land is a direct tax. A tax upon the product of land, whether vegetable, animal, or mineral, is in a certain sense, and perhaps within the decisions above mentioned, a tax upon the land. "For," as Lord Coke said, "what is the land but the profits thereof?" But it seems to me that it could hardly be seriously claimed that a tax upon the crops and cattle of the farmer, or the coal and iron of the miner, though levied upon the property while it remained upon the land, was a direct tax upon the land. A tax upon the rent of land in my opinion falls within the same category. It is rather a difference in the name of the thing taxed, than in the principle of the taxation. The rent is no more directly the outgrowth or profit of the land than the crops or the coal, and a direct tax upon either is only an indirect tax upon the land. While, within the cases above cited, it is a tax upon land, it is a direct tax only upon one of the many profits of land, and is not only not a direct tax upon the land itself, but is also subject to the other objection that it is, in its nature, incapable of apportionment according to population.

It is true that we have often held that what cannot be done directly cannot be done indirectly, but this applies only when it cannot be done at all, directly or indirectly; but if it can be done directly in one manner, *i.e.* by the rule of apportionment, it does not follow that it may not be done indirectly

in another manner. There is no want of power on the part of Congress to tax land, but in exercising that power it must impose direct taxes by the rule of apportionment. The power still remains, however, to impose indirect taxes by the rule of uniformity. Being of opinion that a tax upon rents is an indirect tax upon lands, I am driven to the conclusion that the tax in question is valid.

The tax upon the income of municipal bonds falls obviously within the other category, of an indirect tax upon something which Congress has no right to tax at all, and hence is invalid. Here is a question, not of the method of taxation, but of the power to subject the property to taxation in any form. It seems to me that the cases of *Collector* v. *Day*, 11 Wall. 113, holding that it is not competent for Congress to impose a tax upon the salary of a judicial officer of a State; *McCulloch* v. *Maryland*, 4 Wheat. 316, holding that a State could not impose a tax upon the operation of the Bank of the United States; and *United States* v. *Railroad Co.*, 17 Wall. 322, holding that a municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues; *Wisconsin Central Railroad* v. *Price*, 133 U. S. 496, holding that no State has the power to tax the property of the United States within its limits; and *Van Brocklin* v. *Tennessee*, 117 U. S. 151, to the same effect, apply *mutatis mutandis* to the bonds in question, and the tax upon them must, therefore, be invalid.

There is, in certain particulars, a want of uniformity in this law, which may have created in the minds of some the impression that it was studiously designed not only to shift the burden of taxation upon the wealthy class, but to exempt certain favored corporations from its operation. There is certainly no want of uniformity within the meaning of the Constitution, since we have repeatedly held that the uniformity there referred to is territorial only. *Loughborough* v. *Blake*, 5 Wheat. 317; *Head Money Cases*, 112 U. S. 580. In the words of the Constitution, the tax must be uniform "throughout the United States."

Irrespective, however, of the Constitution, a tax which is

wanting in uniformity among members of the same class is, or may be, invalid. But this does not deprive the legislature of the power to make exemptions, provided such exemptions rest upon some principle, and are not purely arbitrary, or created solely for the purpose of favoring some person or body of persons. Thus in every civilized country there is an exemption of small incomes, which it would be manifest cruelty to tax, and the power to make such exemptions once granted, the amount is within the discretion of the legislature, and so long as that power is not wantonly abused, the courts are bound to respect it. In this law there is an exemption of $4000, which indicates a purpose on the part of Congress that the burden of this tax should fall on the wealthy, or at least upon the well-to-do. If men who have an income or property beyond their pressing needs are not the ones to pay taxes, it is difficult to say who are; in other words, enlightened taxation is imposed upon property and not upon persons. Poll taxes, formerly a considerable source of revenue, are now practically obsolete. The exemption of $4000 is designed, undoubtedly, to cover the actual living expenses of the large majority of families, and the fact that it is not applied to corporations is explained by the fact that corporations have no corresponding expenses. The expenses of earning their profits are, of course, deducted in the same manner as the corresponding expenses of a private individual are deductible from the earnings of his business. The moment the profits of a corporation are paid over to the stockholders, the exemption of $4000 attaches to them in the hands of each stockholder.

The fact that savings banks and mutual insurance companies, whose profits are paid to policy holders, are exempted, is explicable on the theory, (whether a sound one or not, I need not stop to inquire,) that these institutions are not, in their original conception, intended as schemes for the accumulation of money; and if this exemption operates as an abuse in certain cases, and with respect to certain very wealthy corporations, it is probable that the recognition of such abuses was necessary to the exemption of the whole class.

It is difficult to overestimate the importance of these cases. I certainly cannot overstate the regret I feel at the disposition made of them by the court. It is never a light thing to set aside the deliberate will of the legislature, and in my opinion it should never be done, except upon the clearest proof of its conflict with the fundamental law. Respect for the Constitution will not be inspired by a narrow and technical construction which shall limit or impair the necessary powers of Congress. Did the reversal of these cases involve merely the striking down of the inequitable features of this law, or even the whole law, for its want of uniformity, the consequences would be less serious; but as it implies a declaration that every income tax must be laid according to the rule of apportionment, the decision involves nothing less than a surrender of the taxing power to the moneyed class. By resuscitating an argument that was exploded in the *Hylton case*, and has lain practically dormant for a hundred years, it is made to do duty in nullifying, not this law alone, but every similar law that is not based upon an impossible theory of apportionment. Even the spectre of socialism is conjured up to frighten Congress from laying taxes upon the people in proportion to their ability to pay them. It is certainly a strange commentary upon the Constitution of the United States and upon a democratic government that Congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized State. It is a confession of feebleness in which I find myself wholly unable to join.

While I have no doubt that Congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth.

As I cannot escape the conviction that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportions of a national calamity, I feel it a duty to enter my protest against it.

MR. JUSTICE JACKSON dissenting.

I am unable to yield my assent to the judgment of the court in these cases. My strength has not been equal to the task of preparing a formal dissenting opinion since the decision was ageed upon. I concur fully in the dissents expressed by Mr. Justice White on the former hearing and by the Justices who will dissent now, and will only add a brief outline of my views upon the main questions presented and decided.

It is not and cannot be denied that, under the broad and comprehensive taxing power conferred by the Constitution on the national government, Congress has the authority to tax incomes from whatsoever source arising, whether from real estate or personal property or otherwise. It is equally clear that Congress, in the exercise of this authority, has the discretion to impose the tax upon incomes above a designated amount. The underlying and controlling question now presented is, whether a tax on incomes received from land and personalty is a "direct tax," and subject to the rule of apportionment.

The decision of the court, holding the income tax law of August, 1894, void, is based upon the following propositions:

First. That a tax upon real and personal property is a direct tax within the meaning of the Constitution, and, as such, in order to be valid, must be apportioned among the several States according to their respective populations. Second. That the incomes derived or realized from such property are an inseparable incident thereof, and so far partake of the nature of the property out of which they arise as to stand upon the same footing as the property itself. From these premises the conclusion is reached that a tax on incomes arising from both real and personal property is a "direct tax," and subject to the same rule of apportionment as a tax laid directly on the property itself, and not being so imposed by the act of 1894, according to the rule of numbers, is unconstitutional and void. Third. That the invalidity of the tax on incomes from real and personal property being established, the remaining portions of the income tax law are also void, notwithstanding the fact that such remaining portions clearly come within the

class of taxes designated as duties or excises in respect to which the rule of apportionment has no application, but which are controlled and regulated by the rule of uniformity.

It is not found, and could not be properly found by the court, that there is in the other provisions of the law any such lack of uniformity as would be sufficient to render these remaining provisions void for that reason. There is, therefore, no essential connection between the class of incomes which the court holds to be within the rule of apportionment and the other class falling within the rule of uniformity, and I cannot understand the principle upon which the court reaches the conclusion that, because one branch of the law is invalid for the reason that the tax is not laid by the rule of apportionment, it thereby defeats and invalidates another branch resting upon the rule of uniformity, and in respect to which there is no valid objection. If the conclusion of the court on this third proposition is sound, the principle upon which it rests could with equal propriety be extended to the entire revenue act of August, 1894.

I shall not dwell upon these considerations. They have been fully elaborated by Mr. Justice Harlan. There is just as much room for the assumption that Congress would not have passed the customs branches of the law without the provision taxing incomes from real and personal estate, as that they would not have passed the provision relating to incomes resting upon the rule of uniformity. Unconstitutional provisions of an act will, no doubt, sometimes defeat constitutional provisions where they are so essentially and inseparably connected in substance as to prevent the enforcement of the valid part without giving effect to the invalid portion. But when the valid and the invalid portions of the act are not mutually dependent upon each other as considerations, conditions, or compensation for each other, and the valid portions are capable of separate enforcement, the latter are never, especially in revenue laws, declared void because of invalid portions of the law.

The rule is illustrated in numerous decisions of this court and of the highest courts of the States. Take the *State Freight Tax Cases*, 15 Wall. 232. There was a single act imposing a

tonnage tax upon all railroads, on all freight transported by them. The constitutionality of the law was attacked on the ground that it applied not merely to freight carried wholly within the State, but extended to freight received without and brought into the State, and to that received within and carried beyond the limits of the State, which came within the interstate commerce provision of the Constitution of the United States. This court held the tax invalid as to this latter class of freight; but, being valid as to the internal freight, that much of the law could not be defeated by the invalid part, although the act imposing the tax was single and entire. To the same effect are the cases of *Huntington* v. *Worthen*, 120 U. S. 97; *Allen* v. *Louisiana*, 103 U. S. 80; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411 (where the point was directly made that the invalid part should defeat the valid part); and *Field* v. *Clark*, 143 U. S. 649, 696, 697. In this last case this court said: "Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject-matter may be invalid. A different rule might be disastrous to the financial operations of the government and produce the utmost confusion in the business of the entire country."

Here the distinction between the two branches of the income tax law are entirely separable. They rest upon different rules; one part can be enforced without the other, and to hold that the alleged invalid portion, if invalid, should break down the valid portion, is a proposition which I think entirely erroneous, and wholly unsupported either upon principle or authority.

In considering the question whether a tax on incomes from real or personal estate is a direct tax within the meaning of those words as employed in the Constitution, I shall not enter upon any discussion of the decisions of this court, commencing with the *Hylton case* in 1796 (3 Dall. 171), and ending with the *Springer case* in 1880 (102 U. S. 507); nor shall I dwell upon the approval of those decisions by the great law-writers of the country and by all the commentators on the Constitution; nor will I dwell upon the long-continued prac-

tice of the government in compliance with the principle laid down in those decisions. They, in my judgment, settle and conclude the question now before the court, contrary to the present decision. But, if they do not settle they certainly raise such a doubt on the subject as should restrain the court from declaring the act unconstitutional. No rule of construction is better settled than that this court will not declare invalid a statute passed by a coördinate branch of the government, in whose favor every presumption should be made, unless its repugnancy to the Constitution is clear beyond a reasonable doubt. In *Ogden* v. *Saunders*, 12 Wheat. 213, this court said that the mere fact of a doubt was sufficient to prevent the court from declaring the act unconstitutional, and that language in substance is repeated in the *Sinking Fund Cases*, 99 U. S. 700, where the opinion of the court was given by Chief Justice Waite, who said the act must be beyond all reasonable doubt unconstitutional before this court would so declare it.

It seems to me the court in this case adopts a wrong method of arriving at the true meaning of the words "direct tax" as employed in the Constitution. It attaches too much weight and importance to detached expressions of individuals and writers on political economy, made subsequent to the adoption of the Constitution, and who do not, in fact, agree upon any definition of a "direct tax." From such sources we derive no real light upon the subject. To ascertain the true meaning of the words "direct tax" or "direct taxes" we should have regard not merely to the words themselves, but to the connection in which they are used in the Constitution and to the conditions and circumstances existing when the Constitution was formed and adopted. What were the surrounding circumstances? I shall refer to them very briefly. The only subject of direct taxation prevailing at the time was land. The States did tax some articles of personal property, but such property was not the subject of general taxation by valuation or assessment. Land and its appurtenances was the principal object of taxation in all the States. By the VIIIth Article of the Confederation the expenses of the government were to be borne out

of a common treasury, to be supplied by the States according to the value of the granted and surveyed lands in each State, such valuation to be estimated or the assessment to be made by the Congress in such mode as they should from time to time determine. This was a direct tax directly laid upon the value of all the real estate in the country. The trouble with it was that the Confederation had no power of enforcing its assessment. All it could do, after arriving at the assessment or estimate, was to make its requisitions upon the several States for their respective quotas. They were not met. This radical defect in the Confederation had to be remedied in the new Constitution, which accordingly gave to the national government the power of imposing taxation directly upon all citizens or inhabitants of the country, and to enforce such taxation without the agency or instrumentality of the States. The framers of the Constitution knew that land was the general object of taxation in all the States. They found no fault with the VIIIth Article of the Confederation so far as it imposed taxation on the value of land and the appurtenances thereof in each State.

Now it may reasonably and properly be assumed that the framers of the Constitution in adopting the rule of apportionment, according to the population of the several States, had reference to subjects or objects of taxation of universal or general distribution throughout all the States. A capitation or poll tax had its subject in every State, and was, so to speak, self-apportioning according to numbers. "Other direct tax" used in connection with such capitation tax must have been intended to refer to subjects having like, or approximate, relation to numbers, and found in all the States. It never was contemplated to reach by direct taxation subjects of partial distribution. What would be thought of a direct tax and the apportionment thereof laid upon cotton at so much a bale, upon tobacco at so much a hogshead, upon rice at so much a ton or a tierce? Would not the idea of apportioning that tax on property, non-existing in a majority of the States, be utterly frivolous and absurd?

Not only was land the subject of general distributions, but

evidently in the minds of the framers of the Constitution from the fact that it was the subject of taxation under the Confederation. But at the time of the adoption of the Constitution there was, with the single exception of a partial income tax in the State of Delaware, no general tax on incomes in this country nor in any State thereof. Did the framers of the Constitution look forward into the future so as to contemplate and intend to cover such a tax as was then unknown to them? I think not.

It was ten or eleven years after the adoption of the Constitution before the English government passed her first income tax law under the leadership of Mr. Pitt. The question then arose, to which the Chief Justice has referred, whether, in estimating income, you could look or have any regard to the source from which it sprung. That question was material, because, by the English loan acts it was provided that the public dividends should be paid "free of any tax or charge whatever," and Mr. Pitt was confronted with the question on his income tax law whether he proposed to reach or could reach income from those stocks. He said the words must receive a reasonable interpretation, and that the true construction was that you should not look at all to the nature of the source, but that you should consider dividends, for the purpose of the income tax, simply in the relation to the receiver as so much income. This construction was adopted and put in practice for over fifty years without question. In 1853 Mr. Gladstone, as Chancellor of the Exchequer, resisting with all his genius the effort to make important changes of the income tax, said, in a speech before the House of Commons, that the construction of Mr. Pitt was undoubtedly correct. These opinions of distinguished statesmen may not have the force of judicial authority, but they show what men of eminence and men of ability and distinction thought of the income tax at its original inception.

If the assumption I have made that the framers of the Constitution in providing for the apportionment of a direct tax had in mind a subject-matter or subjects-matter, which had some general distribution among the States is correct, it is

clear that a tax on incomes — a subject not of general distribution at that time or since — is not a "direct tax" in the sense of the Constitution.

The framers of the Constitution proceeded upon the theory entertained by all political writers of that day, that there was some relation, more or less direct, between population and land. But there is no connection, direct or proximate, between rents of land and incomes of personalty and population — none whatever. They did not have any relation to each other at the time the Constitution was adopted, nor have they ever had since, and perhaps never will have.

Again, it is settled by well-considered authorities that a tax on rents and a tax on land itself is not duplicate or double taxation. The authorities in England and in this country hold that a tax on rents and a tax on land are different things. Besides the English cases, to which I have not the time or strength to refer, there is the well-considered case of *Robinson* v. *The County of Allegheny*, 7 Penn. St. 161, when Gibson was the Chief Justice of the Supreme Court of Pennsylvania, holding that a tax on rent is not a tax on the land out of which it arises. In that case there was a *lease in fee* of certain premises, the lessee covenanting to pay all taxes on the demised premises. A tax was laid by the State upon both land and rent, and the question arose whether the tenant, even under that express covenant, was bound to pay the tax on the land itself. The Supreme Court of the State held that he was not; that there were two separate, distinct, and independent subjects-matter; and that his covenant to pay on the demised premises did not extend to the payment of the tax charged upon the rent against the land owner. All the circumstances surrounding the formation and adoption of the Constitution lead to the conclusion that only such tax as is laid directly upon property as such, according to valuation or assessment, is a "direct tax" within the true meaning of the Constitution.

Again, we cannot attribute to the framers of the Constitution an intention to make any tax a direct tax which it was impossible to apportion. If it cannot be apportioned without

gross injustice, we may feel assured that it is a tax never contemplated by the Constitution as a direct tax. No tax, therefore, can be regarded as a direct tax, in the sense of that instrument, which is incapable of apportionment by the rule of numbers. The constitutional provision clearly implies in the requirement of apportionment that a direct tax is such, and such only, as can be apportioned without glaring inequality, manifest injustice, and unfairness as between those subject to its burden. The most natural and practical test by which to determine what is a direct tax in the sense of the Constitution is to ascertain whether the tax can be apportioned among the several States according to their respective numbers, with reasonable approximation to justice, fairness, and equality to all the citizens and inhabitants of the country who may be subject to the operation of the law. The fact that a tax cannot be so apportioned without producing gross injustice and inequality among those required to pay it should settle the question that it was not a direct tax within the true sense and meaning of those words as they are used in the Constitution.

Let us apply this test. Take the illustration suggested in the opinion of the court. Congress lays a tax of thirty millions upon the incomes of the country above a certain designated amount, and directs that tax to be apportioned among the several States according to their numbers, and when so apportioned to be pro-rated amongst the citizens of the respective States coming within the operation of the law. To two States of equal population the same amount will be allotted. In one of these States there are 1000 individuals and in the other 2000 subject to the tax. The former under the operation of the apportionment will be required to pay *twice* the rate of the latter on the same amount of income. This disparity and inequality will increase just in proportion as the numbers subject to the tax in the different States differ or vary. By way of further illustration, take the new State of Washington and the old State of Rhode Island, having about the same population. To each would be assigned the same amount of the general assessment. In the former, we will say, there are 5000 citizens subject to the operation of the law, in the latter

50,000. The citizen of Washington will be required to pay ten times as much as the citizen of Rhode Island on the *same amount* of taxable income. Extend the rule to all the States, and the result is that the larger the number of those subject to the operation of the law in any given State, the smaller their proportion of the tax and the smaller their rate of taxation, while, in respect to the smaller number in other States, the greater will be their rate of taxation on the same income.

But it is said that this inequality was intentional upon the part of the framers of the Constitution; that it was adopted with a view to protect property owners as a class. Where does such an idea find support or countenance under a Constitution framed and adopted "to promote justice?" The government is not dealing with the States in this matter; it is dealing with its own citizens throughout the country, irrespective of state lines, and to say that the Constitution, which was intended to promote peace and justice, either in its whole or in any part thereof, ever intended to work out such a result, and produce such gross discrimination and injustice between the citizens of a common country, is beyond all reason.

What is to be the end of the application of this new rule adopted by the court? A tax is laid by the general government on all the money on hand or on deposit of every citizen of the government at a given date. Such taxation prevails in many of the States. The government has, under its taxing power, the right to lay such a tax. When laid a few parties come before the court and say: "My deposits were derived from the proceeds of farm products or from the interest on bonds and securities, and they are not, therefore, taxable by this law." To make your tax valid you must apportion the tax amongst all the citizens of the government, according to the population of the respective States, taking the whole subject-matter out of the control of Congress, both the rate of taxation and the assessment, and imposing it upon the people of the country by an arbitrary rule which produces such inequality as I have briefly pointed out.

In my judgment the principle announced in the decision practically destroys the power of the government to reach

incomes from real and personal estate. There is to my mind little or no real difference between denying the existence of the power to tax incomes from real and personal estate, and attaching such conditions and requirements to its exercise as will render it impossible or incapable of any practical operation. You might just as well in this case strike at the power to reach incomes from the sources indicated as to attach these conditions of apportionment which no legislature can ever undertake to adopt, and which, if adopted, cannot be enforced with any degree of equality or fairness between the common citizens of a common country.

The decision disregards the well-established canon of construction to which I have referred, that an act passed by a coördinate branch of the government has every presumption in its favor, and should never be declared invalid by the courts unless its repugnancy to the Constitution is clear beyond all reasonable doubt. It is not a matter of conjecture; it is the established principle that it must be clear beyond a reasonable doubt. I cannot see, in view of the past, how this case can be said to be free of doubt.

Again, the decision not only takes from Congress its rightful power of fixing the rate of taxation, but substitutes a rule incapable of application without producing the most monstrous inequality and injustice between citizens residing in different sections of their common country, such as the framers of the Constitution never could have contemplated, such as no free and enlightened people can ever possibly sanction or approve.

The practical operation of the decision is not only to disregard the great principles of equality in taxation, but the further principle that in the imposition of taxes for the benefit of the government the burdens thereof should be imposed upon those having most *ability* to bear them. This decision, in effect, works out a directly opposite result, in relieving the citizens having the greater *ability*, while the burdens of taxation are made to fall most heavily and oppressively upon those having the least ability. It lightens the burden upon the larger number, in some States subject to the tax, and places it most un-

equally and disproportionately on the smaller number in other States. Considered in all its bearings, this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of Congress. It strikes down an important portion of the most vital and essential power of the government in practically excluding any recourse to incomes from real and personal estate for the purpose of raising needed revenue to meet the government's wants and necessities under any circumstances.

I am therefore compelled to enter my dissent to the judgment of the court.

Mr. Justice White dissenting.

I deem it unnecessary to elaborate my reasons for adhering to the views hitherto expressed by me, and content myself with the following statement of points:

1st. The previous opinion of the court held that the inclusion of rentals from real estate in income subject to taxation laid a direct tax on the real estate itself, and was, therefore, unconstitutional and void, unless apportioned. From this position I dissented, on the ground that it overthrew the settled construction of the Constitution, as applied in one hundred years of practice, sanctioned by the repeated and unanimous decisions of this court, and taught by every theoretical and philosophical writer on the Constitution who has expressed an opinion upon the subject.

2d. The court in its present opinion considers that the Constitution requires it to extend the former ruling yet further, and holds that the inclusion of revenue from personal property in an income subjected to taxation amounts to imposing a direct tax on the personal property, which is also void, unless apportioned. As a tax on income from real and personal property is declared to be unconstitutional unless apportioned, because it is equivalent to a direct tax on such property, it follows that the decision now rendered holds not only that the rule of apportionment must be applied to an income tax, but also that no tax, whether direct or indirect, on either real and personal property or investments can be levied unless by apportionment. Every-

thing said in the dissent from the previous decision applies to the ruling now announced, which, I think, aggravates and accentuates the court's departure from the settled construction of the Constitution.

3d. The court does not now, except in some particulars, review the reasoning advanced in support of its previous conclusion, and therefore the opinion does not render it necessary for me to do more than refer to the views expressed in my former dissent, as applicable to the position now taken and then to briefly notice the new matter advanced.

4th. As, however, on the rehearing, the issues have been elaborately argued, I deem it also my duty to state why the reargument has in no way shaken, but on the contrary has strengthened, the convictions hitherto expressed.

5th. The reasons urged on the reargument seem to me to involve a series of contradictory theories:

a. Thus, in answering the proposition that *United States* v. *Hylton* and the cases which followed and confirmed it, have settled that the word "direct," as used in the Constitution, applies only to capitation taxes and taxes on land, it is first contended that this claim is unfounded, and that nothing of the kind was so decided, and it is then argued that "a century of error" should furnish no obstacle to the reversal, by this court, of a continuous line of decisions interpreting the constitutional meaning of that word, if such decisions be considered wrong. Whence the "century of error" is evolved, unless the cases relied on decided that the word "direct" was not to be considered in its economic sense, does not appear from the argument.

b. In answer to the proposition that the passage of the carriage-tax act and the decision in the *Hylton case* which declared that act constitutional, involved the assumption that the word "direct" in the Constitution was to be considered as applying only to a tax on land and capitation, it is said that this view of the act and decision is faulty, and, therefore, the inference deduced from it is erroneous. At the same time reference is made to the opinion of Mr. Madison, that the carriage-tax act was passed in violation of the Consti-

tution, and hence that the decision which held it constitutional was wrong. How that distinguished statesman could have considered that the act violated the Constitution, and how he could have regarded the decision which affirmed its validity as erroneous, unless the act and decision were not in accord with his view of the meaning of the word "direct" the argument also fails to elucidate.

6th. Attention was previously called to the fact that practically all the theoretical and philosophical writers on the Constitution, since the carriage-tax act was passed and the *Hylton case* was decided, have declared that the word "direct" in the Constitution applies only to taxes on land and capitation taxes. The list of writers, formerly referred to, with the addition of a few others not then mentioned, includes Kent, Story, Cooley, Miller, Bancroft, the historian of the Constitution, Pomeroy, Hare, Burroughs, Ordroneaux, Black, Farrar, Flanders, Bateman, Patterson, and Von Holst. How is this overwhelming *consensus* of publicists, of law writers, and historians answered? By saying that their opinions ought not to be regarded, because they were all misled by the *dicta* in the *Hylton case* into teaching an erroneous doctrine. How, if the *Hylton case* did not decide this question of direct taxation, it could have misled all these writers — among them some of the noblest and brightest intellects which have adorned our national life — is not explained. In other words, in order to escape the effect of the act and of the decision upon it, it is argued that they did not, by necessary implication, establish that direct taxes were only land and capitation taxes, and in the same breath, in order to avoid the force of the harmonious interpretation of the Constitution by all the great writers who have expounded it, we are told that their views are worthless because they were misled by the *Hylton case.*

7th. If, as is admitted, all these authors have interpreted the *Hylton case* as confining direct taxes to land and capitation taxes, I submit that their unanimity, instead of affording foundation for the argument that they were misled by that case, furnishes a much better and safer guide as to what its decision necessarily implied, than does the contention now

made, unless we are to hold that all these great minds were so feeble as to be led into concluding that the case decided what it did not decide, and unless we are to say that the true light in regard to the meaning of this word "direct" has come to no writer or thinker from that time until now.

8th. Whilst it is admitted that in the discussions at the bar of this court in years past, when the previous cases were before it, copious reference was made to the lines of authority here advanced, and that nothing new is now urged, we are, at the same time, told that, strange as it may seem, the sources of the Constitution have been "neglected" up to the present time; and this supposed neglect is asserted in order to justify the overthrow of an interpretation of the Constitution concluded by enactments and decisions dating from the foundation of the government. How this neglect of the sources of the Constitution in the past is compatible with the admission that nothing new is here advanced, is not explained.

9th. Although the opinions of Kent, Story, Cooley, and all the other teachers and writers on the Constitution are here disregarded in determining the constitutional meaning of the word "direct," the opinions of some of the same authors are cited as conclusive on other questions involved in this case. Why the opinions of these great men should be treated as "worthless" in regard to one question of constitutional law, and considered conclusive on another, remains to be discovered.

10th. The same conflict of positions is presented in other respects. Thus, in support of various views upon incidental questions, we are referred to many opinions of this court as conclusive, and, at the same time, we are told that all the decisions of this court from the *Hylton case* down to the *Springer case* in regard to direct taxation are wrong if they limit the word "direct" to land and capitation, and must, therefore, be disregarded, because "a century of error" does not suffice to determine a question. How the decisions of this court settling one principle are to be cited as authority for that principle, and, at the same time, it is to be argued, that other decisions, equally unanimous and concurrent, are

no authority for another principle, involves a logical dilemma, which cannot be solved.

11th. In dissenting before, it was contended that the passage of the carriage-tax act and the decision of this court thereon had been accepted by the Legislative and Executive branches of the government from that time to this, and that this acceptance had been manifested by conforming all taxes thereafter imposed to the rule of taxation thus established. This is answered by saying that there was no such acceptance, because the mere abstention from the exercise of a power affords no indication of an intention to disown the power. The fallacy here consists in confusing action with inaction. It was not reasoned in the previous dissent that mere inaction implied the lack of a governmental power, but that the definitive action in a particular way, when construed in connection with the Hylton decision, established a continuous governmental interpretation.

12th. Whilst denying that there has been any rule evolved from the *Hylton case* and applied by the government for the past hundred years, it is said that the results of that case were always disputed when enforced. How there could be no rule, and yet the results of the rule could be disputed, is likewise a difficulty which is not answered.

13th. The admission of the dispute was necessitated by the statement that when, in 1861, it was proposed to levy a direct tax, by apportionment, on personal property, a committee of the House of Representatives reported that under the *Hylton case* it could not be done. This fact, if accurately stated, furnishes the best evidence of the existence of the rule which the *Hylton case* had established, and shows that the decision now made reverses that case, and sustains the contention of the minority who voted against the carriage-tax act, and whose views were defeated in its passage and repudiated in the decision upon it, and have besides been overthrown by the unbroken history of the government and by all the other adjudications of this court confirming the *Hylton case.*

14th. The decision here announced holding that the tax on the income from real estate and the tax on the income from

personal property and investments are direct, and therefore require apportionment, rests necessarily on the proposition that the word "direct" in the Constitution must be construed in the economic sense; that is to say, whether a tax be direct or indirect is to be tested by ascertaining whether it is capable of being shifted from the one who immediately pays it to an ultimate consumer. If it cannot be so shifted, it is direct; if it can be, it is indirect. But the word in this sense applies not only to the income from real estate and personal property, but also to business gains, professional earnings, salaries, and all of the many sources from which human activity evolves profit or income without invested capital. These latter the opinion holds to be taxable without apportionment, upon the theory that taxes on them are "excises," and, therefore, do not require apportionment according to the previous decisions of this court on the subject of income taxation. These decisions, *Hylton* v. *United States*, 3 Dall. 171; *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Scholey* v. *Rew*, 23 Wall. 331; *Springer* v. *United States*, 102 U. S. 586, hold that the word "direct" in the Constitution refers only to direct taxes on land, and therefore has a constitutional significance wholly different from the sense given to that word by the economists. The ruling now announced overthrows all these decisions. It also subverts the economic signification of the word "direct" which it seemingly adopts. Under that meaning, taxes on business gains, professional earnings, and salaries are as much direct, and, indeed, even more so, than would be taxes on invested personal property. It follows, I submit, that the decision now rendered accepts a rule and at once in part overthrows it. In other words, the necessary result of the conclusion is to repudiate the decisions of this court, previously rendered, on the ground that they misinterpreted the word "direct," by not giving it its economic sense, and then to decline to follow the economic sense because of the previous decisions. Thus the adoption of the economic meaning of the word destroys the decisions, and they in turn destroy the rule established. It follows, it seems to me, that the conclusion now announced rests neither upon

the economic sense of the word "direct" or the constitutional significance of that term. But it must rest upon one or the other to be sustained. Resting on neither, it has, to my mind, no foundation in reason whatever.

15th. This contradiction points in the strongest way to what I conceive to be the error of changing, at this late day, a settled construction of the Constitution. It demonstrates, I think, how conclusively the previous cases have determined every question involved in this, and shows that the doctrine cannot be now laid down that the word "direct" in the Constitution is to be interpreted in the economic sense, and be consistently maintained.

16th. The injustice of the conclusion points to the error of adopting it. It takes invested wealth and reads it into the Constitution as a favored and protected class of property, which cannot be taxed without apportionment, whilst it leaves the occupation of the minister, the doctor, the professor, the lawyer, the inventor, the author, the merchant, the mechanic, and all other forms of industry upon which the prosperity of a people must depend, subject to taxation without that condition. A rule which works out this result, which, it seems to me, stultifies the Constitution by making it an instrument of the most grievous wrong, should not be adopted, especially when, in order to do so, the decisions of this court, the opinions of the law writers and publicists, tradition, practice, and the settled policy of the government must be overthrown.

17th. Nor is the wrong, which this conclusion involves, mitigated by the contention that the doctrine of apportionment now here applied to indirect as well as direct taxes on all real estate, and invested personal property, leaves the government with ample power to reach such property by taxation, and make it bear its just part of the public burdens. On the contrary, instead of doing this, it really deprives the government of the ability to tax such property at all, because the tax, it is now held, must be imposed by the rule of apportionment according to population. The absolute inequality and injustice of taxing wealth by reference to population and

without regard to the amount of the wealth taxed are so manifest that this system should not be extended beyond the settled rule which confines it to direct taxes on real estate. To destroy the fixed interpretation of the Constitution, by which the rule of apportionment according to population, is confined to direct taxes on real estate so as to make that rule include indirect taxes on real estate and taxes, whether direct or indirect, on invested personal property, stocks, bonds, etc., reads into the Constitution the most flagrantly unjust, unequal, and wrongful system of taxation known to any civilized government. This strikes me as too clear for argument. I can conceive of no greater injustice than would result from imposing on one million of people in one State, having only ten millions of invested wealth, the same amount of tax as that imposed on the like number of people in another State having fifty times that amount of invested wealth. The application of the rule of apportionment by population to invested personal wealth would not only work out this wrong, but would ultimately prove a self-destructive process, from the facility with which such property changes its *situs*. If so taxed, all property of this character would soon be transferred to the States where the sum of accumulated wealth was greatest in proportion to population, and where therefore the burden of taxation would be lightest, and thus the mighty wrong resulting from the very nature of the extension of the rule would be aggravated. It is clear then, I think, that the admission of the power of taxation in regard to invested personal property, coupled with the restriction that the tax must be distributed by population and not by wealth, involves a substantial denial of the power itself, because the condition renders its exercise practically impossible. To say a thing can only be done in a way which must necessarily bring about the grossest wrong, is to delusively admit the existence of the power, while substantially denying it. And the grievous results sure to follow from any attempt to adopt such a system are so obvious that my mind cannot fail to see that if a tax on invested personal property were imposed by the rule of population, and there were no other means of preventing

its enforcement, the red spectre of revolution would shake our institutions to their foundation.

18th. This demonstrates the fallacy of the proposition that the interpretation of the Constitution now announced concedes to the national government ample means to sustain itself by taxation in an extraordinary emergency. It leaves only the tariff or impost, excise taxation, and the direct or indirect taxes on the vital energies of the country, which, as I have said, the opinion now holds are not subject to the rule of apportionment. In case of foreign war, embargo, blockade, or other international complications, the means of support from tariff taxation would disappear; none of the accumulated invested property of the country could be reached, except according to the impracticable rule of apportionment; and even indirect taxation on real estate would be unavailable, for the opinion now announces that the rule of apportionment applies to an indirect as well as a direct tax on such property. The government would thus be practically deprived of the means of support.

19th. The claim that the States may pay the amount of the apportioned tax and thus save the injustice to their citizens resulting from its enforcement, does not render the conclusion less hurtful. In the first place, the fact that the State may pay the sum apportioned in no way lessens the evil, because the tax, being assessed by population and not by wealth, must, however paid, operate the injustice which I have just stated. Moreover, the contention that a State could by payment of the whole sum of a tax on personal property, apportioned according to population, relieve the citizen from grievous wrong to result from its enforcement against his property, is an admission that the collection of such tax against the property of the citizen, because of its injustice, would be practically impossible. If substantially impossible of enforcement against the citizen's property, it would be equally so as against the State, for there would be no obligation on the State to pay, and thus there would be no power whatever to enforce. Hence, the decision now rendered, so far as taxing real and personal property and invested wealth is concerned,

reduces the government of the United States to the paralyzed condition which existed under the Confederation, and to remove which the Constitution of the United States was adopted.

20th. The suggestion that if the construction now adopted, by the court, brings about hurtful results, it can be cured by an amendment to the Constitution instead of sustaining the conclusion reached, shows its fallacy. The *Hylton case* was decided more than one hundred years ago. The income tax laws of the past were enacted also years ago. At the time they were passed, the debates and reports conclusively show that they were made to conform to the rulings in the *Hylton case.* Since all these things were done, the Constitution has been repeatedly amended. These amendments followed the civil war, and were adopted for the purpose of supplying defects in the national power. Can it be doubted that if an intimation had been conveyed that the decisions of this court would or could be overruled, so as to deprive the government of an essential power of taxation, the amendments would have rendered such a change of ruling impossible? The adoption of the amendments, none of which repudiated the uniform policy of the government, was practically a ratification of that policy and an acquiescence in the settled rule of interpretation theretofore adopted.

21st. It is, I submit, greatly to be deplored that, after more than one hundred years of our national existence, after the government has withstood the strain of foreign wars and the dread ordeal of civil strife, and its people have become united and powerful, this court should consider itself compelled to go back to a long repudiated and rejected theory of the Constitution, by which the government is deprived of an inherent attribute of its being, a necessary power of taxation.

APPENDIX.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1894.

Original Docket.

Number of cases	16
Number of cases disposed of	9
Leaving undisposed of	7

Appellate Docket.

Number of cases at the close of the October Term, 1893, not disposed of	714
Number of cases docketed during the October Term, 1894	332
Total	1046
Number of cases disposed of October Term, 1894	406
Number of cases remaining undisposed of, showing a reduction of 74 cases,	640

INDEX.

ADMIRALTY.

On the 17th of August, 1889, H., having no knowledge of this mortgage, purchased for a valuable consideration a note of S. On the 29th of August, 1889, C. caused the chattel mortgage to be placed on record. On the 29th of August, 1890, H. instituted garnishee proceedings against C. averring that he had possession and control of property of S. by a title which was void as to the creditors of S. The garnishee answered setting up title under the chattel mortgage. The court below held that in consequence of the failure to file the chattel mortgage, and of the fact that H. became a creditor of S. in the interim, the chattel mortgage was void under the laws of Michigan as to H., and gave judgment accordingly. *Held*, That in this that court committed no error. *Cutler* v. *Huston*, 423.

CHINESE EXCLUSION.

1. The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that respect enforced exclusively through executive officers, without judicial intervention, having been settled by previous adjudications, it is now decided that a statute passed in execution of that power is applicable to an alien who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reënter it. *Lem Moon Sing* v. *United States*, 539.
2. *Lau Ow Bew* v. *United States*, 144 U. S. 47, distinguished from this case. *Ib.*
3. No opinion is expressed upon the question whether, under the facts stated in the application for the writ of *habeas corpus*, Lem Moon Sing was entitled, of right, under some law or treaty to reënter the United States. *Ib.*

CIRCUIT COURTS OF APPEAL.

See JURISDICTION, A, 12.

CLAIMS AGAINST THE UNITED STATES.

See DISTRICT ATTORNEY;
ESTOPPEL, 1;
MARSHAL OF A COURT OF THE UNITED STATES.

COMMISSIONER OF A CIRCUIT COURT.

A preliminary examination before a commissioner of a Circuit Court is not a case pending in any court of the United States, within the meaning of Rev. Stat. § 5406. *Todd* v. *United States*, 278.

CONSPIRACY.

See CONSTITUTIONAL LAW, 5.

CONSTITUTIONAL LAW.

1. The Texas statute of May 6, 1882, making it unlawful for a railroad company in that State to charge and collect a greater sum for transporting freight than is specified in the bill of lading, is, when applied to freight transported into the State from a place without it, in conflict with the provision in section 6 of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, that it shall be unlawful for such carrier to charge and collect a greater or less compensation for the transportation of the property than is specified in the published schedule of rates provided for by the act, and in force at the time; and, being thus in conflict, it is not applicable to interstate shipments. *Gulf, Colorado & Santa Fé Railway Co.* v. *Hefley*, 98.
2. When a state statute and a Federal statute operate upon the same subject-matter, and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the state statute must give way. *Ib.*
3. In the Fifth Article of Amendments to the Constitution of the United States, providing that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger," the words "when in actual service in time of war or public danger" apply to the militia only. *Johnson* v. *Sayre*, 109.
4. A statute of Pennsylvania imposing a tax upon the tolls received by the New York, Lake Erie and Western Railroad Company from other railroad companies, for the use by them respectively of so much of its railroad and tracks as lies in the State of Pennsylvania, for the passage over them of trains owned and hauled by such companies respectively, is a valid tax, and is not in conflict with the interstate commerce clause of the Constitution when applied to goods so transported from without the State of Pennsylvania. *N. Y., Lake Erie & Western Railroad Co.* v. *Pennsylvania*, 431.
5. It is the right of every private citizen of the United States to inform a marshal of the United States, or his deputy, of a violation of the internal revenue laws of the United States; this right is secured to the citizen by the Constitution of the United States; and a conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right, or because of his having exercised it, is punishable under section 5508 of the Revised Statutes. *In re Quarles and Butler*, 532.

CONTRACT.

ESTOPPEL.

EVIDENCE.

INJUNCTION.

See INTERSTATE COMMERCE, 4, 5, 6, 7, 8, 9.

INTERSTATE COMMERCE.

1. While the government of the United States is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers, among which are the power over interstate commerce and the power over the transmission of the mails. *In re Debs, Petitioner*, 564.
2. The powers thus conferred are not dormant, but have been assumed and put into practical exercise by Congressional legislation. *Ib.*
3. In the exercise of those powers the United States may remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. *Ib.*
4. While it may be competent for the government, through the executive branch, and in the use of the entire executive power of the Nation, to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and the character of any of them, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain them, the jurisdiction of courts to interfere in such matters by injunction being recognized from ancient times and by indubitable authority. *Ib.*
5. Such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law, or by the fact that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; as the penalty for a violation of such injunction is no substitute for, and no defence to, a prosecution for criminal offences committed in the course of such violation. *Ib.*
6. The complaint filed in this case clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue, and under it the Circuit Court had power to issue its process of injunction. *Ib.*
7. Such an injunction having been issued and served upon the defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Rev. Stat. § 725, and to enter the order of punishment complained of. *Ib.*
8. The Circuit Court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court. *Ib.*
9. The court enters into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, on which the Circuit Court mainly relied to sustain its

INTERNAL REVENUE.

JUDGMENT.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

JUROR.

A suitable inquiry is permissible in order to ascertain whether a juror has any bias, to be conducted under the supervision of the court and to be largely left to its sound discretion; and in this case there was no error in not allowing a juror to be asked, "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against the defendant?" *Connors* v. *United States*, 408.

LACHES.

1. Whenever property is claimed by one owner, and he exercises acts of ownership over it and the validity of such acts is not questioned by his neighbors till after the lapse of many years when the statute of limitations has run, and those who, for any apparent defects in the

MILITIA.

See CONSTITUTIONAL LAW, 3.

MORTGAGE.

See CONTRACT, 1.

MUNICIPAL BOND.

1. *Lyons* v. *Munson*, 99 U. S. 676, affirmed to the point that under c. 907 of the laws of New York for 1869, the county judge was the officer charged by law with the duty to decide whether municipal bonds could be legally issued in payment of subscriptions to railroad stock, and that his judgment was conclusive till reversed by a higher court. *Andes* v. *Ely*, 313.
2. *Orleans* v. *Platt*, 99 U. S. 684, affirmed to the point that such a judgment could not be collaterally attacked. *Ib.*
3. These judgments are not affected by *Craig* v. *Andes*, 93 N. Y. 405, as that case has since been held by the Court of Appeals of New York to have been a collusive case, and not to stand in the way of a re-examination. *Ib.*
4. The attaching a condition to his signature by a petitioner under that statute of New York does not necessarily vitiate it. *Ib.*
5. One who contracts with a corporation as such cannot afterwards avoid the obligations so assumed by him on the ground that the supposed corporation was not one *de jure*. *Ib.*
6. If the county judge in a notice issued by him under that act fails to specify the place at which the hearing on the petition will be had, it will be presumed that his regular office is the place intended for it. *Ib.*
7. When municipal bonds issued in payment of a subscription to railroad stock recite on their face that all necessary steps have been taken to justify their issue, the municipality is estopped from showing the contrary in an action brought by a *bona fide* holder to enforce them. *Ib.*
8. A town, under the laws of the State of New York, is a corporation, so far as respects the making of contracts, the right to sue, and the liability to be sued. *Ib.*

OFFICER IN THE ARMY.

See CONSTITUTIONAL LAW, 3.

OFFICER IN THE NAVY.

See CONSTITUTIONAL LAW, 3;
COURT MARTIAL.

PARTNERSHIP.

See EQUITY, 2.

PATENT FOR INVENTION.

1. Arthur Kirk was the original inventor of the invention patented to him by letters patent No. 268,411, issued December 5, 1882, for a new and useful improvement in movable dams; and that invention was the application of an old device to meet a novel exigency and to subserve a new purpose, and was a useful improvement and patentable, and was not anticipated by other patents or inventions and was infringed by the dams constructed by the plaintiff in error. *Du Bois* v. *Kirk*, 58.
2. The fact that the defendant is able to accomplish the same result as the plaintiff by another and different method does not affect the plaintiff's right to his injunction. *Ib.*
3. Processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of the process, while those which consist solely in the operation of a machine are not; and where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon his mechanism does not impair his right to a patent for the process. *Risdon Iron and Locomotive Works* v. *Medart*, 68.
4. A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, that is to say, for the function of a machine. *Ib.*
5. A patent only for superior workmanship is invalid. *Ib.*
6. If it appears, upon demurrer to a bill to restrain infringement of letters patent, that the patent is invalid, the bill should be sustained. *Ib.*
7. Letters patent No. 248,599, granted October 25, 1881, to Philip Medart for the manufacture of belt pulleys, and letters patent No. 248,598, granted October 25, 1881, to him for a belt pulley, and letters patent No. 238,702, granted to him March 8, 1881, for a belt pulley, are all invalid. *Ib.*
8. A person in the employ of a smelting company invented a new method of tapping and withdrawing molten metal from a smelting furnace. He took out a patent for it, and permitted his employer to use it without charge, so long as he remained in its employ, which was about ten years. After that his employer continued to use it, and, when the patent was about to expire, the patentee filed a bill against the company, praying for injunctions, preliminary and perpetual, and for an accounting. Before the return of the subpœna the patent had expired. On the trial it appeared that the invention had been used for more than seventeen years with the knowledge and assent of the patentee, and without any complaint on his part, except that the company had not paid royalties after he quitted its employment. The defences

POWER OF ATTORNEY.

PRACTICE.

See EQUITY, 6;
JURISDICTION, A, 4, 5, 6, 7;
TRESPASS, 3.

PUBLIC LAND.

B. STATUTES OF STATES OR TERRITORIES.

TAX SALES IN WEST VIRGINIA.

1. C., in his lifetime, was in possession, claiming ownership under divers patents of the Commonwealth of Virginia, of several contiguous tracts of land in West Virginia, described in the several surveys thereof. In September, 1875, they were sold for non-payment of taxes assessed upon them for the year 1874, and, under the operation of the tax laws of that State, the title was suspended for one year, the State being the purchaser, in order to enable the owner to pay the taxes within that year, and thus free the land from the charge. C. died three months before the expiration of the year. After his death and after the expiration of the year, his heirs commenced proceedings under the state statutes, praying for leave to pay all back taxes and to acquire the title to the lands which had then become vested in the State. Decrees were entered giving them permission to redeem, and releasing the lands from the forfeiture and from all former taxes and damages. Under these decrees they made the payments. They then found that an adverse title to the lands was set up by purchasers at tax sales made in 1869 for the non-payment of taxes assessed in 1868, to persons claiming under other alleged surveys, and under other grants from the Commonwealth, and under other tax sales made prior to the separation, which are set forth in detail in the opinion of the court. The heirs of C. thereupon filed their bill in equity against the persons setting up such adverse title, praying for a decree annulling the deeds under which the defendants claimed title, and the removal thereby of the cloud created by them on the plaintiff's title. *Held*, (1) That the claims of the heirs of C. were sustained, unless overthrown by the evidence adduced by the defendants; (2) that the examination and review of that evidence by the court showed that the tax sale of 1869 had no validity, and that there was nothing in the case to affect the validity of the claim of the heirs of C. *Rich* v. *Braxton*, 375.
2. By the law of Virginia in force prior to the creation of the State of West Virginia, it was the duty of the sheriff or collector, when lands were sold for taxes, to purchase them on behalf of the Commonwealth for the amount of the taxes, unless some person bid that