
T
98919929 8

UNITED STATES REPORTS

VOLUME 161

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1895

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1896

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.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.

JUDSON HARMON, Attorney General.
HOLMES CONRAD, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1895.

CHEMICAL NATIONAL BANK *v.* HARTFORD DEPOSIT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 735. Submitted January 7, 1896. — Decided February 3, 1896.

The legal existence of a corporation is not cut short by its insolvency and the consequent appointment of a receiver; and there is nothing in the statutes relating to national banks which takes them out of the operation of this general rule.

After passing into the hands of a receiver, appointed by the Comptroller of the Currency, under the provisions of the Revised Statutes, a national bank remains liable, during the remainder of the term, for accrued and accruing rent under a lease of the premises occupied by it, although the receiver may have abandoned and surrendered them; but if the lessor, in the exercise of a power conferred by the lease, reënters and relets the premises, the liability of the bank after the reletting is limited to the rent then accrued and unpaid, and the diminution, if any, in the rent for the remainder of the term, after the reletting.

THIS was an action of assumpsit brought by the Hartford Deposit Company against the Chemical National Bank of Chicago and the receiver of the bank in the Superior Court of Cook County to recover damages for a failure to pay rent

alleged to be due, under a written lease, from August 1, 1893, to April 30, 1894. The cause was submitted to the court for trial on a stipulation as to the facts, of which the lease formed a part; the issues were found in favor of defendants and judgment was rendered accordingly. Plaintiff took the case to the Appellate Court for the first district of Illinois, which affirmed the judgment as to the receiver, but reversed it as to the Chemical National Bank, and entered judgment for the sum of $9000. 58 Ill. App. 256. An appeal was prosecuted to the Supreme Court of Illinois and the judgment of the Appellate Court affirmed. 156 Illinois, 522. This writ of error was thereupon brought.

The facts were thus stated by the Supreme Court:

"The Chemical National Bank of Chicago entered into a lease, dated November 18, 1892, with the Hartford Deposit Company, of a banking office of a certain building owned by the said Hartford Deposit Company. In accordance with its terms the bank paid $2500 on the delivery of said lease. The term was for a period of five years, from May 1, 1893, at an annual rental of $12,000, payable in equal monthly instalments of $1000 in advance, exclusive of and in addition to said first payment of $2500. The bank entered into and took possession of said premises on May 1, 1893, the first day of said term, and the first instalment of rent fell due and was payable on that day. This instalment was not paid when due, nor had it, or any part of it, been paid when, on May 9, 1893, the bank became insolvent and a national-bank examiner took possession of its assets and of said premises. On July 21 a receiver was duly appointed, and on July 27 he notified the Hartford Deposit Company of his election to terminate said lease after July 31, 1893, so far as he, as receiver, was concerned. On the same day, namely, July 27, said receiver paid to the Hartford Deposit Company the sum of $2709.68, which was, as agreed, the ratable amount of rent due for the period to July 31, inclusive. No other or further rent was paid under said lease by any other person or at any other time. The premises remained vacant until May 1, 1894, when they were relet at a reduced rental."

Mr. Hiram T. Gilbert for plaintiff in error.

I. The appointment of a receiver of a national banking association by the Comptroller of the Currency on account of its insolvency amounts, for all practical purposes, to the dissolution of such association. *Fidelity Safe Deposit & Trust Co.* v. *Armstrong*, 35 Fed. Rep. 567; *Bethel Bank* v. *Pahquioque Bank*, 14 Wall. 383; *White* v. *Knox*, 111 U. S. 784; Rev. St. §§ 5141, 5151, 5191, 5195, 5201, 5205, 5234, 5235, 5236, 5239; act of June 30, 1876, c. 156, 19 Stat. 63.

II. A claim to be entitled to be proven up and paid by dividends out of the assets of a national banking association in the hands of a receiver must be one which, at the date of the suspension of the association, was a then existing demand, and the claim for rent under this lease is not such a demand. *Riggin* v. *Magwire*, 15 Wall. 549; *French* v. *Morse*, 2 Gray, 111, 115; *Savory* v. *Stocking*, 4 Cush. 607; *Dean* v. *Caldwell*, 127 Mass. 242; *White* v. *Knox*, 111 U. S. 784; *Fidelity Safe Deposit & Trust Co.* v. *Armstrong*, 35 Fed. Rep. 567; *Chemical Nat. Bank* v. *Armstrong*, 59 Fed. Rep. 372.

III. After the appointment by the Comptroller of the Currency of a receiver of a national banking association judgment cannot be rendered against such association, or its receiver, for any claim which, at the date of the bank's suspension, was not an existing demand. *Bethel Bank* v. *Pahquioque Bank*, 14 Wall. 383; *White* v. *Knox*, 111 U. S. 784; Rev. Stat. §§ 5235, 5236.

Mr. Charles H. Baldwin for defendant in error.

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

It is not claimed that the express covenant to pay rent was released by the insolvency of the lessee merely; nor that the election of the receiver not to accept the lease had any effect on the contract between the lessor and the lessee; nor that the lessor had done anything itself to terminate its rights under the lease. But it is argued that no judgment could be

rendered against the bank because the appointment of a receiver amounted to its dissolution, and because the rent in question was not a demand existing at the date of the bank's suspension, and, therefore, not a claim entitled to be proven up and paid out of the assets of the bank or carried into judgment. The state courts ruled both branches of this contention adversely to plaintiff in error.

Granting that, in the absence of statutory provision to the contrary, suits cannot be maintained and judgments rendered against corporations whose chartered existence has terminated, it is not pretended in this case that that event had taken place by lapse of time, by judicial proceedings, or otherwise, unless, as is insisted, the appointment of a receiver in itself put an end to the bank as a corporate entity.

The general rule is that the legal existence of a corporation cannot be cut short in this way, and we can find nothing in the statutes in relation to insolvent national banks which gives that effect to such an appointment or justifies any distinction in that regard as between them and other insolvent corporations.

By section 5136 of the Revised Statutes it is provided that every national bank, duly incorporated, shall have succession for the period of twenty years from its organization, "unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law."

A receiver may be appointed upon the occurrence of the particular defaults enumerated in sections 5141, 5151, 5191 5195, 5201, and 5205, not in question here.

Section 5151 provides: "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Sections 5220 and 5221 provide for the voluntary dissolution of these associations, and sections 5226 and 5227 for the pro-

test of their circulating notes on failure to redeem and the appointment of a special agent to ascertain the fact.

Sections 5228, 5234, 5236, and 5239 are as follows:

"SEC. 5228. After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same, to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits."

"SEC. 5234. On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

"SEC. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends

on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"SEC. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper Circuit, District, or Territorial Court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

On June 30, 1876, (19 Stat. 63, c. 156,) Congress passed an act, the first section of which provides: "That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes."

By the third section, whenever any association is placed in the hands of a receiver and the creditors and expenses have been paid and the redemption of the circulating notes of such

association provided for, the shareholders may elect an agent to whom on filing bond the remaining assets of the association shall be transferred, and "such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands."

It thus appears that by the terms of the statutes the corporation continues, notwithstanding the appointment of a receiver, if its corporate life has not been extinguished by lapse of time, by any provision of its articles, by any action of its stockholders, or by any judgment of forfeiture. The receiver is indeed appointed to close up the association, that is to say, to wind up its business, get in its assets, and pay its debts, and, if need be, to enforce the personal liability of its shareholders for all its "contracts, debts, and engagements;" but the corporation lingers while this is being done, and on occasion when the receiver has discharged his duty with the satisfactory results enumerated and assets remain, an agent may be chosen, who may sue and be sued in the name of the association in the conduct of the final liquidation. Of course when insolvency is declared the corporation is incapacitated from doing any new business. It has ceased to be a going concern, but it still survives for the purpose of the discharge of its liabilities and the final distribution of its remaining assets when that has been accomplished. No refinement of construction leads to any other result and numerous decisions preclude further discussion.

In *Pahquioque Bank* v. *Bethel Bank*, 36 Connecticut, 325, a national bank having failed and a receiver been appointed, the Supreme Court of Errors of Connecticut, in a well considered opinion, held that the winding up of the corporation as provided did not put an end to its existence so as to affect

the rights of creditors to enforce their claims or determine their validity by suit or otherwise; that there was nothing in the national banking act which justified the claim that the franchise was transferred to the receiver in the authority conferred on him to take possession of the assets; and that the court was unable to discover "by what mode of operation known in the law the proceedings in question can produce that absolute and technical dissolution of a corporation which is produced by a judgment for forfeiture or by a legislative repeal, and bars a suit by a creditor." Judgment was given against the insolvent bank and that judgment affirmed by this court in *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, where it was said: "None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered, and the balance, if any, is paid to the owners of the stock or their legal representatives."

In *National Bank* v. *Insurance Company*, 104 U. S. 54, 73, it was held that a national bank in voluntary liquidation is not thereby dissolved as a corporation, but may sue and be sued by name for the purpose of winding up its business; and Mr. Justice Matthews, delivering the opinion of the court, said: "It is to be observed that the sections under which the proceedings took place which, it is claimed, put an end to the corporate existence of the bank, do not refer, in terms, to a dissolution of the corporation, and there is nothing in the language which suggests it, in the technical sense in which it is used here as a defence. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs, and in order to do so completely and effectually, to notify its creditors to present their claims for payment. And the redemption of its bonds given to secure the payment of its circulating notes, by the required deposit of money in the treasury, is limited in its effect to a discharge of the association and its shareholders from all liability upon its circulating notes. The very purpose of the liquidation provided for is to pay the debts of the corporation, that the

remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution cannot take place, with any show of justice, and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist, as a person in law, capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common law consequences, but rather that of the dissolution of a copartnership, which, nevertheless, continues to subsist for the purpose of liquidation and winding up its business."

And in *Rosenblatt* v. *Johnston*, 104 U. S. 462, 463, Mr. Chief Justice Waite, speaking for the court, referring to the assets and property of an insolvent national bank, remarked: "Such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed."

It is further urged that the claim was not an existing demand at the time of the suspension of the bank and could not be proven up for participation in the distribution of the assets. What effect, if any, this might have on the mere recovery of judgment, and the questions often arising in respect of discharges in bankruptcy or insolvency, or of proceedings against insolvent decedents' estates as to the postponement of belated claims to subsequently discovered assets, the state courts did not find it necessary to consider, as they were of opinion that the liability was an existing demand.

The Appellate Court said: "The lease in question was a lawful contract and engagement for the bank to make. The first monthly instalment of rent was due under it nine days before the bank suspended. By its terms the default that was made by the bank in the non-payment of rent on May 1, gave the right to the appellant to reënter and terminate the lease. The damages were then matured and could have been at once sued for, or appellant could defer its suit, as it did, until by a reletting of the premises the extent of damages had been made certain. That they were unliquidated did not render them contingent. The contingency, default in payment of rent, had happened. After that the damages were a mere matter of calculation." And a similar view was thus expressed by the Supreme Court: "The money was not paid, and there was then a breach of the contract for which an action might have been maintained, and this occurred nine days before insolvency. There is, therefore, no foundation for the position of counsel that the claim of appellee was not an existing demand at the time the bank suspended. The amount of damages may not have been as large on the first day of May, 1893, as at a later period, but on that date there was a breach of the contract and a right of action for such breach."

Clearly the conclusion thus reached involved no denial of a title, right, privilege, or immunity specially set up or claimed under the laws of the United States, and, as already seen, the only Federal question arising was rightly decided.

Judgment affirmed.

BELKNAP *v.* SCHILD.

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

No. 22. Argued January 21, 22, 1895. — Decided February 3, 1896.

The United States have no right to use a patented invention without license of the patentee or making compensation to him.

No suit can be maintained, or injunction granted, against the United States, unless expressly permitted by act of Congress.

Statement of the Case.

Officers or agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of a patent.

No injunction can be issued by the courts of the United States against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party. And the same rule applies to officers of the United States.

A patentee has no title in things made by others in violation of his patent.

In a suit in equity for infringement of a patent, the defendants are liable to account for such profits only as have accrued to themselves from the use of the invention.

In a suit in equity for infringement of a patent, if no ground is shown for equitable relief, by injunction, by account of profits, or otherwise, the plaintiff should be left to his action at law for damages.

Upon a suit in equity by the patentee of an improvement in caisson gates against officers of the United States, using in their official capacity a caisson gate made and used by the United States, in infringement of his patent, at a dry dock in a navy yard, the plaintiff is not entitled to an injunction. Nor can he recover profits, if the only profit proved is a saving to the United States in the cost of the gate.

This was a bill in equity, filed January 20, 1887, in the Circuit Court of the United States for the Northern District of California, by George Schild against George E. Belknap, Joseph Feaster, Christopher C. Wolcott, and Jesse Diamond, for an infringement of letters patent granted by the United States to the plaintiff on October 23, 1883, for an improvement in caisson gates.

The bill alleged that the defendants, with full knowledge and in violation of the plaintiff's exclusive right, manufactured and used, and intended to continue to use, such caisson gates in the State of California; and that he had brought an action in the same court against the Union Iron Works of San Francisco, and on the trial of that action, and after he had waived other than nominal damages, recovered a verdict in the sum of one dollar, in August, 1886, and the validity of his patent and the fact of infringement were thereby established.

The bill prayed that the defendants be decreed to account for and pay over to the plaintiff all such gains and profits as

had or might have accrued to them from purchasing or making or using such improved caisson gates; that any further damages sustained by the plaintiff by reason of the defendants' infringement be assessed and ordered to be paid; that the defendants be restrained by injunction from making or using caisson gates containing the patented improvement; that the caisson gates, containing that improvement, and so manufactured, or purchased or in any manner obtained by the defendants, and now in their possession, be destroyed or delivered up to the plaintiff; and for further relief.

The defendants filed a plea to the whole bill, (called in the record a "plea in abatement,") alleging that the court "ought not to take cognizance of or sustain the aforesaid action," for that the defendant Belknap was a commodore in the United States Navy, and commandant of the United States Navy Yard at Mare Island, California; that the defendants Wolcott, Feaster and Diamond were, respectively, a civil engineer in the Navy, an assistant naval constructor in the Navy, and an employé of the United States at Mare Island; that the only caisson gate which either of the defendants had any relation with, control over, or use of, within the State of California, was one constructed, manufactured and used by the government of the United States and for their use and benefit at the navy yard at Mare Island, and was there built by the Union Iron Works, in pursuance of plans and specifications furnished by the Bureau of Yards and Docks, a board in the naval service of the United States, and was delivered by the Union Iron Works to the United States, and used by the United States in the dry dock of that navy yard; and that neither the defendants, nor either of them, made or constructed the caisson gate in question, or used it for their own use and benefit, or ever had, or pretended to have, any interest in or claim upon it; but that they only operated and used it as the officers, servants and employés of the United States, as a part of the navy yard, and for public uses of the United States, in the exercise of their sovereign and constitutional powers.

The Attorney General of the United States, appearing for this purpose only, filed a suggestion, (called in the record a

"plea to the jurisdiction,") in which he stated that the caisson gate in question was planned and constructed by the United States, and ever since its construction had been in the possession, control and use of the United States at the navy yard at Mare Island, and was operated at the dry dock in the navy yard for naval purposes and the public defence, in the building and repairing of ships for the Navy of the United States; that the United States, through their officers and agents, charged with the possession, control and operation of that navy yard, had at all times been in possession, control and operation of the caisson gate as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers; and that the defendants, and each of them, never had anything to do with the construction, use or operation of the gate, or made any claim of right, title, possession, control or use of it, other than as officers and agents of the United States, and in obedience to orders of the naval department of the government; and therefore, "without submitting the rights of the United States to the jurisdiction of the court, but insisting that the court has no jurisdiction of the controversy, for that the said caisson gate and its use now is and at all times has been the property of the United States," moved that the bill be dismissed, and all proceedings stayed and set aside.

The case having been submitted to the court upon the plea of the defendants, and the suggestion of the Attorney General, both were overruled.

The defendants, Belknap, Feaster, Wolcott and Diamond, then filed an answer, admitting the grant of the letters patent, denying the infringement, setting forth affirmatively the matters stated in their former plea, and alleging that neither these defendants nor the United States were parties to the action brought by the plaintiff against the Union Iron Works, or estopped by the judgment therein.

A general replication was filed; and evidence was taken, by which it appeared that the validity of the plaintiff's patent, and its infringement by the defendants, were subjects of conflicting testimony; that Mare Island and the works and dock

thereon, including the caisson gate, belonged to the United States, and were held and occupied for them by their officers and employés; that the defendants respectively held the positions stated in their former plea, and had no interest in the caisson gate, and nothing to do with it beyond operating it under the direction of the United States; that the gate was built in 1884, without any agreement or license of the plaintiff, by the Union Iron Works under its contract with the United States, and according to plans and specifications furnished by the Bureau of Yards and Docks, and Wolcott simply inspected the materials and workmanship, as the work progressed, to see if they were according to the contract; and that the gate had since been used by the United States, as part of the dock in the navy yard aforesaid.

After a hearing upon pleadings and proofs, the court made an interlocutory decree, adjudging that the patent was valid, and had been infringed by the defendants; referring the case to a master to take an account of the number of caisson gates made or used by the defendants, or either of them, in violation of the patent, and also of the gains, profits and advantages, arising or accruing to the defendants or either of them, and of the damages sustained by the plaintiff; and ordering a perpetual injunction against the defendants and each of them, "and their and each of their agents, servants, clerks and workmen, and all persons claiming or holding under or through them or either of them."

The master reported that one caisson gate to the dock in the navy yard at Mare Island, for the making and using of which the defendants had been adjudged to have infringed the plaintiff's patent, had been made upon plans furnished by the plaintiff and modified by the government officials, and put in use in 1884; that the cost of this gate was $60,000, and the cost of the cheapest practicable gate, constructed on any other plan known to the defendants, would be at least $100,000, and therefore the gains, profits and advantages, which had arisen and accrued to the defendants from infringing the plaintiff's patent, amounted to $40,000; and that no damages, in addition to such gains, profits and advantages, had been proved.

The court overruled exceptions taken by the defendants to the master's report, confirmed his report, and entered a final decree for the plaintiff for the sum of $40,000, with interest and costs. The defendants appealed to this court.

Mr. Assistant Attorney General Conrad for appellants.

Mr. J. H. Miller, (with whom was *Mr. L. T. Michener* on the brief,) for appellee.

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

A recapitulation of the principles heretofore affirmed by this court, touching the liability of the United States, and of their officers and agents, to suit in the judicial tribunals, will go far towards disposing of this case.

It should be premised that our law differs from that of England as to the right of the government to use, without compensation, an invention for which it has granted letters patent.

In England, the grant of a patent for an invention is considered as simply an exercise of the royal prerogative, and not to be construed as precluding the Crown from using the invention at its pleasure; and therefore a petition of right cannot be maintained against the Crown for using a patented invention; although a private person or corporation, that has contracted to supply the government with articles embodying the invention, may be sued for infringement of the patent. *Feather* v. *The Queen*, 6 B. & S. 257; *Dixon* v. *London Small Arms Co.*, L. R. 10 Q. B. 130, and 1 App. Cas. 632.

But, in this country, letters patent for inventions are not granted in the exercise of prerogative, or as a matter of favor, but under art. 1, sect. 8, of the Constitution of the United States, which gives Congress power "to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries." The Patent Act provides that

every patent shall contain a grant to the patentee, his heirs and assigns, for a certain term of years, of "the exclusive right to make, use and vend the invention or discovery throughout the United States." Rev. Stat. § 4884. And this court has repeatedly and uniformly declared that the United States have no more right than any private person to use a patented invention without license of the patentee or making compensation to him. *United States* v. *Burns*, 12 Wall. 246, 252; *Cammeyer* v. *Newton*, 94 U. S. 225, 235; *James* v. *Campbell*, 104 U. S. 356, 358; *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59, 67; *United States* v. *Palmer*, 128 U. S. 262, 270–272.

The United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued. This doctrine has been affirmed by this court in cases too numerous to be cited; and was clearly stated by Mr. Justice Field, delivering judgment in the case of *The Siren*, as follows: "It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy: the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*, 8 Pet. 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits

against its property." 7 Wall. 152–154. So much of this statement as regards suits against the United States, or against their property, was repeated by the present Chief Justice in the recent case of *Stanley* v. *Schwalby*, 147 U. S. 508, 512.

It necessarily follows that, unless expressly permitted by act of Congress, no injunction can be granted against the United States. *United States* v. *McLemore*, 4 How. 286; *Hill* v. *United States*, 9 How. 386; *Case* v. *Terrell*, 11 Wall. 199.

The United States, by successive acts of Congress, have consented to be sued upon their contracts, either in the Court of Claims, or in a Circuit or District Court of the United States. Acts of February 24, 1855, c. 122, § 1; 10 Stat. 612; March 3, 1863, c. 92, § 2; 12 Stat. 765; Rev. Stat. § 1059; Act of March 3, 1887, c. 359, §§ 1, 2; 24 Stat. 505; *United States* v. *Jones*, 131 U. S. 1, 15, 16. The United States may accordingly be sued by a patentee for their use of his invention under a contract made with him by the United States or by their authorized officers. *United States* v. *Burns*, 12 Wall. 246; *United States* v. *Palmer*, 128 U. S. 262; *United States* v. *Berdan Co.*, 156 U. S. 552.

But the United States have not consented to be liable to suits, founded in tort, for wrongs done by their officers, though in the discharge of their official duties. *Gibbons* v. *United States*, 8 Wall. 269; *Morgan* v. *United States*, 14 Wall. 531, 534; *Langford* v. *United States*, 101 U. S. 341; *United States* v. *Jones*, 131 U. S. 1, 16, 18; *German Bank* v. *United States*, 148 U. S. 573, 579, 580; *Hill* v. *United States*, 149 U. S. 593. The United States, therefore, are not liable to a suit for an infringement of a patent, that being an action sounding in tort. *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Berdan Co.*, 156 U. S. 552.

A public officer is not personally liable on a contract, although under his own hand and seal, made by him in the line of his duty, by legal authority, and on account of the government, and enuring to its benefit, and not to his own. *Hodgson* v. *Dexter*, 1 Cranch, 345. See also *Macbeath* v. *Haldimand*, 1 T. R. 172; *Unwin* v. *Wolseley*, 1 T. R. 674; *Palmer* v. *Hutchinson*, 6 App. Cas. 619.

But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. *Little* v. *Barreme*, 2 Cranch, 169; *Bates* v. *Clark*, 95 U. S. 204. Such officers or agents, although acting under order of the United States, are therefore personally liable to be sued for their own infringement of a patent. *Cammeyer* v. *Newton*, 94 U. S. 225, 235. See also *Feather* v. *The Queen*, 6 B. & S. 257, 297; *Vavasseur* v. *Krupp*, 9 Ch. D. 351, 355, 358.

The extent to which officers or agents of the government may be restrained by injunction from doing unlawful acts to the prejudice of private rights is illustrated by the decisions of this court regarding injunctions from the courts of the United States to officers and agents of a State, which, by the Constitution of the United States, is as exempt as the United States are from private suit. *Hans* v. *Louisiana*, 134 U. S. 1.

In a suit to which the State is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion, and in violation of the Constitution or laws of the United States. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 868, 871; *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Pennoyer* v. *McConnaughy*, 140 U. S. 1.

But no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party. *Louisiana* v. *Jumel*, and *Elliott* v. *Wiltz*, 107 U. S. 711, 720–728; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 454–457; *Hagood* v.

Sothern, 117 U. S. 52, 70; *In re Ayers*, 123 U. S. 443; *North Carolina* v. *Temple*, 134 U. S. 22; *McGahey* v. *Virginia*, 135 U. S. 662, 684.

In support of the decree below, much reliance was placed upon *United States* v. *Lee*, 106 U. S. 196; *Stanley* v. *Schwalby*, 147 U. S. 508; and *The Virginia Coupon Cases*, 114 U. S. 269.

In *United States* v. *Lee*, the decision of the court, speaking by Mr. Justice Miller, was that the owner of land held and occupied by the United States for public uses, but under a defective title, might maintain, against the officers in possession of the land under authority of the United States, an action of ejectment, notwithstanding the interposition of the Attorney General in behalf of the United States.

A year afterwards, Mr. Justice Miller, again delivering the opinion of the court, after mentioning a different class of cases, said: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." After citing several cases to this point, he added: "To this class belongs also the recent case of *United States* v. *Lee*, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession." *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 452.

This statement of the decision in *United States* v. *Lee* was

repeated in *Stanley* v. *Schwalby*, in which the point decided was that the statute of limitations, or adverse possession, might be pleaded in defence of an action of trespass to try title against officers of the United States. 147 U. S. 508, 518.

In *Cunningham* v. *Macon & Brunswick Railroad*, above cited, a bill in equity to foreclose a second mortgage of a railroad, and to set aside as invalid a sale and conveyance of the road to the State of Georgia under a foreclosure of the first mortgage, was filed by holders of bonds secured by the second mortgage against the Governor and the Treasurer of the State, as well as against the railroad company and its directors; and was ordered to be dismissed for want of jurisdiction, because, as was said in the opinion: "It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution. This principle is conceded in all the cases; and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction." "In the case now under consideration, the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked. No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession." 109 U. S. 451, 457.

In the cases cited by the appellee, reported under the head of *The Virginia Coupon Cases*, 114 U. S. 269, where a collector of taxes due to the State of Virginia refused to receive

coupons of the State tendered in payment of such a tax, because forbidden to do so by a statute of the State, which was unconstitutional and void as impairing the obligation of the contract made by the State with the holders of such coupons in the statute under which they were issued, the court, speaking by Mr. Justice Matthews, held that the collector was liable to an action of detinue, or of trespass, for distraining personal property for non-payment of the tax; or, where the remedy at law was inadequate, might be restrained by injunction from making the distraint. *Poindexter* v. *Greenhow*, 114 U. S. 270; *Chaffin* v. *Taylor*, 114 U. S. 309; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311.

But where the Circuit Court of the United States, at the suit of one who had tendered such coupons in payment of his taxes, issued an injunction against the Attorney General and other attorneys of the State of Virginia to restrain them from bringing any action in behalf of the State to recover such taxes, and, upon their bringing such actions, committed them for contempt in disobeying the injunction, they were discharged by this court on writs of *habeas corpus*. Mr. Justice Matthews, again delivering its opinion, and fully reviewing the previous cases, said that from the decision in *Cunningham* v. *Macon & Brunswick Railroad*, above cited, "the inference is, that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction;" and added that actions had been sustained against officers acting in behalf of a State "only in those instances where the act complained of, considered apart from the official authority alleged as to its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character;" and that the Eleventh Amendment of the Constitution, declaring that "the judicial power of the United

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," must be held "to cover, not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates;" and therefore concluded that the suit in which the injunction was granted was in substance and in law a suit against the State of Virginia, and consequently the Circuit Court was without jurisdiction to entertain it, the order of injunction and the commitments for contempt were null and void, and the imprisonment of the officers was without authority of law. *In re Ayers*, 123 U. S. 443, 489, 502, 506, 507.

When the matter of the Virginia coupons was last brought before this court, Mr. Justice Bradley, delivering its unanimous opinion, summed up, as the result of the previous decisions, so far as concerns the subject now under consideration, "that no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State;" but that any holder "who tenders such coupons in payment of taxes, debts, dues and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress — by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him." *McGahey* v. *Virginia*, 135 U. S. 662, 684. And this summary was repeated and approved in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 15.

It only remains to apply the principles established by the former decisions to this suit under the Patent Act of the United States.

That act not only provides that "damages for the infringement of any patent may be recovered by action on the case," but also provides that "the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same, or cause the same to be assessed under its direction." Rev. Stat. §§ 4919, 4921.

This bill in equity was filed by the owner of letters patent for an improvement in caisson gates, and alleged that the defendants infringed the patent by manufacturing and using such gates. The defendants filed a plea to the whole bill, and the Attorney General in behalf of the United States filed a suggestion, the single ground of each of which was that the only caisson gate that the defendants had any relation with was not made by them, and was not used by them for their own benefit, but was made and used by the United States in a dry dock at a navy yard, and the defendants only operated and used it as officers, servants and employés of the United States. The fact so pleaded and suggested could not, consistently with the previous decisions, above cited, prevent the defendants from being held liable to the patentee for their own infringement of his patent. There was no error, therefore, in overruling the plea of the defendants and the suggestion of the Attorney General.

But the Circuit Court erred in awarding an injunction against the defendants.

As this court, when deciding that things manufactured under letters patent of the United States were subject to be taxed by a State like other property, said, "The right of prop-

erty in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself." *Patterson* v. *Kentucky*, 97 U. S. 501, 506. Title in the thing manufactured does not give the right to use the patented invention; no more does the patent right in the invention give title in the thing made in violation of the patent.

In an English case, quite analogous to the case at bar, where shells, bought and owned by a foreign sovereign, were brought to England to be put on board his ships of war, the Court of Appeal held that his agents, if they used the shells in England in infringement of an English patent, might be liable in damages to the patentee, but that the court could not restrain the delivery of the shells to the sovereign to whom they belonged. Lord Justice Brett said, "The patent law has nothing to do with property;" and Lord Justice Cotton expressed the same idea more fully, as follows: "The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer if he would otherwise have the property in them. The court, in a suit to restrain the infringement of a patent, does not proceed on the footing that the defendant proved to have infringed has no property in the articles; but, assuming the property to be in him, it prevents the use of those articles, either by removing that which constitutes the infringement, or by ordering, if necessary, a destruction of the articles so as to prevent them from being used in derogation of the plaintiff's rights, and does this as the most effectual mode of protecting the plaintiff's rights — not on the footing that there is no property in the defendant. The court cannot proceed to give that relief, and interfere with the articles, unless it has before it the person entitled to the articles in question, and has as against this person power to adjudicate that the articles are made or used in infringement of the plaintiff's rights." *Vavasseur* v. *Krupp*, 9 Ch. D. 351, 358, 360.

In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the

United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defence and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited.

There was also error in the final decree awarding profits to the plaintiff as against the defendants.

In a suit in equity for the infringement of a patent, the ground upon which profits are recovered is that they are the benefits which have accrued to the defendants from their wrongful use of the plaintiff's invention, and for which they are liable, *ex aequo et bono*, to the like extent as a trustee would be who had used the trust property for his own advantage. The defendants, in any such suit, are therefore liable to account for such profits only as have accrued to themselves from the use of the invention, and not for those

which have accrued to another, and in which they have no participation. *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 138–140; *Root* v. *Railway Co.*, 105 U. S. 189; *Tilghman* v. *Proctor*, 125 U. S. 136, 144–148; *Keystone Co.* v. *Adams*, 151 U. S. 139, 147; *Coupe* v. *Royer*, 155 U. S. 565, 583.

In the leading case of *Elizabeth* v. *Pavement Co.*, a suit in equity for the infringement of a patent for an improvement in wooden pavements was brought against a city, as well as against the contractor who had laid down the pavements. It being shown that the city had made no profits from the use of the invention, but that the contractor had, this court held that profits could be recovered against the contractor only, and not against the city. Mr. Justice Bradley, in delivering judgment, said: "One thing may be affirmed with reasonable confidence, that if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits; the patentee, in such case, is left to his remedy for damages." 97 U. S. 138.

In the case at bar, there was no evidence that the defendants themselves had made any profits whatever from the use of the plaintiff's invention; but the only gains, profits and advantages, upon which the report of the master and the decree of the court were based, were those which had accrued to the United States from the saving in the cost of the gate; and the master found that no damages, in addition to such gains, profits and advantages, had been proved.

The necessary result is that, even if the validity of the patent and its infringement by the defendants are assumed, the plaintiff, upon this record, is not entitled to an injunction, to profits, or to damages.

The finding of the master, that no damages, in addition to profits, had been proved, does not indeed necessarily imply that the plaintiff had not sustained damages, independent of any profits. But no ground for equitable relief, by injunction, by account of profits, or otherwise, being shown, the proper remedy of the plaintiff against the defendants for such damages is by action at law. *Elizabeth* v. *Pavement Co.*, and *Root* v. *Railway Co.*, above cited.

Dissenting Opinion: Harlan, Field, JJ.

The question whether the United States might be liable, in a suit against them in the Court of Claims, or other court of concurrent jurisdiction, as upon a contract, for their use of the caisson gate, if an infringement of the plaintiff's patent, does not arise, and cannot be decided, in this case.

In order that the rights of all parties interested in the controversy may be preserved, the entry in this case will be

Decree of the Circuit Court reversed, and case remanded to that court with directions to dismiss the bill, without prejudice to an action at law against the defendants, or to a suit against the United States.

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

I am unable to concur in the disposition which has been made of this case.

As stated in the opinion of the majority, this court has frequently held that the United States has no more right than any private person to use a patented invention without license of the patentee or without making or securing compensation to him. It is not claimed that the defendants used the plaintiff's patent under a license from him, or that compensation or provision for compensation has been made. The government is, therefore, under an implied obligation to compensate the plaintiff. That obligation arises from the Constitution, which declares that private property shall not be taken for public use without just compensation. Upon this point, the court in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 657, said: "Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, expressed or implied, with the government of the United States.'" The same principle was recognized in *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 597; *United States* v. *Alexander*, 148 U. S. 186, 191, and

Schillinger v. *United States*, 155 U. S. 163, 174, 175. In this view — the defendants being public officers who derive no personal advantage from the use by the government of the plaintiff's invention — the prayer for an injunction might well have been denied upon the ground that there was an adequate and complete remedy by a suit against the United States as upon implied contract. But the court does not proceed distinctly on that ground.

If the plaintiff cannot sue the United States to recover compensation for the use of his invention, actually appropriated by the government for public use, then the only adequate remedy for him would be an injunction against the individual officers, who are proceeding without his license, and without any provision having been made for his being compensated. This must be so, unless the court is prepared to hold that there is no remedy, under the Constitution, for the protection of private rights against illegal invasion by officers of the government. In *United States* v. *Lee*, 106 U. S. 196, 208, 209, this court said that when the citizen, "in one of the courts of competent jurisdiction, has established his right of property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right;" that "no man in this country is so high that he is above the law; no officer of the law may set that law at defiance with impunity; all the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." If the United States may appropriate to public use the invention of a patentee, without his consent, and without liability to suit, as upon implied contract, for the value of the use of such invention; if, as the court holds, a public officer acting only in the interest of the public, is not individually liable for gains, profits and advantages that may accrue to the United States from such use; and if the officer who thus violates the rights of the patentee cannot be restrained by injunction, then the government may well be regarded as organized robbery so far as the rights of patentees are concerned.

Syllabus.

Instead of leaving open the question whether the United States was liable to suit, as upon implied contract, the prayer for injunction, if denied, should have been denied upon the ground, and only upon the ground, that the plaintiff had a complete and adequate remedy by a suit against the government.

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

ROSEN v. UNITED STATES.

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

No. 424. Argued October 29, 1895. — Decided January 27, 1896.

The constitutional right of a defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defence and protect himself after judgment against another prosecution for the same offence; and this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.

The inquiry, in proceedings under Rev. Stat. § 3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails.

Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant

by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious.

When the evidence before the jury, if clear and uncontradicted upon any issue made by the parties, presents a question of law, the court can, without usurping the functions of the jury, instruct them as to the principles applicable to the case made by such evidence.

THE case is stated in the opinion.

Mr. William N. Cohen for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error was indicted under section 3893 of the Revised Statutes, providing that " every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, . . . and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles, or things may be obtained or made, . . . are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating, or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offence be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court. . . . "

The defendant pleaded not guilty, and the trial was entered

upon without objection in any form to the indictment as not sufficiently informing the defendant of the nature of the charge against him.

A verdict of guilty having been returned, the accused moved for a new trial upon the ground, among others, that the indictment was fatally defective in matters of substance. That motion was denied.

The defendant thereupon moved in arrest of judgment upon the ground that the indictment did not charge that he *knew*, at the time, what were the contents of the paper deposited in the mail and alleged to be lewd, obscene, and lascivious. This motion was also denied, and the accused was sentenced to imprisonment at hard labor during a period of thirteen months, and to pay a fine of one dollar.

The paper, "Broadway," referred to in the indictment, was produced in evidence, first, by the United States, and afterwards by the accused. The copy read in evidence by the government was the one which, it was admitted at the trial, the defendant had caused to be deposited in the mail. The pictures of females appearing in that copy were, by direction of the defendant, partially covered with lamp black that could be easily erased with a piece of bread. The object of sending them out in that condition was, of course, to excite a curiosity to know what was thus concealed. The accused read in evidence a copy that he characterized as a "clean" one, and in which the pictures of females, in different attitudes of indecency, were not obscured by lamp black.

The defendant having indicated his purpose to bring the case here for review, the court below ordered these papers to be sent to the clerk of this court with the transcript of the proceedings below.

1. The first contention of the plaintiff in error is, that the indictment was fatally defective in not alleging that the paper in question was deposited in the mail with knowledge on his part that it was obscene, lewd, and lascivious.

The indictment charged that the accused, on the 24th day of April, 1893, within the Southern District of New York, "did unlawfully, wilfully, and knowingly deposit and cause

to be deposited in the post office of the city of New York, for mailing and delivery by the post office establishment of the United States, a certain obscene, lewd, and lascivious paper; which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, Broadway,' and on the same page were printed the words and figures following — that is to say: 'Volume II, number 27; trade-mark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, $4.00 a year, in advance;' and thereupon, on the same page, is a picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word 'tenderloineuse,' and the said paper consists of twelve pages, minute descriptions of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows — that is to say, 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.' — against the peace of the United States and their dignity and contrary to the statute of the United States in such case made and provided."

Undoubtedly the mere depositing in the mail of a writing, paper, or other publication of an obscene, lewd, or lascivious character is not an offence under the statute if the person making the deposit was, at the time and in good faith, without knowledge, information, or notice of its contents. The indictment would have been in better form if it had more distinctly charged that the accused was aware of its character. But this defect should be regarded, after verdict and under the circumstances attending the trial, as one of form under section 1025 of the Revised Statutes providing that the proceedings on an indictment found by a grand jury in any District, Circuit, or other court of the United States, shall not be affected "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." *United States* v. *Chase*, 27 Fed. Rep. 807; *United States* v. *Clark*, 37 Fed. Rep. 106.

The indictment on its face implies that the defendant owned or managed the paper Broadway. He admitted at the trial that he owned and controlled it. He did not pretend that he was ignorant at the time of the contents of the particular number that he caused to be put in the post office at New York. The general charge that he "unlawfully, wilfully, and knowingly deposited and caused to be deposited in the post office . . . a certain obscene, lewd, and lascivious paper"— describing it by its name, volume, number, date of trade-mark, date of issue, and as having on it the name of Lew Rosen, proprietor, the same name borne by the defendant — may, not unreasonably, be construed as meaning that the defendant was, and must have been, aware of the nature of its contents at the time he caused it to be put into the post office for transmission and delivery. Of course he did not understand the government as claiming that the mere depositing in the post office of an obscene, lewd, and lascivious paper was an offence under the statute, if the person so depositing it had neither knowledge nor notice, at the time, of its character or contents. He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited.

In their ordinary acceptation, the words "unlawfully, wilfully, and knowingly" when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it. The case is therefore not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused.

2. The defendant also contends that the indictment was

fatally defective, in that it did not set out with reasonable particularity those parts of the paper relied on to support the charge in the indictment. He insists that the omission from the indictment of a description of the pictures of female figures found in the paper was in violation of the constitutional guaranty that the defendant in a criminal case shall be informed of the nature and cause of the accusation against him. Sixth Amendment.

A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offence charged as will enable him to make his defence and to plead the judgment in bar of any further prosecution for the same crime. Does the indictment in this case meet these requirements? It describes the paper alleged to be obscene, lewd, and lascivious with such minuteness as to leave no possible doubt as to its identity. If the defendant did not have in his possession or could not procure a duplicate of such paper, he could have applied to the court for an order that he be furnished with a bill of particulars to the end that he might properly defend himself at the trial. *United States* v. *Bennett*, 16 Blatchford, 338, 351; *Rex* v. *Hodgson*, 3 Car. & P. 422; Wharton's Cr. Pl. & Pr. § 702. He made no such application but went to trial without suggesting that he was not sufficiently informed by the indictment of the nature and cause of the accusation against him. When the paper in question was produced in evidence he made no objection to it as not being sufficiently described in the indictment, but at the conclusion of the evidence on the part of the prosecution moved to dismiss on the ground that the paper was not obscene. This motion having been overruled he testified in his own behalf, offering in evidence a duplicate of the same paper, admitting that lamp black — capable of being easily removed so as to bring each offensive picture in full view of any person receiving or inspecting the paper — had by his direction been put on the entire edition of April 15, 1893. He now insists that the indictment was fatally defective, because it did not disclose in detail the contents of the twelve pages that were charged to constitute an obscene, lewd, and lascivious paper.

If it be said that he did not know what part of the twelve pages were considered by the grand jury as obscene, lewd, and lascivious, the answer is that he was not entitled to know what passed in the conferences of grand jurors. He was not entitled to show, as matter of defence, that the grand jury proceeded on insufficient grounds. He had to meet only the case made by the indictment and by the evidence adduced by the government. And if he wished to be informed, before entering upon the trial, what particular parts of the paper would be relied on as bringing the case within the statute, he could, as already suggested, have applied for a bill of particulars, which the court, in the exercise of a sound legal discretion, might have granted or refused as the ends of justice required.

The principal authority relied on in support of the defendant's contention is the case in England of an indictment for publishing an obscene libel, namely, "a certain indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals, etc." The jury found that the book was obscene, and a motion in arrest of judgment was made by the accused. The motion was denied, Cockburn, C. J., Mellor, J., concurring, held: "If the omission is in the indictment — if that be the objection, and it be a valid one — it is an objection that ought to have been taken by demurrer, and, therefore, I cannot help thinking that, upon the balance of convenience we shall act more wisely in saying that the judgment pronounced on this indictment ought not to be set aside by making the motion absolute to arrest the judgment; but if there be any valid foundation for the contention the defendants have raised upon the indictment it should be taken by demurrer." *Queen* v. *Bradlaugh*, 2 Q. B. D. 569, 573. The judgment was reversed in the Court of Appeal, which held that in an indictment for publishing an obscene book, described only by its title, the words alleged to be obscene must be set out, and their omission would not be cured by a verdict of guilty. In his opinion in that case, Lord Justice Brett considered what kind of omissions would be cured by verdict, and declared, as the result of

the authorities, that "in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment." But he also said: "I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and obscene pictures. The publication of obscene prints and obscene pictures may be in one sense libellous, but they are not words, and therefore they do not seem to me to fall within the rules as to criminal pleadings which we are considering here to-day." *Bradlaugh* v. *Queen*, 3 Q. B. D. 607, 634.

Looking at the cases in the American courts, we find that in *Commonwealth* v. *Sharpless*, 2 Seargeant & Rawle, 91, 103, (1815) which was an indictment for exhibiting an obscene picture, it was objected, after verdict and on motion in arrest of judgment, that the picture was not sufficiently described. Chief Justice Tilghman said: "We do not know that the picture had any name, and therefore, it might be impossible to designate it by name. What then is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records; these are circumstances which may be well omitted. Whether the picture was really indecent, the jury might judge from the *evidence*, or, if necessary, from *inspection;* the witnesses could identify it. I am of opinion, that the description is sufficient."

The question was considered in Massachusetts in 1821, in *Commonwealth* v. *Holmes*, 17 Mass. 336, 337. That was an indictment for publishing a lewd and obscene print, contained in a certain book entitled "Memoirs of a Woman of Pleasure," and for publishing the same book. Two of the counts alleged that the printed book was so lewd, wicked, and obscene "that the same would be offensive to the court here, and improper to be placed upon the records thereof." Chief Justice Parker, speaking for the court, held these counts to be good, saying: "It can never be required that an obscene book and picture should be displayed upon the records of the court: which must be done, if the description in these counts is insufficient. This

would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it." Subsequently, in *Commonwealth* v. *Tarbox*, 1 Cush. 66, 72, which was an indictment under a state enactment for printing, publishing, and distributing an obscene paper, the court said: "In indictments for offences of this description, it is not always necessary that the contents of the publication should be inserted; but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene, as to render it improper that it should appear on the record; and, then, the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of *Commonwealth* v. *Holmes*, 17 Mass. 336, furnishes both an authority and a precedent for this form of pleading." In *Commonwealth* v. *McCance*, 164 Mass. 162, an indictment charging the defendant with selling a certain book containing, among other things, obscene language, was held to be insufficient. The court distinguished the case before it from previous cases, and said that while the principle announced in *Commonwealth* v. *Holmes* must be regarded as an exception to the general rule relating to libellous publications, the weight of authority in this country was in favor of that decision.

So, in *People* v. *Girardin*, 1 Michigan, 90, 91, which was an indictment for printing and publishing a certain paper described by its title, and characterized as wicked, obscene, etc., the court said: "There is another rule as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters. To do this would be to require a court

of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule. To convict the defendant, he must be shown to have published the libel; if he is the publisher he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. The indictment in this cause corresponds with the precedents to be found in books of the highest merit."

In *State* v. *Brown*, 27 Vermont, 619, in which the indictment stated that the grand jurors omitted from the indictment the lewd and obscene paper alleged to have been sold, because it would be offensive to the court and improper to be placed on the records of the court, Chief Justice Redfield said: "Ordinarily the indictment, in a case like the present, should set forth the book or publication *in haec verba*, the same as in indictments for libel or forgery. This seems to be an acknowledged principle in the books. But even in indictments for forgery, it may be excused, as if the forged instrument is in the possession of the opposite party. So, also, in a case like the present, if the publication be of so gross a character that spreading it upon the record will be an offence against decency, it may be excused, as all the English precedents show. Some of the precedents are much like the present, describing the obscene character of the publication in general terms. But more generally the nature of the publication is more specifically described. But in both cases the principle of the case is the same. If the paper is of a character to offend decency and outrage modesty, it need not be so spread upon the record as to produce that effect. And if it is alleged, in such case, to be a publication within the general terms in which the offence is defined by the statute, it is sufficient, which seems to be done in the present case. The degree of particularity, with which the paper could be described without exposing its grossness, would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the former case it could not be more particularly described than it here is without offending decency."

Opinion of the Court.

In *McNair* v. *The People*, 89 Illinois, 441, 443, the question was whether the indictment for printing, having in possession, and giving away an obscene and indecent picture was sufficient under a provision of the Illinois Criminal Code declaring that an indictment should be deemed sufficiently technical and correct, which stated the offence in the terms and language of the statute creating the offence, or so plainly that the nature of the offence could be easily understood. The court, speaking by Mr. Justice Walker, said that "it was necessary to set out the supposed obscene matter in the indictment, unless the obscene publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment, as an excuse for failing to set out the obscene matter; that whether obscene or not, is a question of law and not of fact; that the question is for the court to determine, and not for the jury." To the same effect are *Fuller* v. *The People*, 92 Illinois, 182, 184; *State* v. *Smith*, 17 R. I. 371, 374–5.

The earlier cases were fully examined by Mr. Justice Blatchford, when he was a judge of the Circuit Court, in *United States* v. *Bennett*, 16 Blatchford, 338, 351, in which it was charged that the defendant "did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain obscene, lewd, and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene, and lascivious, that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment." Speaking for himself and Judges Benedict and Choate, Mr. Justice Blatchford said: "In the present indictment, the defendant had information given to him as to the offence charged, by the date of the mailing, by the title of the book, and by the address on the wrapper. The indictment states the reason for not setting forth the book to be, that it is too obscene and indecent to be set forth. A copy of the book, with a designation of the obscene passages relied on,

could have been obtained before the trial, by asking for a bill of particulars. The defendant was not deprived of the right 'to be informed of the nature and cause of the accusation.' The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment."

The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defence and protect himself after judgment against another prosecution for the same offence; that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.

The refusal of the court to arrest the judgment was not erroneous. The defendant knew from the indictment itself what paper or publication would be offered by the government in evidence, and that the prosecution would insist that the pictures of females displayed in that paper were obscene, lewd, and lascivious. It is said that some of the printed matter and pictures in the paper could not possibly be regarded as of that class. That fact is not disclosed by the indictment. Besides, the failure to set out such matters and pictures could not have prejudiced the accused. The paper being offered in evidence, if it appeared that some of the printed matter or some of the pictures were not obscene, lewd, or lascivious, the

jury could have been instructed upon that subject at the instance of either party. But, as we have already said, the defendant did not ask for a bill of particulars nor object to the indictment as insufficient, but made his defence upon the broad ground that the paper that he caused to be deposited in the post office was not obscene, lewd, or lascivious.

We are of opinion that the indictment sufficiently informed the accused of the nature and cause of the accusation against him, and that there was no legal ground for an arrest of the judgment.

3. At the trial below the defendant, by his counsel, asked the court to instruct the jury that he should be acquitted if they entertained a reasonable doubt whether he knew that the paper or publication, referred to in the indictment, was obscene. This request was refused, and an exception was taken to the ruling of the court.

This request for instructions was intended to announce the proposition that no one could be convicted of the offence of having unlawfully, wilfully, and knowingly used the mails for the transmission and delivery of an obscene, lewd, and lascivious publication — although he may have had at the time actual knowledge or notice of its contents — unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious. The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for

determining whether the statute has been violated. Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious.

4. Another contention of the accused is, that the paper alleged to have been mailed was sent in response to a decoy letter, and, for that reason, no crime was committed. It is only necessary to say that that question has been disposed of adversely to the defendant's contention by *Grimm* v. *United States*, 156 U. S. 604, 611. In that case it was said: "The law was actually violated by the defendant; he placed letters in the post office which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under those assumed names, and received his letters was a government detective, in no manner detracts from his guilt." That doctrine was again announced in *Goode* v. *United States*, 159 U. S. 663, 669, in which case it was said that the fact that "certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a government detective, was no defence to an indictment for mailing such prohibited publications."

5. It is also assigned for error that the court left it to the jury to say whether the paper in question was obscene, when it was for the court, as a matter of law, to determine that question. If the court had instructed the jury as matter of law that the paper described in the indictment was obscene, lewd, and lascivious, no error would have been committed; for the paper itself was in evidence; it was of the class excluded from the mails; and there was no dispute as to its contents. It has long been the settled doctrine of this court that the evidence before the jury, if clear and uncontradicted upon any issue made by the parties, presented a question of law, in respect of which the court could, without usurping the func-

tions of the jury, instruct them as to the principles applicable to the case made by such evidence. *Pleasant* v. *Fant*, 22 Wall. 116, 121: *Montclair* v. *Dana*, 107 U. S. 162; *Marshall* v. *Hubbard*, 117 U. S. 415, 419; *Sparf and Hansen* v. *United States*, 156 U. S. 51, 99, 100. Even if we should hold that the court ought to have instructed the jury, as matter of law, that the paper was, within the meaning of the statute, obscene, lewd, and lascivious, it would not follow that the judgment should, for that reason, be reversed, because it is clear that no injury came to the defendant by submitting the question of the character of the paper to the jury. But it is proper to add that it was competent for the court below, in its discretion, and even if it had been inclined to regard the paper as obscene, lewd, and lascivious, to submit to the jury the general question of the nature of the paper, accompanied by instructions indicating the principles or rules by which they should be guided in determining what was an obscene, lewd, or lascivious paper within the contemplation of the statute under which the indictment was framed. That was what the court did when it charged the jury that "the test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall." "Would it," the court said, "suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?" In view of the character of the paper, as an inspection of it will instantly disclose, the test prescribed for the jury was quite as liberal as the defendant had any right to demand.

Other questions are discussed in the elaborate brief filed for the defendant. Some of them do not require notice; others were not sufficiently saved by exceptions, at the proper time, and will not, therefore, be considered or determined.

We find no error of law in the record, and the judgment is

Affirmed.

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

Dissenting Opinion: White, Shiras, JJ.

Mr. Justice Shiras and myself are unable to concur in the opinion and judgment of the court. Thinking, as we do, that the consequence of the affirmance of the judgment is to deprive the accused of rights guaranteed to him under the Constitution of the United States, we are impelled to state the reasons for our dissent.

It was claimed at the bar of this court that the indictment was absolutely void, because it failed to set forth an offence against the law of the United States. This contention rested on two propositions: First, that the indictment did not on its face contain a statement of the obscene matter charged to have been illegally mailed; second, because even if the failure to so state was excused by the allegation in the indictment that the matter was too obscene and offensive to be repeated, the indictment was none the less absolutely void, because it failed to give an identifying reference to that which the grand jury found to be obscene.

If these objections be well founded, they are necessarily apparent on the face of the record. They go to the jurisdiction of the court *ratione materiæ*. They consequently demand consideration whether or not they were presented to the court below, or have been regularly assigned for error here. *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351. The questions, then, are:

First. Was it necessary to spread the matter alleged to be obscene in full in the indictment, and was the failure to do so excused by the allegation in the indictment that it was too offensive to be put on the record?

It is unquestioned that the English rule requires, where obscene words are relied upon, that the obscene matter should be set out explicitly in the indictment, and that the averment that is too obscene to be so stated is insufficient to excuse the omission. *Regina* v. *Bradlaugh*, 3 Q. B. Div. 621. But this is not the doctrine of the American courts. At the time *Regina* v. *Bradlaugh* was decided the contrary rule had been announced in several leading cases in this country, and the court in the Bradlaugh case said: "In support of this contention for the crown some American cases were cited. Deci-

sions in the courts of the United States are not binding authorities, and although they may be expressly in point, yet, if they are contrary to our law, they must be disregarded." The cases thus referred to have since been followed by many other American authorities, so that the question may be considered in this country as determined adversely to the English rule. *Commonwealth* v. *Holmes*, 17 Mass. 336; *Commonwealth* v. *Tarbox*, 1 Cush. 66; *People* v. *Girardin*, 1 Michigan, 90; *State* v. *Pennington*, 5 Lea, 506; *McNair* v. *People*, 89 Illinois, 441; *Fuller* v. *People*, 92 Illinois, 182; *State* v. *Brown*, 27 Vermont, 619; *State* v. *Griffin*, 43 Texas, 538; *State* v. *Smith*, 17 R. I. 371; *Commonwealth* v. *Dejardin*, 126 Mass. 46; *Commonwealth* v. *Wright*, 139 Mass. 382; *Commonwealth* v. *McCance*, 164 Mass. 162; *United States* v. *Bennett*, 16 Blatchford, 338. It was with reference to this well settled view that in *Grimm* v. *United States*, 156 U. S. 604, in speaking of sending obscene matter through the mails, the court said (p. 608): "The charge is not of sending obscene matter through the mails, in which case some description might be necessary, both for identification of the offence, and to enable the court to determine whether the matter was obscene, and, therefore, non-mailable. Even in such cases it held that it is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned."

Second. Where the obscene matter is not spread upon the face of the indictment, and is excused under the averment that it would be offensive to morality to do so, is the indictment valid where it gives no specific reference identifying the matter found by the grand jury to be obscene, thus rendering it impossible to determine upon what the grand jury based its presentment?

In considering this question it must be borne in mind that imprisonment at hard labor in the penitentiary is the penalty which may be imposed for sending obscene matter through the mails; hence the offence is an infamous one. *Mackin* v. *United States*, 117 U. S. 348; *Ex parte Wilson*, 114 U. S. 417; *In re Claasen*, 140 U. S. 200. It must also be considered that, being an infamous offence, the prosecution can, under the Fifth

Amendment to the Constitution, only be by indictment. The necessity for identifying references in the indictment, to the obscene matter upon which the grand jury makes its finding, is an essential part of the rule, dispensing with the obligation of stating the obscene matter, in so many words, in the indictment. The reason upon which the English rule rests is that spreading in full the obscene matter is essential to protect the accused in his rights, to enable him to move to quash, or in arrest of judgment, or to present on review by error the validity or invalidity of the indictment. The American rule is based upon the reason that such spreading upon the record is not essential to protect the rights of the accused, because the obscene matter, passed on by the grand jury, can be so identified by a reference to it in the indictment, as to enable it to be, by bill of particulars or otherwise, readily supplied for all the purposes of defence; hence, the omission deprives the accused of no substantial right, whilst subserving the ends of public morality and decency.

The authorities make this clear. Thus in *Grimm* v. *United States*, *ub. sup.*, the court said: "It is enough to so far describe it [obscene matter] that its obnoxious character may be discerned." And the reason which exacted this reference was declared to be "both for identification of the offence and to enable the court to determine whether the matter was obscene, and, therefore, non-mailable." In *Commonwealth* v. *McCance*, *supra*, the indictment charged the accused with "selling a certain book then and there called 'The Decameron of Boccaccio,' and which said book upon the title page thereof was then and there of the tenor following, (describing the title page,) . . . which said book then and there contained among other things certain obscene, indecent and impure language, . . . which said book is so lewd, obscene, indecent and impure that the same would be offensive to the court and improper to be placed upon the records thereof." The court, whilst fully recognizing the rule which renders it unnecessary to spread obscene matter in the indictment, also applied the principle which holds that where such matter is not put upon the record there must be an identifying reference in the indictment so that it may be deter-

mined from the face thereof what was the particular matter upon which the grand jury acted. In consequence of so holding the judgment was reversed and the verdict set aside. See also *Babcock* v. *United States*, 34 Fed. Rep. 873.

Indeed, the correctness of the ruling in *Commonwealth* v. *McCance* we think results from the very nature of things. It being unquestionable that a grand jury must find an indictment in order that the prosecution be valid, how can it be said that there has been such a presentment, when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to be obscene? To say that it can be supplied by a bill of particulars or otherwise is a misconception, for it becomes impossible to supply that which does not legally exist. The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer nor any one else have power to create the necessary averments to make that an indictment, which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safeguards. The general rule requires an indictment to be specific. *Stephens* v. *State*, Wright (Ohio), 73; *Commonwealth* v. *Gillespie*, 7 S. & R. 469; *Commonwealth* v. *Stow*, 1 Mass. 54; *Commonwealth* v. *Bailey*, 1 Mass. 62; *Commonwealth* v. *Sweney*, 10 S. & R. 173; *Commonwealth* v. *Wright*, 1 Cush. 46; *Commonwealth* v. *Tarbox*, 1 Cush. 66; *Commonwealth* v. *Houghton*, 8 Mass. 107; *King* v. *Beere*, 12 Mod. 219; *State* v. *Parker*, 1 D. Chipman (Vermont), 298. See, also, *Commonwealth* v. *Stevens*, 1 Mass. 203. To this rule there has been evolved an exception. This exception, as we have said, is that where the publication or mailing of obscene matter is charged by a grand jury, such matter need not be stated in the indictment, provided in that instrument it be referred to and identified. Under the ruling now announced, it seems to us that the exception is made to destroy the rule, and that an indictment is held to be valid even although it makes no reference whatever to the matter relied on to show guilt. Thus the qualification as to the identifying reference by which alone the exception is justified disappears, and the

result logically leads to the recognition of the right of a grand jury to present without stating or referring to the facts upon which its presentment is made, and also concedes the power of a prosecuting officer to supply matter in an indictment, and thus make that which is absolutely void a valid instrument. The wisdom of the rule announced in *Commonwealth* v. *McCance*, was well illustrated by the indictment presented in that case, as it is by the alleged indictment under consideration here. Will it be said that an indictment which charged that an accused published obscene matter contained in twenty volumes of books called the Encyclopædia Britannica or Americana, giving the title page, and followed by the statement that a more minute description would be offensive to morality, would be adequate? And yet what difference would exist, except in degree, between such an indictment and the one here held to be valid? Nor is it logical to say that as an accused has no right to know the secrets of a grand jury room, therefore he is not entitled to be informed as to the matter upon which the grand jury bases its presentment. The Constitution forbids in a certain class of cases prosecution except by indictment, and, therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is entitled, under the Constitution, to know the secrets of the grand jury room.

If these views as to the necessity of an identifying reference, supported, as we think they are, by the statement of the court in *Grimm* v. *United States*, and the ruling of the Supreme Court of Massachusetts in *Commonwealth* v. *McCance*, be sound, their application to this case is clear.

The language of the indictment, whilst it identifies the paper as an entirety, fails in any degree to designate what matter therein, whether words or picture, was found to be obscene by the grand jury, and upon which their presentment was made. It is impossible from the mere description of the title page of the paper, and the averment that it contains twelve pages and was published on a particular day, to in any way ascertain what part, whether pictures or print, contained in the twelve pages, was acted on by the grand

jury. In other words, using the identification of the paper given by the indictment, the mind looks in vain for any reference to the particular things, found in the paper, which were considered as within the statute.

Nor can it be correctly said that the alleged indictment under consideration charged that each and every part of the newspaper was obscene, and therefore the grand jury found the whole paper was of that character, thus identifying the whole. It will be seen, from an examination of the indictment, that its language expressly charges that only portions of the publication to which it refers are obscene. The paper to which the indictment relates is twelve pages of the ordinary size of illustrated papers, with a title page as described in the indictment. Three of its pages are devoted to advertisements; all the other pages, except the sixth and seventh, contained pictures and printed matter. The excepted pages contain only pictures, which are blackened over in part so as to seemingly conceal them, and yet leaving enough unblackened to suggest the subjects which they depict. The eighth page has similar pictures along with the printed matter. After describing the title page of the paper and the picture thereon, the indictment says "and the said paper consists of twelve pages, minute description of which with the pictures therein and thereon would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd and indecent matters." This is not an allegation that the entire contents of the publication were obscene, because if that was intended there would be no necessity of referring to a "minute description" of the paper as essential to disclose the obscene matter. It can, reasonably, only bear the construction that the publication was claimed to be obscene because of "obscene, lewd and indecent matters" appearing somewhere in the publication. It is evident, therefore, that particular matter contained in the twelve pages was contemplated, and that the indictment furnishes no means for ascertaining in what this matter consists, by reference or otherwise.

It is clear that the defences here advanced, if they be well founded, assert not that the indictment is formally defective,

but that it fails on its face to state an offence. The defect is therefore not one of form under Rev. Stat. § 1025. On both principle and authority such error goes to the existence of the indictment, and consequently is essentially one of substance. *Ex parte Bain*, 121 U. S. 1. This is especially applicable to a case where, by the Constitution, the accused cannot be prosecuted except on presentment by a grand jury. That the mere silence or acquiescence of the accused cannot deprive him of his constitutional right is obvious. In *Hopt* v. *Utah*, 110 U. S. 574, speaking through Mr. Justice Harlan, the court said (p. 579):

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirements as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority.' (1 Bl. Com. 144.) The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind. (4 Bl. Com. 11.) Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the

trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

Doubtless it was like reasoning which caused the court in *Commonwealth* v. *Maher*, 16 Pick. 120, to refuse, in a capital case, to allow an amendment as to a matter of substance even with the consent of the prisoner, and which also made the court in *Commonwealth* v. *McCance* set aside the verdict against the accused. In accord with this view is the doctrine which denies the power, even by statute, to authorize amendments which substantially change an indictment. The result of the authorities to this effect is thus stated by Bishop: "If, in a case where the Constitution gives the defendant the right to be tried by an indictment, the legislature should undertake to authorize such amendments as leave the indictment no longer the finding of the grand jury, an amendment under it would oust the jurisdiction of the court, and the cause must stop. Such is the substance of the authorities, though the doctrine is not always stated in these words." (1 Bish. New Crim. Proc. § 97, p. 55, and authorities there cited; Whart. Crim. Pl. & Prac. § 90, sub. 2, and authorities there cited.) The legislative authority not being competent to authorize an amendment so as to convert a void into a valid indictment, surely a prosecuting officer can have no such power.

The indictment, being, as we think, fatally defective in failing to state an offence, which defect could not be supplied in the court below, and cannot be so supplied here without converting an absolutely void into a valid indictment, and thus violating the Constitution which secures the accused an immunity from prosecution except upon presentment by a grand jury, the verdict and judgment should be reversed.

In re EMBLEN, Petitioner.

ORIGINAL.

No. 9, Original. Argued December 16, 1895. — Decided March 2, 1896.

If, after the Secretary of the Interior has decided a contest as to the right of preëmption to public land in favor of one contestant, and has granted a rehearing, but before the rehearing is had, Congress passes an act confirming the entry of that contestant, and directing that a patent issue to him, and a patent is issued accordingly, a writ of mandamus will not lie to compel the Secretary to proceed to adjudication of the contest.

THIS was a petition of George F. Emblen for a writ of mandamus to the Secretary of the Interior to hear and decide a contest between Emblen and George F. Weed as to a quarter section of land in Colorado. The petition alleged the following facts:

In February, 1885, and long before, the land in question, situated in the Denver land district, Colorado, was a part of the unappropriated public domain, suitable for agricultural purposes, and subject to entry and purchase under the preemption and homestead laws. On February 26, 1885, Weed filed in the land office of that district a declaratory statement under oath, as required by the preëmption laws, alleging his settlement upon the land, and his purpose to occupy and cultivate it, and to acquire title to it under those laws. On September 19, 1885, the register and receiver of the district received from Weed final proofs of settlement, improvement and other essential facts, and the government price, and issued to him a cash entry certificate of purchase, entitling him in due course to a patent for the land.

On October 4, 1888, before any patent had been issued, Emblen filed a protest in that office against the issue of a patent to Weed for the land in question, alleging fraud, misrepresentation and perjury on Weed's part touching his settlement, occupation and purpose, and demanding a hearing thereon, and asking to be allowed all the rights of a contestant under the act of May 14, 1880, c. 89. 21 Stat. 140. On May 21, 1889, the register and receiver, after hearing evidence and

arguments, dismissed the protest and contest. Emblen appealed to the Commissioner of the General Land Office, who, on February 20, 1890, reversed the decision, and held Weed's entry for cancellation. Meanwhile the town of Yuma had been built upon the land; and Weed and the board of trustees of Yuma petitioned for a rehearing, which was granted by the Commissioner.

Shortly afterwards, a new land district was created, with offices at Akron, Colorado. The land being in this district, the rehearing was transferred to the register and receiver thereof. Emblen protested, on the ground that the receiver was interested personally in the result of the contest, because he claimed ownership of a portion of the land by a conveyance from Weed. The protest was overruled, and, Emblen refusing to appear before the register, or to submit to his jurisdiction, an *ex parte* hearing was had, and a decision was rendered on November 4, 1890, in favor of Weed, dismissing the contest, and was affirmed on successive appeals to the Commissioner of the General Land Office, and to the Secretary of the Interior. On August 25, 1893, the Secretary of the Interior granted a petition of Emblen for a rehearing upon newly discovered evidence, and expressed the opinion that the proceedings before the register and receiver at Akron were invalid.

Before such rehearing was had, Congress passed the act of December 29, 1894, c. 15, confirming Weed's entry, and directing that a patent issue to him for the land. 28 Stat. 599. In February, 1895, a patent was accordingly issued to Weed; and the Secretary of the Interior, solely by reason of the passage of this act, suspended all proceedings in the contest, and declined to authorize or direct any further hearing, trial, or consideration thereof.

The petitioner further alleged that in good faith, and in reliance upon the acts of Congress and the regulations of the land department, he had spent in this contest years of labor, and large sums of money; that he desired that the contest proceed to final adjudication and disposition; and that, should he succeed therein, it was his purpose to claim and to exercise

his preference right of entry and purchase of the land, as by law authorized and provided.

The prayer of the petition was that the act of Congress be declared unconstitutional and void; that the patent to Weed be likewise declared void, because issued without warrant or authority in law; and "that a writ of mandamus issue, directed to the Secretary of the Interior, requiring him to proceed to the final adjudication and disposition of said contest, in accordance with the general acts of Congress, and the rules and regulations of the land department, in that behalf made and provided."

Mr. Henry B. O'Reily for petitioner.

I. At the time of the passage of this act the land in question had been segregated from the mass of the public domain; it was no longer any part of the "territory or property" of the United States; it was in fact and in law private property. *Wilcox* v. *Jackson*, 13 Pet. 498; *United States* v. *Turner*, 54 Fed. Rep. 228; *Reichart* v. *Felps*, 6 Wall. 160; *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570; *Borden* v. *Northern Pacific Railroad*, 145 U. S. 535.

II. If private property Congress had no dominion over it. After each entry of public lands the power of Congress to dispose thereof ceases, or is certainly suspended, until such entry may be cancelled or forfeited as by law authorized.

III. The act is void as an unprecedented and unwarranted interference with the judicial proceedings of a tribunal lawfully established while actually engaged, within the sphere of its lawful authority, in the determination of a controversy touching the respective rights of individuals to certain property. Confusion and chaos must necessarily result where one department of the government is permitted to encroach upon, or to usurp any of the powers properly belonging to another. *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Germania Iron Co.* v. *United States*, 58 Fed. Rep. 334; *Marquez* v. *Frisbie*, 101 U. S. 473; *Casey* v. *Vassen*, 50 Fed. Rep. 258.

IV. The act is void as an unprecedented and unlawful attempt, by special act, to deprive petitioner of a very valuable right, and exclusive privilege, secured to him and to his heirs, by general laws, then and still in full force, upon the faith of which he had expended, as by law required, much time and money. It was an endeavor to abrogate a contractual, if not a vested right, secured to petitioner upon compliance with, and in pursuance of, lawful acts of Congress. *Shepley* v. *Cowan*, 91 U. S. 330; *Reichart* v. *Felps*, 6 Wall. 160; *Stoddard* v. *Chambers*, 2 How. 284.

V. The act is void because it denied to petitioner the equal protection of the laws.

VI. If the act be void, and the Secretary declines to proceed with this contest solely on account thereof, mandamus is the proper remedy to require him to reinstate said cause and to proceed with the judicial disposition thereof in due course. *In re Hohorst*, 150 U. S. 653; *McPherson* v. *Blacker*, 146 U. S. 1; *N. Y. Life Ins. Co.* v. *Wilson*, 8 Pet. 291; *Ex parte Morgan*, 114 U. S. 174; *Livingston* v. *Dorgenois*, 7 Cranch, 577.

Mr. S. M. Stockslager, (with whom was *Mr. George C. Heard* on the brief,) by special leave of court for the Lincoln Land Company, opposing.

Mr. Assistant Attorney General Whitney opposing.

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

This is an attempt to use a writ of mandamus to the Secretary of the Interior as a writ of error to review his acts, and to draw into the jurisdiction of the courts matters which are within the exclusive cognizance of the land department.

By section 2273 of the Revised Statutes, "When two or more persons settle on the same tract of land, the right of preëmption shall be in him who made the first settlement, provided such person conforms to the other provision of the law; and all questions as to the right of preëmption arising

between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district officers, in cases of contest for the right of preëmption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

By the act of May 14, 1880, c. 89, § 2, "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preëmption, homestead or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands." 21 Stat. 141.

The contest between Emblen and Weed was conducted in accordance with these statutes. After the last decision of the register and receiver, affirmed by the Commissioner of the General Land Office, and by the Secretary of the Interior, in favor of Weed; and after the Secretary of the Interior had granted a petition of Emblen for a rehearing, and before the rehearing had been had; Congress passed an act confirming Weed's entry, and directing that a patent issue to him for the land in controversy. The Secretary of the Interior thereupon suspended the pending proceedings, and declined to authorize any further hearing of the contest; and a patent was actually issued to Weed before this petition for a writ of mandamus was filed.

Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of preëmption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the land department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the land department. The patent conveys the legal title to the patentee; and cannot be revoked or set

Statement of the Case.

aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies. *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47; *Turner* v. *Sawyer*, 150 U. S. 578, 586.

Writ of mandamus denied.

HARRISON *v.* FORTLAGE.

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

No. 14. Argued November 13, 1894. — Decided March 2, 1896.

A contract for the sale of goods "shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer Empress of India," at a certain price "*ex* ship"; "sea-damaged, if any, to be taken at a fair allowance; no arrival, no sale;" and providing that if, by any unforeseen accident, she is unable to load and no other steamer can be procured within the month, the contract is to be void; does not require the goods to be carried to their destination by the vessel named; and is satisfied if the goods are put on board of her at the Philippines at the time specified, and, upon her being so injured on the voyage by perils of the sea as to be unable to carry them on, are forwarded by her master by another steamer to Philadelphia.

This was an action of assumpsit, brought April 22, 1890, in the Circuit Court of the United States for the Eastern District of Pennsylvania, by Hermann Fortlage and others, aliens, partners under the name of A. Tesdorpf & Company, against Charles C. Harrison and others, citizens of Pennsylvania, partners under the name of Harrison, Frazier & Company, upon a contract in writing for the purchase of 2500 tons of sugar. The facts admitted or proved at the trial were as follows:

The plaintiffs' agent signed, and the defendants accepted, a contract in writing in the following terms:

"New York, June 22, 1889.

"Messrs. Harrison, Frazier & Co., Philadelphia.

"Dear Sirs: I have this day sold you, for account of Messrs. A. Tesdorpf & Co., of London, about 2500 tons superior Iloilo sugars, usual assortment, ($\frac{1}{8}$ No. 1, $\frac{1}{4}$ No. 2, and $\frac{5}{8}$ No. 3,) shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer Empress of India, at $5\frac{5}{8}$ c. per pound *ex* ship, net landed weights, two per cent tare, cash, less $2\frac{1}{2}$ per cent, in ten days from average date of discharge.

"Sea-damaged, if any, to be taken at a fair allowance.

"No arrival, no sale.

"Should the steamer, through any unforeseen circumstance, such as accidents of the seas, stress of weather, &c., be unable to load these sugars within the time specified, and the sellers cannot secure other steam tonnage to load in June, this contract is to be void."

The words "*ex* ship," as used in this contract, were understood in the trade to mean that the buyer receives the goods at the tackle of the ship, the seller paying the freight and the duty, and the buyer paying all charges of landing after the goods leave the ship's tackle.

The plaintiffs were merchants; and the defendants, as the plaintiffs knew, were refiners of sugar, and bought this sugar for use in their regular business.

The sugar was shipped at the Philippine Islands, in bags, in the amount, quality and assortment, and within the time, specified in the contract, on the steamer Empress of India, which was then seaworthy and fit in every particular for her voyage, and which sailed for Philadelphia, *via* the Suez Canal, June 23, 1889. The usual length of the voyage was three months, unless prolonged by accident or by perils of the sea.

On August 21, 1889, the Empress of India, while at anchor at Port Said, was, without her fault, run into by another steamer, and so much damaged as to be obliged to land her

cargo, and to go to Alexandria to be repaired. After being repaired, and reloading her cargo, she sailed from Port Said, November 30, 1889; and, in crossing the Atlantic, met with extraordinarily rough weather, and was forced to put into Bermuda, January 5, 1890; and there, upon the recommendation of surveyors, and in order to enable her to proceed on her voyage with safety, discharged 700 tons of the sugar.

On February 11, 1890, she arrived at Philadelphia, with the remaining 1800 tons of the sugar on board. The 700 tons were forwarded from Bermuda by another steamer, which arrived at Philadelphia, March 3, 1890.

The plaintiffs tendered all the sugar to the defendants; and they refused to receive any of it, upon the sole ground that the contract required the sugar to be brought to Philadelphia in the Empress of India, and therefore the plaintiffs had not performed the contract.

The sugar was sold, by agreement of the parties, and for whom it might concern, for less than the contract price; and it was admitted that, if the plaintiffs were entitled to recover at all, the measure of damages was the sum of $63,098, the difference between the contract price and the proceeds of the sale.

The Circuit Court instructed the jury that the plaintiffs were not required by the contract to do more than they had done, and that the defendants were not warranted in declining to receive the sugar; and the jury, by direction of the court, returned a verdict for the plaintiffs for the sum claimed, and interest, upon which judgment was rendered. The defendants excepted to the instruction and direction of the court, and sued out this writ of error.

Mr. John G. Johnson for plaintiffs in error.

I. An arrival by the Empress of India was a condition precedent.

That this is so, and that the words are not words of contract, but of condition, seems settled by the remark of Parke, B., in *Johnson* v. *Macdonald*, 9 M. & W., 600, 603, and the

decision there. That is, no obligation is assumed by the seller that the goods shall be carried at all, much less that they shall be carried by a particular ship. But he is not to be bound to deliver or the purchaser to accept unless the goods reach Philadelphia in that ship. The contract was not a sale — it was a contract to sell, which became a sale only on performance of the conditions precedent, whatever they were, among which it was admitted loading within time was one, and arrival of the sugar at Philadelphia was another. That is, until and unless the goods arrived there was no sale, no duty to tender, no duty to accept, no title had passed, no ownership existed in the purchaser. This was admitted below, and probably will be in this court. The authorities are numerous, and will be found collected in *Neldon* v. *Smith*, 7 Vroom, (36 N. J. Law,) 148. It is a contract to sell the goods when they arrive. *Stockdale* v. *Dunlop*, 6 M. & W. 224, Parke, B. The best test, however, is that the purchasers have no insurable interest in the property. *Stockdale* v. *Dunlop*, *ub. sup.*

In contending that *arrival*, which is a condition precedent to the sale, extends to ship as well as cargo, *i.e.*, means arrival of cargo by that ship, we submit the following considerations looking to the contract alone for the reasons:

It is a precedent condition in all contracts of sale that there is a subject of sale. Benjamin on Sales, § 669.

The sale here is made to depend on arrival — *no arrival, no sale.* Therefore, till there is an arrival there can be no subject of sale.

It might be supposed to be, if the words are not carefully weighed, a condition avoiding the sale, but it is not, for no title is to pass till arrival, and that is the test, whether the transaction is a sale or a contract to sell. That the sugar did not, till arrival, become the subject of a sale is shown by *Bowes* v. *Shand*, 2 App. Cas. 455, and accords with plaintiffs' own views as shown by their evidence.

The property that is contracted to be sold, and that was to be the thing sold, on the happening of the future event (arrival), is the thing described in the contract — sugar — and

among the terms there is this one: that it is to be *shipped to Philadelphia per Empress of India.*

It may not be amiss to point out a consequence of reading the contract as it was asked to be read, viz., that arrival of the sugar was the one only condition precedent and that the mode of arriving was immaterial. It will follow that one of the most important rights of a shipper is lost by the plaintiff and given to no one. This is the right of electing to permit the goods to be forwarded or to accept them at the port of distress. The shipper always has such a right; if he declines exercising it, the master may, by forwarding, impose a very heavy burden on his goods.

If, therefore, he has undertaken to deliver in the event of the arrival of the goods, regardless of the ship, he cannot avoid the duty because the burden becomes too great. Intentionally to divert the goods would be a fraud on the contract, if his object was to avoid his obligation to deliver. *Hawes* v. *Humble*, 2 Camp. 327, *n.* If arrival by the ship is the condition, he is discharged altogether by the misfortune to that ship. *Idle* v. *Thornton*, 3 Camp. 274.

It is this that is the basis of the decision of the Court of Exchequer in *Lovatt* v. *Hamilton*, 5 M. & W. 639, which the judge at the trial distinctly refused to follow. He would not see that if the arrival by the ship is not part of the condition, the seller will be subjected to very different responsibilities than if the contract is to deliver on the arrival of the goods only. *Hale* v. *Rawson*, 4 C. B. (N. S.) 85, is an illustration of the effect of confining the condition to the arrival of the ship only. The obligation to deliver the goods was held to be absolute though there were none on board.

It being admitted that arrival of some kind is a condition precedent, the inquiry arises does this contract belong to the class known as contracts to arrive, which are classified in Benjamin on Sales, § 586. The contract concludes with "no arrival, no sale." All the duty of the purchaser must be wrapped up in that one word *arrival.* The authorities agree that the word "arrival" does not apply to the goods only, but to the ship as well. *Idle* v. *Thornton*, 3 Camp. 274;

Shields v. *Pettie*, 4 Comst. 122; *Johnson* v. *Macdonald*, 9 M. & W. 600; *Stockdale* v. *Dunlop*, 6 M. & W. 224; *Lovatt* v. *Hamilton*, 5 M. & W. 639; *Hawes* v. *Humble*, 2 Camp. 328, n.; *Hale* v. *Rawson*, 4 C. B. (N. S.) 85. Unless the words exclude the construction, the condition to arrive, if a ship is named, means the arrival of that ship, with the cargo.

II. It follows that a delivery by the Trinidad was not a delivery by the Empress of India for the purposes of this contract. That it was for the purpose of enabling the Empress to earn the agreed freight is nothing to the purpose. There is no connection between the contract to sell and the contract with the carrier *to carry*. The phrase that a master is the agent of all concerned has nothing to do with the case. It applies perfectly to the seller, who was the owner, and to the insurer, and to any one having a right in or to the sugar, but we had none. We could not insure; we had no insurable interest. *Stockdale* v. *Dunlop*, 6 M. & W. 224, decides the very point.

The English and American cases differ as to the duty of the master to forward; but in this case there was no duty, even under the American rule. *Griswold* v. *New York Ins. Co.*, 3 Johns. 327.

Whose agent then was the master? How could he be agent for one not having an interest in the cargo? He was agent of the shipowner to earn the freight, say all the authorities. *Australian Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *Cargo ex Argus*, L. R. 5 P. C. 134, 164; *Notara* v. *Henderson*, L. R. 7 Q. B. 225; *Shipton* v. *Thornton*, 9 Ad. & El. 314; *Hickie* v. *Rodocanachi*, 4 H. & N. 455; *Vlierboom* v. *Chapman*, 13 M. & W. 230; L. R. 1 Ad. & Ec. 293; *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447; *Neill* v. *Whitworth*, 18 C. B. (N. S.) 435.

If the parties stipulate for delivery by a certain vessel, there can be no other delivery substituted for it. *Bowes* v. *Shand*, 2 App. Cas. 455; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255; *Coddington* v. *Paleologo*, (*per* Martin B.,) L. R. 2 Ex. 193, 197.

In fact, if we discard the uniform rule in England, founded on Baron Parke's suggestion in *Johnson* v. *Macdonald*, *supra*,

we have a stipulation for loading in a particular steamer, which is a condition, but *quâ* all that relates to the mode of transportation, there is neither contract nor condition. The seller, in the event of disaster, and the shipowner, are each given an option as to that, but not the purchaser. Which is the more reasonable construction of a contract resting on mutual promises? See *Iasigi* v. *Rosenstein*, 141 N. Y. 414.

Mr. William Allen Butler, (with whom was *Mr. Wilhelmus Mynderse* on the brief,) for defendant in error.

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

The single question is whether the contract between the parties required all the sugar to be brought to Philadelphia in the Empress of India, upon which it was originally shipped. This depends upon the meaning of the terms of the writing in which the parties must be assumed to have embodied and expressed their whole intention, and to have defined all the conditions of the contract. The court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of. *Norrington* v. *Wright*, 115 U. S. 188; *Filley* v. *Pope*, 115 U. S. 213; *Watts* v. *Camors*, 115 U. S. 353; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255; *Seitz* v. *Brewers' Refrigerating Co.*, 141 U. S. 510; *Bowes* v. *Shand*, 2 App. Cas. 455; *Welsh* v. *Gossler*, 89 N. Y. 540; *Cunningham* v. *Judson*, 100 N. Y. 179; *Iasigi* v. *Rosenstein*, 141 N. Y. 414.

This contract was made in June, 1889, for the sale of sugar, described as "shipping or to be shipped during this month from the Philippines to Philadelphia, per steamer Empress of India." A contract "to ship by" a certain vessel for a particular voyage ordinarily means simply "to put on board," not including the subsequent carriage; and there is nothing in this contract to show that a different meaning was in the contemplation of the parties.

The words "*ex* ship" are not restricted to any particular ship; and by the usage of merchants, as shown in this case, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing. They do not constitute a condition of the contract, but are inserted for the benefit of the seller. See *Neill* v. *Whitworth*, 18 C. B. (N. S.) 435, and L. R. 1 C. P. 684.

The clause "sea-damaged, if any, to be taken at a fair allowance," contemplates the risk of damage to the goods by perils of the sea, and does not restrict to any particular ship the subsequent transportation of such goods to their destination.

In the clause "no arrival, no sale," the word "arrival" evidently refers, as the word "sale" must necessarily refer, to the goods which are the subject of the contract, and not to the particular vessel on which they are shipped; and the whole effect of the clause is that, if the goods never arrive at their destination, the buyers acquire no property in them, and do not become liable to the sellers for the price.

The remaining clause, which provides that, if the Empress of India, by unforeseen accident, is unable to load in June, and the sellers cannot secure another steamer during that month, the contract is to be void, touches the matter of loading only. The contract fixes no limitation of time in any other respect.

The contract nowhere requires that the sugar shall arrive at Philadelphia by the Empress of India; and essentially differs in this respect from the cases, cited at the bar, of contracts for the sale of goods "to arrive" by, or "on the arrival" of, a ship named, as in *Lovatt* v. *Hamilton*, 5 M. & W. 639; *Johnson* v. *Macdonald*, 9 M. & W. 600; and *Hale* v. *Rawson*, 4 C. B. (N. S.) 85. A particular ship being designated as to the putting on board only, and not as to the arrival, it is not to be inferred that the goods must be carried to their destination in the same ship.

The sugar in question having been put on board the Empress of India, and the conditions of the contract thus satisfied, so far as that ship was concerned, the subsequent transportation and delivery of the goods were to be governed by the

general rules of the maritime law. By that law, as understood in England, the master, from the necessity of the case, had the right, and, by our law, the duty, in case of disaster to his ship, to transship the goods and send them on by another vessel, if one could be had. *The Maggie Hammond*, 9 Wall. 435, 458; 3 Kent Com. 212.

In the able argument for the plaintiffs in error, it was admitted that the rule, that the master in case of necessity is the agent of all concerned, applied to the seller, who was the owner, and to the insurer, and to any one having an insurable interest in the goods; but it was contended that the plaintiffs in error, before the arrival of the goods, had no insurable interest therein, and *Stockdale* v. *Dunlop*, 6 M. & W. 224, was relied on as decisive of this. But that case was decided upon the single ground that there the contract for the sale of goods was oral, and therefore incapable of being enforced. It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself. In the present case, the plaintiffs in error, under a valid contract in writing, had an insurable interest, by reason of the title which would accrue to them upon arrival and delivery, and of the injury which they might suffer by a previous loss of the goods. *Insurance Co.* v. *Chase*, 5 Wall. 509, 513; *Filley* v. *Pope*, 115 U. S. 213, 220; *Wilson* v. *Jones*, L. R. 2 Ex. 131, 151; 3 Kent Com. 276.

Judgment affirmed.

FRANCE *v.* CONNOR.

ERROR TO THE SUPREME COURT OF THE STATE OF WYOMING.

No. 68. Argued May 2, 3, 1895. — Decided March 2, 1896.

Section 18 of the act of Congress of March 3, 1887, c. 397, conferring and regulating the right of dower, applies to the Territory of Utah only, and not to other Territories of the United States.

Opinion of the Court.

THIS was a petition for the assignment and setting off of dower in lands in the county of Carbon and Territory of Wyoming, filed April 1, 1889, in the district court for that county, and alleging that the plaintiff on February 7, 1887, intermarried with James France, then and until his death a resident and citizen of that county and Territory; that he died August 21, 1888, intestate, leaving the plaintiff his widow, and having been seized, during the marriage, of an estate of inheritance in land situated in that county, and fully described in the petition; that upon his death the plaintiff, by virtue of the marriage, became entitled to dower in these lands, which had never been assigned or set off to her, and which she had never received any compensation or equivalent for, or at any time lawfully released her right to; that on March 16, 1888, he, being insolvent, made an assignment, according to the laws of the Territory, to the defendants, for the benefit of his creditors, of all his property, including these lands; and that the defendants took and since held possession of these lands, and refused to assign and set off to the plaintiff her dower therein. The defendants filed a general demurrer, which was sustained, and judgment entered for the defendants.

The plaintiff filed a petition in error in the Supreme Court of the Territory, which, upon the admission of the State of Wyoming into the Union, was entered and argued in the Supreme Court of the State, and the judgment affirmed, upon the ground that the act of Congress of March 3, 1887, c. 397, § 18, did not apply to the Territory of Wyoming. 3 Wyoming, 445. The plaintiff sued out this writ of error.

Mr. Charles N. Potter and *Mr. A. B. Browne* for plaintiff in error.

Mr. Samuel Shellabarger for defendants in error.

Mr. Melville C. Brown filed a brief for same.

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

Opinion of the Court.

By a statute of the Territory of Wyoming, passed December 10, 1869, and embodied in the subsequent codes of the Territory, "Dower and the tenancy by the curtesy are abolished, and neither husband nor wife shall have any share in the estate of the other, save as herein provided." Wyoming Stat. 1869, c. 41, § 1; Compiled Laws of 1876, c. 42, § 1; Rev. Stat. of 1887, § 2221.

The single question in this case is whether this provision of the territorial statute has been annulled or superseded by section 18 of the act of Congress of March 3, 1887, c. 397, conferring and regulating the right of dower; or, in other words, whether this section applies to the Territory of Utah only, or extends to all the Territories of the United States. In order to determine this question, it becomes necessary to consider the scope and the connection of the various parts of the act. 24 Stat. 635.

The act is entitled "An act to amend an act entitled 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two."

Sections 1 and 2 relate to testimony in prosecutions for bigamy, polygamy or unlawful cohabitation. Sections 3–5 define and punish the offences of adultery, incest and fornication. These five sections do not mention the place of commission of any offence; and may perhaps be held to include "any Territory, or other place over which the United States have exclusive jurisdiction," since so much of the act of March 22, 1882, c. 47, referred to in the title of this act, as defined and punished offences, expressly included any such Territory or place. 22 Stat. 30. But upon the question whether such provisions apply to the District of Columbia there have been conflicting opinions. *United States* v. *Crawford*, 6 Mackey, 319; *Knight* v. *United States*, 5 D. C. App. —. And we are not now required to determine the application of those provisions of the act of 1887.

The next three sections of this act are in terms limited to the Territory of Utah. Section 6 relates to the institution of

prosecutions for adultery; section 7, to the powers of commissioners of the courts; and section 8, to the powers of the marshal and his deputies as peace officers.

Sections 9 and 10 relate to evidence, by certificate or otherwise, of marriages "in any of the Territories of the United States."

Section 11 disapproves and annuls all laws enacted by the legislature of the Territory of Utah, providing for or recognizing the capacity of illegitimate children to inherit or to be entitled to any distributive share in the estate of their father; and enacts that no illegitimate child shall hereafter be entitled to inherit from the father, or to receive any distributive share in his estate, unless born within twelve months after the passage of the act, or made legitimate under the act of Congress of March 22, 1882, c. 47, § 7. See *Cope* v. *Cope*, 137 U. S. 682, 688.

Section 12 disapproves and annuls all statutes of the Territory of Utah, conferring jurisdiction upon the probate courts, other than over estates of deceased persons, or over guardianships of the persons and property of infants or insane persons; and transfers the jurisdiction so withdrawn to the district courts of the Territory.

Section 13 directs that proceedings shall be instituted to forfeit and escheat to the United States property obtained or held by corporations in violation of the act of June 1, 1862, c. 126, § 3, (12 Stat. 501,) or of section 1890 of the Revised Statutes — each of which provides that "no corporation or association for religious or charitable purposes shall acquire or hold real estate in any Territory, during the existence of the territorial government," of a greater value than $50,000 — and that the proceeds of the forfeiture shall be applied to common schools "in the Territory in which such property may be;" but that houses of worship, parsonages and burial grounds shall be exempt from forfeiture. The terms of the acts referred to, as well as those of the section itself, show that it extends to all the Territories. And section 14 provides for the discovery of documents in such proceedings "in any Territory of the United States."

Sections 15, 16 and 17 disapprove and annul the acts of the legislature of the Territory of Utah, and of the so-called government of the State of Deseret, creating or continuing the Mormon corporations known as The Perpetual Emigrating Fund Company and The Church of Jesus Christ of Latter Day Saints. See *Mormon Church* v. *United States*, 136 U. S. 1.

Then comes section 18, relating to dower, the extent and effect of which are now in question.

Then follow seven sections, each of which is restricted, in terms, to the Territory of Utah. Section 19 requires the judges of probate in Utah to be appointed by the President of the United States, with the consent of the Senate; and annuls the laws of Utah providing for their election by the territorial legislature. Section 20 makes it unlawful for women to vote at any election in Utah; and annuls all laws of Utah providing for their registration or voting. Section 21 annuls all laws of Utah providing for numbering or identifying the votes at elections. Section 22 abolishes the election districts, and the apportionment of representatives, established by the legislature of Utah; provides for new election districts, and a new apportionment; and declares that none but citizens of the United States shall be entitled to vote at any election in that Territory. Section 23 temporarily continues in force in Utah provisions of section 9 of the act of 1882 concerning the registration of voters and the conduct of elections. Section 24 requires of voters, officers and jurors in Utah an oath to obey this act and those of which it is an amendment; and disqualifies those convicted under this act, or under the act of 1882, or guilty of polygamy or of cognate offences. Section 25 abolishes the office of superintendent of schools, created by the laws of Utah; requires a commissioner to be appointed instead by the Supreme Court of the Territory; and prescribes his duties.

Section 26 (which might perhaps have been more appropriately inserted after section 13 or 14) provides that all religious societies may hold, through trustees nominated and appointed as therein directed "in a Territory," real estate necessary for houses of worship, parsonages and burial grounds.

The 27th and final section annuls all laws of the so called State of Deseret, or of the Territory of Utah, for the organization of the militia; and requires the militia of Utah to be organized under and subjected to the laws of the United States.

The leading provisions of section 18 are as follows:

"(*a*) A widow shall be endowed of third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she shall have lawfully released her right thereto.

"(*b*) The widow of any alien who at the time of his death shall be entitled by law to hold any real estate, if she be an inhabitant of the Territory at the time of such death, shall be entitled to dower of such estate in the same manner as if such alien had been a native citizen."

The whole section was taken from the statutes of the State of New York, with little more than verbal changes, one of which was a substitution of "the Territory" for "this State" in the second sentence, just quoted. N. Y. Rev. Stat. pt. 2, c. 1, tit. 3, §§ 1–8.

It was argued for the plaintiff in error that these words, "the Territory," not being restricted to the Territory of Utah, mean any Territory in which the land lies of which a widow seeks to be endowed.

To this it was answered that, if such had been the intention of Congress, it would have been expressed, either by such general words as "a Territory," or "any Territory," or else, as in section 13, by such a definition as "the Territory in which such property may be;" and that the words "the Territory," without more, in section 18, grammatically and naturally refer to the last antecedent, which is the Territory of Utah, mentioned in section 17. But there are broader considerations leading to the same result.

Most of the other sections of the act relate to the Territory of Utah only; and, whenever it is intended to include other Territories in them, the intention is expressed in so many words, either in the section itself, or in earlier statutes to which it distinctly refers.

Not only the three sections which immediately precede section 18, but the seven sections which immediately follow it, are expressly restricted to the Territory of Utah.

The restriction to the Territory of Utah of the provisions denying the right of voting to women, in section 20, and to polygamists, in section 24, is the more marked, because women had the right to vote in the Territory of Wyoming; Wyoming Rev. Stat. of 1887, § 1103; and the act of Congress of 1882, referred to in section 24, had prohibited polygamists from voting in any Territory of the United States. Act of March 22, 1882, c. 47, § 8; 22 Stat. 31.

The only section, other than section 18, in the act of Congress of 1887, which affects the title that any member of a man's family shall take in his estate, is section 12, enacting that illegitimate children shall take no share by descent or distribution in the estate of the father; and this section is restricted to the Territory of Utah, although section 7 of the act of 1882, referred to in the saving clause of this section, legitimated the issue of Mormon marriages "in any Territory of the United States." 22 Stat. 31.

The well known fact, that the practice of plural marriages was more common and more firmly rooted in Utah than in any other Territory, afforded special reasons for protecting the lawful wife and children, by reinstating in that Territory the rules of the common law, securing to her the right of dower, and not permitting illegitimate children to inherit from their father.

Under the laws of the Territory of Utah, as existing at the time of the passage of the act of Congress of 1887, all illegitimate children inherited from their father; no right of dower was allowed; and there was no community of property between husband and wife, but all property acquired by either, before or after marriage, remained his or her separate property absolutely. Compiled Laws of Utah of 1876, §§ 677, 1020, 1022.

At the time of the passage of the act of 1887 there were, beside Utah and Wyoming, six other organized Territories of the United States — New Mexico, Arizona, Dakota, Montana,

Idaho and Washington — to all of which section 18 of that act must apply, if it applies to Wyoming. The wife's right of dower in the husband's lands existed in Montana only, and had been expressly abolished by territorial statute in Dakota, Idaho and Washington. In New Mexico and Arizona, as well as in Idaho and Washington, the law of community of property between husband and wife, derived from the civil law, through the laws of Spain and France, prevailed, to a greater or less extent. *Martinez* v. *Lucero*, 1 New Mexico, 208, 216; New Mexico Comp. Laws of 1884, §§ 1087, 1422; *Charauleau* v. *Woffenden*, 1 Arizona, 243; Arizona Comp. Laws of 1877, §§ 1968, 1977; Dakota Civil Code of 1877, §§ 78, 779; Montana Stat. February 11, 1876; Idaho Stat. January 6, 1875, §§ 2, 9–11; Washington Code of 1881, §§ 2409–2412, 2414.

Although Congress has the undoubted power to annul or modify at its pleasure the statutes of any Territory of the United States, yet an intention to supersede the local law is not to be presumed, unless clearly expressed. *Davis* v. *Beason*, 133 U. S. 333; *Cope* v. *Cope*, 137 U. S. 682.

It cannot be presumed that Congress, in an enactment which was peculiarly called for in the Territory of Utah, intended to make so important a change in the law of real property in other Territories of the United States.

For these reasons, which are substantially those upon which the court below proceeded, its

Judgment is affirmed.

BALL *v.* HALSELL.

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

No. 471. Submitted December 18, 1895. — Decided March 2, 1896.

By the act of February 26, 1853, c. 81, § 1, (Rev. Stat. § 3477,) every specific assignment, in whatever form, of any claim against the United States, under a statute or treaty, whether to be presented to one of the execu-

Statement of the Case.

tive departments, or to be prosecuted in the Court of Claims, is void, unless assented to by the United States.

A contract, by which the owner of a claim against the United States for Indian depredations appointed an attorney to receive and give acquittances for one half of the money which the attorney might recover of the United States upon that claim, will not, although the attorney has obtained from the Secretary of the Interior a recommendation for the payment of a certain sum upon that claim, but for the payment of which Congress has made no appropriation, support an action by the attorney against the principal for part of a less sum recovered upon that claim from the United States in the Court of Claims under the subsequent act of March 3, 1891, c. 358, out of which the attorney has been allowed and paid less than twenty per cent of that sum, as provided by that act.

THIS was an action brought August 18, 1893, in the Circuit Court of the United States for the Northern District of Texas, by Thomas Ball, a citizen of the State of Virginia, against Julia F. Halsell, a citizen of the State of Texas, residing in that district, and the widow, legatee and executrix of J. G. Halsell, upon a written contract made with the plaintiff by said Halsell in his lifetime, in these words:

"We, the undersigned parties of the first part, do hereby constitute and appoint Thomas Ball our lawful attorney to receive, and to make, sign and give all necessary acquittances and receipts for, one half of all money which may be received by him as our attorney at law, for prosecuting claims against the United States Government, on account of the depredations of the Comanche and Kiowa Indians on our property of horses, mules and cattle in the State of Texas. Said one half being the amount agreed by us to pay him of all that he may recover of said government for said depredations.

"Given under our hands this 22d day of May, A.D. 1874.

"J. G. Halsell."

The signature of the contract was admitted. The other material facts, as alleged in the petition, and found by the court, (to which the parties, waiving a trial by jury, submitted the case,) were as follows:

The plaintiff presented to the Department of the Interior in March, 1875, a claim of Halsell, amounting to $24,860, for such depredations, and prosecuted it before the department,

and the department recommended payment of the sum of $19,625 to Halsell for such depredations. No appropriation was made by Congress to pay the sum so awarded. On March 6, 1891, after the passage by Congress of the act of March 3, 1891, c. 538, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," Ball, acting under his power of attorney, brought a suit in behalf of Halsell, under the provisions of that act, in the Court of Claims, to recover the sum so awarded by the Department of the Interior; and after the death of Halsell, and the substitution of his executrix as claimant in his stead, judgment was rendered for the sum of $17,720, in her favor, and against the United States and the Kiowa and Comanche tribes of Indians; and by the terms of that judgment the sum of $1500 was awarded to Ball as the claimant's attorney. Soon afterwards the United States paid this sum to him, and paid the amount of the judgment for $17,720, less this sum, to the executrix.

In the present suit, Ball claimed to be entitled to recover, under the contract aforesaid, one half of said amount of $17,720, less the sum of $1500 paid him.

The defendant, in her answer, alleged that "the contract described in the plaintiff's petition, if any such was ever made, was declared void by the ninth section of the act of March 3, 1891, of the Congress of the United States, entitled 'An act to provide for the adjudication and payment of claims arising from Indian depredations;' and by the authority and directions of the same section, an allowance, and all that said act permitted to be paid the plaintiff under his said employment, was made to the plaintiff in the judgment rendered by said Court of Claims in favor of this defendant, and was paid to him out of the Treasury of the United States."

Upon the facts above stated, the Circuit Court made the following conclusion of law: "The court being of opinion that said contract is rendered nugatory, and the provision therein made for compensation for said attorney, Thomas Ball, is superseded by the ninth section of the act of March 3, 1891, and being of opinion that said contract is not en

forceable, and that said statute above referred to fixes and provides for the payment of all the compensation which attorneys prosecuting the claim under said act are entitled to receive, judgment is rendered for the defendant." The plaintiff sued out this writ of error.

Mr. John J. Weed for plaintiff in error.

I. The contract between the plaintiff in error and Halsell was a legal contract, and, having been fully performed by the plaintiff in error, he was entitled to be paid the compensation therein stipulated to be paid upon such performance.

Contracts, which provide for the payment of compensation to an attorney for services rendered by him in the prosecution of a claim against the United States, which are contingent upon the successful prosecution of such claim, and provide for payment of a part of the amount collected to the attorney collecting the claim, have been sanctioned as legal and enforced in this court. *Wylie* v. *Coxe*, 15 How. 416; *Wright* v. *Tebbitts*, 91 U. S. 252; *Stanton* v. *Embrey*, 93 U. S. 548; *Taylor* v. *Bemiss*, 110 U. S. 42, 46.

II. The contract, being one authorized by law when made, is protected by the Constitution from the effect of any act of Congress which would impair its obligation, or deprive the plaintiff in error of such rights of property as were therein secured to him.

The judgment of the court from which this writ of error is prosecuted, is based exclusively upon the provisions of the ninth section of the act entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, 26 Stat. 851, which provides as follows: "That all sales, transfers or assignments of any such claims, heretofore or hereafter made, except such as have occurred in the due administration of decedent's estates, and all contracts heretofore made for fees and allowances to claimants' attorneys are hereby declared void."

The learned judge who decided this case, declared that the effect of the above statute was to render the said contract "nugatory," and to "supersede" the provisions of said con-

tract so far as provision was therein made for compensation to the plaintiff in error for services rendered by him in the prosecution and collection of the claim of the defendant testator against the United States. If such is the legal effect of that statute, it is unconstitutional and void, for the following reasons: (1) it impairs the obligations of a lawful contract made between two citizens for the accomplishment of a lawful purpose; (2) it deprives the plaintiff in error of his property without "due process of law;" (3) it is the assumption by Congress of judicial power. *Sinking Fund case*, 99 U. S. 700; *Fletcher* v. *Peck*, 6 Cranch, 87; *United States* v. *Klein*, 13 Wall. 123.

III. A statute which is remedial in its character, and provides for the judicial determination of claims against the United States, is neither "an act of grace," a bounty, a gift nor a donation. *De Groot* v. *United States*, 5 Wall. 410; *United States* v. *Clyde*, 13 Wall. 35; *United States* v. *Anderson*, 9 Wall. 56.

If, however, the fruits of the judgment secured to Halsell by the services rendered by the plaintiff under said act, and his receipt of such fruits was a gift he would not by an acceptance of the gift have been relieved of his contract obligation to the plaintiff. This question is expressly decided in the case of *Davis* v. *Commonwealth*, 164 Mass. 241, recently decided by the Supreme Judicial Court of Massachusetts, and involved the right of Davis to recover the fee stipulated to be paid by the State for services rendered in securing a refund of the direct tax which had been paid by Massachusetts under the provisions of the direct tax-law of August 5, 1861. The court held that the attorney, having rendered the service required by the contract, was entitled to be paid the compensation therein stipulated.

IV. The acceptance by the plaintiff in error of the sum of fifteen hundred dollars allowed by the Court of Claims in its judgment in the case of *Halsell's Executrix* v. *United States*, and its subsequent payment by the United States to the plaintiff, did not render the contract made by Halsell with the plaintiff, "not enforceable" in the courts of the United States.

The fact of the receipt by the plaintiff, of that sum, did not satisfy or discharge the obligations of the defendant in error to the plaintiff under the contract of May 22, 1874. *Bostwick* v. *United States*, 94 U. S. 53.

Mr. Henry C. Coke for defendant in error. (The defendant in error, *Mrs. Julia F. Halsell*, was on his brief.)

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

In determining the construction and effect of the contract sued on, it is important to keep in mind the acts of Congress and the decisions of this court bearing upon the subject.

In *Kendall* v. *United States*, 7 Wall. 113, certain attorneys in 1843 (before Congress had passed any act regulating assignments of claims against the United States) made an agreement with the representatives of the Western Cherokees, a branch of the Cherokee tribe of Indians, to prosecute a claim of the Western Cherokees against the United States, and to receive directly from the United States five per cent of all sums collected upon the claim. By a treaty between the United States and the Cherokee tribe in 1846, it was agreed that certain sums found due to the Western Cherokees should be paid by the United States directly to the heads of families *per capita*, and should not be assignable. 9 Stat. 874. And by the act of September 30, 1850, c. 91, making an appropriation of the sum necessary to fulfil that treaty, Congress provided that "in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due." 9 Stat. 556. This court held that the attorneys could not maintain a suit in the Court of Claims to recover, as compensation for their services in procuring the treaty and appropriation, the five per cent that the Indians had agreed should be paid to the attorneys by the United States; and, speaking by Mr. Justice Miller, said: "We apprehend that the doctrine has never been held, that a claim of no fixed amount, nor time or mode of payment; a claim which has

never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them." "We have no hesitation in saying that the United States, under the circumstances, had the right to make the treaty that was made, without consulting plaintiffs, or incurring any liability to them. The act of Congress, which appropriated the money, only followed the treaty in securing its payment to the individual Indians, without deduction for agents. And both the act and the treaty are inconsistent with the payment of any part of the sum thus appropriated to plaintiffs." 7 Wall. 116–118.

By the act of February 26, 1853, c. 81, § 1, "All transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." 10 Stat. 170. This section has been reënacted, in almost the same words, in section 3477 of the Revised Statutes.

At the first term of this court after the passage of the act of 1853, it was said by this court, speaking by Mr. Justice Grier, that "this act annuls all champertous contracts with agents of private claims." *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314, 336. And the act has since been held by this court to include all specific assignments, in whatever form, of any claim against the United States under a statute or treaty, whether to be presented to one of the executive departments, or to be prosecuted in the Court of Claims; and to make every such assignment void, unless it has been assented to by the United States. *United States* v. *Gillis*, 95 U. S. 407;

Spofford v. *Kirk*, 97 U. S. 484; *McKnight* v. *United States*, 98 U. S. 179; *St. Paul & Duluth Railroad* v. *United States*, 112 U. S. 733; *Hager* v. *Swayne*, 149 U. S. 242, 247.

In *Spofford* v. *Kirk*, above cited, the owner of a claim against the United States for military supplies had, before its allowance or the issue of a warrant for its payment, drawn upon the attorneys employed by him to prosecute it an order to pay to a third person a certain sum out of any moneys coming into their hands on account of the claim; the order had been accepted by the drawees, and sold by the payee to a purchaser in good faith for value; and the drawer and acceptors, after the issue of the treasury warrant, declined to admit the validity of the order. It was adjudged that the accepted order, otherwise an equitable assignment, was void, by reason of the statute, and therefore passed no right in the fund, and could not be enforced against the drawer and acceptors.

That decision has never been overruled or questioned by the court, although the act has been held not to apply to general assignments made by a debtor of all his property for the benefit of his creditors, whether under a bankrupt or insolvent law, or otherwise; *Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Butler* v. *Goreley*, 146 U. S. 303; nor to enable the original claimant to recover of the United States a sum once paid by the United States to his attorney in fact, holding a power of attorney, made before the allowance of the claim and the issue of the warrant, and remaining unrevoked; *Bailey* v. *United States*, 109 U. S. 432; nor to invalidate a contract of partnership in furnishing supplies to the United States, or a promise by one to another of the partners to pay a sum, already due him under the partnership articles, out of money to be received from the United States for such supplies; *Hobbs* v. *McLean*, 117 U. S. 567; nor to affect the right of a mortgagee of real estate leased to the United States, or of a pledgee of the rents thereof, to recover from the mortgagors or pledgors the amount of rents paid to them by the United States. *Freedman's Co.* v. *Shepherd*, 127 U. S. 494.

In the latest case in which the act was considered, the court, speaking by the present Chief Justice, said: "The legislation shows that the intent of Congress was that the assignment of naked claims against the government for the purpose of suit, or in view of litigation or otherwise, should not be countenanced. At common law, the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and, although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy." *Hager* v. *Swayne*, 149 U. S. 242, 247, 248.

By several decisions of this court, indeed, beginning at December term, 1853, contracts for contingent fees, by which attorneys, employed to prosecute claims against the United States, were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid. *Wylie* v. *Coxe*, (1853) 15 How. 415; *Wright* v. *Tebbitts*, (1875) 91 U. S. 252; *Stanton* v. *Embrey*, (1876) 93 U. S. 548; *Taylor* v. *Bemiss*, (1883) 110 U. S. 42. The reason for upholding the validity of such contracts was first stated by Mr. Justice Miller, in *Taylor* v. *Bemiss*, as follows: "The well known difficulties and delays in obtaining payment of just claims, which are not within the ordinary course of procedure of the auditing officers of the government, justifies a liberal compensation in successful cases, where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means, residing far from the seat of government, who can give neither money nor personal attention to securing their rights." 110 U. S. 45. The proportion allowed to the attorneys, in *Wylie* v. *Coxe*, was one twentieth; in *Wright* v. *Tebbitts*, one tenth; in *Stanton* v. *Embrey*, one fifth; and in *Taylor* v. *Bemiss*, one half.

Congress has evidently considered that, in some cases, at least, to permit contracts to be made for the payment to attorneys, by way of contingent fee, of a large proportion of the amount to be recovered, is in danger of leading to extortion and oppression.

It was apparently owing to such considerations, that Congress, in the act of March 3, 1891, c. 538, when conferring upon the Court of Claims jurisdiction of claims arising from Indian depredations, including such claims as had been examined and allowed by the Department of the Interior; and providing that the judgments of that court, unless reversed or modified on rehearing or appeal, should "be a final determination of the causes decided, and of the rights and obligations of the parties thereto;" enacted, in section 9, that "all sales, transfers or assignments of any such claims, heretofore or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void; and all warrants issued by the Secretary of the Treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors or administrators, or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys; and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case, and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent of such judgment shall be allowed by the court." 26 Stat. 851–854.

The contract now sued on begins in the form of a power of attorney, appearing on its face to have been intended to be signed by several persons, constituting and appointing Ball their attorney "to receive, and to make, sign and give all necessary acquittances and receipts for, one half of all money which may be received by him, as our attorney at law, for prosecuting claims against the United States government" on account of Indian depredations; and the instrument ends with

this clause: "Said one half being the amount agreed by us to pay him of all that he may recover of said government for said depredations." It is signed by Halsell only.

The instrument was a unilateral contract, not signed by the attorney, nor containing any agreement on his part, and — so long, at least, as it had not been carried into execution — might be revoked by the principal; or might be disregarded by him in making a settlement with the United States; or might be treated by him as absolutely null and void in any contest between him and the attorney. *Kendall* v. *United States*, 7 Wall. 113; *Spofford* v. *Kirk*, 97 U. S. 484; *Bailey* v. *United States*, 109 U. S. 432, 439; *Walker* v. *Walker*, 125 U. S. 339.

By the very terms of the contract, the attorney was to be paid only out of money recovered and received by him from the United States. Although he prosecuted the claim before the Department of the Interior, and that department recommended payment of a certain sum upon the claim, yet before that sum had been paid, or Congress had made any appropriation for its payment, and, therefore, before he had either recovered or received any money from the United States, or was entitled to any compensation by the terms of the contract now sued on, Congress passed the act of March 3, 1891, c. 538.

By this act, as already stated, Congress, while giving to the Court of Claims jurisdiction and authority to inquire into and finally adjudicate certain claims arising from Indian depredations, including such as had been examined and allowed by the Department of the Interior, not only declared void all sales, transfers or assignments of such claims, theretofore or thereafter made — except in the administration of the estates of deceased persons — and all contracts theretofore made for fees and allowances to claimant's attorneys; but expressly provided that all treasury warrants in payment of the judgments of the court should be made payable and be delivered only to the claimant, or to his heirs, executors or administrators, except so much thereof as the court, at the time of rendering the judgment, and as part thereof, should allow to be paid directly to the claimant's attorney, not exceeding in any case twenty per cent of the amount recovered.

In view of previous experience, this last provision was a wise, reasonable and just provision for the protection of suitors; and it was clearly within the constitutional power of Congress.

As was said by Chief Justice Taney, "It is an established principle of jurisprudence, in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Beers* v. *Arkansas*, 20 How. 527, 529; *In re Ayers*, 123 U. S. 443, 505; *Hans* v. *Louisiana*, 134 U. S. 1, 17.

Much reliance was placed by the plaintiff upon the recent decision of the Supreme Judicial Court of Massachusetts in *Davis* v. *Commonwealth*, 164 Mass. 241, in which an agent, whom the State of Massachusetts had employed to prosecute a claim of the State against the United States, and to whom the State had agreed to pay, in full compensation for his services, two per cent of the amount recovered, was held to be entitled to recover from the State the amount of the compensation so agreed upon; notwithstanding that Congress, in the act appropriating money to pay the claim of the State, had provided that no part of the money should be paid by the State to any attorney or agent under a previous contract between him and the representative of the State. But the case was treated by the court as not free from difficulty; and it differed in several respects from the case at bar. The original agreement between the agent and the State was expressly authorized by its legislature, and was therefore lawful and valid when made. That agreement, as construed by the court, did not necessarily require the agent's compensation to be paid out of money received from the United States. The act of Congress, as the court observed, "did not

undertake to declare void any contracts theretofore made between the representative of the State and an agent or attorney." It did provide that no part of the money received from the United States should be paid by the State to its agent. The act was passed after the services in question had been substantially performed. The act itself fixed the fact and the amount of the liability of the United States; appropriated the money to pay it; and left nothing to be ascertained by subsequent judicial proceedings.

But in the present case, as has been seen, the original agreement was contrary to the express terms of the act of Congress of 1853. That agreement cannot, as it appears to us, be construed as a promise of the principal to pay to the attorney any sum whatever, except out of money recovered and received by the attorney from the United States. The act of Congress of 1891 expressly declared void "all contracts heretofore made for fees and allowances to claimants' attorneys." This act was passed before the attorney had either recovered or received any money upon the principal's claim against the United States. The act did not recognize either the lawfulness or the amount of the claim, or make any appropriation for its payment. But it provided for its ascertainment and adjudication by judicial proceedings, and for the allowance, by the judgment in those proceedings, of a reasonable compensation to the attorney. The restriction of the compensation of attorneys to the amounts so allowed by the court was one of the terms and conditions upon which the United States consented to be sued.

In the suit brought by Ball on behalf of Halsell against the United States under the act of 1891, the Court of Claims rendered judgment in favor of the executrix of Halsell against the United States for $17,720, a smaller amount than had been recommended by the Department of the Interior, and fixed the allowance to Ball at the sum of $1500, between eight and nine per cent of the amount of the judgment. The United States have paid this sum to Ball, and the rest of the judgment to Halsell's executrix.

For the reasons above stated, Ball cannot maintain this

Statement of the Case.

action upon the contract between him and Halsell; and he does not sue, and could not recover, upon a *quantum meruit*. *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314, 337.

Judgment affirmed.

SMITH *v.* UNITED STATES.

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

No. 608. Argued November 19, 1895. — Decided March 2, 1896.

Upon a trial for murder, where the question is whether the killing was in self-defence, evidence that the deceased was a larger and more powerful man than the defendant, as well as evidence that the deceased had the general reputation of being a quarrelsome and dangerous man, is competent evidence for the defendant.

Upon the question whether a homicide was committed in self-defence, witnesses called by the defendant testified that the deceased had the general reputation of being a man of a quarrelsome and dangerous character; and being asked on cross-examination whether they had ever been arrested for anything, it appeared that one of them had been arrested, convicted and imprisoned for selling whiskey, and others had been arrested, but not convicted, for various offences. The judge instructed the jury that reputation was the reflection of character, and, in order to be entitled to consideration, must come from a pure source, and be the reflection of honest and conscientious men, who have character themselves; that, if a man is without character himself, his action characterized by crime, his conscience seared by criminal conduct, he is incompetent to know what character is; and that if it was the reflection of keepers of gambling hells, and violators of law, and prison convicts, the jury should cast it aside as so much worthless matter. *Held*, that the defendant, having excepted to this instruction, and been convicted of murder, was entitled to a new trial.

This was an indictment in the Circuit Court of the United States for the Western District of Arkansas for the murder, at the Cherokee Nation in the Indian Country, on September 27, 1894, of John Welch, a negro and not an Indian, by shooting him with a pistol.

Statement of the Case.

At the trial, the government introduced evidence tending to show that Welch and the defendant, about noon, at a fair ground in Muscogee, at a spot close by their respective tents, and near a merry-go-round, a dance hall, gambling places, refreshment booths, and other tents and buildings, and in the presence of a crowd of people, fell into dispute; that the defendant ran into his tent, and finding one Scott Gentry inside, snatched Gentry's pistol from his belt, came out, and shot and killed Welch; and that Welch was unarmed at the time.

The defendant admitted the killing, and contended that he did it in self-defence; and, being called as a witness in his own behalf, testified that he knew Welch, "was very nearly raised up with him," and they had "tussled together all the way up from boys;" that Welch was a bigger and much stronger man than himself; that he knew that Welch had a pistol the night before; and that, when he shot Welch, Welch was advancing, with his right hand at his hip pocket, towards the defendant, and threatening to kill him.

The defendant also called witnesses, who testified that the deceased had previously made threats against the defendant's life; and five other witnesses, living at Muscogee, who testified that they had known Welch for years, and that he had the general reputation of being a man of quarrelsome and dangerous character.

Each of these five witnesses was asked by the district attorney, on cross-examination, whether he had ever been arrested for anything. In answer to this question, one of them testified that he had been arrested, tried and acquitted for murder; and had been arrested for gambling, and discharged. A second witness testified that he had been arrested for "fighting and gambling" only. A third witness testified that he had once been arrested, three or four years before, and brought to Fort Smith, for selling whiskey; and, on reëxamination, that the grand jury ignored the charge, and that he had never been convicted of anything. A fourth witness testified that he had been arrested for "fighting and whiskey," but for nothing else, and had twice "served a jail

sentence for whiskey." The fifth witness testified that he had never been arrested for anything; and there was no other evidence of the arrest or conviction of any of these witnesses, or that any of them had anything to do with keeping a gambling place.

The court, in the charge to the jury, instructed them as to the evidence of the character of the deceased as follows: "Now, what is reputation? It is the reflection of character. Character is the thing itself. It is that which a man makes day after day, and hour after hour, and year after year, by his bearing and conduct in the community where he lives. If that thing is reflected by the words spoken by men of credit, by men of standing, by men of pure character standing before you, that such reputation is so reflected as that you can believe it, of course it is entitled to consideration and to be taken in the case if it is applicable. But it is to come from men who are morally and mentally competent to know what it means. If a man is without character himself, if his action has been characterized by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is. He has none himself, and he is incompetent to determine when other men have one. And above all is it necessary, important, and essential to the interests of public justice, that justice should not be defeated by men of that character scraped from the four corners of the earth. You are to see to it that it comes from a pure source; and then, again, you are to see to it that it is the reflection, not by keepers of dives and gambling hells, and violators of law, and prison convicts, but it is the reflection of honest and conscientious men, of men who possess character themselves; men of integrity; men whose judgments make up in your community your character that you prize so highly, because it is the opinion of honest, intelligent, judicious and just men and women in your community. That is the source that character is to come from, and the only source from which you can derive it in a reliable way. If it does not come from that source, but comes from the source I have designated, cast it aside as so much worthless

matter invoked wrongfully in cases of this character." To this instruction the defendant at the time excepted; and, after being convicted and sentenced for murder, sued out this writ of error.

Mr. William M. Cravens for plaintiff in error. *Mr. C. J. Frederick* was on his brief.

Mr. Assistant Attorney General Whitney for defendant in error.

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

The main question in controversy at the trial was whether the killing of Welch by the defendant was in self-defence. Upon that question any evidence, which, according to the common experience of mankind, tended to show that the defendant had reasonable cause to apprehend great bodily harm from the conduct of the deceased towards him just before the killing, was admissible; and upon principle, and by the weight of authority, evidence that the deceased was a larger and more powerful man than the defendant, as well as evidence that the deceased had the general reputation of being a quarrelsome and dangerous person, was competent, especially if his character in this respect was known to the defendant, which there was evidence in this case tending to show. *Wiggin* v. *People*, 93 U. S. 465; *Allison* v. *United States*, 160 U. S. 203, 215; *State* v. *Benham*, 23 Iowa, 154; *Commonwealth* v. *Barnacle*, 134 Mass. 215; *Hurd* v. *People*, 25 Michigan, 405; *State* v. *Bryant*, 55 Missouri, 75; *Marts* v. *State*, 26 Ohio St. 162; *State* v. *Nett*, 50 Wisconsin, 524; *State* v. *Turpin*, 77 No. Car. 473; Wharton on Homicide, (2d ed.) §§ 606–623, and cases cited. In *Wiggin* v. *People*, above referred to, evidence that "the deceased's general character was bad, and that he was a dangerous, violent, vindictive and brutal man," was admitted at the trial; and was assumed to be competent, both in the opinion of this court delivered by

Mr. Justice Miller, and in the dissenting opinion of Mr. Justice Clifford. 93 U. S. 466, 470, 474.

The testimony introduced by the defendant to the character of the deceased was therefore competent and material.

All that was shown, by way of impeaching the credibility of any of the five witnesses who testified to this point, was that one of them had been arrested, tried and acquitted for murder, and had been arrested for gambling, and discharged; another had been arrested for fighting and gambling; another arrested for fighting and for selling whiskey; and another arrested, convicted and imprisoned for selling whiskey. There was no evidence that any of the witnesses, except this one, had been convicted of any offence whatever, or that any one of the five had anything to do with keeping a gambling place.

Yet the court, in instructing the jury as to the weight to be given to the evidence of the character of the deceased, told them that reputation was the reflection of character, and, in order to be entitled to consideration, must "come from a pure source," and be "the reflection of honest and conscientious men, of men who possess character themselves, men of integrity, men whose judgments make up in your community your character that you prize so highly, because it is the opinion of honest, intelligent, judicious and just men and women in your community;" and that "if a man is without character himself, if his action has been characterized by crime, if his conscience has been seared by criminal conduct, he is thus rendered incompetent to know what character is; he has none himself, and he is incompetent to determine when other men have one;" and charged the jury "to see to it that it is the reflection not by keepers of dives and gambling hells, and violators of law, and prison convicts," and, if it comes from that source, to "cast it aside as so much worthless matter invoked wrongfully in cases of this character."

This heaping up of injurious epithets upon the witnesses, coupled with the injunction (which could have no application to anything before the court except their testimony) to "cast it aside as so much worthless matter invoked wrongfully," could not have been understood by the jury otherwise than as

a command to disregard all the testimony introduced in behalf of the defendant, bearing upon the character of the deceased as a quarrelsome and dangerous man.

The character of a quarrelsome and dangerous man is not always so well known to peaceable and law-abiding citizens, that their testimony upon the subject can be had. In this, as in other matters involved in the administration of the criminal law, it is often necessary to resort to those who are more familiar with the persons between whom, and the places in which, quarrels and affrays are apt to take place.

No doubt has been suggested as to the competency of any of the witnesses in question; and their credibility was a matter to be determined by the jury. The judge having, in effect, peremptorily withdrawn this matter from their consideration, the defendant is entitled to a new trial. *Hicks* v. *United States*, 150 U. S. 442; *Starr* v. *United States*, 153 U. S. 614; *Allison* v. *United States*, 160 U. S. 203.

It is, to say the least, doubtful whether evidence of an arrest only, not followed by a conviction, is competent to affect the credibility of a witness. *Ryan* v. *People*, 79 N. Y. 593; *Van Bokkelen* v. *Berdell*, 130 N. Y. 141. But such evidence having been admitted without objection as to these witnesses, and having been previously introduced by the defendant's counsel in cross-examining the witnesses for the government, the expression of a decisive opinion upon it would be out of place.

It becomes unnecessary to consider the other exceptions to the rulings and instructions of the court.

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

UNION PACIFIC RAILWAY COMPANY *v.* CALLAGHAN.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 271. Submitted January 22, 1896. — Decided March 2, 1896.

When the bond, in a case brought here by writ of error, is defective, this court will generally allow a proper bond to be filed, if necessary.

An exception to the refusal of the trial court to find for the defendant is waived, if made by defendant without resting his case.

Where propositions submitted to a jury are excepted to in mass, the exception will be overruled provided any of the propositions be correct.

Where a general exception is taken to the refusal of a series of instructions, it will not be considered if any one of the propositions is unsound.

THIS was an action brought by James Callaghan against the Union Pacific Railway Company, in the Circuit Court of the United States for the District of Colorado, to recover damages for injuries received by him through the alleged negligence of defendant. The evidence tended to establish these facts: On August 18, 1890, a repair train operated by defendant, consisting of five flat cars, loaded with timber to be used in repairing bridges, three box cars, and a caboose, in running from Trinidad to Trinchera, went through a defective bridge, and Callaghan, who was riding on the train, was injured.

Heavy storms had prevailed during the preceding week, causing extensive washouts and damages to the roadbed and bridges, so that none but repair trains had passed over the line between Trinidad and Trinchera for three days.

Callaghan was a section foreman on a branch railroad from Trinidad to Sopris, and some time on August 17 he received orders from the superintendent of the railway company to take all the men in his section and assist in repairing the line between Trinidad and Trinchera, and accordingly went to Trinidad, where he was joined by some other section foremen with their crews, all being under one De Remer, a contractor

in the employment of the company, who had been called in to assist in repairing the road, but who had no control over the management of the train, which was in charge of a conductor with an engineer and fireman.

The train left Trinidad about five P.M., Sunday, the 17th, pursuant to orders received from the superintendent, then at Trinchera, and who had that day examined the bridge, which subsequently fell, but so far as appeared gave no directions or warning to De Remer, or the trainmen, in respect of its condition. The train proceeded slowly during the night, De Remer and a track walker going in front with a lantern, and before morning they found one bridge washed out and another rendered dangerous by floods, and repaired them. The bridge where the accident occurred was about half a mile north of Trinchera and three miles south of Adair, another station on the road. The approaches at each end of it had been washed away for over fifteen or twenty feet, so that it was unsafe. The foreman of that section discovered its condition on the 17th, and caused the usual danger signal, a red flag, to be placed along the road between the rails at about seven hundred feet north of the bridge, and its condition was known to the road master as well as to the superintendent before the train left Trinidad.

When the train reached Adair it was running about fifteen miles an hour. The section foreman was there and signalled the train to stop for the purpose of telling them about the bridge, and if it had stopped, would have done so. The engineer saw his signal and commenced to stop, and had slowed up to about four miles an hour, when the conductor signalled him to go ahead. The train then went on without giving the section foreman any opportunity to give information concerning the danger. The bridge could be seen for about nine hundred feet north on the road, but the engineer apparently neither saw its condition nor the red flag, but drove his train upon it, and the car upon which Callaghan was riding went through.

At the conclusion of defendant's evidence, except reading the rules, defendant asked the court to instruct the jury that

there was no evidence sufficient to warrant a verdict for plaintiff, which request was denied, and defendant excepted. Defendant then introduced in evidence the company's rule 227, which read as follows:

"In case of an extraordinary rain storm or high water, trains must be brought to a stop, and a man sent out to examine bridges, trestles, culverts and other points liable to damage, before passing over. Conductors will make careful inquiry at all stopping places, and, when thought advisable, make extra stops to ascertain the extent and severity of storms, taking no risk. In case of doubt as to the safety of proceeding, they will place their trains upon a siding, and remain there until certain it is safe to proceed."

Thereupon plaintiff offered to introduce evidence showing that there was a conductor on the train. Defendant then asked the court to give to the jury the following instructions:

"1. The court is asked to instruct the jury that, under the evidence in this case, the accident appears to have been caused by the failure of the engineer of the work train to observe the rules and regulations of the company in respect to running trains in cases of extraordinary floods, etc., and in his failure to observe the danger signal that, according to the evidence, had been placed in places where he ought to have seen the same in the exercise of the care that was required of him in respect thereto.

"2. The court is asked to instruct the jury that they are not at liberty to infer from the evidence in the case that the accident was caused by the negligence of the conductor in signalling the engineer to proceed after the train had slowed down, since such signal to the engineer in nowise released the engineer from care in respect to observance of all precautions necessary to prevent an accident under the circumstances, the evidence showing that the engineer must have been aware of the likelihood of danger at any place along the line.

"3. The court is asked to instruct the jury that the mere fact that the accident would not probably have happened if the conductor had allowed the train to be brought to a stop at Adair, affords no ground for saying that not stopping the

Counsel for the Motion.

train at Adair was the cause of the accident, since it is true that if the train had not started from Trinidad or Adair or run at all the accident would not have happened, and the mere fact of starting the train, or continuing the train in motion after it had started, does not make the running of the train under those circumstances the proximate cause of the accident by which the plaintiff was injured.

"4. The court is asked to instruct the jury, that the jury are not at liberty to infer, or even from the mere fact that the conductor gave signal to proceed after the engineer had slowed up at Adair was the proximate cause of the injury to the plaintiff, since such signal to proceed can be held to proceed in precisely the same manner as the engineer was bound to proceed under the rules and regulations of the company under which he was acting, and in view of what the engineer knew of the dangers he was bound to apprehend from the floods, etc., that had existed for some days prior to the accident; and that even if the jury believe from the evidence it was negligent in the conductor to proceed after he had slowed down, yet the plaintiff will not be entitled to recover because of such negligence of the conductor unless they further believe from the evidence that such negligence was the proximate cause of the injury."

The record then states: "But the court refused to give each and every of said instructions; to which ruling of the court, the defendant, by its counsel, then and there duly excepted." The court thereupon charged the jury at large upon the whole case. No exception was taken to any part of the charge. The jury found for plaintiff, judgment was entered on the verdict, the cause taken on error to the Circuit Court of Appeals for the Eighth Circuit, and the judgment affirmed. 56 Fed. Rep. 988. This writ of error was then allowed and a supersedeas bond given and approved, in which no penal sum was named. A motion to dismiss or affirm was submitted. Callaghan subsequently died and the cause was revived in the name of Anna Callaghan, administratrix, etc.

Mr. C. S. Thomas and *Mr. W. H. Bryant* for the motion.

Mr. John F. Dillon and *Mr. John M. Thurston* opposing.

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

We should not dismiss this writ of error on account of the defective character of the bond but allow a proper bond to be filed, if necessary, which in this instance it is not, as the motion to affirm must be sustained.

It is settled that an exception to the refusal of the trial court to instruct the jury to find for the defendant is waived if made by defendant without resting his case. The question goes to the sufficiency of the evidence, and that is, of course, of the entire evidence. *Columbia & Puget Sound Railroad* v. *Hawthorne*, 144 U. S. 202, 206. After defendant's motion for an instruction in its favor was denied, it put in evidence its rule 227, which manifestly might have had an important bearing. The motion was not renewed, and we think the action of the court cannot be assigned for error.

Again, it is firmly established that where propositions submitted to a jury are excepted to, in mass, the exception will be overruled provided any of the propositions be correct, and where a general exception is taken to the refusal of a series of instructions, it will not be considered if any one of the propositions is unsound. *Newport News and Mississippi Valley Co.* v. *Pace*, 158 U. S. 36. It was contended by defendant that the accident was the result of the engineer's negligence alone, and that, therefore, plaintiff could not recover. In the light of the evidence the first instruction requested by defendant was properly refused, and, without considering the others, the exception as taken to the ruling of the court must fail. And no exception was saved to any of the instructions given by the court on the whole case.

Judgment affirmed.

FISHBACK *v.* WESTERN UNION TELEGRAPH COMPANY.

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

No. 341. Argued January 22, 23, 1896. — Decided March 2, 1896.

A Circuit Court of the United States has no jurisdiction of a bill to enjoin the collection of separate county taxes by separate county officers, in the State of Arkansas, against the Western Union Telegraph Company, (a corporation which has accepted the provisions of the Statute now codified in the Revised Statutes as Section 5263 to Section 5269,) on its line in each of said counties in that State, when the amount of the tax in no one of the counties reaches the sum of two thousand dollars; and this result is not affected by the fact that if the county assessments were aggregated they would exceed two thousand dollars, as the several county clerks or tax collectors cannot be joined in a single suit in a Federal court, and the jurisdiction sustained on the ground that the total amount involved exceeds the jurisdictional limitation; nor by the fact that the railroad commissioners of the State, who had already acted in the matter, were made parties defendant to the suit.

THIS was a bill filed by the Western Union Telegraph Company January 2, 1894, in the Circuit Court of the United States for the Eastern District of Arkansas against William M. Fishback, Henry B. Armistead, and Charles B. Mills, constituting the board of railroad commissioners for the State of Arkansas, and some forty-seven clerks of different counties in the State, in which complainant had lines of telegraph, alleging that the complainant was a corporation and citizen of New York and each of the defendants was a citizen of Arkansas, "and that the amount or value in controversy in this suit exceeds the sum of two thousand dollars, exclusive of interest and costs;" that on and prior to April 8, 1893, complainant was and had ever since been engaged in the business of operating telegraph lines and sending telegrams over the same to different parts of the United States, with extensive cable lines under the sea, having its general office in the city of New York; that on that day the general assembly of Arkansas passed an

act entitled "An act to assess and collect taxes from certain corporations," a copy whereof was attached to and made part of the bill; that, as stated in the company's return under the act, the value of the lines of the company within Arkansas made upon the basis of actual cost less depreciation, would not exceed $102,229.68, and that if valued on the basis of the cost of the reproduction of an entirely new line, would be $282,763.71; that any apportionment to Arkansas of the company's capital stock on a mileage basis would necessarily include the value of bonds, real estate, contracts, franchises, and patent rights, all of which were outside the jurisdiction of the State of Arkansas; that in Arkansas the gross receipts averaged $23 per mile of wire, and that the net earnings in Arkansas did not exceed $6 per mile of wire; that taking the entire capital of the company at the stock exchange price of July 1, 1893, if the apportionment thereof to the State of Arkansas upon the mileage basis were taxed at an average of two per cent, "which is probably the average rate of taxation in Arkansas," it would require the company to pay a tax annually in Arkansas of nearly fifty per cent of its net earnings from all its business in that State, whether from interstate or local traffic, which was a rate of taxation unheard of, grossly unequal and substantially destructive. It was further alleged, among other things, that on July 1, 1867, the company formally accepted the provisions of the act of July 24, 1866, now sections 5263 to 5269 of the Revised Statutes, and by virtue thereof the company was an agent of the government of the United States in the transmission of intelligence by electricity, and that the enforcement of the scheme of taxation provided in the alleged law would substantially destroy the value of the company's property in Arkansas and prevent it from performing its obligations under said act. Schedules of the real estate of the Western Union Telegraph Company, of the miles of wire and poles of all the lines owned by the company within the State of Arkansas, and the location thereof in each county; and of the gross receipts for 1892, were also made part of the bill. The bill charged that the act in question was unconstitutional and void for reasons given at length, but averred that

the board of railroad commissioners of the State, composed of the governor, secretary, and auditor, had nevertheless assessed complainant's property for taxes within the State, under said act, at the sum of $195 per mile of its lines of telegraph therein, making the whole amount of property thus assessed $396,387, and a copy of the assessment was made a part of the bill, showing the number of miles, the value per mile, and the total value in each county; also the mileage in cities and towns, and the total value thereof.

And it was also alleged that the secretary of State had certified said several assessments to the several county assessors, who had listed the same as property owned by complainant subject to taxation for 1893 in those counties and had returned said assessments to the county clerks thereof, whose duty it was to make out tax books for their respective counties, enter the assessments, levy the taxes thereon at the rate fixed for state, county, and all other purposes, extend the same on the tax books, and deliver them to the tax collectors with warrants requiring the collection of said taxes.

The prayer of the bill was that the railroad commissioners should be required to show the grounds of their assessment; that the act of April 8, 1893, be decreed to be unconstitutional and void; that the act of the board in assessing complainant's property for taxation be cancelled; and that defendants be enjoined from proceeding under said act or pursuant to said assessment, to execute the same, and the county clerks specifically restrained from discharging the duties thereby imposed.

On January 29, 1894, complainant filed an amended bill averring that since the filing of the original bill the county clerks had, pursuant to the assessment of complainant's property by the railroad commissioners, made out the tax books for their several counties, entered the said several assessments, levied the taxes thereon at the rate fixed for state, county, and all other purposes, spread the same upon the tax books and delivered the books to the several tax collectors of the several counties, together with a warrant authorizing and requiring the collection of the same. The amended bill then charged that forty-seven persons, naming them, were the

tax collectors for the counties severally named, and citizens of Arkansas, prayed that they be made parties defendant and be enjoined from proceeding to collect the taxes.

Defendants demurred to the bill and amended bill, and on February 20, 1894, the Circuit Court overruled the demurrer, whereupon complainant dismissed the bill as to the several county clerks, and the defendants, electing to abide by their demurrer, it was decreed "that the defendants and each and every of them, their agents and deputies, be perpetually restrained and enjoined from taking any steps or proceeding in any manner to enforce the collection of taxes assessed against the property of the Western Union Telegraph Company under the assessment made by defendants William M. Fishback, Henry B. Armistead, and Charles B. Mills, in their capacity as a board of railroad commissioners for the said State of Arkansas, under the provisions of an act of the general assembly entitled 'An act to assess and collect taxes from certain corporations,' approved April 8, 1893; and for costs." An appeal to this court was duly prayed and allowed, citation waived, cost bond approved and filed, together with an assignment of errors.

Mr. A. H. Garland for appellants. *Mr. James P. Clarke* and *Mr. R. C. Garland* were on his brief.

Mr. Rush Taggart for appellee. *Mr. John F. Dillon* was on his brief.

Mr. Willard Brown, *Mr. Charles W. Wells* and *Mr. U. M. Rose* filed a brief for appellee.

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

It is argued that under the averments of the bill the Circuit Court had jurisdiction on two grounds: 1. Diverse citizenship; 2. In that the case made by the bill was one arising under the Constitution and laws of the United States. Even if this

were so, the Circuit Court could not take cognizance of the suit unless the matter in dispute exceeded, exclusive of costs and interest, the sum of $2000. Act of March 3, 1887, c. 373, §1, 24 Stat. 552; act of August 13, 1888, c. 866, 25 Stat. 433; *United States* v. *Sayward*, 160 U. S. 493, 498.

In *Walter* v. *Northeastern Railroad Co.*, 147 U. S. 370, we held that "a Circuit Court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments in separate counties, no one of which amounts to two thousand dollars, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined together in the bill, making an aggregate of over two thousand dollars."

The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. *Ex parte Smith*, 94 U. S. 455; *Metcalf* v. *Watertown*, 128 U. S. 586. The general averment in this bill that "the amount or value in controversy in this suit exceeds the sum of two thousand dollars, exclusive of interest and costs," was a mere conclusion, and it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach two thousand dollars. If the rate of taxation in Arkansas did not exceed two per cent as indicated in the return of the telegraph company to the railroad commissioners, the highest amount of taxes in any one county would fall below $400.

Although if these county assessments were aggregated they would considerably exceed two thousand dollars, yet the several county clerks or tax collectors cannot be joined in a single suit in a Federal court and the jurisdiction sustained on the ground that the total amount involved exceeds the jurisdictional limitation, as already ruled in Walter's case, nor do we

find any ground as we did in *Northern Pacific Railroad Co.* v. *Walker*, 148 U. S. 391, upon which an amendment could be permitted.

Without intimating in any degree, under what circumstances, if at all, such a bill might lie, we may add that jurisdiction cannot be sustained here on the ground that, as the railroad commissioners were parties defendant, this bill might be treated, though they had already acted, as seeking to restrain the making of the assessment as a whole.

Decree reversed with costs and cause remanded with a direction to dismiss the suit for want of jurisdiction.

WILLIAM M. FISHBACK *v.* THE PACIFIC EXPRESS COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. No. 342. Argued with No. 341.

THE CHIEF JUSTICE: This case differs in no essential respect from that just decided and must take the same course.

Decree reversed with costs and cause remanded with a direction to dismiss the suit for want of jurisdiction.

Mr. A. H. Garland for appellants. *Mr. James P. Clarke* and *Mr. R. C. Garland* were on his brief.

Mr. Westel W. Morsman for appellee. *Mr. John M. Moore* was on his brief.

NEW ORLEANS FLOUR INSPECTORS *v.* GLOVER.

PETITION FOR A REHEARING.

No. 88. Received January 11, 1896. — Decided March 2, 1896.

The decree dismissing the appeal in this case, (160 U. S. 170,) is vacated, and the decree below reversed without costs to either party, and the cause remanded with directions to dismiss the bill.

THE case is stated in the opinion.

Mr. J. R. Beckwith submitted for petitioners on their petition.

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

This was a bill filed by complainants June 19, 1891, in the Circuit Court of the United States for the Eastern District of Louisiana against the Board of Flour Inspectors for the Port of New Orleans and the individual members thereof; to enjoin the enforcement of a certain act of 1870 of the general assembly of Louisiana. The ground of equity interposition set up was want of adequate remedy at law, as indicated by the following averments: "Your orators show that they respectively each receive their large consignments of flour from other States of the Union almost daily, and, as each lot arrives at the port of New Orleans, the defendants claim and insist on the right and power to inspect the same on its arrival and to make such inspections compulsory and claim and demand their fees of two cents a barrel therefor on every barrel arriving, and if such fees are not paid the defendant board will bring a great multitude of suits and prosecutions under said statute to enforce its illegal claims; that as to each of your orators such suits will be each of small amounts, in inferior courts, and will be of great number, each arising out of almost daily inspections and involving large, constant, and daily expenses, many counsel fees, and much loss of time, vexation, annoyance, and irreparable injury; that there is no practicable method under the said act of 1870 or any other law of Louisiana of paying said fees to said board under protest and recovering the same; that such a course would involve for each of your orators a multiplicity of controversies and suits and great expense, loss of time, and vexation, and if each of your orators should recover judgments from time to time against the board for the return of such fees as unduly paid, they could have no judgments for their counsel fees, nor has the defendant board any fund or property whatever to respond to the same, nor is there any appropriation or provision of law to pay the same, and the collection of such judgments or any of them would be utterly impossible."

Opinion of the Court.

The court granted a preliminary injunction, on condition of bond being given for ten thousand dollars, enjoining defendants from enforcing the act of 1870 by "demanding any inspection of flour imported or brought to the port of New Orleans by complainants," and "from demanding from complainants by suit or otherwise any fees for compulsory inspection established by said law."

Defendants demurred, their demurrer was overruled, and, they electing to abide by it, a decree was entered January 25, 1892, perpetually enjoining defendants "from enforcing against the complainants or any of them, the act No. 71 of the extra session of the general assembly of Louisiana of the year 1870, by demanding any inspection of flour imported to the port of New Orleans for sale by the complainants from States of the United States other than Louisiana or from foreign countries, and from demanding from any of the complainants or suing any of them for any fees of compulsory inspection of such flour under said act No. 71 of 1870, extra session." From this decree defendants prosecuted an appeal to this court.

Upon the submission of the case, it appearing that the act complained of as unconstitutional was repealed June 28, 1892, we were of opinion that the case came within the rule laid down in *Mills* v. *Green*, 159 U. S. 651, and the appeal was accordingly dismissed. 160 U. S. 170.

Our attention has been since called by counsel to the fact that the decree was so broad as to restrain defendants from testing at law their right to recover fees prior to the date when the repealing act went into effect, which restraint was of course left in force by the dismissal of the appeal. We should not, therefore, have entered the order of dismissal, but it is equally clear that the bill cannot be maintained for an injunction against bringing actions at law if appellants should be so advised.

The order hereinbefore entered dismissing the appeal will therefore be vacated and the decree reversed, without costs to either party, and the cause remanded to the Circuit Court with a direction to dismiss the bill.

BEEBE *v.* UNITED STATES.

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

No. 71. Argued November 18, 1895. — Decided March 2, 1896.

In Alabama a judgment in itself imposes no lien upon the property of the judgment debtor, but the issue of an execution and its delivery to the officer are necessary to create a lien.

According to the settled rule in Alabama, when an execution comes to the hands of the sheriff the lien attaches and continues from term to term, provided alias and pluries writs are duly issued and delivered, and while it is so kept alive the lien is, upon levy and sale, paramount to any intermediate conveyance by the debtor; and as, in this case, the facts show that valid executions were issued and delivered to the marshal as early as January 23, 1877, and on return alias executions were duly issued and duly levied, the subsequent sale related back to the original issue, and took the legal title out of the plaintiff in error prior to his deed of March 22, 1877.

When it appears by a memorandum on judgment records that "by consent execution is stayed until" a date named, and execution issues before that date, it will be presumed, nothing appearing to the contrary, that it was rightly issued, and that either the agreement lacked consideration, or was not authorized, or had been by mutual assent annulled, or that the terms of the agreement had not been complied with by defendant.

THIS was an action "in the nature of ejectment," as so denominated in the Alabama code, brought by the United States against Eugene Beebe, Sims Phillips, and Adeline Thomas for the recovery of an undivided one fourth interest in a tract of land known as the Montgomery race track, containing eighty acres, in the Circuit Court of the United States for the Middle District of Alabama. Beebe defended as landlord, and Phillips and Thomas were his tenants. Trial was had; a verdict rendered for plaintiffs; and judgment entered thereon accordingly. On the trial plaintiffs put in evidence a deed executed by Josiah Morris and wife, June 14, 1873, to Eugene Beebe and Ferrie Henshaw of an undivided one half of the eighty acres in question, of which it was admitted Morris was seized and possessed at that date. The records

of two separate judgments recovered in favor of the United States against Beebe and others, December 19, 1876, at the regular November term, 1876, of the Circuit Court of the United States for the Middle District of Alabama, for the sums respectively of $991 and $1638.68, were put in evidence. The consideratum clause in each instance concluded, "for which let execution issue." Above the record of each judgment appeared the amount thereof in figures, followed by the words: "Stay of ex. till 25th March, 1877. R.;" and at the foot of each judgment were these words: "And by consent execution is stayed until the 25th day of March, A.D. 1877."

Two alias executions issued on said judgments, May 10, 1877, "with the indorsements thereon," were put in evidence. They ran in one of the forms of an alias writ, "again you are hereby commanded," and were entitled on the back, "alias fi. fa." Each had endorsed upon it (in almost verbally identical words) the following:

"Received in office January 23d, 1877.

"GEO. TURNER, *U. S. Marshal.*

"To satisfy the within execution, I have levied, this 5th day of April, 1877, on an undivided half interest in the following described property, to wit:

* * * * *

"2d. The tract of land known as Montgomery race track, near Montgomery, containing 80 acres, more or less.

* * * * *

"Notice in writing given the defendant.

"GEO. TURNER, *U. S. Marshal.*

* * * * *

"Returned for alias, not advertised and sold for want of time. April 6th, 1877.

"GEO. TURNER, *U. S. Marshal,*
"P'r F. JOST, *Dep.*"

Below these indorsements, on each writ, the clerk of the court certified, under his hand and seal, May 10, A.D. 1877,

"the foregoing page to contain a true copy of the return of the marshal on the execution issued next last preceding this in the aforesaid cause as the same appears of record and on file in my office as clerk of said court."

There was also endorsed on each writ, "Received in office May 10, 1877;" and a levy, May 10, 1877, which included said tract of land.

On the execution for $1638.68 appeared this return: "The property of the defendant, Beebe, herein described, [certain property being named as excepted,] was, on the second day of July, 1877, sold to the United States for one thousand dollars, and deed made to the United States for the same. George Turner, U. S. Marshal."

Plaintiffs then introduced in evidence a deed of the United States marshal to the United States, dated July 2, 1877, and duly acknowledged and recorded, reciting the levy of execution on the property and the sale thereof on that date, after due advertisement, to the United States, as the highest and best bidder, and conveying all Beebe's interest in the tract.

Defendants offered in evidence a deed from Beebe to Henshaw, dated March 22, and acknowledged and recorded March 23, 1877. This instrument recited that a copartnership had existed between Beebe and Henshaw under the name of E. Beebe & Co.; that Beebe would be found on a settlement of the affairs of the firm to be indebted to it, and also to Henshaw for moneys advanced and paid out by him in excess of his proportion as partner, the precise amount of which could not be ascertained until the debts of the firm were paid and a settlement had between Beebe and Henshaw; that Beebe and Henshaw were owners as partners of real and personal property, which was enumerated, and included an undivided half interest in a tract of land called "the old Montgomery race track;" and, therefore, "to protect and secure" the creditors of the firm and to enable Henshaw "the more easily and readily" to settle and pay its debts and "to protect and secure" Henshaw for moneys paid out and advanced for the firm in excess of his proportion, and "to protect and secure him" for all moneys that Beebe might owe the firm or Hen-

shaw on a settlement between them of the firm's affairs, Beebe conveyed all his interest in the property described, as partner, or otherwise, to Henshaw, "in trust, to sell the same at such times and places and on such terms, for credit or for cash, or for part cash and part credit, and at private or public sale, as the best interests of the said creditors of said firm and of him and myself as he may determine, and to apply the proceeds thereof to the payment of the debts of the said firm, and to the payment of what I may be found indebted to said firm or to said Ferrie Henshaw on the settlement between us of the affairs and business of said firm, and if any excess should remain in his hands from the sale of said property after the payment of said debts of said firm and of what I may owe the said firm or owe him on the said settlement of the business and affairs of said firm, then he shall pay back to me such excess; and if there should remain in his hands any of said property not required to be sold for the purposes aforesaid, then on such final settlement between us he shall reconvey the same to me, my heirs or assigns."

Plaintiffs objected to the introduction of this deed in evidence on the grounds, among others, that it "is void upon its face," and that it "sets up no claim superior to the title of the United States acquired at the execution sale." Beebe was then sworn as a witness, and defendants proposed to prove by him that at the time of the execution of the deed offered in evidence, Beebe and Henshaw were in copartnership; that at that date the partnership was indebted to various persons in amounts aggregating forty thousand dollars, and Beebe was indebted to Henshaw about two thousand dollars individually, and also about the same sum on account of partnership matters; that the property was purchased while Beebe and Henshaw were partners, and was purchased with partnership assets; that the deed had been delivered to and accepted by Henshaw; but defendants admitted that Henshaw had never sold any of the property conveyed by the deed, and that nothing had been done thereunder. The court sustained plaintiffs' objection to the introduction of the deed, and refused to allow the same to be read in evidence, and defendants excepted.

Opinion of the Court.

Thereupon plaintiffs offered in evidence a deed by Henshaw to Beebe, dated February 23, 1878, which recited that the debts and business affairs of the partnership had been fully settled without the necessity of having to sell any of the property for that purpose, and, therefore, Henshaw reconveyed to Beebe an undivided one half interest in and to the property. In that connection defendants "proved," (offered to prove,) that after March 22, 1877, Henshaw became incapable of attending to business; and that thereupon Beebe procured Henshaw to execute the deed of February 23, 1878, at which time the debts and business affairs of the partnership had not in fact been settled and paid.

The court instructed the jury that "if they believed the evidence the plaintiff was entitled to recover the land sued for in the complaint filed in this cause."

The following errors were assigned: "(1) The rejection of the deed executed by the plaintiff, Eugene Beebe, to Ferrie Henshaw on the 22d day of March, 1877, offered in evidence by the plaintiffs in error, conveying to said Henshaw the property involved in this cause. (2) The rejection of said deed, offered in evidence by the plaintiffs in error, in connection with the facts the plaintiffs in error proposed to prove by the testimony of the said Eugene Beebe. (3) The rejection of the testimony of said Eugene Beebe, offered by the plaintiffs in error in connection with said deed and to support the same. (4) The charge of the court to the jury 'that if they believed the evidence the plaintiff was entitled to recover the land sued for in this cause.'"

Mr. H. C. Tompkins for plaintiffs in error. *Mr. H. S. Cattell* was on his brief.

Mr. Assistant Attorney General Dickinson for defendants in error.

Mr. George H. Patrick filed a brief for same.

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

The exception saved by defendants was to the refusal of the court to admit the deed of March 22, 1877, in evidence, and the first three errors assigned may be considered together.

It is the settled law of Alabama that a judgment in itself imposes no lien upon the property of the judgment debtor, real or personal, but that the issue of an execution and its delivery to the officer are necessary to create a lien. *Dane* v. *McArthur*, 57 Alabama, 448; *Carlisle* v. *Godwin*, 68 Alabama, 137; *Perkins* v. *Brierfield Iron & Coal Co.*, 77 Alabama, 403, 409.

Under section 2871 of the Code of Alabama of 1867, applicable here, executions could be levied on real property to which the defendant had a legal right, or a perfect equity, having paid the purchase money, or in which he had a vested legal interest, in possession, reversion or remainder, whether he had the entire estate or was entitled to it in common with others; on personal property of the defendant; on an equity of redemption in land or personal property.

The deed of Morris of June 14, 1873, to Beebe and Henshaw, "their heirs and assigns," conveyed an undivided one half interest in the lands to the grantees and vested in each of them an undivided one fourth interest as tenants in common. This was so held in *Southern Cotton Oil Co.* v. *Henshaw*, 89 Alabama, 448, 451, and that, "this being the case, although a partnership existed between Beebe and Henshaw, upon the death of the latter the legal title of his undivided one fourth interest descended to, and vested in, his heirs, also as tenants in common with each other and with Beebe."

Defendants conceded legal title in Beebe, but by way of answering the objection to the instrument of March 22, 1877, as on its face lacking in good faith, evidence was tendered to show that the real estate was purchased with partnership funds, though not for partnership purposes. *Hatchett* v. *Blanton*, 72 Alabama, 423, 435; Pars. Part. *365.

The evidence in this regard, such as it was, was offered in connection with the question of the admissibility of the deed of March 22, 1877, and the action of the court to which an exception was saved was solely to the refusal to permit that deed to be introduced.

If valid executions were issued and delivered to the marshal as early as January 23, 1877, and, on return, alias executions were issued and duly levied, then the subsequent sale related back and took the legal title out of Beebe, prior to March 22, 1877, so that the deed of the latter date was immaterial, and there was no error in refusing to admit it.

It is argued that the only executions shown by the record to have been issued on the judgments were those of May 10, 1877, but we do not think so. The executions of that date were alias writs, and the presumption is that they were preceded by others regularly issued. *Sellers* v. *Hayes*, 17 Alabama, 749; *Pollard* v. *Cocke*, 19 Alabama, 188. But the fact did not rest upon presumption, for these writs bore the indorsement of the receipt by the marshal, January 23, 1877, of the previous writs; their levy on the property in question, April 5, 1877; and their return April 6, 1877, for want of time to advertise the sale. And the return of the marshal covering the date of the receipt and the levy of the prior writs was duly endorsed upon the alias writs and certified to by the clerk of the court under his hand and seal. All this was admitted in evidence without objection, and if defendants desired to raise the objection that the original executions ought to be produced, they should have done so then, when, if well founded, the objection could have been removed.

The code of 1867 provided that the clerk should issue executions as soon after the adjournment of the court as practicable, within the time prescribed, namely, if the session was one week, within ten days; if two weeks, within fifteen days; if three or more weeks, within twenty days; the day, month, and year of its receipt was required to be endorsed thereon; return to be made three days before the first day of the return term, which was the next term after its date, unless issued less than fifteen days before court, and then the term next thereafter; and the reason for its non-execution in whole or in part was required to be stated in the return. §§ 2838, 2839, 2851, 2852, 2853, and 2854.

Sections 2872 and 2873 were as follows:

"§ 2872. A writ of *fieri facias* is a lien only within the

county in which it is received by the officer, on the land and personal property of the defendant, subject to levy and sale from the time only that the writ is received by the sheriff; which lien continues as long as the writ is regularly issued and delivered to the sheriff without the lapse of an entire term.

"§ 2873. The liens of executions as between different judgment creditors, and between judgment creditors and purchasers from the defendant for valuable consideration, are hereby declared to be: that if an entire term elapse between the return of an execution and the suing out of an alias, the lien created by the delivery of the first execution to the sheriff is lost; but if an alias be sued out before the lapse of an entire term, and delivered to the sheriff before the sale of property under a junior execution, the lien created by the delivery of the first execution must be preferred."

The regular terms of the Circuit Court of the United States for the Middle District of Alabama began on the first Monday of November, 1876, and the first Monday of May, 1877, and these writs were issued, delivered and levied without the lapse of an entire term as specified in the statute. *Carlisle* v. *May*, 75 Alabama, 502. According to the settled rule in Alabama where an execution comes to the hands of the sheriff, the lien attaches and continues from term to term provided alias and pluries writs are duly issued and delivered; and, while it is so kept alive, the lien is, upon levy and sale, paramount to any intermediate conveyance of the debtor. *Parks* v. *Coffey*, 52 Alabama, 32; *Hendon* v. *White*, 52 Alabama, 597; *Childs* v. *Jones*, 60 Alabama, 352; *Perkins* v. *Brierfield Co.*, 77 Alabama, 403, 410; *Massingill* v. *Downs*, 7 How. 760, 767.

The original executions here had been duly issued and levied but returned for want of time to advertise and sell. The alias writs were then taken out, and apparently a new levy and sale made thereunder. In some jurisdictions a formal *venditioni exponas* might have been issued, but these alias writs with their indorsements thereon of the prior levy were quite as efficacious, and the sale could be sustained as made under the original or new levy.

In *Dryer* v. *Graham*, 58 Alabama, 623, 626, the Supreme Court of Alabama said: "It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of *venditioni exponas*. If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a *venditioni exponas* is the proper writ. The *venditioni exponas* continues the lien of the execution which has been levied, as to the property on which the levy was made, whether the property be real or personal. The writ is, indeed, merely for the continuation and completion of the original execution. And if its mandate is for the sale of land on which there has been a previous levy, it not only compels a sale, but confers the authority to sell, and the title of the purchaser has relation to the date of the lien of the execution. . . . A *venditioni exponas* is in its nature and operation, as to the property on which the levy may have been made, an alias execution. It merely commands and authorizes, as to real estate, the completion of the execution already begun."

Certainly this sale was none the less valid because there had been a levy of the original writs, and alias executions were issued and levied on the same property.

But it is contended on behalf of plaintiffs in error that no executions could have issued until March 25, 1877, by reason of the memoranda on the judgment records that "by consent execution is stayed until the 25th day of March, A.D. 1877."

Assuming that the consent for a stay was given by some one acting for the government, although that does not appear, yet from the fact that executions were issued before the expiration of the time, the presumption would be reasonable, nothing appearing to the contrary, that they were rightly issued, and that either the agreement lacked consideration, or was not authorized, or had been by mutual assent annulled, or that the terms of the agreement had not been complied with by defendants.

The Supreme Court of Mississippi held in *Jones* v. *Bailey*, 5 How. (Miss.) 564, where plaintiffs agreed to stay of execution for a certain time, "unless defendants consent for its

issuance sooner," and execution was issued without regard to the agreement and property sold, that the presumption was that it issued with the consent of defendants.

The marshal's return on the original writs showed that notice of the levy thereof was given Beebe in writing as required by statute, (§ 2857,) and the fact that he did not complain that the executions had been issued contrary to agreement renders the presumption that they were not obnoxious to that objection well nigh, if not altogether, unanswerable.

Aside from this, as the executions were in fact issued, and received by the marshal January 23, 1877, the question thus suggested would be whether the executions were voidable or absolutely void, if the consent for a stay was lawful and the executions were taken out in violation thereof.

In Freeman on Executions, (2d ed.) §§ 25, 26, *et seq.*, a text book cited and relied on in numerous decisions of the Supreme Court of Alabama, it is said that the decided preponderance of authority is in favor of the proposition that the premature issue of an execution is an irregularity merely; that the execution is erroneous but must be respected and may be enforced until it is vacated in some manner prescribed by law; that no one but the defendant can complain of it, and even he cannot do so in any collateral proceeding. And among other cases, *Blaine* v. *The Ship Charles Carter*, 4 Cranch, 328, is cited, which was decided by Chief Justice Marshall on circuit and his decree affirmed by this court, Mr. Justice Chase delivering the opinion. In that case, under an act of Congress providing that "until the expiration of ten days, execution shall not issue," certain executions were collaterally objected to on the ground that they were issued within ten days, and the court said: "If irregular, the court from which they issued ought to have been moved to set them aside; they were not void, because the marshal could have justified under them, and if voidable, the proper means of destroying their efficacy have not been pursued." So, an execution issued after a year and a day is voidable but not void; even the defendant cannot attack it collaterally; and a levy and sale, made under it, are sufficient to transfer his

title. Freeman, § 29. In *Brevard* v. *Jones*, 50 Alabama, 221, 242, this was so held, and the court remarked: "It can make no difference if the plaintiff in execution is the purchaser, because the question is not one of notice, but of the *status* of the execution."

In *Steele* v. *Tutwiler*, 68 Alabama, 107, 110, the Supreme Court of Alabama referred to *Morgan* v. *Evans*, 72 Illinois, 586, which ruled that an execution was not void but voidable where it issued on a dormant judgment after the time limited by statute; and *Stewart* v. *Stocker*, 13 S. & R. 199, where a similar ruling was made in respect of an execution issued on a judgment confessed prematurely, contrary to the terms of a bond; and the court said: "In all such cases, though the execution may be erroneous, and irregular, it must be respected and enforced, until vacated by motion to quash, or in some other manner prescribed by law. Freeman on Ex. § 25. And it is the duty of the party seeking to take advantage of irregularities or defects of this character to move with proper diligence, at the earliest opportunity. Undue *laches* is treated as a waiver of the right, and operates as an irrevocable renunciation of it. Freeman on Ex. §§ 76, 30. And after a delay of seven years in this case, without explanation or excuse, we think the motion comes too late." And to the same effect see *Henderson* v. *Henderson*, 66 Alabama, 556, 558. Again, it is held that executions issued contrary to agreement between the parties are subject to the same rules as other premature executions. In *Cody* v. *Quinn*, 6 Ired. (Law) 191, 193, it was decided that a memorandum made on the docket with the consent of the parties by the clerk "No *fi. fa.* to issue until October or until ordered," was no part of the judgment, and if execution were issued before then it was not void. In *Townsend* v. *Fontenot*, 42 La. Ann. 890, which was a suit to restrain the execution of a judgment recovered in a suit to enforce payment of certain notes with recognition of a mortgage and vendor's privilege, the judgment contained the following statement, prepared and written by plaintiff's counsel, and inserted by plaintiff's instructions: "The attorney of plaintiff in this suit declares he has been instructed not to seize or sell said

property before the end of the year;" and it was held to operate a stay of execution.

But in the case in hand the judgment records are complete and perfect in themselves, and executions were thereby ordered to issue. The entries as to stay purported to be memoranda of an agreement of counsel, were evidently placed where they were as memoranda merely, and did not form part of the judgments. Even if the entries could be treated as the act of the court, and the executions were improperly issued, which is not to be presumed under the circumstances disclosed by this record, they would not have been absolutely void and incapable of being validated.

So far as appears, Beebe never took any steps to quash the executions or to vacate the levy, if any ground existed for doing so, and the evidence that they issued and were levied was admitted without objection on the trial. We regard the position now taken on his behalf as destitute of merit. The Circuit Court properly excluded the deed of March 22, 1877, and, this being so, no error was committed in the charge to the jury.

Judgment affirmed.

MR. JUSTICE GRAY, who was not present at the argument, and MR. JUSTICE PECKHAM, who was not then a member of the court, took no part in the decision.

CAREY *v.* HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY.

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

No. 642. Submitted December 23, 1895. — Decided March 2, 1896.

A bill in equity by a corporation, or by the stockholders of a corporation, in a Circuit Court of the United States, to set aside a final decree of that court against the corporation in a foreclosure suit, upon the ground that the decree was obtained by collusion and fraud and that the court had

Statement of the Case.

no jurisdiction to make it, is an ancillary suit and a continuation of the main suit so far as the jurisdiction of the Circuit Court as a court of the United States is concerned.

As the jurisdiction of the Circuit Court of the United States was invoked throughout this litigation upon the ground of diverse citizenship, and as this bill must be regarded as ancillary, auxiliary or supplemental to the suit for the foreclosure of the mortgage, or, as it were, in continuation thereof, the decree of the Circuit Court of Appeals in that suit being made final by section 6, of the act of March 3, 1891, c. 517, 26 Stat. 826, no appeal lies to this court.

THIS was a bill filed by Carey, a citizen and resident of New Jersey, and seven other persons, citizens and residents of New York and citizens of Great Britain, respectively, as stockholders of the Houston and Texas Central Railway Company, in their own behalf and in behalf of all others similarly situated, in the Circuit Court of the United States for the Eastern District of Texas, against the Houston and Texas Central Railway Company, No. 1, a corporation created by and existing under the laws of the State of Texas and a citizen of that State, residing in the Eastern District; the Houston and Texas Central Railway Company, No. 2, likewise a citizen of Texas and a resident of the eastern district; the Central Trust Company of New York, a citizen of New York; the Farmers' Loan and Trust Company of New York, as trustee, a citizen of New York; Nelson S. Easton and James Rintoul, as trustees, citizens, and residents of New York; Benjamin A. Shepherd, trustee, a citizen of Texas; and many other persons and corporations, citizens of New York, Kentucky, Texas, and Louisiana; to impeach and vacate a certain decree of the Circuit Court entered in the consolidated cause hereafter mentioned.

The Houston and Texas Central Railway Company was a corporation and citizen of the State of Texas and a resident of the Eastern District of that State, owning a railway consisting of a main line from Houston to Dennison; a line from Hempstead to Austin, called the Western Division; and a line from Bremond to Ross, known as the Waco and Northwestern Division; and a large quantity of lands acquired from the State. The property of the company was subject to the lien of seven mortgages, known as the Main Line first mort-

gage, Western Division first mortgage, Waco and Northwestern Division first mortgage, Main Line and Western Division consolidated mortgage, Waco and Northwestern Division consolidated mortgage, Income and Indemnity mortgage, and General mortgage. The company made default January 1, 1885, in the payment of interest on its Main Line first mortgage bonds and its Western Division first mortgage bonds. On February 11, 1885, Nelson S. Easton and James Rintoul, citizens and residents of the State of New York, trustees under the Main Line first mortgage and Western Division first mortgage, filed their two bills in equity in the Circuit Court of the United States for the Eastern District of Texas against the Houston and Texas Central Railway Company as a corporation and citizen of the State of Texas for the purpose of enforcing the trust provided in the mortgages, protecting the trust property, obtaining proceedings for the sale of certain lands covered by the mortgages, and for other relief; and prayed for an accounting, an injunction, a decree of sale of part of the trust property, and for a receiver. These suits were numbered 183 and 184 on the equity docket. The railway company appeared and answered these bills.

On February 16, 1885, the Southern Development Company, a corporation organized under the laws of California and a citizen and resident of that State, in its own behalf and in behalf of all other persons similarly situated, who might intervene in the suit to protect their own interests, filed its bill of complaint in the Circuit Court against the railway company as a corporation organized under the laws of Texas, alleging among other things that it was a creditor of the defendant for large sums advanced for supplies, labor, operating and managing expenses, and other necessary expenses, which defendant had promised to pay out of its earnings; that the indebtedness was in equity a charge upon defendant's income and property; that there had been a diversion of the income and that by reason thereof a lien had resulted in complainant's favor which it was entitled to have enforced. The bill alleged the absolute insolvency of the railway company and that loss and injury would be occasioned by a sale of the property in

parcels, and prayed for the appointment of receivers and the payment of complainant's claim out of the rents, revenues, and earnings of the property. The railway company appeared in this suit, which was numbered 185, and on February 20, 1885, an order was made by the Circuit Court appointing Benjamin G. Clark and Charles Dillingham joint receivers of all the property, real and personal, of said company. On the succeeding twentieth of April, the Southern Development Company amended its bill, making Nelson S. Easton and James Rintoul, trustees; the Farmers' Loan and Trust Company, a corporation and citizen of the State of New York; and Benjamin A. Shepherd, trustee, under the Income and Indemnity mortgage, a citizen of Texas and a resident of the Eastern District of that State, defendants thereto, and praying that accounts might be taken, liens and incumbrances marshalled, net earnings applied, and if the amounts realized should not be sufficient for the payment of the claim, that the property should be sold for that purpose. The railway company answered the bill on its merits, and the defendants Easton and Rintoul, trustees, filed demurrers.

March 18, 1885, the Farmers' Loan and Trust Company, a corporation and citizen of New York, filed its bill in equity in the Circuit Court against the railway company, which was numbered 188 on the equity docket, alleging that it was the trustee under the Waco and Northwestern Division first and consolidated mortgages, and the Main Line and Western Division consolidated mortgages; that the mortgagors had violated many of their agreements and that default had been made in the payment of interest; that the company was insolvent; that the suits hereinbefore mentioned were pending; that the trust property was in jeopardy; and it prayed for an accounting, injunction and a decree of sale of part of the trust property and for a receiver of all the property of every description of the railway company, with the usual powers. The railway company answered this bill on the merits, June 22, 1885.

The Circuit Court made three orders on May 7, 1885, in these cases: In No. 185, as to sales of lands and their proceeds, and directing the receivers to account; in Nos. 183 and

184, making that order applicable to those cases; and in No. 188, making the same order as to that case.

January 21, 1886, Easton and Rintoul, trustees in the two mortgages involved in Nos. 183 and 184, citizens of the State of New York, filed two other bills in equity for the foreclosure and sale of the railway property covered by those mortgages; that to foreclose the Main Line first mortgage was numbered 198, and that to foreclose the Western Division first mortgage was numbered 199. In No. 198 complainants made the Houston and Texas Central Railway Company and Benjamin A. Shepherd, a citizen and resident of Texas, and trustee under the Income and Indemnity mortgage, defendants, and as to the Farmers' Loan and Trust Company averred that as trustees under the mortgages or deeds of trust, "hereinafter described, that company would be found benefited by, and it is to their advantage that, the judgment and relief hereinafter prayed for, or some part thereof, should be granted to your orators. That said property covered by the said first mortgage on said main line, as well as all the other property, assets, and effects of said railway company, being now in the hands of this court, by the receivership existing in respect of the same, and your orators thereby being required by law to institute this action in this court and to come before this tribunal, in order to reach the property in its possession, and to obtain its rights concerning the same, and all the parties interested in the property covered by said mortgage on the main line, as well as all the other mortgages and property of said railway company, being now before the court in said actions hereinbefore described as Nos. 183, 184, 185, and 188, on the equity docket of this court, the said Farmers' Loan and Trust Company may and should be made a party defendant in this cause irrespective of its citizenship. And said corporation should be brought in as a defendant herein by the order and direction of this court, and should be bound by the judgment and proceedings herein."

The record does not show that this company was made a defendant or appeared at this stage of the proceedings.

In No. 199 the same parties were joined as defendants and

a like averment made as to the Farmers' Loan and Trust Company. Process was issued under both of these bills against the railway company and Shepherd, trustee, and duly served upon them. Thereafter, and on April 24, 1886, the Farmers' Loan and Trust Company filed a bill in equity in the Circuit Court for the foreclosure of the general mortgage, which was numbered 201. The railway company was made sole party defendant, and the bill prayed for a sale of all the property of the railway company to satisfy the mortgage debt. Process was issued and served.

On May 26, 1886, an order was entered by Mr. Justice Woods and the Circuit Judge in the six suits upon the mortgages, whereby it was ordered, adjudged and decreed that no further proceedings should be taken in causes Nos. 183, 184, and 188, without notice to the railway company, and that causes Nos. 198, 199, and 201 should be consolidated under No. 198, under the name and style of "*Nelson S. Easton and James Rintoul, Trustees, and the Farmers' Loan and Trust Company, Trustee, against The Houston and Texas Central Railway Company and Benjamin Shepherd, Trustee, consolidated cause;*" that, in said cause Easton and Rintoul should stand as complainants, as trustees under the mortgages made by the defendant railway company, dated respectively July 1, 1866, and December 21, 1870; that the Farmers' Loan and Trust Company, expressly assenting thereto, should stand as complainant, as trustee under the mortgages made by the railway company, dated, respectively, June 16, 1873, October 1, 1872, May 1, 1875, and April 1, 1881; that Shepherd should stand as defendant, as trustee under the mortgage made by the railway company, dated May 7, 1877; that the bills filed in causes Nos. 198, 199, and 201 should stand as bills in the consolidated cause, and might be amended by either complainant, as it might be advised, and that any party might file an answer to any original or amended bill; and that in case any one or more of the bills filed by the complainants, in the causes consolidated, should be finally dismissed, the remaining bill or bills should continue to stand as the bill in such consolidated cause. On the same day an order was made in said

consolidated cause No. 198, appointing Nelson S. Easton, James Rintoul, and Charles Dillingham, receivers of all the property of the railway company, and directing Clark and Dillingham, as receivers in No. 185, to immediately transfer and deliver all said property to the receivers so appointed. May 27, 1886, and after the possession of all the property in controversy had passed into the hands of Easton and Rintoul and Dillingham, as receivers, the court made a decree dismissing the bill of the Southern Development Company in No. 185 for want of equity, and declared and directed that "all said property being now in the custody of the court, and such custody and control being continuous, the entry of this decree shall operate *ipso facto* a transfer of the legal custody of said property from said Clark and Dillingham to the said receivers in No. 198." Various amendments were subsequently filed.

The railway company answered in consolidated cause No. 198, September 3, 1886. The Farmers' Loan and Trust Company, though cocomplainant in the consolidated cause, answered the bills of Easton and Rintoul, trustees, August 2, 1886.

On April 30, 1888, Shepherd, trustee, with leave of court, filed a cross-bill in No. 198 to foreclose the Income and Indemnity mortgage, and the railway company answered admitting the truth thereof.

On May 1, 1888, the Farmers' Loan and Trust Company filed bills in the nature of cross-bills, with leave of court, to foreclose the Main Line and Western Division consolidated mortgage and the Waco and Northwestern Division consolidated mortgage. The railway company answered these bills May 2, 1888, and the Farmers' Loan and Trust Company answered Shepherd's cross-bill on the same day. All the mortgages were thus under foreclosure except the Waco and Northwestern Division first mortgage.

On May 4, 1888, the court made its decree of foreclosure and sale in consolidated cause No. 198. The property was sold under the decree September 8, 1888, at Galveston, Texas. The property covered by the Waco and Northwestern Division first mortgage was purchased subject to that mort-

gage by George E. Downs for $25,000, and all the residue of the property of the railway company was sold to Frederick P. Olcott, president of the Central Trust Company, for $10,580,000. The sale was duly confirmed December 4, 1888.

On December 23, 1889, Carey and others, as stockholders of the Houston and Texas Central Railway Company, filed their bill in the Circuit Court for the vacation of said sale and decree; and an amended bill February 18, 1890. The contents of these pleadings are largely set forth in *Carey* v. *Houston & Texas Railway*, 150 U. S. 170. The gravamen of the bill was that the decree was entered through collusion and fraud. Briefly, the bill alleged that prior to 1883, defendant Huntington, who, with his associates, controlled the Southern Development Company, formed a syndicate with them for the purpose of acquiring, in his own interest and in the interest of that company, and of the Southern Pacific Company, the control of the Houston and Texas Central Railway Company in such manner that the railway might be run solely in the interest of the syndicate and the Southern Pacific Company, the rights of the stockholders being effectually shut out and barred. The bill further alleged that in January, 1885, the holders of the first mortgage bonds presented their coupons for payment, and it was fraudulently contrived by Huntington and his associates so that the coupons were cashed and secretly taken up by the Southern Development Company, without notice to the holders thereof; that thereupon that company commenced suit against the Houston and Texas Central Railway Company in the Circuit Court, and in February, 1885, the appointment of receivers was procured in that suit, the order being made with the consent of the railway company through its solicitors; that subsequently defendants Easton and Rintoul, trustees, filed their bills in the Circuit Court for foreclosure, and the Farmers' Loan and Trust Company filed its bill, which said bills were numbered 198, 199, and 201, and the causes were by consent consolidated as No. 198; that the suit of the Southern Development Company was dismissed, and thereupon receivers of the railway company were ap-

pointed in the consolidated cause, the company through their counsel consenting. It was also averred that in none of the mortgages was it provided that the failure to pay interest upon any of the bonds should be taken to precipitate the maturity of the principal, nor did they provide for nor permit the sale of the railway prior to the maturity of the principal of the bonds; and that the answer of the railway company in said suits expressly denied that the principal sum of the bonds had become due or demandable, and averred that the court had no power to decree a sale of the railway prior to the maturity thereof or prior to the sale of the lands covered by the mortgages.

The bill then set up an agreement for the reorganization of the railway company, and alleged that in pursuance thereof and of the scheme mapped out, complainants in the consolidated causes applied for and on consent procured to be entered the decree of May 4, 1888, for the foreclosure of the mortgages, and a sale of the property, and the sale followed accordingly.

The bill charged that "the said decree was and is absolutely invalid and void and beyond the power of the court to grant; that there was no foundation for said decree or jurisdiction in the court to award it, and that the same was entered by consent and agreement and without any investigation or adjudication by the court, but was the result of agreement simply, and was procured, as complainants allege on information and belief, by collusion and fraud on the part of said Huntington and his associates and the directors and officers of said Houston and Texas Central Railway Company, and was and is a part of the scheme to acquire possession of said railway in the interest of said Huntington and the said Southern Pacific Company without regard to the rights or interests of the holders of the stock of the said company No. 1 and in direct disregard of the provisions and terms of the mortgages; that the defences interposed that the principal of the mortgages had not become due and that the said railway could not be sold without a sale first of the lands and the other defences interposed were substantially abandoned and withdrawn as

part of the said wrongful and fraudulent scheme herein referred to; that the said defences were never submitted to the court for adjudication or determination, nor was evidence heard or offered to sustain the same, but the decree was the result of the agreement which the bondholders had made with the said Southern Pacific Company and Central Trust Company, and the rights of the stockholders were not considered or protected by any of the parties to the record in said cause, nor submitted to the court for adjudication or investigation, nor were the stockholders in any way advised or permitted to be informed of the transaction herein complained of."

It was further averred that the decree fixed no amount due, and no amount which the company was required to pay to redeem, and that it contradicted the provisions of the mortgages.

The organization of a company styled the Houston and Texas Central Railway Company, designated in the bill as No. 2, after possession under the sale was acquired, for the purpose of operating the railway, was then set up, and the terms on which the stockholders of the original company were informed September 1, 1889, they could participate in the new company, which required payment of an enormous and unnecessary assessment, and constituted an attempt to compel the stockholders of company No. 1 to turn over their stock to Huntington and his associates, etc. The prayer of the bill was that the decree rendered by the court May 4, 1888, in the consolidated cause, be vacated and set aside and adjudged to be fraudulent, collusive, illegal, and void, and that complainants be permitted to intervene and become parties defendant in said suit, and be heard and defend the same; that the sale of the railway and lands of the Houston and Texas Central Railway Company, No. 1, under said decree be vacated and set aside, and the said railway and lands be restored to the possession of the receivers; that defendants be enjoined temporarily and perpetually from delivering or recording any mortgage upon the property of the company referred to in said decree, and from issuing, alienating or parting with any of the shares of stock of the new or reorganized

Statement of the Case.

Houston and Texas Central Railway Company, No. 2, or any bonds secured by mortgage upon any property claimed to be possessed by said company, or any stock or bonds issued or intended to be issued pursuant to the reorganization agreement; and for general relief.

The principal defendants at first demurred, and then answered the bill, denying the allegations upon which complainants sought to impeach the validity of the decree of the Circuit Court in the foreclosure proceedings and the other transactions referred to. Complainants filed replications. A motion for an injunction *pendente lite* was denied. 45 Fed. Rep. 438.

The cause came on for final hearing on the pleadings and proofs November 16, 1892, and the Circuit Court entered a final decree dismissing the bill as to all the defendants with costs. 52 Fed. Rep. 671.

Complainants prayed two appeals from this decree, one to the Circuit Court of Appeals for the Fifth Circuit, and the other to this court. The appeals were allowed, citations issued and assignments of errors filed. On motion of appellees, the appeal to this court was dismissed November 13, 1893. *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170. The case on the appeal taken to the Circuit Court of Appeals was heard by that court, Circuit Judge McCormick presiding, and on June 5, 1894, being one of the days of November term, 1893, a decree was rendered affirming the decree of the Circuit Court.

May 2, 1895, a petition was presented to Circuit Judge McCormick, praying the allowance of an appeal from the decree to this court, which on the same day was allowed by an order in writing upon the petition, and at the same time a citation was signed, and a cost bond approved. The petition for appeal and the order allowing the same and the bond and an assignment of errors were all filed May 2, 1895, in the office of the clerk of the Circuit Court of Appeals. The record was filed here June 4, 1895, and appellees now move to dismiss the appeal.

Mr. J. Hubley Ashton, *Mr. E. B. Kruttschnitt*, and *Mr. Adrian H. Joline* for the motion.

Mr. Jefferson Chandler, *Mr. A. J. Dittenhoefer*, *Mr. George Clark*, and *Mr. Russell H. Landale*, opposing.

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

By the fifth section of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, it is provided that appeals may be taken from the Circuit Courts directly to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." And we held in respect of the direct appeal to this court taken from the decree of the Circuit Court in this cause that such an appeal was not authorized simply because the jurisdiction of the Circuit Court over another suit previously determined by the same court, might be involved, and we said: "It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it and duly certified, justifies such an appeal directly to this court. This suit to impeach the decree of May 4, 1888, and to prevent the consummation of the alleged plan of reorganization, was a separate and distinct case, so far as this inquiry is concerned, from a suit to foreclose the mortgages on the railroad property; and no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein can be availed of to sustain the present appeal from the decree in this proceeding." *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 180.

We are quite content with the conclusion there reached, for this suit is in itself unquestionably a distinct suit in the sense in which those words were used in disposing of the former appeal; and in respect of it the jurisdiction of the Circuit Court was not in issue, nor was any question of juris-

diction certified. Carey and his cocomplainants did not intervene in consolidated cause No. 198, and seek to have the question of the jurisdiction of the Circuit Court therein certified to this court and appeal directly therefrom, nor did they file a bill of review for error of law apparent in that the Circuit Court took jurisdiction as a court of the United States. The gravamen of the bill they did file was fraud and collusion, and the allegations of want of jurisdiction relate to prematurity in the attempt to foreclose or to other matters not bearing on the jurisdiction of the Federal courts as such. And the prayer was that the decree be vacated and adjudged fraudulent, collusive, illegal, and void; that complainants might be permitted to intervene and become parties defendant; that the sale of the railroad and lands of the company under the decree be vacated and set aside; "and the said railway and lands be restored to the possession of the receivers appointed by this court or such other officers or receivers as the court may name;" for injunction and general relief.

But the question now before us is whether the decree of the Circuit Court of Appeals affirming the decree of the Circuit Court upon the merits is made final by the sixth section of the act of March 3, 1891, which provides that "the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases."

The suits "of a civil nature, at common law or in equity," of which the Circuit Courts of the United States have original cognizance, are enumerated in the first section of the judiciary act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433.

It is denied that the jurisdiction of the Circuit Court in the present suit depended entirely or at all upon the fact that the opposite parties were citizens of different States, and insisted

that jurisdiction was entertained because it was a bill to set aside a foreclosure decree entered in the Circuit Court by consent and in pursuance of a fraudulent plan to reorganize the company, and the *res* was in possession of the court whether "rightfully or wrongfully." The ground of jurisdiction thus suggested is not a ground of Federal jurisdiction, but of the exercise of the powers of courts of superior general jurisdiction; and it undoubtedly exists over all suits and proceedings ancillary, auxiliary, or supplemental to other suits, of which the Circuit Courts have cognizance as courts of the United States.

The character of this jurisdiction is thus treated by Mr. Justice Miller in *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633, where, speaking for the court, he said: "The question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law."

In *Rouse* v. *Letcher*, 156 U. S. 47, 50, we have already adjudged that the sixth section authorizes no appeal to this court from a decree of a Circuit Court of Appeals in an ancillary or supplemental suit or proceeding in the Circuit Court, where the jurisdiction of that court in the main or original suit depends entirely upon the parties being citizens of different States. In that case the main foreclosure suit was between

citizens of different States, and receivers had been appointed. A proceeding by intervention was afterwards instituted in the Circuit Court against the receivers, who appealed to this court from the decree of the Circuit Court of Appeals against them, and the appeal was dismissed because the opposite parties to the foreclosure suit were citizens of different States, and the decree was therefore made final by the statute. And we said:

"And since where jurisdiction would not obtain in an independent suit, an intervening proceeding may nevertheless be maintained as ancillary and supplemental under the jurisdiction already subsisting, such proceeding is to be regarded in that aspect, even in cases where the Circuit Court might have had jurisdiction of an independent action. Here, as we have said, the jurisdiction of the Circuit Court was invoked in the first instance by the filing of the bill, and it was under that jurisdiction that appellee intervened in the case, and that jurisdiction depended entirely upon diverse citizenship. . . . If the word 'controversy' added anything to the comprehensiveness of the section, the fact remains that the exercise of the power of disposition over this intervention, whether styled suit or controversy, was the exercise of power invoked at the institution of the main suit, and it is to that point of time that the inquiry as to the jurisdiction must necessarily be referred. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138. Nor can the conclusion be otherwise because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit."

Rouse v. *Letcher* was followed in *Gregory* v. *Van Ee*, 160 U. S. 643, 646, and it was there observed:

"The Circuit Courts of the United States have cognizance of suits as provided by the acts of Congress, and when their jurisdiction as Federal courts has attached, they possess and exercise all the powers of courts of superior general jurisdiction. Accordingly they entertain and dispose of interventions and the

like on familiar and recognized principles of general law and practice, but the ground on which their jurisdiction as courts of the United States rests is to be found in the statutes, and to that source must always be attributed.

"Manifestly, the decree in the main suit cannot be revised through an appeal from a decree on ancillary or supplemental proceedings, thus accomplishing indirectly what could not be done directly. And even if the decree on such proceedings may be in itself independent of the controversy between the original parties, yet if the proceedings are entertained in the Circuit Court because of its possession of the subject of the ancillary or supplemental application, the disposition of the latter must partake of the finality of the main decree, and cannot be brought here on the theory that the Circuit Court exercised jurisdiction independently of the ground of jurisdiction which was originally invoked as giving cognizance to that court as a court of the United States."

Complainants and defendants in the bill under consideration were not all citizens of different States, and the jurisdiction of the Circuit Court over the suit did not purport to be founded upon diverse citizenship. Independently, therefore, of the foreclosure suit, the decree in which was sought to be impeached, the bill was not sustainable in the Circuit Court.

It is very well settled that a bill in equity by a corporation or the stockholders of a corporation in the Circuit Court to set aside a final decree of that court against the corporation in a foreclosure suit upon the ground that such a decree was obtained by collusion and fraud, and the court had no jurisdiction to make it, is an ancillary suit and a continuation of the main suit so far as the jurisdiction of the Circuit Court as a court of the United States is concerned. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Pacific Railroad* v. *Missouri Pacific Railway*, 111 U. S. 505, 522. The bill in the latter case was brought in the Circuit Court for the Eastern District of Missouri by a corporation, a citizen of Missouri, against another corporation, also a citizen of Missouri, other citizens of Missouri, and others, alleging fraud and collusion in the original foreclosure suit

and praying that the decree of foreclosure and sale be set aside. Mr. Justice Blatchford, delivering the opinion of the court, said:

"The bill falls within recognized cases which have been adjudged by this court, and have been recently reviewed and reaffirmed in *Krippendorf* v. *Hyde*, 110 U. S. 276. On the question of jurisdiction the suit may be regarded as ancillary to the Ketchum suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller in *Pacific Railroad* v. *Missouri Pacific Railway*, 1 McCrary, 647. The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the Circuit Court. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633."

The same principle was applied to a bill by the stockholders of a corporation filed for the purpose of impeaching a decree of foreclosure and sale, by Mr. Justice Jackson, then Circuit Judge, in *Foster* v. *Mansfield &c. Railroad Co.*, 36 Fed. Rep. 627, 628, in the Circuit Court for the Northern District of Ohio, where he said:

"There is no want of jurisdiction growing out of the fact that some of the defendants to the present suit are citizens of the same State (Ohio) with the complainant, inasmuch as this suit may properly be regarded as ancillary or supplemental to the original suit in which the decree complained of was made. It is well settled that in such cases suit may be maintained without regard to the citizenship of the parties. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Railroad Co.* v. *Railroad Co.*, 111 U. S. 505. It is also well settled that a shareholder may interpose and set the machinery of the law in motion for the protection of corporate rights, or the redress of corporate wrongs, when the corporate management, after proper demand, refuses or fails to act in the matter."

The decree in that case was affirmed by this court, 146 U. S.

88, and there is a marked resemblance between the bill exhibited there and that before us.

We regard it as not open to argument that the jurisdiction of the Circuit Court, as a court of the United States, over this suit rested on the jurisdiction of that court over the suit in which the decree of May 4, 1888, was rendered, and we think it clear that that jurisdiction depended entirely upon diverse citizenship.

The bill in No. 201 was filed by the Farmers' Loan and Trust Company, trustee, a citizen of New York, against the Houston and Texas Central Railway Company, a citizen of Texas, April 24, 1886, to foreclose the general mortgage, and no other party was named as defendant. The ground of Federal jurisdiction was diverse citizenship. How efficacious a decree could have been rendered in that cause, if it had stood alone, we need not consider, nor inquire when persons who might be considered necessary parties may be dispensed with as such. It may be noted, however, that the general mortgage was the last mortgage, and prior incumbrancers, the validity of whose incumbrances is not drawn in question, are not indispensable parties to a bill to foreclose a mortgage so situated. *Hagan* v. *Walker*, 14 How. 29, 37; Jones on Mortgages, § 1439.

The bills in Nos. 198 and 199 were filed by Easton and Rintoul, trustees, citizens of New York, January 21, 1886, against the Houston and Texas Central Railway Company and Benjamin A. Shepherd, trustee, both citizens of Texas, to foreclose the Main Line first mortgage and the Western Division first mortgage, and it was alleged that the Farmers' Loan and Trust Company, trustee, under subsequent mortgages, should be made a party defendant and brought in by the order and direction of the court, in view of the fact that the property was in the Circuit Court's possession, and complainants had therefore been obliged to institute their suit therein. These cases were consolidated by the order of May 26, 1886, the parties being arranged for the purposes of jurisdiction on the one side or the other of the matters in dispute, as indicated in *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, and, unless that

order is to be disregarded, the question whether either case lacked an indispensable party, became immaterial. Thereafter cross-bills and answers were filed as has been stated. The jurisdiction over these three separate suits and over the consolidated cause depended entirely upon diverse citizenship, and if maintainable as to either of them, could be maintained as to all by reason of lawful possession of the *res*.

In No. 185, the Southern Development Company, a corporation and citizen of California, filed its bill against the railway company as a corporation and citizen of Texas, February 16, 1885, the jurisdiction resting upon diverse citizenship, and in that suit the court appointed receivers February 20, 1885, and took and retained possession of the property under that receivership up to May 26, 1886, when it was transferred to the receivers appointed in the consolidated cause, who thereby became receivers under each of the separate bills so consolidated, all of which had in fact been filed long after the property was in the possession of the court. Certainly, possession under one or the other of these bills drew to the court the right to decide upon conflicting claims to the ultimate possession and control of the property, to marshal all liens upon it, and to enforce them. *Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171, 201.

We conclude, therefore, that as the jurisdiction of the Circuit Court for the Eastern District of Texas as a court of the United States was invoked throughout the litigation upon the ground of diverse citizenship, and as this bill must be regarded as ancillary, auxiliary, or supplemental to the foreclosure suit, or, as it were, in continuation thereof, the decree of the Circuit Court of Appeals was made final by the sixth section of the act of March 3, 1891, and the appeal to this court from that decree will not lie.

Appeal dismissed.

Mr. Justice Peckham was not a member of the court when this motion was submitted, and took no part in its disposition.

BANK OF COMMERCE *v.* TENNESSEE FOR THE USE OF MEMPHIS.

BANK OF COMMERCE *v.* TENNESSEE AND COUNTY OF SHELBY.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Nos. 668, 669. Argued[1] January 20, 21, 22, 1896. — Decided March 2, 1896.

The provision in the charter of the plaintiff in error that "said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes," limits the amount of tax on each share of stock in the hands of the shareholders, and any subsequent revenue law of the State which imposes an additional tax on such shares in the hands of shareholders impairs the obligation of the contract, and is void. *Farrington* v. *Tennessee*, 95 U. S., 679, affirmed to this point.

The decision by the Supreme Court of the State that this exemption applies to new stock in the bank, created and issued since the adoption of the constitution of 1870, being in favor of the exemption claimed by the bank, cannot be reviewed by this court.

When not otherwise exempted, the capital stock of a corporation and its shares in the hands of shareholders, may both be taxed; and if so taxed it is not double taxation.

The surplus accumulated by the plaintiff in error is not exempted from taxation by the said provision of exemption in its charter.

THESE were writs of error to the Supreme Court of the State of Tennessee, sued out by the plaintiffs in error for the purpose of reviewing the judgment of the state court in favor of the State in each case. They were both of them suits in equity brought by the State for the use of the city of Memphis in the one case, and by the State and the county of Shelby in the other, for the purpose of recovering the amounts of certain taxes alleged to be due the city of Memphis and the

[1] This case was argued with Nos. 766, 676, 677, 269, 674, 675, 678, 679, 672, and 673, reported *infra*.

Statement of the Case.

county of Shelby for various years, commencing in 1887. The suits were substantially alike and involved the same questions, and the decision of the one will be the decision of the other. In the further discussion it will only be necessary to refer to the first case.

The bill, after it was amended, set forth the material facts necessary to raise the questions herein involved. It alleged the incorporation of the bank in 1856, and in its charter was contained the following provision: "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes; and shall pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes." It alleged that notwithstanding the above provision there had been assessed upon the stock certain amounts, alleged to be due for taxes, for the years 1887 to 1890, inclusive, by virtue of chapter 2 of the general tax laws of the State for the year 1887, and chapter 104 of the laws of 1889, and in the amended supplemental bill an additional sum was claimed for the taxes from 1891 to 1894, inclusive, under the above mentioned acts. The bill also made claim to recover the *ad valorem* taxes on the surplus and undivided profits of the plaintiff in error bank for the years 1892, 1893, and 1894, under the proviso contained in section 3 of chapter 26 of the Extra Session Acts of 1891, the proviso reading: "*Provided*, That the surplus and undivided profits in such bank, banking association or other corporation shall be assessable to said bank or other corporation, and the same shall not be considered in the assessment of the stock therein." All the material allegations necessary to show a valid and legal assessment upon the stock were set forth in the bill, unless the provision in the charter of the bank above alluded to prevents the assessment of such stock or shares of stock in the hands of shareholders in any other way or for any other sum than that stated in the charter. The bill also alleged that complainant was advised that the capital stock in a corporation and shares of stock in the hands of shareholders were separate and distinct subjects of taxation, and that in the

absence of any exemption clause it was within the power of the State, without subjecting such legislation to the objection of double taxation, to have taxed both the capital stock of the corporation and the shares of stock in the hands of the stockholders; that the charter tax, bonus, or whatever else it may be called, of one half of one per cent to be paid to the State was a tax upon the shares of stock, and that the language "in lieu of all other taxes" meant in lieu of all other taxes on the shares of stock, and that it had no effect to exempt the capital stock of the corporation from taxation. The question of law whether the capital stock was subject to *ad valorem* taxes or the shares of stock in the hands of the shareholders was submitted to the court for determination. The bill also set forth that after the adoption of the constitution of Tennessee of 1870 (on the 4th day of May in that year) the capital of the bank had been increased from either $60,000, or from $200,000, to $1,000,000, and the plaintiffs alleged that the new stock, whatever might be the amount thereof, aside from all other questions, was taxable.

To the original bill a demurrer was filed upon the ground that the general tax laws, under which the taxes against the bank or its shareholders were assessed and sought to be collected, were violative of the contract provision of the Constitution of the United States. The demurrer was overruled with leave to the defendants to rely on it in their answer. Thereupon a stipulation was made, in each case fixing the basis of the reassessments for the years 1891 to 1894, inclusive, waiving the necessity for the discovery of the shareholders in the bank upon the bank's agreeing "that for the purposes of this case the shares of stock in the name of J. A. Omberg shall be taken as validly and legally assessed for the years aforesaid." It was further stipulated "that any liability that might be adjudged against Mr. Omberg as a shareholder in such corporation should be treated as establishing a like liability of all the shareholders therein, and that for such liability of all the shareholders as thus established a decree should be entered against the corporation, the said corporation consenting that complainants have a decree against it for

any liability for taxes that may be herein established against the shareholders." The stipulation between the parties was that the defendant J. A. Omberg should, for the purpose of testing the liability of the shareholders for taxes, be considered and treated as a representative of all the shareholders, and that a liability decreed against him for taxes due as a shareholder should be considered as the liability of all the shareholders duly established, and that a decree in favor of complainants should be entered against the bank and against its unknown shareholders.

The case thereupon was heard upon the amended and supplemental bills, the stipulations above spoken of, which were filed, and the demurrer of the defendants which raised the question that the tax laws under which these taxes were sought to be collected against it and its shareholders were void, because in conflict with section 10 of Article I of the Constitution of the United States. The chancellor, before whom the case was tried, was of opinion that the demurrer was well taken, and accordingly dismissed the bill of complaint. The Supreme Court of the State of Tennessee reversed this decree of dismissal and held, first, that the owners of shares of stock in the Bank of Commerce were thus liable for *ad valorem* taxes to the city of Memphis; and, second, that the bank was liable for *ad valorem* taxes to the city for the years 1892 to 1894, inclusive, on its surplus and undivided profits. Judgment was entered accordingly, and the plaintiffs in error, the Bank of Commerce and J. A. Omberg, have sued out this writ of error to obtain a review of the judgment by this court.

The errors assigned were:

(1) That the Supreme Court of Tennessee erred in adjudging a liability of the shareholders in the Bank of Commerce to pay to the State of Tennessee, or to the county of Shelby or to the city of Memphis *ad valorem* taxes on their shares of stock for the years specified, because, as is alleged, the shareholders are thereby deprived of the immunity from taxes guaranteed to them by the contract contained in the charter of the Bank of Commerce, and that the general tax laws af-

firmed to be valid against them are repugnant to the Constitution of the United States.

(2) For the like ground error is assigned to so much of the decree as denies to the plaintiff in error, the Bank of Commerce, an exemption from taxation on its surplus and undivided profits, notwithstanding its exemption therefrom under its charter provision.

Mr. William H. Carroll and *Mr. R. J. Morgan*, (with whom were *Mr. T. B. Turley* and *Mr. L. B. McFarland* on the brief,) for the Bank of Commerce and Omberg. In support of the second assignment of error they cited: *State* v. *Union Bank*, 9 Yerg. 119; *DeSoto Bank* v. *Memphis*, 6 Bax. 415; *Memphis* v. *Hernando Ins. Co.*, 6 Bax. 527; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Bank of Commerce* v. *McGowan*, 6 Lea, 703; *Bank* v. *Tennessee*, 104 U. S. 493; *Tennessee* v. *Whitworth*, 117 U. S. 129; *New Haven* v. *Bank*, 31 Conn. 106; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688.

Mr. S. P. Walker, (with whom were *Mr. C. W. Metcalf* and *Mr. F. T. Edmondson* on the brief,) for the State of Tennessee.

I. Defendants in error insist that if the decision in *Farrington* v. *The State*, 95 U. S. 679, is to be considered as controlling, the charter tax in question is laid upon the shares of stock, and the exemption is of the shares alone; that the capital stock and franchises of the defendant bank are taxable, under the rulings of that case.

II. The language of this charter, however, essentially differs from that of the Union and Planters' Bank; and the conclusions to be reached in the two cases must also differ.

By the proper construction of the charter of this bank, the commuted charter tax is to be paid by the bank upon its capital stock, the exemption is of the capital stock, and the shares of stock are taxable.

The language of the exemption clause, to the effect that "said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other cred-

itors, *except the State for taxes*, and shall pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes," clearly intends that the preferential right of the State for taxes refers to such general annual taxes as might be laid on the shares, and affirmatively demonstrates a reservation of power to tax the shares, rather than a surrender thereof.

The commuted charter tax is to be paid by the corporation on the capital stock, and the exemption is of that subject of taxation alone. *Farrington* v. *Tennessee*, 95 U. S. 679; *Memphis* v. *Farrington*, 8 Bax. 539; *Tennessee* v. *Whitworth*, 117 U. S. 129; *Delaware Railroad Tax*, 18 Wall. 206; *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665.

III. However the general question of charter exemption may be determined, the capital stock paid in, or the shares of stock of the defendant bank, subscribed and issued since the adoption of the state constitution on the 5th of May, 1870, is or are taxable. *Railroad Co.* v. *Heckt*, 95 U. S. 168; *Ex parte N. E. & S. W. Railroad*, 37 Ala. 679; *Howard* v. *Kentucky Ins. Co.*, 13 B. Mon. 282; *Bank of Columbia* v. *Okley*, 4 Wheat. 235; *Aspinwall* v. *Daviess County*, 22 How. 364; *Memphis &c. Railroad* v. *Commissioners*, 112 U. S. 609; *Railway Co.* v. *Allerton*, 18 Wall. 233; *State* v. *Bull*, 16 Conn. 179; *Dartmouth College* v. *Woodward*, 4 Wheat. 688; *Frost* v. *Frostburg Coal Co.*, 24 How. 278; *Trask* v. *Maguire*, 18 Wall. 391; *Memphis* v. *Memphis City Bank*, 7 Pickle, 574.

IV. The surplus is in any event taxable.

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

The claim of the State seems to have been in the alternative, that either the corporation was liable for the taxes assessed under the general laws above referred to, or else that the shareholders were, and the bill was framed with the idea of obtaining a final decision in regard to which of the two parties was liable without making it necessary to commence two actions for that purpose. The defendants,

the bank and shareholders, claimed entire exemption from all taxes upon either the corporation or the shareholders, other than the taxes imposed in the charter. In support of its claim that the correct construction of the charter clause, as now presented, is that the charter tax was laid on the capital stock, and that it was exempted from further taxation, and that the shares of stock were subject to general taxation, counsel for the State refer to the decision in the case of *Farrington* v. *State of Tennessee*, 95 U. S. 679. In that report, at page 681, Mr. Justice Swayne quotes the exemption clause of the charter in question as taken from the record in that case as follows: "That the said company shall pay to the State an annual tax of one half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." A full and correct quotation of the clause (which is in reality the same in both cases) has already been given, but it may be repeated here. It is as follows: "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes; and shall pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes." The record from which Mr. Justice Swayne made his quotation omitted the prior portion of the clause just set forth, and counsel for the State herein claim that the decision in the *Farrington case*, by this court, which held "that the exemption was a contract between the State and the bank limiting the amount of tax on each share of stock, and that a subsequent revenue law of the State which imposed additional taxes on the shares in the hands of the shareholders impaired the obligation of the contract and was void," was not decisive of this case. The difference between the provision as quoted by Mr. Justice Swayne and the actual provision is, as counsel claim, material, and must lead to different results, because the first quotation was misleading, and the record did not state the whole clause. It was upon this assumed difference that the Supreme Court of Tennessee, in this case, came to the conclusion it did, and held that the

charter tax was on the capital stock, and the exemption from further taxation was an exemption of that stock, and that the shares of stock were, in the hands of the shareholders, subject to general taxation. As this court in the *Farrington case* has held that the charter tax was laid *on the shares of stock*, and that the same were *not subject to other or further taxation*, the Tennessee court acknowledged the controlling force of that decision upon the case then before it, provided the question was the same or in substance the same as was considered and decided in the *Farrington case*. The state court then proceeded to point out in its opinion what it considered to be the material difference between the two provisions, and it held that the provision which gives a lien on the stock for debts due the bank by the stockholders before and in preference to other creditors, except the State for taxes, materially changes the meaning from that contained in the exemption clause quoted in the *Farrington case*, and that the language, as now quoted, naturally implied that the tax referred to in the charter was upon the capital stock, and that the lien reserved by the State for taxes does not refer to the annual charter tax, for the reason that the charter tax was to be paid by the corporation, but that it referred to such other or general tax as might be levied by the State upon the shares, thus showing that the intention of the State was to reserve to itself the right to tax the shares in the hands of the shareholders, and to exempt the stock as the property of the corporation. It was also said that it was neither natural nor reasonable to assume that the State reserved a lien on the shares which were the property of the shareholders to pay a tax that the corporation was required to pay. In other words, it could not be supposed that the State required one person to pay a tax and reserved a lien upon the property of another to secure its payment, and that if the lien of the State was reserved for securing the payment of the charter tax the State was placed in the attitude of having voluntarily postponed itself to every other creditor of the corporation because all creditors must be paid before the shareholder gets anything. These reasons which commended

themselves to the Supreme Court of Tennessee were sufficient in the judgment of that tribunal to show a difference in the meaning of the two clauses, and it therefore came to the conclusion it did notwithstanding the decision of this court in the *Farrington case*, and the shareholders were held liable to pay the tax claimed by the state authorities.

On the other hand, it is said that the difference in the language used in the two quotations is wholly immaterial in any event, and that whatever portion of the clause may have been omitted in the record in the *Farrington case*, the whole charter of the bank was before the court for its examination, and it cannot be supposed that in a case of such importance, argued by such eminent counsel as those who appeared in that case, there was anything overlooked or omitted. The claim is therefore made that the court must have regarded the portion of the clause omitted in the record as immaterial.

We do not think under the circumstances that we ought now to come to a different conclusion upon the question of exemption from that which was arrived at by this court in the *Farrington case*. As the whole charter was then before the court, we are not prepared to say that its force was misunderstood, or that there was an omission by the court to consider all the language of the exemption clause simply because a portion of it is omitted in the quotation from the record made in the opinion therein delivered. We are not inclined, therefore, to overrule or distinguish the *Farrington case*, and we must now hold that the charter clause of exemption limits the amount of tax on each share of stock in the hands of the shareholder, and that any subsequent revenue law of the State which imposes an additional tax on such shares in the hands of shareholders impairs the obligation of the contract and is void. This compels us to reverse the judgments herein against the shareholders.

Counsel for plaintiffs in error also urged in the course of their argument before us that the *Farrington case* not only decided that the shareholders were exempt from any further taxation by reason of this clause in the charter, but that the corporation was also thereby exempted, so that the only tax

that could be collected from either the corporation, the shareholders, or both, was the one half of one per cent mentioned in the charter.

Within this general claim of exemption is embraced the right to tax the stock in this bank issued since the adoption of the present constitution of Tennessee, in 1870. The charter (which was granted long before the adoption of that constitution) provides, section 2, that the capital stock of said company shall be divided into shares of $50 each, and when 200 shares shall have been subscribed, and the sum of $1 per share paid thereon, the shareholders may meet and elect five directors. Section 4 provides that the bank "may receive on deposit any and all sums not less than one dollar per week offered as stock deposits, . . . and when such deposits shall amount to fifty dollars they may, at the option of the depositor, become stock in the institution." The parties to this suit agreed by stipulation that on the 5th day of May, 1870 (the day the constitution was adopted,) the capital stock of the bank was $200,000, and that on March 17, 1887, and on sundry days prior to June 1, 1887, it was regularly increased to $600,000, and that on the 17th day of March, 1890, and on sundry days prior to June 1, 1890, it was again regularly increased to $1,000,000. The Supreme Court allowed the claim of exemption and held that the stock issued since the adoption of the new constitution stood in all respects as to taxation the same as the stock earlier issued, notwithstanding the provision of the constitution for the taxation of all property, and that, therefore, the bank was not liable to the tax claimed by the state authorities. The validity of the claim made by the bank for exemption of the new as well as of the old stock was therefore admitted by the state court as a right protected by the Federal constitution.

The plaintiffs in error claim that as to this portion of the decision of the Supreme Court of Tennessee it cannot be reviewed by this court, because it was in favor of the bank. The bank by its answer to the bill drew in question the validity of the acts of the assessing officer of the State acting under the authority of the general statutes of Tennessee, pro-

viding for the assessment of its property, on the ground that the authority exercised by the assessing officer under the Tennessee statutes impaired the obligation of the contract entered into between the State and the bank in its charter, and the decision of the Supreme Court of Tennessee was against the validity of the authority so exercised under those general revenue laws.

The state court decided in favor of the exemption claimed by the bank by virtue of its contract with the State. The protection of the constitutional provision was thus accorded it.

We are of the opinion that this court cannot in this case review that decision.

Section 709, Revised Statutes of the United States, gives jurisdiction to this court, among other things, upon writ of error to review the final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision of the state court is in favor of their validity. Here the decision of the state court is against the validity of the acts of the assessing officer acting under the authority of the revenue laws as applied to the property of the bank, and it is in favor of the exemption claimed under the contract.

In *Murdock* v. *City of Memphis*, 20 Wall. 590, it was held that, under the provisions of the act of February 5, 1867, c. 28, 14 Stat. 385, of which section 709 of the Revised Statutes is substantially a transcript, it was essential to the jurisdiction of this court to review a question decided in a state court, that one of the questions mentioned in the Federal statute must have been raised and presented to the state court, and that it must have been decided by the state court against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States. To the same effect are *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *St. Paul, Minneapolis & Manitoba Railway* v. *Todd County*, 142 U. S. 282.

We cannot, therefore, review the decision of the state court allowing the claim of exemption from taxation of the capital stock of the bank, although the consequence is that in these cases both the capital stock and the shares thereof in the hands of the shareholders escape any taxation other than the charter tax.

Accepting, as we do, the authority of the *Farrington case* for the point therein decided, which exempts the stock in the hands of the shareholders from any further tax than that which is provided for in the charter, and being concluded in this case by the decision of the Supreme Court of Tennessee in favor of the exemption of the capital stock of the corporation, we are not here called upon to examine the validity of the claim of the bank as to the decision of this court in cases preceding that of Farrington, where counsel allege it has been determined that both the corporation and the shares of stock in the hands of the shareholders are exempt from further taxation under clauses which are said to be similar to those in the charter under consideration.

In this case of *The Bank* v. *The State of Tennessee*, for the use of the city of Memphis, (the first of the above entitled actions,) the Supreme Court held that the bank was liable to pay the municipal taxes under the revenue law, (section 3, chapter 26, Extra Session Acts, 1891,) above mentioned, upon its surplus and undivided profits. Section 3 of that act has already been referred to, but the material portion of it is here set forth, and is as follows:

"Provided, that the surplus and undivided profits in such bank, banking association or other corporation shall be assessable to said bank or other corporation, and the same shall not be considered in the assessment of the stock therein."

The corporation, plaintiff in error, demands the same exemption from taxation on its surplus that has been accorded it for its capital stock, and it bases its contention upon the same clause of exemption in its charter. We think it cannot be sustained as to the surplus, which we believe is taxable under the law above quoted. This whole demand of exemption from taxation made by the bank and its shareholders must be con-

sidered with reference to the general rule governing claims of that nature. It is well known, has long existed, and is undoubted. *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192, 195; *Vicksburg & Pacific Railroad* v. *Dennis*, 116 U. S. 665, and many cases there cited; *Farrington* v. *Tennessee*, 95 U. S. 679, 686; *West Wisconsin Railway* v. *Supervisors*, 93 U. S. 595; *Tucker* v. *Ferguson*, 22 Wall. 527.

These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Van Allen* v. *Assessors*, 3 Wall. 573; *People* v. *Commissioners*, 4 Wall. 244, cited in *Farrington* v. *Tennessee*, 95 U. S. 687.

This statement has been reiterated many times in various decisions by this court, and is not now disputed by any one. In the case last cited, Mr. Justice Swayne, in delivering the opinion of the court, enumerated many objects liable to be taxed other than the capital stock of a corporation, and among them he instanced, (1.) the franchise to be a corporation; (2.) the accumulated earnings; (3.) profits and dividends; (4.) real estate belonging to the corporation and necessary for its business; and he adds that "this enumeration shows the search-

ing and comprehensive taxation to which such institutions are subjected where there is no protection by previous compact." And in *Tennessee* v. *Whitworth*, 117 U. S. 129, at page 136, Mr. Chief Justice Waite, in delivering the opinion of the court, says: "That in corporations four elements of taxable value are sometimes found. First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and, fourth, the shares of capital stock in the hands of the individual stockholders."

The surplus belonging to this bank is "corporate property," and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of one half of one per cent upon each share of the capital stock, which shall be in lieu of all other taxes. The exemption is not, in our judgment, greater in its scope than the subject of the tax. Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock and there is a surplus over, above and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders.

The case of *Bank* v. *Tennessee*, 104 U. S. 493, does not hold to the contrary of this doctrine. This question was not therein discussed or decided. The question which was decided related only to the taxation of real property not used by the bank in its business, and it was held liable to taxation.

The case is no authority for the proposition contended for here, namely, that the whole surplus of this bank is exempt from taxation. No individual shareholder has any legal right to claim any portion of this surplus; until divided by the board of directors it remains the property of the corporation itself, and in the sense in which the words "capital stock"

are used in the exemption clause the surplus does not form any part thereof. It is said that the purpose of incorporating a bank is to enable the institution to accumulate profits and to make dividends out of them, and that the dividends cannot be made until the profits have been accumulated, and that under this ruling profits would come under the description of surplus to be taxed before distribution in a dividend. It is true that dividends cannot rightfully be made until profits have accumulated; but it is one thing to accumulate profits each six months or annually and then divide them among the stockholders by way of dividends, and quite another thing to accumulate profits year after year, and, while still declaring dividends, accumulate a surplus which is not so divided. The sums accumulated by way of profit between the regularly recurring dividend days might not be regarded as surplus, provided those profits were regularly distributed in dividends. The surplus in this case is clearly not of that kind which has been saved for the purpose of being distributed by dividends. It may be true that the general effect of a tax on this surplus might indirectly operate upon the shareholder by possibly lessening the value of his shares to some extent, but that is not the same as if a tax had been laid upon those shares. In levying the charter tax it was conceded that the tax has always been measured by the par value of the shares of stock, while the actual value of such shares, because of the large surplus owned by the bank may have been very much greater, and the statute under which the surplus is taxed provides that such surplus must not be considered in the assessment upon the stock; so that provision is made whereby a tax upon the surplus and the charter tax upon the shares of stock will neither be double nor unjust taxation. Although a surplus may be required by the national banking act, and also by the laws of good and safe banking, yet we do not perceive that this fact has any material effect upon the question.

We are, therefore, of opinion that the surplus was properly taxed, and that the bank's claim of exemption as to such surplus is without foundation in law.

Counsel for the Plaintiff.

These views lead to a reversal of so much of the judgment as is against the shareholders, and the cases are, therefore, remanded to the state court for further proceedings in conformity with this opinion.

Mr. Justice White concurred in so far as the decree recognized the exemption of the shares of stock from all taxation except that enumerated in the contract, but dissented from the conclusion as to the power to tax the surplus and undivided profits.

SHELBY COUNTY *v.* UNION AND PLANTERS' BANK.

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

No. 766. Argued January 20, 21, 22, 1896. — Decided March 2, 1896.

A clause in the charter by a State of a banking corporation requiring it to "pay to the State an annual tax of one half of one per cent on each share of capital stock which shall be in lieu of all other taxes," while it limits the amount of tax on each share of stock in the hands of the shareholders, does not apply to or cover the case of the capital stock of the corporation or its surplus and accumulated profits, but such capital stock, surplus and accumulated profits are liable to be taxed as the State may determine.

The previous cases examined, and shown (especially *Farrington* v. *Tennessee*, 95 U. S. 679, and *Gordon* v. *Appeal Tax Court*, 3 How. 133) not to be inconsistent with the above decision.

The case is stated in the opinion.

Mr. S. P. Walker, (with whom were *Mr. C. W. Metcalf* and *Mr. F. T. Edmondson* on his brief,) for the State of Tennessee and the County of Shelby, cited the following Tennessee cases: *Memphis* v. *Farrington*, 8 Bax. 539; *State* v. *Union Bank*, 9 Yerg. 488; *Memphis* v. *Ensley*, 6 Bax. 553; *Nashville Gaslight Co.* v. *Nashville*, 8 Lea, 407; *Street Railroad* v. *Morrow*, 3 Pickle, 406.

Opinion of the Court.

Mr. William H. Carroll, (with whom was *Mr. Isham G. Harris* on the brief,) for Union & Planters' Bank, cited the following Tennessee cases: *Knoxville Railroad* v. *Hicks*, 9 Bax. 442; *State* v. *Butler*, 13 Lea, 400; *State* v. *Butler*, 2 Pickle, 614; *University of the South* v. *Skidmore*, 3 Pickle, 156; *Memphis* v. *Union & Planters' Bank*, 7 Pickle, 546; *Memphis* v. *Memphis City Bank*, 7 Pickle, 574; *Hazen* v. *Bank*, 1 Sneed, 115; *Memphis* v. *Farrington*, 8 Baxter, 539; *Tennessee* v. *Union Bank*, 9 Yerger, 488; *State* v. *Nashville Savings Bank*, 16 Lea, 111.

Mr. Justice Peckham delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States for the Western District of Tennessee, granting an injunction at the suit of the Union & Planters' Bank to restrain the municipal authorities from collecting any tax laid upon the surplus of the bank, on the ground that such surplus is exempt under a clause in the charter of the bank similar to the one discussed in the above cases of the *Bank of Commerce*, *ante*, 134. The Circuit Court granted the injunction and permanently enjoined the municipal authorities from the collection of the tax. They have appealed to this court.

There are two grounds, either of which, if decided in favor of appellants in this case, would result in upholding the validity of the tax upon the surplus: First, if it should be held that by the true interpretation of the charter the exemption, while applying to the shares of stock in the hands of the shareholders, does not extend to the corporation itself, the tax would be valid; second, even if the tax on the capital stock were void, that upon the surplus might still be upheld on the authority of the case of the *Bank of Commerce*, *ante*, 134. We have already held in that case that a tax on the surplus was valid, but the question whether a tax on the capital stock of the bank was valid could not be raised there, because the case was before us on a writ of error taken to a state court, and the question in the state court was decided in favor of the exemption claimed by the bank. This being an appeal from

a judgment of the United States Circuit Court, both questions are open for our decision. We think it, therefore, proper to here decide the question first above stated.

Various decisions of the courts of Tennessee have been cited by counsel on both sides as to the meaning of the exemption clause, whether or not it covered the capital stock and the shares also. Generally, the courts of that State held before the decision by this court of the *Farrington case*, that the charter tax was laid upon the corporate capital stock, and the exemption was of that stock from any further tax. Subsequently to the decision in that case the state courts have held that under the construction given to the clause in the *Farrington case* and in *Bank* v. *Tennessee*, 104 U. S. 493, the tax was on the shares, and the exemption covered both the capital stock and the shares thereof. The decision giving exemption to both classes of property was adjudged alone upon the authority cited. In such a case as this, where we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the previous decisions of the state courts, except when they have been so long and so firmly established as to constitute a rule of property, (which is not the case here,) and we decide for ourselves independently of the decisions of the state courts, whether there is a contract and whether its obligation is impaired. *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244, 256; *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665–667; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492.

While according to the decisions of the Supreme Court of Tennessee the respect which is most justly due them on account of the high character of that tribunal, nevertheless the responsibility is upon us to determine the question independently, and we cannot agree with that court in its construction of the decisions of this court in the two cases mentioned. Indeed, one of the judges of the state court said in the course of an opinion, *Memphis* v. *Union & Planters' Bank*, 7 Pickle, 546, 553, that since the *Farrington case* the court had recog-

nized the decision and had, at the same time, adhered to its own former decisions that no *ad valorem* tax could be lawfully laid on the capital stock, and thus the effect of the two decisions, the one Federal and the other state, was that both classes were exempted. Other judges said they were exempted by reason of the Federal decisions.

We stated in the *Bank of Commerce case*, *ante*, 134, that the tax provided in this charter is laid upon the shares of stock in the hands of the shareholders, and they are exempt from any further taxation on account of their ownership of such shares. In that respect we followed the case of *Farrington* v. *Tennessee*, 95 U. S. 679, and we refused in the *Bank of Commerce case* to overrule or distinguish it; but it is claimed on the part of the appellee herein that the *Farrington case* also decided that the charter tax is in lieu of all other taxes, not only upon the shares in the hands of the shareholders, but that it exempts the corporation and all its property from any further taxation. We cannot give so broad an effect to the decision in the *Farrington case*. The question of the exemption of the corporation and its property from taxation did not arise in that case, and there was no adjudication of that question by its decision. Farrington was the owner of certain shares of stock in the bank, and the State and the county of Shelby each claimed the right, under the law, to assess taxes against him by reason of his ownership of those shares, at the same rate that taxes were assessed and levied upon other taxable property. He resisted the payment of the taxes upon the ground that by virtue of the exemption clause in the charter the bank, its franchise, its capital stock, and also the shares of stock of the individual stockholders, were subject to no taxation other than at the rate specified in the charter.

Although in setting forth the grounds of his resistance to the payment of the tax, Farrington stated that the bank, its franchise and its capital stock, were not subject to taxation, still that was not a material question. If the shares of stock owned by him were not subject to taxation in his hands, that was sufficient for him, and the question of the exemption of property of the corporation would not be involved. The

corporation was not a party to the suit, and although in the opinion written upon the decision of the question whether the shares were liable to taxation in his hands, it may have rather been assumed that the stock was not subject to taxation as against the corporation, or that the whole stock was exempt in whosesoever hands it was, the matter actually decided was the exemption from taxation of these shares in the hands of the shareholders. In the suit that was instituted it was agreed that if in any event the decision was adverse to Farrington, judgment should be rendered against him for a certain number of dollars, the amount of the tax assessed against him, and if the decision should be in his favor, then the judgment was to be that the taxes were illegally assessed, and that said shares of stock were to be exempt from all other taxation, except the one half of one per cent to the State, as provided for in the tenth section of the bank's charter, and the collection of any further tax was to be enjoined. The trial court rendered a decree enjoining the collection of the tax, which was reversed by the Supreme Court of the State, on the ground that the shares of stock were not the property or thing exempted, and it was, therefore, adjudged that Farrington should pay to the State the sums of money assessed upon his shares. Farrington thereupon sued out a writ of error, and coming into this court the judgment of the Supreme Court of Tennessee was reversed, and it was held that the charter tax was upon the shares of stock in the hands of its shareholders, and that they were consequently exempt from the payment of any further tax.

There are undoubtedly some expressions in the opinion of Mr. Justice Swayne which lend color to the idea that, in his belief, not only were the shares in the hands of the shareholders exempt from any further taxation than that imposed by the charter, but that the property of the corporation was itself exempt from any taxation other than that provided for in that section; the latter question, however, was not before the court and was not decided by it, and we are of opinion that, assuming that the charter tax was laid upon the shares of stock in the hands of the shareholders, the exemption from

further taxation applies to the subject which was taxed under the charter, and is not of any greater scope, and that it would not, therefore, include the exemption from taxation of either the capital stock or the surplus, which is the property of the corporation itself. We come to this conclusion because of the fact, well established by the decisions of this as well as many state courts, that there is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders. So separate are these properties, and so distinct in their nature, that the taxation of the one property is not the taxation of the other. This is no new doctrine, and the distinction between the two properties was recognized by the Supreme Court of Tennessee as long ago as in the case of the *Union Bank* v. *State*, 9 Yerger, 490, decided in 1836. It was held that, under the clause of the charter there under consideration, any further tax on the capital stock than that which was provided for in the charter itself was void, but that the State might tax the shares of stock in the hands of individuals notwithstanding the exemption from further taxation on the capital stock.

We do not admit the claim made by the counsel for appellee, that the *Farrington case* must have decided the exemption of the stock of the corporation, because in the case of *Wickes* v. *State of Tennessee*, (mentioned in a note to the *Farrington case* at page 690,) as is claimed, the exemption was of the capital stock of the corporation which was held nevertheless to come within the principle of the main case decided. There was no material difference in the meaning of the exemption clause in the various cases mentioned in the note to the *Farrington case*. Those clauses were of substantially the same import as that in the *Farrington case*, and they are set forth in the dissenting opinion of Mr. Justice Strong at page 692 of the report. The whole court was of one opinion upon the subject, that there was no substantial difference in the extent of the exemptions contained in the several charters, although there was some difference in their phraseology, but the question was, as stated by Mr. Justice Strong, which of the parties was to

receive the benefit of the exemption, namely, was it to be the corporation, or was it intended for the individual stockholder. It was upon that question that the court divided; those in the minority believing that the exemption was intended in each case for the corporation, while the case as actually decided holds that the individual shareholder was entitled to the benefit from the exemption, and there is no adjudication that that exemption extended also to the corporation and its property.

Other cases in this court are cited by counsel for the appellee, which it is claimed are authority for their proposition of exemption of the corporate property from further taxation. Among them is the *State Bank of Ohio* v. *Knoop*, 16 How. 369. The sixtieth section of the general banking law of the State of Ohio, passed in 1845, required the bank to set off six per cent of each semi-annual dividend made by it for the use of the State, which sum or amount so set off was to be in lieu of all taxes to which the company or stockholders therein would otherwise be subject. Subsequently, the State passed an act providing for other and different taxation. The bank refused to pay, whereupon the treasurer of the county brought an action to enforce payment of such tax, and it was claimed on the part of the treasurer that the provision in the general banking law, above mentioned, was not a contract fixing the amount of the tax, but was a law prescribing a rule of taxation until changed by the legislature. This court held that it was a contract, and that as the operation of the law providing for a different tax increased the tax upon the bank, it was protected by the terms of its contract, and was not bound to pay that increase. The claim was also argued in that case, on the part of the State, that it was not within the power of any legislature to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and hence the provision in question, if construed as an attempt to accomplish that end, must be held to be void. But it was held in this court that the legislature had the power to pass the act in question, and that the bank was entitled to be protected from any further or other taxation. The question, which of the two properties, the bank or the shares of stock in the hands

of the shareholders, was liable to taxation was not in the case, and was not decided, but the language of the statute is totally different and much more comprehensive than the language of the charter now before the court. In the Ohio case the payment was to be in lieu of all taxes to which the company *or the stockholders* would otherwise be subject, embracing both propositions. The case is certainly no authority for the claim made on the part of this appellee.

The next case is that of *Dodge* v. *Woolsey*, 18 How. 331. This is substantially the same case as that just above mentioned, with the sole difference that the State in 1851 adopted a new constitution, in which it was declared that taxes should be imposed upon banks in the mode which an act subsequently passed in 1852 purported to carry out. An assessment was made upon the bank which would result in a larger tax than that provided for in the charter, and one of the shareholders in the bank commenced a suit in equity against the directors to prevent them from paying the tax, on the ground that the bank was exempt from any such payment, and that it would be a misapplication of the capital or profits of the bank if either were taken to pay such tax. This court again decided as to the validity of the contract in favor of the bank, and that there was no material distinction between the two cases arising from the fact that the State of Ohio had adopted a new constitution in the meantime, and under that had passed an act providing for a different method of assessing the property of the bank. This was held to be wholly immaterial as having no effect upon the validity and binding force of the original contract for exemption contained in the charter of the bank.

The same question again came before this court in *Jefferson Branch Bank* v. *Skelley*, 1 Black, 436, the only purpose of which case seems to have been to ask of this court a reëxamination of the questions already decided and a reversal of its judgments already twice rendered. This was refused, and the opinion closed by citing the language of the Chief Justice in Knoop's case as follows: "I think that by the sixtieth section of the act of 1845, the State of Ohio bound itself by a con-

tract to levy no higher tax than the one there mentioned upon the banks or stocks of banks organized under that law during the continuance of their charters. In my judgment, the words used are too plain to admit of any other construction." Nothing in those cases, construing the charter of the Ohio bank, affords any countenance to the claim made here.

One other case from this court is cited, that of *Gordon* v. *Appeal Tax Court*, 3 How. 133, 147. The question in that case depended upon the constitutionality of a tax imposed by the legislature of Maryland in 1841, it being alleged to be in violation of a contract made by the legislature in 1821. The legislature of Maryland in 1821 continued the charters of several banks to the year 1845, upon condition that they would make a road and pay a school tax, and it was provided that if any banks should accept and comply with the terms and conditions of the act the faith of the State was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act. Subsequently a tax was levied upon the stockholders as individuals, according to the amount of their stock, and it was held that by the legislation of 1821 continuing the charters of the banks upon conditions which had been accepted and performed by the banks, a contract was created relating to something beyond the franchise, and that it exempted the stockholders from the tax which the State endeavored to levy upon them thereafter.

This case lends some color to the claim made by the appellee, and yet we do not think it is decisive in favor of that claim. It was a peculiar case. The banks were all in existence, and the question was in regard to their accepting a condition upon compliance with which their charters were to be extended. The act of acceptance, it was stated, would be that of the individual shareholders. The tax was on the shares, and the question which was made was whether the act of the legislature of Maryland of 1841, in imposing a tax upon those shares, impaired the obligation of the contract theretofore entered into between the bank and the State of Maryland. There were two classes of banks, designated as the *old* and *new* banks. The *old* were those which were chartered previous to

the year 1821, and the *new* those which were chartered after the year 1830, and taxes had always, since the incorporation of the banks, been assessed upon their real and personal property in all the cities and counties of the State in the same manner as upon property of the same kind belonging to individuals, and they had always been paid by the banks up to this time. Mr. Justice Wayne in the course of his opinion puts the question: "Does it (the act in question) exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts, that a tax upon the parts would have upon the whole. Besides, the legislature, in proposing the terms and conditions of the act, used the word 'banks' with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charters. The acceptance of the act could only be made by the stockholders. They did accept, and the State recognized it as the act of the stockholders. It could not have been given or been recognized in any other way. True it is, that when accepted and recognized, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character or by whose assent it was to become a contract with the State, to ascertain the intention of the legislature in making the pledge, 'that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'"

The Justice then proceeded in the opinion to discuss the question as to what was meant by the language of exemption, and it was claimed that by reason of the peculiar nature of the act of acceptance, which was that of the stockholders as distinguished from the corporate action of the bank by the board of directors, the exemption was offered and directed to that authority which could accept the condition and perform it, namely, the stockholders themselves, and hence it was

worked out that the meaning of the legislature, under the circumstances of that case, was to exempt from further taxation the shares of stock in the hands of the shareholders. An examination of this case shows that the question of the exemption of both the corporation and the shareholders did not technically arise, although in the course of his opinion Mr. Justice Wayne gives an exemption to both, as above quoted. That case has been the subject of criticism in several instances, notably in the case of *People* v. *Commissioners*, 4 Wall. 244, and in *New Orleans City &c. Co.* v. *New Orleans*, 143 U. S. 195, and cases therein cited. Giving to the *Gordon case* the full weight of authority for the point actually decided, it does not hold that language, such as we have in the case under consideration, operates to exempt both the capital stock of the corporation and the shares of stock in the hands of its shareholders from all taxation beyond that mentioned in the charter, and we are entirely unwilling to unnecessarily extend the authority of that case so as to cover the question here. Long after that case was decided this court in many cases, notably that of *Van Allen* v. *Assessors*, 3 Wall. 573, and *People* v. *Commissioners*, 4 Wall. 244, recognized the separate and distinct character of the two properties, the capital stock and the shares thereof in the hands of individual shareholders, and such separate property in our opinion is strong proof of the limitation of the exemption to the property which is taxed.

Another case decided in this court is that of *Bank* v. *Tennessee*, 104 U. S. 493. That was a case where the questions arose under this same general statute of exemption. The taxing authorities had taxed the bank on all its real estate, consisting of its banking house, a portion of which only it used for the transaction of its own business and it rented the balance, and it was taxed also for three other pieces of real estate bid in by it upon sales under trust deeds to secure indebtedness. The charter provided that the bank might "purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell and exchange the same, and may hold such real or personal property or estate as may be conveyed to it to secure debts due the institution, and may

sell and convey the same." The Supreme Court of the State held that while the bank was not liable to be taxed on that portion of its building used by it for the transaction of its business, it was liable for the taxes on the remainder, and also on the other real estate purchased by it. The bank appealed from the decree of the state court, claiming an exemption of the entire property from taxation under its charter. The State did not appeal, although the decree of the court held a portion of the property non-taxable. It will thus be seen that the only question open for review here was, whether the portion actually taxed was exempt, and this court was of the same opinion as the Supreme Court of Tennessee, and held that as to the portion of the property not used for banking purposes, and as to the other real estate of the bank, it was not exempt from the payment of a tax thereon. The fact of the exemption from taxation of that portion of the property used by the bank in its business seems to have been assumed without argument or decision by this court. There is nothing in that case which affords support to the contention here.

Nor is there anything in the case of *Tennessee* v. *Whitworth*, 117 U. S. 129, tending to show that the court in the case of *Farrington* v. *Tennessee*, 95 U. S. 679, held that the exemption covered both properties, the corporation and the shares. Mr. Chief Justice Waite in the *Whitworth case*, on page 136, said in speaking of the *Farrington case*, that the question was whether the clause in the charter, there quoted, exempted the shares in the hands of the stockholders from any further taxation by the State. He said: "The court, three Justices dissenting, held that it did, because, as the charter tax was laid on each share subscribed, the further exemption must necessarily have been of the shares in the hands of the holders, although the tax as imposed was payable by the corporation. In all cases of this kind the question is as to the intent of the legislature, the presumption always being against any surrender of the taxing power." No comfort can be extracted from the remarks of the Chief Justice as even tending to show that the exemption clause covered both the property of the corporation and the shares of stock in the hands of individual shareholders.

Syllabus.

We have found no case in this court which is authority for the proposition, that language, such as is under consideration in this case, exempts from further taxation both the capital stock of the corporation and the shares of stock in the hands of individual shareholders. As the *Farrington case* decides that this language does import that the charter tax is laid upon the shares in the hands of individual shareholders, and that those shares are exempt from further taxation, that question is set at rest, and there being nothing in any case which extends that language to both properties, we hold that when it is made applicable to the separate shares in the hands of individual shareholders, it does not apply to or cover the case of the capital stock of the corporation, and that such stock is liable to be taxed, as the State may determine.

This determines the liability of the capital stock of the Union and Planters' Bank to taxation, and of course it overrules any claim on the part of that bank for exemption from taxation of its surplus or accumulated profits. The question whether such surplus could be taxed if the capital stock itself were to be regarded as exempt has also been decided in the preceding case of the Bank of Commerce. The decree of the Circuit Court must, therefore, be

Reversed, and the cause remanded to that court with directions to dismiss the bill with costs.

Mr. Justice White dissented.

MERCANTILE BANK *v.* TENNESSEE, FOR THE USE OF MEMPHIS.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 676. Argued January 20, 21, 22, 1896. — Decided March 2, 1896.

A judicial sale and conveyance, made under order of court, of the franchises of a corporation whose taxation is limited by the act of the legislature of the State incorporating it to a rate therein named, carries to the pur-

chaser, (if anything,) only the franchise to be a corporation; and a corporation organized to receive and receiving conveyance of such franchises, is not the same corporation as the original corporation, and is liable to taxation according to the constitution and laws of the State in force at the time of the sale, or which may be subsequently adopted or enacted, and is not entitled to the limitation and exemption contained in the original act of incorporation.

This also was a bill filed by the State of Tennessee against the Mercantile Bank for the purpose of collecting taxes alleged to be due plaintiff below under the statutes of that State.

The bill alleged that the legislature of Tennessee, by an act passed February 29, 1856, incorporated the Gayoso Savings Institution, and by the third section of the act it was provided that the institution should "pay to the State an annual tax of one half of one per cent on each share of the capital stock, which shall be in lieu of all other taxes." The company, as complainants allege, was duly organized under the act of incorporation, at what date it is not known, but at all events it was engaged in a general banking business in the city of Memphis from a date as early as 1856 down to the year 1869. In that year the institution failed, and a bill was filed by its president, John C. Lanier, in the proper court, for an administration of the affairs of the company as an insolvent corporation under the laws of the State. In the course of the proceedings one E. B. McHenry was appointed receiver of the assets of the company by the court, and on the 11th day of June, 1880, the court directed the receiver to sell the charter of the company. On the 28th of June of that year the receiver did sell the charter at public auction for the sum of $201, to Julius A. Taylor, and the sale was afterwards duly reported to and confirmed by the court. On the 26th of March, 1881, the legislature of the State passed an act changing the name of the company to that of the Mercantile Bank, and thereupon Mr. Taylor undertook to sell the charter to John R. Godwin and others, who organized the bank with a capital stock of $200,000. Since the year 1885 the company has been carrying on a general banking business in the city of Memphis, claiming to be organized under and to have all the rights, privi-

leges, and immunities originally granted to the Gayoso institution, and that by virtue of this claim neither the defendant company nor its shareholders had paid any taxes whatever to the State, county, or municipality since its organization, except the one half of one per cent as provided in the charter.

Complainant charged that it was wholly incompetent to sell the charter of the Gayoso Savings Institution, and that the defendant company had no right or title thereto, and especially that it had no rightful claim to immunity from taxation as contained in that charter, and it is averred that all the stock of the defendant company was subscribed for and issued since the adoption by the State, on May 4, 1870, of the constitution of that year. For the year 1891 the capital stock of the company was assessed at a valuation of $160,000. The bill then further alleged the various statutes of the State of Tennessee providing for the assessment of shares or of the capital stock of corporations, and various other allegations were made tending to show a valid assessment either upon the capital stock or the shares of stock in the hands of shareholders, if the claim for exemption was not well founded. It prayed for a discovery of the names of the shareholders, and that the court may determine whether the corporation or the shareholders have any immunity from taxation under the charter of that company; and that complainants have a decree against the defendant corporation for such taxes, with interest, etc.

To that bill the defendants filed a demurrer, and as grounds thereof stated that the defendant, the Mercantile Bank, was treated and sued in the proceeding as a corporation organized under the charter above mentioned, and exercising all the powers and franchises conferred by it and in the enjoyment of the privileges and immunities bestowed by it, and that, therefore, the complainants cannot treat the defendant as a corporation under such charter and at the same time deny its right and title thereto; that it could not treat the defendant as a corporation under that charter and then deny the existence of the charter; that it could not sue the said defendant as a corporation under the charter for the purpose of imposing burdens on it, and then deny the benefit of the

privileges and immunities conferred thereunder; that if the Mercantile Bank had no right or title to the charter, and if the charter was destroyed and ended by the judicial proceedings referred to, then there was no such corporation as the Mercantile Bank, and the business conducted under that name was a mere partnership, and the bill should have been filed against the persons composing such partnership. Another ground of demurrer was, that it appeared in the third section of the charter above mentioned, under which the bank was organized, and it appeared on the face of the bill, that the bank was to pay to the State an annual tax of one half of one per cent on each share of capital stock, which was to be in lieu of all other taxes, and that this constituted a contract between the State on the one side and the bank or shareholders on the other, under which both the capital of the bank and the shares of stock in the hands of the shareholders were exempt, and that the various acts of the legislature subsequent to the grant of that charter and providing for the assessment of the shares of stock in corporations, if applied to the defendant corporation, impaired the obligations of the contract, and were in conflict with section 10, article I of the Constitution of the United States, and were void.

This demurrer was overruled, with leave to insist upon the grounds thereof upon the hearing.

Complainants then, by leave of court, filed their amended and supplemental bill, adding various allegations not material to here notice, except that it was stated that by a stipulation between the parties the defendant corporation had assumed the payment of any liability that might be established against the shareholders therein, and that the defendant C. Hunter Raine should be made a defendant in his capacity as a shareholder, and that whatever liability should be established against him should be taken as established against all the shareholders in the defendant corporation, and that the liability of all those established should be assumed by the defendant corporation.

To avoid the labor and expense of taking proof and to

bring the case to a final hearing, the parties then agreed upon certain facts, among which were the following: The charter of the Gayoso Savings Institution and all amendments thereto referred to in the pleadings are set forth in the statement. The first section of the charter named certain individuals, and it was enacted that they and their associates and successors "be, and they are hereby, created a body politic and corporate by the name and style of the Gayoso Savings Institution, and by that name shall have succession," etc. Provision is then made for subscription for the capital stock, which is to be divided into shares of $50 each, and when 200 shares shall have been subscribed and the sum of one dollar per share paid thereon the shareholders may meet and elect five directors. The third section contains the exemption clause, which, as therein set forth, is as follows: "Said institution shall have a lien on the stock for debts due it by the shareholders, before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes." Section 4 granted to it the usual banking privileges as therein set forth. An amendment to this charter, passed March 26, 1881, changed the name of the Gayoso Savings Institution to the Mercantile Bank of Memphis. The statement also shows who were the owners of the capital stock of the Gayoso Savings Institution at the time of the commencement of the suit of John C. Lanier against the institution, mentioned in the original bill.

It is also stated that on the 5th day of March, 1881, Julius A. Taylor (the purchaser of the charter at the receiver's sale in June, 1880,) and eight other persons, who were associated with him, held a meeting as stockholders of the Gayoso Savings Institution, the minutes of which meeting are therein set out. The minutes set forth that on the 5th day of March, 1881, a meeting of the stockholders of the Gayoso Savings Institution was held in Memphis, at which certain stockholders were present and who were therein named, and that one of them was elected chairman of the meeting, and he reported that

the requisite number of shares, 200, had been duly subscribed to as follows, (giving the names of the subscribers,) and that the sum of one dollar per share each had been paid in. It was then moved and seconded to proceed to the election of six directors, which was carried, and such directors were then elected. Just before the time of this meeting the parties therein named signed and executed a stock subscription paper, which is in the following words: "We, the undersigned, agree to take stock in the Gayoso Savings Institution of Memphis, Tennessee, to the amount set opposite our respective names, and to pay the same in such manner as may be ordered by the board of directors, having this day paid in the sum of one dollar on each share." (Here follow the names of the subscribers.) These are the "stockholders" who are mentioned in the minutes of the stockholders' meeting. It is stated that this organization of the institution was continued regularly and without intermission, but without the actual transaction of any banking business until 1883, and that in April, 1883, the said Julius A. Taylor and his associates transferred their stock in the corporation, by regular and proper transfer of the certificates of stock, to John R. Godwin and his associates, and on April 17, 1883, John R. Godwin and his associates, at a stockholders' meeting of said corporation, increased the capital stock to $200,000, and began a regular banking business under said charter, and said corporation has, under that organization, continued said banking business down to the present date, with the same capital stock of $200,000.

The regularity of the organization from the 5th day of March, 1881, the date when Julius A. Taylor and his eight associates held the stockholders' meeting above mentioned, is not questioned. Of the $200,000 capital stock which was issued by John R. Godwin and his associates on the 17th of April, 1883, $180,000 was new stock, which was divided between said John R. Godwin and his associates. The Gayoso Savings Institution from the time it was originally organized under its charter in 1856 to the date when the bill was filed in the case of John C. Lanier and others in 1869,

regularly paid year after year to the State of Tennessee the commutation tax mentioned in its charter of one half of one per cent on each share of capital stock, and since the 5th day of March, 1881, the defendant corporation, under the name of the Gayoso Savings Institution and the Mercantile Bank, has constantly paid said commutation tax to the State down to this date. It is further stated that the defendants can produce no evidence of the payment of said commutation tax during the interval above shown. Proper copies of the decree of sale of the charter in the case of John C. Lanier against the Gayoso Savings Institution, the receiver's report of the sale and the decree confirming the same are set forth in the agreed statement, and it is admitted that a part of the papers in that case are lost or mislaid and cannot be found.

It was further admitted that on June 10, 1880, the receiver in the case of *Lanier* v. *The Gayoso Savings Institution*, filed a petition in the case asking for instructions as to what should be done with the charter. The petition was lost and no copy could be found. It was stated that there was never any transfer of the certificates of stock from the old stockholders in the Gayoso Savings Institution to Julius A. Taylor and his associates, unless as a matter of law such transfer can be made out as the legal effect of the facts above stated. With one or two exceptions all the old stockholders in the Gayoso Savings Institution were residents of the city of Memphis and the State of Tennessee, and none of them ever claimed any interest in the charter or the business being conducted thereunder or in the stock issued thereunder after the sale of the charter to the said Julius A. Taylor. It was alleged that "the defendants contend that the legal effect of the facts herein stated and of the steps taken in said case of *John C. Lanier* v. *The Gayoso Savings Institution*, as set forth above, was to make a legal transfer of the stock in said Gayoso Savings Institution from the persons who owned the same at the time said bill was filed in said case to the said J. A. Taylor and his associates and their successors. This proposition is denied by complainants, and the question is submitted for decision to the court." Further facts in relation to the assess-

Counsel for Parties.

ment of stock are also set forth, as are also certain cross-bills filed by certain depositors in the bank against Lanier, and others who were officers and directors in the bank, alleging fraud on their part in the reception of deposits and in the payment of certain debts or claims. Upon this agreed statement of facts and the bill and supplemental bill and demurrer the parties went to trial.

The decree in the chancery court was in favor of plaintiffs in error on all points. An appeal was taken by the State to the Supreme Court. That court reversed the decree of the chancery court, and held that the plaintiffs in error were not entitled to the immunity from taxation contained in the third section of the charter passed in 1856, and gave a decree against the shares of stock and surplus for the full amount of the taxes claimed by the city and county from the year 1888 down. The defendants below sued out a writ of error from this court, and assigned as ground of error that the judgment of the court should have been in their favor, denying the right of the State or city to recover any taxes from either the corporation or shareholders because of the immunity from taxation granted to them by the third section of the charter, and that a denial of that right deprived the defendants below of the immunity guaranteed to them by the contract contained in the third section of the charter, and that the tax laws affirmed to be valid against them are repugnant to the contract provision of the Constitution of the United States. As a second ground of error, it was stated that the court erred in denying to the corporation, plaintiff in error, an exemption from taxation on its surplus and undivided profits. And the third ground was stated to be error of the court in adjudging a liability of the corporation, plaintiff in error, to pay the privilege tax mentioned therein on the same ground of immunity granted to it by the third section of the charter.

Mr. T. B. Turley, (with whom was *Mr. L. E. Wright* on the brief,) for plaintiffs in error.

Mr. S. P. Walker, (with whom was *Mr. C. W. Metcalf* and *Mr. F. T. Edmondson* on the brief,) for defendant in error.

Opinion of the Court.

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

By the original charter granted to the Gayoso Savings Institution in 1856, under which an organization was effected and the institution did business for many years, an exemption was granted to it similar to that granted in the case of the *Bank of Commerce*, just decided, *ante*, 134. That exemption was applicable to the shareholders upon their shares of stock, and did not apply to the capital stock of the institution. The shareholders in this case have been assessed at a greater rate than is permitted by the third section of the charter in question, and the assessment would, therefore, be void if that section is applicable to this case.

The corporation plaintiff in error can make title to the charter in question only by virtue of the sale thereof under the decree in the suit of Lanier against the Gayoso Savings Institution, which was commenced in 1869. There is not a particle of evidence which in terms shows the transfer of the shares of stock in that institution owned by its shareholders at the time when the charter was sold, nor is there any evidence from which such transfer of stock by those shareholders to Taylor and his associates can properly be inferred; neither they nor their assignees of the charter can claim to be the same original corporation by reason of any previous purchase of specific shares held by the former shareholders. The record shows that the receiver was ordered "to sell at public auction to the highest bidder for cash the charter of the Gayoso Savings Institution, together with all the rights and privileges thereunder." It was the charter which the receiver assumed to sell and which alone he did sell, and not any specific shares of stock. The report of the receiver shows that under that order, which was made on the 11th of June, 1880, he advertised the charter of the Gayoso Savings Institution for sale on the 29th day of June, 1880, "together with all rights, privileges and franchises thereunder," and that on the last named day the charter was struck off and sold to Julius A. Taylor at and for the sum of $201, "his being the highest, best and

last bid; that such bid was followed by paying to the receiver the amount of same in cash, which the receiver holds subject to the order of the court." On the 21st of July, 1880, the chancellor made a decree, in which it is stated that the cause "came on to be further heard on the report of sale by the receiver filed herein, which is in words and figures following: [Here insert report;] and there being no exception to said report, the same is in all things confirmed, and the title to the charter of the Gayoso Savings Institution, with all the powers, privileges and franchises thereunto belonging, is hereby vested in J. A. Taylor, his heirs and assigns." This citation from the record is clear evidence of what the transaction purported to be. There is no mention or hint of any assignment or transfer of the shares of stock to the purchaser of the charter by the then owners of such shares, and it seems to be quite clear that none such was ever made. At any rate, there is not the slightest proof upon the subject showing affirmatively that it was made. At the time of the sale of the charter under the decree in the Lanier suit the constitution of Tennessee had been adopted by the people in 1870, and since that time has been in full force and operation. That constitution prohibited exemptions from taxation, and provided that all property, real, personal or mixed, should be taxed, excepting such as in explicit terms was exempt, stating what property might be and what should be exempt from taxation, and directing that all the rest shall be taxed.

We may inquire now, what was the effect of the sale of the charter under the decree in the *Lanier case?* We have been referred to no statute authorizing the sale of charters of corporations circumstanced as the Gayoso Savings Institution was at the time of this sale, and it is questionable, to say the least, whether any title to the charter passed by the proceedings under the decree in the *Lanier case.* In order to show the existence of a contract of exemption the corporation plaintiff in error must connect itself with and show that it or its shareholders are entitled to the benefit of the provision of exemption contained in the charter of 1856. Certainly no greater power was exercised by the court of chancery in de-

creeing the sale of the charter in the Lanier suit than would have been the case had a statute existed providing for the mortgaging of the charter, and its subsequent sale at foreclosure, on breach of condition named in the mortgage. Such a sale, it has been held, does not transfer to the purchaser the franchise to be a corporation, but only the right to reorganize as a corporation, subject to the laws, constitutional and otherwise, existing at the time of the reorganization. *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 112 U. S. 609. The franchise to be a corporation is distinguished from the franchise to exercise as a corporation the banking powers named in this charter. The exemption from taxation contained in the third section of the act of 1856 was a personal privilege in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter, and there is no express or clear intention of the law requiring that exemption to pass as a continuing franchise to the purchaser thereof. *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244. In the face of the constitutional provision prohibiting exemption, it can still less be claimed that the sale of the charter carried the exemption. All that Mr. Taylor and his associates could have acquired by the purchase of the charter, after the adoption of the constitution of 1870, if they acquired anything, were the rights and privileges mentioned in the charter, and subject to the provisions of the constitution and laws existing at the time of such purchase.

The meeting of Julius A. Taylor and his eight associates on the 5th of March, 1881, was nothing more than an attempt to reorganize by reason of the sale to Taylor under the decree in the Lanier suit. Immediately prior to the organization of that meeting, Taylor and his associates had subscribed for and agreed to take stock in the Gayoso Savings Institution of Memphis, Tennessee, to the amount set opposite their respective names, and to pay the same in such manner as might be ordered by the board of directors, having that day paid in the sum of one dollar on each share. These subscribers for stock at once held a meeting, assuming to act as stockholders of the

Gayoso Savings Institution, and attempting to reorganize that institution by virtue of the purchase of the original charter, and they assumed by these proceedings to become an organization and corporation known as the Gayoso Savings Institution. It is, at least, very doubtful whether they succeeded in this way in accomplishing that purpose. However that may be, they claimed to be and assumed to act as a corporation known by that name, and there was, so far as appears, no other corporation of that name and no other proceeding on the part of any one claiming to be that corporation or to have any rights therein. Assuming to act as a corporation by the name of the Gayoso Savings Institution of Memphis, Tennessee, is by no means the same as being in fact the original corporation whose charter they purchased and whose corporate name they took. So far, by their action they had not become a corporation at all, but were simply assuming to be one. The legislature, however, passed an act on the 26th of March, 1881, changing the name of the Gayoso Savings Institution, which these stockholders claimed and assumed to be, to the name of the Mercantile Bank of Memphis, and thus recognized them as a corporation, and from that time the corporation continued regularly and without intermission until 1883, when Taylor and his associates transferred their stock, by regular and proper transfer of the certificates of stock, to John R. Godwin and his associates, who, since the 17th of April, 1833, have been doing a regular banking business under the charter down to the present time. They are the successors of the purchasers of the charter, and have been substantially recognized as a corporation by the legislature.

It may thus be that the corporation plaintiff in error is in fact organized and doing business under the general provisions of the charter of 1856 by virtue of the sale of the charter and the recognition of the legislature, and exercising the banking franchise and other rights granted therein to the original shareholders, but not as the identical corporation originally incorporated, and for that reason it is without the immunity from taxation contained in the third section of the charter. There is nothing, therefore, legally inconsistent in

treating the corporation of plaintiff in error as a corporation doing business by virtue of the charter of 1856, and the legislative recognition accorded to Taylor and his associates in 1881, while at the same time the exemption contained in that same charter is held not to have passed by any of the proceedings above mentioned. This view of the case disposes of the objection taken by plaintiff in error to the position of the State as being inconsistent in that it assumes by taxing the corporation plaintiff in error or its shareholders and by its bill of complaint in this suit to treat the former as a corporation, while at the same time denying it the exemption contained in the third section of the act of 1856. We agree that the bill of complaint and the supplemental bill in this suit both proceed upon an implication that the corporation plaintiff in error is actually a corporation under the provisions of the charter of 1856 alone, and that it has no other charter under which to justify its corporate existence than the one just named; but for the reasons already given, the attitude of the State is not inconsistent in treating the plaintiff in error as a corporation, and at the same time denying to it any title to the exemption claimed. The corporation may exist under and by virtue of the purchase of the charter at the receiver's sale, and the legislative recognition and the assumption of the State that it is a corporation, and yet not have the title to the exemption, because it is not in fact or in law the same corporation originally incorporated.

The judgment must be

Affirmed.

MR. JUSTICE WHITE concurred in the result.

MERCANTILE BANK *v.* TENNESSEE AND SHELBY COUNTY, No. 677, by stipulation, abides the event of the foregoing case.

PHŒNIX FIRE AND MARINE INSURANCE COMPANY *v.* TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 269. Argued January 20, 21, 22, 1896. — Decided March 2, 1896.

A state statute granting to a company incorporated by it "all the rights and privileges" which had been granted by a previous statute of the State to another corporation, does not confer upon the new company an exemption from taxation beyond a defined limit which was conferred upon the other company by the act incorporating it.

The ruling of the highest court of a State, in a suit to recover taxes alleged to be due, concerning the effect to be given to a former judgment of the same court as to the liability of the same parties to pay similar taxes previously assessed, is not subject to review by this court.

THE case is stated in the opinion.

Mr. B. M. Estes for plaintiffs in error.

Mr. S. P. Walker, (with whom was *Mr. F. T. Edmondson* on the brief,) for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This was a bill filed by the plaintiffs below in the Chancery Court of Tennessee for Shelby County, in October, 1891, to recover taxes alleged to be due from the corporation, plaintiff in error, or its stockholders, to the city of Memphis for the years 1888 to 1891, inclusive. The complainant's bill alleged that neither the defendant company nor its shareholders had any immunity from taxation, and that if any such immunity existed it could not operate to protect both the shareholders and the capital stock. Judgment was accordingly prayed in the alternative against the corporation or the stockholders according as the taxes might be held to have been laid upon one or the other. A demurrer was interposed to the bill, which was sustained in the court below, but upon appeal to

the Supreme Court, that judgment was reversed. *Memphis* v. *Phœnix Insurance Co.*, 7 Pickle, 566. The latter court held that the charter of the company contained no immunity from taxation, and that both its shares of stock and capital stock were subject to the taxing power of the State and municipality. The case was thereupon remanded to the court below for further proceedings. It having been determined by the Supreme Court that the complainant upon the allegations of the bill was entitled to a discovery of the names and residences of the stockholders, a stipulation was entered into between the parties to avoid the necessity of the discovery, by which it was agreed that the corporation would assume any liability that might be established against the stockholders, and that a decree might be entered accordingly, and that the defendant Johnson should be made a defendant in his capacity of a stockholder and as the representative of all the others.

By its answer the defendant company claimed immunity from taxation both for itself and its shareholders, and also set up a plea of *res judicata*, and alleged various objections to the validity of the several assessments upon which complainant claimed taxes due to the State. The case was duly tried, and judgment for the complainant was rendered by the trial court, in which it was adjudged that by the charter neither the defendant company nor its shares of stock had any immunity from taxation, and that both were, for the years mentioned in the bill, subject to the taxing power of the State. The court decided the Federal question made by the defendants below against them, and adjudged that the state tax laws set up in the record, under which the taxes were levied, were not violative of the Constitution of the United States, or void as claimed by the defendants. This judgment was in substance affirmed by the Supreme Court, and the defendants below sued out a writ of error, and the record is now here for review.

The question first arising is as to the correctness of the judgment holding that the plaintiffs in error were not entitled to any immunity from taxation either as to the capital stock or the shares of stock in the hands of stockholders. The

following are the facts: The Bluff City Insurance Company of Memphis was duly incorporated by an act of the legislature of Tennessee, and by section ten of the act of incorporation it was enacted "that said company shall pay to the State an annual tax of one half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." On the 20th day of March, 1858, the legislature of Tennessee incorporated the De Soto Insurance Company, and that charter was amended on the 30th of March, 1860, and by section eleven of that act "all the rights, privileges *and immunities*" of the Bluff City Insurance Company were granted to the De Soto Insurance Company. On the 11th day of March, 1867, the legislature incorporated the Washington Fire and Marine Insurance Company of Memphis, Tennessee, and by that act "all the rights and privileges" (omitting the word "immunities") of the De Soto Insurance Company of Memphis, Tennessee, granted to it in its charter or amendments were granted to the Washington Fire & Marine Insurance Company, above named, and by the act of the legislature, approved March 28, 1881, the name of the Washington Fire & Marine Insurance Company was changed to the Phœnix Fire & Marine Insurance Company of Memphis, Tennessee, being the plaintiffs in error. The act of incorporation and the amendments thereto were duly accepted by plaintiff in error and its stockholders, and since that time the business of fire and marine insurance has been conducted by it in Memphis, under the last corporate name.

It will thus be seen that the Bluff City Insurance Company was to pay to the State a certain annual tax on each share of capital stock subscribed, which was declared to be in lieu of all other taxes, and the question is now presented, whether by virtue of these various statutes the plaintiff in error was granted an immunity from taxation to the same extent as that given to the Bluff City Insurance Company and to the De Soto Insurance Company. Is immunity from taxation granted to plaintiff in error under language which grants "all the rights and privileges" of a company which has such immunity? In statutes, as is sometimes the case in legal

documents, more words are occasionally used than are necessary to convey the meaning of those who passed the statute or executed the document, and it may happen that this very excess of verbiage tends to confuse rather than to enlighten one as to the meaning intended. The words "rights, privileges and immunities" when used in a statute of the kind under consideration are certainly full and ample for the purpose of granting an exemption from taxation contained in the first or original statute, and when in granting to still another company certain rights the word "immunities" is dropped, its absence would seem and ought to have some special significance. In granting to the De Soto company "all the rights, privileges and immunities" of the Bluff City company, all words were used which could be regarded as necessary to carry the exemption from taxation possessed by the Bluff City company, while in the next following grant, that of the charter of the plaintiff in error, the word "immunities" is omitted. Is there any meaning to be attached to that omission? And, if so, what? We think some meaning is to be attached to it. The word "immunity" expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an "immunity" than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption. It must always be borne in mind in construing language of this nature that the claim for exemption must be made out wholly beyond doubt; for, as stated by Mr. Justice Harlan, in *Chicago, Burlington & Kansas City Railroad* v. *Guffey*, 120 U. S. 569, 575: "It is the settled doctrine of this court that an immunity from taxation by a State will not be recognized unless granted in terms too plain to be mistaken." See also *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279. In leaving out a word which, if used, would be regarded as specially and particularly including an exemption from taxation granted to another company, it seems to us that a very grave doubt is cast upon the title of plaintiff in error to the exemption claimed, and in such case the existence

of a well founded doubt is equivalent to a denial of the claim.

The learned counsel for plaintiff in error have cited many statutes of the State of Tennessee in which it is said the word "immunities" is sometimes used where no exemption from taxation was intended, and he quotes a section from one act, (Acts 1866–'7, Private, section 49 of an act, page 155,) which grants "all the powers, privileges and immunities" of another company that had no exemption, and in another case there was granted "all the rights, franchises and privileges" of a railroad company which had an exemption from taxation. Many other instances of a like nature are cited. The result of it is to occasion great difficulty in determining what was really intended by the legislature in these various acts. The learned counsel for plaintiff in error also state that about the time these charters in question were granted the legislature customarily expressed the purpose to tax corporations when no exemption was intended. The inference is sought to be drawn in favor of exemption, if the legislature did not affirmatively grant the right to tax. We cannot assent to any such view, and we could come to no such conclusion from an examination of the general statutes cited by counsel. It is a complete overturning of the universal rule in regard to taxation. The power and the right to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption.

We can see nothing in the "surrounding circumstances" which counsel claim should influence our examination and conclusion as to the meaning of these statutes, that in any way induces the belief that an exemption was plainly intended. Our attention has not been called to circumstances which we should regard as of that nature, nor is our judicial knowledge of them sufficient in kind or degree to cause us to conclude that this exemption was intended to be granted to plaintiff in error. We do not find that at this time there was, as counsel insist, any settled rule of the courts that the word "privileges" always embraced exemption from taxation, or that "rights and privileges" and "privileges and immunities" were used

indiscriminately and interchangeably, and always included such exemption. The different words above quoted were undoubtedly used in different statutes, and sometimes it might be insisted that one thing was meant and sometimes another, but we cannot find that there was any well known and definite rule governing the courts of Tennessee at that time which made the words "privileges" or "rights," when used in cases of this nature, include, beyond any doubt and in all cases, an exemption from taxation.

In *Wilson* v. *Gaines*, 9 Bax. 546, it was held by the Supreme Court of Tennessee that as the State in its constitution (article 11, section 7, constitution 1834) used in the same connection all the words "rights," "privileges," "immunities" and "exemption," each of these words was to be given, in statutory interpretation, a meaning so limited as not to include anything expressed by the others, and that when any one of them is found in a statute the legislature must be conclusively presumed to have used it in its restricted sense. This decision of the Tennessee court tends very strongly to the idea that the words "immunity" or "exemption" would have been required to secure the exemption to a company in a case like this. It is true that this view was not assented to by this court as being the correct one, *Tennessee* v. *Whitworth*, 117 U. S. 139, 146, and it is simply cited for the purpose of showing what the Tennessee court did decide in regard to the meaning of its own constitution in reference to this subject.

That the legislature was, about the time in question, freely incorporating various companies and granting them exemption from taxation with considerable liberality is not a sufficient reason to induce this court to depart from the universal and well established rule making a claim for exemption a matter to be proved beyond all doubt. The circumstance which we regard as very significant and which has already been alluded to, consists in the omission of the word "immunities" in the grant to plaintiff in error. That omission we attach great weight to, and the least that can be said of it is that it involves the question in doubt.

It cannot be denied that the decisions of this court are

somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, where under the laws of Missouri (section 4 of the act of March 2, 1869) there was a provision that the consolidated companies should be "subject to all the liabilities and bound by all the obligations of the companies within this State" and "be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place." The question was said to admit of doubt, whether under the name "franchises and privileges" an immunity from taxation passed to the new company. Various cases are cited in the opinion, which was delivered by Mr. Justice Brown, showing the grounds taken by this court in such cases. In *Chesapeake & Ohio Railway* v. *Miller*, 114 U. S. 176, (a foreclosure case,) it decided that an immunity from taxation enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, "and should succeed to all such franchises, rights and privileges as would have been had by the original company but for such sale and conveyance." The case followed that of *Morgan* v. *Louisiana*, 93 U. S. 217, (also a foreclosure case,) where it was held that the words "franchises, rights and privileges" did not necessarily include a grant of exemption or immunity from taxation. See also, to same effect, *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 112 U. S. 609. The case of *Pickard* v. *Tennessee &c. Railroad*, 130 U. S. 637, 642, may also be referred to, upon the point that exemption, although it might be granted, must be considered as a personal privilege not extending beyond the immediate grantee unless otherwise so declared in express terms, and it was therein declared that such immunity

would not pass merely by a conveyance of the property and franchises of a railroad company, although such company might itself hold property exempt from taxation. In that case Mr. Justice Field, speaking for the court, said: "It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include an immunity in the term franchise, it will not be so construed. It can have its full force by confining it to other grants to the corporation." This language is referred to by Mr. Chief Justice Fuller in the case of *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, where, at page 297, he says: "We do not deny that an exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect," citing the *Pickard case.*

Looking at the other side, we find the case of *Humphrey* v *Pegues*, 16 Wall. 244, where there was a grant to a railroad company of "all the rights, powers and privileges" granted by the charter of another company which exempted the property of such other company from taxation, and it was held that the property of the first company was thereby also exempted. Mr. Justice Hunt, in delivering the opinion of the court, said that "a more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage or special exemption from a burden falling upon others." Again, in *Tennessee* v. *Whitworth*, 117 U. S. 139, it was held that a right to have shares in its capital stock exempt from taxation within the State was conferred upon a railroad corporation by a state statute granting to it "all the rights, powers and privileges," or granting it "all the powers and privileges" conferred upon another corporation named, if the latter corporation possessed by law such right of exemption. The question in that case

arose as to the meaning of certain statutes passed by the legislature of Tennessee, resulting in the consolidation of certain railroads therein mentioned. In the course of his opinion Mr. Chief Justice Waite cites the case of *Philadelphia, Wilmington & Baltimore Railroad* v. *Maryland*, 10 How. 376, 393, where Mr. Chief Justice Taney, speaking of a statute which authorized the union of two railroad companies, and secured to the union company "the property, rights and privileges which that law or other laws conferred on them," (the separate companies or either of them,) said that such language extended to the union company the exemption from taxation contained in the charter of one of the uniting companies. Mr. Chief Justice Waite, continuing, in his opinion said: "As has already been seen, the word 'privilege' in its ordinary meaning, when used in this connection, includes an exemption from taxation." The decision in this last case should be confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word "privilege," it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out.

The later cases of *Pickard* v. *Tennessee &c. Railroad*, 130 U. S. 637, and *Wilmington &c. Railroad* v. *Alsbrook*, 146 U. S. *supra*, show that there must be other language than the mere word "privilege" or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted. The case of *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, adds nothing to the discussion on either side. The particular point was not in that case, but it seems to be cited by counsel for plaintiffs in error for the purpose of showing what was the general condition of the State at the time of the adoption of the constitution in 1834, and what was the policy of the State in regard to internal improvements, which the constitution declared ought to be encouraged. The incorporation of an insurance company would hardly come within the most liberal meaning of the term "internal improvements."

If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach.

Second. Concluding, as we have, that this plaintiff in error, insurance company, is not exempt from taxation by the language of the statutes above mentioned, we come to the consideration of the second defence interposed by its shareholders. It seems that some time in the year 1873 the shareholders or some of them were sued by the city of Memphis to collect from them certain taxes alleged to be due that city for the year 1872 upon the shares of stock held by them. By the decision of the Supreme Court of Tennessee the city recovered a judgment. A stipulation was then entered into between the parties to that suit, which is in the record, by which it appears that the same questions involved in that suit were fully and fairly presented in the case decided in favor of the plaintiffs, at that term of court, wherein the State of Tennessee and Shelby County were complainants and Napoleon Hill and others, stockholders in the Memphis Fire and General Insurance Company, were defendants, and which action had been carried to the Supreme Court of the United States by writ of error for its decision of the questions, and, therefore, to save the expense of argument in the case, it was agreed by counsel for all parties that the Memphis city case should abide by the decision of *Tennessee* v. *Hill*, which should be conclusive upon the parties to the stipulation in all things the same as though actually rendered in that case. If the decree in the *Hill case* were affirmed, then this decree was to be affirmed, and if the other should be reversed, then this was to be reversed. After the signing of that stipulation, the *Hill case* was duly prosecuted by writ of error and argued before the Supreme Court of the United States, where the judgment in favor of complainant was reversed and the cause remanded to the Supreme Court of Tennessee with directions to enter its decree therein for the defendant Hill. This was done, and, in accordance

with the stipulation above mentioned, a decree was thereupon entered in the Memphis city action, reversing the judgment in favor of plaintiff, and adjudging and decreeing that the tax levied and assessed by the city of Memphis upon the defendant's share of stock was illegal, and adjudging that the city of Memphis could not legally assess said shares of stock for taxation, in the hands of the owners thereof, and that such shares were exempt from any and all municipal taxation, and the city and its officers were perpetually enjoined from collecting or proceeding to collect such taxes. This judgment was entered by consent, and pursuant to the stipulation of the parties entered into at the time the writ of error was sued out in the *Hill case* and it is now set up and offered in evidence as an adjudication in favor of the shareholders of the insurance company who are admitted to be the direct successors of the shareholders of the company sued in the former action, and the decision of the state court, refusing the benefit of that adjudication to the shareholders, is claimed to have been error, and to present a Federal question for review by this court. The judgment is not claimed as an adjudication or estoppel in favor of the corporation, because the corporation was not a party to the suit.

We think the decision of the Supreme Court as to the weight to be given the judgment is not reviewable by us because it is not a Federal question. The former judgment determined that, as between the city and the shareholders, the latter were not subject to pay the taxes for the years specified. In the action now under consideration we have determined that there was no immunity conferred either upon the corporation or the stockholders by the statutes cited. On the trial of this action the former judgment was offered in evidence by the shareholders, and it was held to constitute no bar to the maintenance of this action by the plaintiff, nor did it operate as an estoppel upon their right to claim taxes for subsequent years. The judgment offered in evidence was the judgment of a state court, and the refusal to accord to it all that was claimed for it in the nature of an estoppel by counsel for plaintiffs in error was, in any event, no more than

a refusal to give to a judgment of one of its own courts that degree of force as evidence which it was by the general law entitled to. In no event was it anything other than error committed by the court below in regard to the general law or rule of evidence, which has nothing of a Federal question connected with it. It is entirely different from the case of a refusal of a state court to give the proper effect to a judgment of a court of the United States. If a state court erroneously refuse to give such weight and effect to a judgment of one of the courts of the United States a Federal question arises, which is within the jurisdiction of this court to review upon writ of error to the Supreme Court of the State. *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-house Co.*, 120 U. S. 141. Although no higher sanctity or effect can be claimed for the judgment of a Federal court than is due under the same circumstances to judgments of state courts in like cases, *Dupasseur* v. *Rochereau*, 21 Wall. 130, 135; *Embry* v. *Palmer*, 107 U. S. 3, yet in the case of a judgment of the former court the Constitution provides that full faith and credit shall be given it, and whether it has or has not been given it by a state court is a Federal question, while if the state court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own courts and among its own citizens, that error is not subject to review by this court, because it constitutes no Federal question.

If it were otherwise, every decision of a state court, claimed to be erroneous, which involved the failure to give, what the defeated party might claim to be the proper weight to one of its own judgments, would present a Federal question, and would be reviewable here. There is no question of contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a state court operated as an estoppel against the plaintiff below, and prevented the state court from granting it the relief to which it would otherwise be entitled. In granting relief it was bound to consider the Federal question, as to whether there was or was not a contract of immunity, and that question was open to review here and we have

just reviewed it. It is moreover quite doubtful whether the court below committed any error, even if the question were to be regarded as of a Federal nature, and open to us for review. *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 314.

It is said that a suit for taxes for one year is no bar to a suit for taxes for another year; that it is not the same transaction, and the judgment in a prior action can never operate as an estoppel other than as to those matters which were in issue and controverted, and upon the determination of which a finding or verdict was rendered. It is not necessary in this case, however, to determine whether there was any one particular fact in issue and litigated in the first case, and which would be closed from further controversy, and which, as thus decided, would preclude a recovery in this case. We hold that the question in any event, as presented in this case, was not a Federal one.

These views render a discussion of any other question in the case unnecessary and lead to an affirmance of the judgment herein.

Affirmed.

MR. JUSTICE WHITE dissented.

MEMPHIS CITY BANK *v.* TENNESSEE FOR THE USE OF MEMPHIS.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 674. Argued January 20, 21, 22, 1896. — Decided March 2, 1896.

A corporation organized for the purpose of doing an insurance business, under an act of the legislature of the State of Tennessee passed before the adoption by that State of its constitution of 1870, with a provision in the charter limiting the rate and extent of taxation by the State, does not continue to enjoy the exemption if its corporate objects and business are changed to those of a bank by legislation enacted subsequent to the adoption of that constitution.

Statement of the Case.

A judgment in favor of the exemption of its shareholders from taxation in excess of the statutory limit, entered before the insurance company was changed to a bank, cannot be upheld as *res judicata* in an action brought after the change to recover such excess.

THIS suit is similar to those which precede, and is brought for the collection of taxes against the corporation, plaintiff in error, or its stockholders. It was tried upon an agreed statement of facts. Those which are material to the present inquiry are the following: The defendant corporation in January, 1870, under its then name of the Memphis City Fire and General Insurance Company, was duly organized under the charter granted to it on the 24th of January, 1870, and the organization under it was in all respects valid and no question is made upon the same. The defendant from that date down to the year 1887 carried on an insurance business under its charter in the city of Memphis. In that year, in pursuance of the powers granted in chapter 190, Acts of 1887, the corporation (also claiming the right to do so under the powers conferred by its charter) changed its business from that of insurance to that of banking, and since that date down to the present time has exclusively conducted a banking business in Memphis. Section 2 of the original charter empowers the corporation to receive in trust from any person, moneys, jewels, plate and other valuable things, and to give acknowledgment therefor in such form as the directors of the corporation may deem best suited to the protection and convenience of depositors and the company. And the corporation was also authorized to loan its surplus funds on any public stock, or stock of any incorporated company, or of the United States, or either of them, or to invest such funds in any real or personal estate, choses in action or other good securities. Section 7 provides that there shall be levied a state tax of one half of one per cent upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as the other taxes are by law collected, which shall be in lieu of all other taxes and assessments. Chapter 190 of the Acts of 1887 enacted that any company incorporated under the laws of Tennessee, having by its charter the right to receive moneys

in trust or otherwise, should be held to have the power to receive deposits, and loan the same and its capital stock on any kind of commercial, or business paper, or real estate, buy and sell exchange, and all kinds of public or private securities and commercial paper. It was also further provided in that act "that the exercise of any of the granted powers should not operate to forfeit any franchise, right, power, privilege or immunity granted in the original charter, and that the non-user of a part of a corporation's powers, privileges and franchises should not have the effect of forfeiting any franchise, right, power, privilege or immunity contained in its charter."

On the 23d of January, 1889, the legislature passed an act changing the name of the corporation plaintiff in error from that of the Memphis City Fire and General Insurance Company to that of the Memphis City Bank, and since that time it has conducted business under the latter name. From its first organization in 1870 down to the present time it has regularly and constantly paid to the State of Tennessee the charter tax provided for in section seven of its charter, and has regularly filed with the comptroller of the State the statement required and called for by the seventh section of that charter.

The opinion of the Supreme Court of Tennessee delivered upon the demurrer to the bill in this case will be found reported in 7 Pickle, 574, under the name of *Memphis* v. *Memphis City Bank.* In the year 1872 the State of Tennessee, the county of Shelby, and the city of Memphis undertook to tax the shares of stock of the Memphis City Fire and General Insurance Company at their market value in the hands of the shareholders, at the same rate as other property was taxed. The shareholders denied this right and claimed an exemption from all taxation except to the extent of the tax provided for in the seventh section of the charter. Thereupon an agreed case was made up between the parties, the State of Tennessee on the one side and Napoleon Hill, a stockholder in the company, on behalf of all the other stockholders on the other side. The case was made in conformity with the laws of Tennessee, and the question submitted to the

Counsel for Parties.

Second Chancery Court of Shelby County and State of Tennessee to determine whether the said county or State had the right to impose a tax upon the shares other than the one half of one per cent provided for in its charter. The case was regularly heard in the Second Chancery Court of Shelby County, and decided in favor of the shareholders, and against the power to tax. It was then carried to the Supreme Court of Tennessee, where the decision of the chancery court was reversed, and the power to tax affirmed. The case was heard in the Supreme Court in connection with several cases of the same character under the title of the *City of Memphis* v. *William M. Farrington*, 8 Baxter, 539. Mr. Hill sued out a writ of error from this court in behalf of himself and the other shareholders, and the case was regularly heard in this court upon the Federal question, and upon that hearing this court reversed the decree of the Supreme Court of Tennessee and affirmed that of the Second Chancery Court of Shelby County, and upon a mandate properly issued from this court to the state court a judgment was entered in favor of said Hill and the other shareholders in the company. The case, as decided by this court, is reported under the name of *Farrington* v. *Tennessee* 95 U. S. 679. The plaintiffs in error herein rely upon that final decree as being a full, final, and complete adjudication of all questions involved in this case, and as being *res judicata* and binding upon the parties hereto.

Upon these agreed facts the case was tried and judgment given for the shareholders, which upon appeal was reversed by the Supreme Court of Tennessee, and judgment entered for the city of Memphis for the recovery of taxes upon the shares of stock in the Memphis City Bank and upon the surplus and undivided profits for the years therein named, and it is to review this judgment that the plaintiffs in error come here.

Mr. T. B. Turley, (with whom were *Mr. T. M. Scruggs* and *Mr. L. E. Wright* on the brief,) for plaintiffs in error.

Mr. S. P. Walker, (with whom were *Mr. C. W. Metcalf* and *Mr. F. T. Edmondson* on the brief,) for defendants in error.

Opinion of the Court.

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

The question in this case is whether the corporation plaintiff in error, could, while availing itself of the general act, (chapter 190, Acts of 1887, above referred to,) change its business from that of insurance, as provided in its charter granted in January, 1870, to that of banking, and still retain the exemption from the payment of any taxes other than those provided for in section seven of that charter. After such change of business and by virtue of section fourteen of the general revenue law of the State, passed in 1887, the State assumed to tax the plaintiffs in error at a greater rate than that provided for in the original charter, and it is to collect these taxes that this suit is brought. At the time the act of 1887 (chapter 190) was passed, under which the corporation plaintiff in error claimed the right to change its business, (while also at the same time claiming that right under its original charter,) the constitution of Tennessee, adopted in 1870, was in full force. That constitution provided, article 2, section 28, that "all property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the State, counties, cities or towns." By section 8, article 2 of the constitution of 1870 it was provided, among other things, "that no corporation shall be created or its powers increased or diminished by special laws, but the general assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may at any time be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested."

Under these two provisions of the constitution, giving effect to both, the legislature could not even by general law grant or preserve an immunity from taxation, not otherwise existing, total or partial, to the capital stock or shares of a corporation. The twenty-eighth section of the second article of the constitution requires that all property shall be taxed except such as is exempt by that section, or is by that section authorized to be exempt by the legislature, and this kind of property in question

in this case does not come within either class spoken of in that section. We think that the change from the business of insurance to that of banking is a material and radical change, and to such an extent that the legislature, under the constitution of 1870, would have no power to continue an exemption from taxation granted by the charter to the insurance company so that it should continue to exist in favor of a company exercising an exclusively banking business. The legislature was powerless in the face of the constitutional provision mentioned to provide "that the exercise of any of the granted powers should not operate to forfeit any franchise, right, power, privilege or immunity" granted in the original charter. The Supreme Court of Tennessee has so construed the constitution. 7 Pickle, 574.

That court holds that the legislature could not, by enacting such a proviso in connection with the authority given by it to a corporation to change its business, transfer an exemption from taxation granted to that corporation while exercising the powers originally granted to it by its charter prior to the adoption of the constitution of 1870.

The substantial effect of chapter 190, Acts of 1887, when made applicable to any company having, by its charter, the right to receive moneys in trust or otherwise, was to grant a new charter to the extent of granting banking powers, and the company, availing itself of the privileges mentioned in such act, took them subject to the constitution and laws then in force. It was not, properly speaking, a mere act increasing the powers of the corporation so that such corporation could perform other acts of a nature similar to those which it was already authorized to perform by its original charter. It was not an increase but it was a change of powers to the extent that those granted by the act of 1887 were of a totally different character and nature. An insurance corporation differs radically from a banking corporation, and the powers given to one cannot be exercised by the other without some authority granted by the State through its legislature. This corporation, plaintiff in error, since the passage of the act in question, has not only availed itself of the privileges therein granted,

but it has totally abandoned the exercise of the powers originally granted to it in its charter of 1870, and by such abandonment on the one hand and the exercise of the privileges granted to it by the act of 1887 on the other, it has become, in substance and effect, a banking corporation, and, necessarily, it must look to the act of 1887 as its authority for the exercise of its banking privileges. The original contract of exemption from taxation was manifestly granted to the original corporation to be availed of by it while it was in the exercise of its corporate powers as an insurance company. It cannot be held to go with the corporation when it abandons the performance of the acts authorized in its original charter and proceeds to exercise the privileges of and do a business as a banking corporation by virtue of the act of 1887. As a result, when it assumes to make use of the privileges granted to it under the act last named, it must do so subject to the constitution and laws existing at the time when that act was passed, and its rights and privileges must be exercised in subordination thereto.

Upon the proposition argued by plaintiffs in error, that they have the right to engage in their present business of banking by virtue of the original charter, we are of opinion that such right does not exist. The power to receive in trust for any person moneys or other valuable thing, and of giving their acknowledgment therefor, and to loan their surplus funds as provided in the second section of the original charter, in no sense authorizes them to conduct a general banking business. They must look to the act of 1887 alone for their power to transact that kind of business, and, for the reasons we have stated, they are not entitled to the exemption provided for in section 7 of their charter.

Second. We do not think that the plea of *res judicata* can be upheld upon the facts as stated. The former judgment was entered in an action commenced long prior to the act of 1887 to recover taxes alleged to have become due while the corporation plaintiff in error was engaged in its original business of an insurance company, and the judgment was upon the right of its shareholders to be exempt from any further

taxation than that provided for in the charter while the company was doing business as such insurance company. The judgment could, therefore, not be an estoppel or operate in any manner as a bar to the maintenance of this action, based upon facts of a totally different nature, and arising long after the judgment was obtained in the former action.

The judgment must, therefore, be

Affirmed.

MEMPHIS CITY BANK *v.* TENNESSE AND SHELBY COUNTY, No. 675, by stipulation, is to abide the event of foregoing case.

PLANTERS' INSURANCE COMPANY *v.* TENNESSEE FOR THE USE OF MEMPHIS.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 678. Argued January 20, 21, 22, 1896. — Decided March 2, 1896.

In 1860 the legislature of Tennessee incorporated the Energetic Insurance Company of Nashville, with a proviso in the charter limiting its taxation to one quarter of one per cent on its capital stock. In 1870 a new constitution was adopted by the State, forbidding such limitation. In 1884 the surviving corporators of the Energetic Insurance Company, which had not then been organized, met and organized the company under that name. In 1885 the name of the company was changed by legislative act to Planters' Fire and Marine Insurance Company, and it was authorized to remove its *situs* to Memphis, which it did, and increased its capital stock. Since that time it has regularly paid its taxes at the rate named in the act of 1860. In a suit to recover taxes at the regular tax rate, which was in excess of the statutory limitation: *Held*, that the organization of the corporation having been made subsequently to the adoption of the constitution of 1870, and of its coming into force, the corporation was subject to the provisions of that instrument regulating taxation.

THIS was another bill filed by the State of Tennessee for the use of the city of Memphis against defendants below to

recover taxes alleged to be due on the capital stock or shares of stock in the corporation plaintiff in error. The Supreme Court of Tennessee gave judgment in favor of the plaintiff below, and the plaintiffs in error have brought the case here for review. The case was tried upon an agreed statement of facts, among which are the following: On the 24th day of March, 1860, the Energetic Insurance Company of Nashville was incorporated. By the sixtieth section of that charter it was provided "that said company shall pay to the State an annual tax or bonus of one fourth of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." On the 10th day of December, 1866, the Planters' Insurance Company was incorporated, and thereafter it conducted a general fire insurance business in the city of Memphis up to the year 1885. No immunity from taxation was granted that company. On the 27th day of March, 1885, the name of the Energetic Insurance Company was changed to the Planters' and Marine Insurance Company of Memphis, and the company was authorized to remove its *situs* and office to the then taxing district of Shelby County, now the city of Memphis.

From the time of the passage of the act providing for the incorporation of the Energetic Insurance Company in 1860 down to the 30th day of January, 1884, no action was taken by the incorporators named in the act towards organizing a corporation accepting the charter. On the last named date a meeting was had of some of the incorporators, named in the act, and the first minutes which can be found in the office of the defendant corporation, or which it can produce, are the minutes of the incorporators, stockholders, and directors held on that day. Six individuals were named in the original charter as incorporators, together with such other persons as might thereafter be duly associated with them, and at this meeting of the stockholders in January, 1884, four of them were present, and the other incorporators mentioned in the charter were dead at that time. It appears from those minutes that, pursuant to the terms and stipulations of an act of the legislature of Tennessee, a meeting was that day —

Statement of the Case.

January 30, 1884 — called of the incorporators of the Energetic Insurance Company of Nashville, and in response to that call four of such incorporators appeared. A moderator was selected and books were opened, or ordered to be opened, for subscriptions to the capital stock of the company, and it was resolved that the first directory should consist of five persons. Stock was then subscribed by the various persons, amounting to $100,000, and the stockholders thus subscribing, being present either in person or by proxy, it was unanimously agreed by the incorporators present that the stockholders should go into an election for directors, and that the incorporators as such should adjourn. Thereupon, on the same day, it appears from the minutes that a meeting of the stockholders of the company was held and a board of directors elected, and the stockholders then voted to call a meeting of the directors for the same day. A meeting of the directors was then held, and a president, secretary, and treasurer of the company elected, and from that day (January, 1884) the organization of the corporation plaintiff in error was regular and continuous.

After its name was changed by the legislature to the Planters' Fire and Marine Insurance Company, and it was authorized to remove its *situs* to the city of Memphis, its stock was increased to $150,000 and it removed its place of business to Memphis, and bought out the assets and property of the Planters' Insurance Company and reinsured its risks. Since that time the defendant has regularly paid the commutation tax of one fourth of one per cent on each share of capital stock subscribed to the State of Tennessee, pursuant to the terms of the charter, up to the present time. By virtue of the general revenue laws of the State, the corporation, plaintiff in error, or its stockholders, have been taxed upon the capital stock or shares of stock at a greater rate than that provided for in the sixtieth section of the act of incorporation, and the plaintiffs in error claim that by virtue of that sixtieth section they are entitled to exemption from all taxation, except that therein provided for.

Mr. T. B. Turley, (with whom was *Mr. L. E. Wright* on the brief,) for plaintiffs in error.

Mr. S. P. Walker, (with whom were *Mr. C. W. Metcalf* and *Mr. F. T. Edmondson* on the brief,) for defendants in error.

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

The claim set up by plaintiffs in error is that the insurance company was duly incorporated as the Energetic Insurance Company of Nashville, under the act passed March 24, 1860; that it is the same company as therein incorporated, and entitled to all the benefits and immunities, among them that of exemption from taxation granted by that charter.

The defendants in error deny that claim, and assert the right to tax by virtue of the general revenue laws of the State. They assert that by reason of the failure to accept the charter and organize thereunder until after the lapse of 24 years the corporation did not acquire the right of exemption provided for in the sixtieth section of the charter, because at the time the company was organized in 1884 the constitution of the State of Tennessee, adopted in 1870, was in full force, and by that constitution any exemption of the property of the corporation, its capital stock or its shares of stock, was prohibited.

The plaintiffs in error answer that they are either a corporation organized under that charter or else there is no corporation, and the individuals assuming to act as such should be sued in their individual capacity, and if liable at all for any taxes whatever, they must be liable as individuals only. They further say that the State by its action herein recognizes them as a corporation, and if a corporation at all, they are such under the original charter above mentioned, and if they be a corporation under such charter, they are entitled to all the rights and privileges and immunities granted by that charter as a whole, and that they cannot be prosecuted as a corporation under that charter for the purpose of compelling them to

pay taxes, and, at the same time, be denied the right of exemption from such payment granted by that sixtieth section. They also allege that this action of the State is a collateral attack upon their charter by denying their immunity from taxation given by its sixtieth section, and therefore calling in question its existence as a corporation, and an action of that kind can only be maintained by the State by means of a *quo warranto*, either against the corporation itself for the exercise of powers not granted it, or against the individuals for assuming to exercise the corporate powers.

For the purpose of effecting a dissolution of a corporation grounded upon some alleged forfeiture of its rights and powers, the State must act through its attorney general and by action in the nature of *quo warranto*. This is not such an action, and the dissolution of the corporation is not its object. The State in effect so far recognizes it as a corporation as to demand payment of taxes on its capital stock, or on its shares of stock, and when as a defence to that action the corporation plaintiff in error, or its stockholders, set up its alleged right of exemption under the sixtieth section of the charter, the answer of the State is, you are not entitled to that exemption, because at the time your charter was accepted, 24 years after it was granted by the legislature, the constitution of the State prevented the grant of any exemption such as is claimed by you, to which the plaintiffs in error rejoin, that in this action you cannot look at the time when the charter was accepted, but as the corporation is acting under the original charter, the sixtieth section remains in full force.

We think that even in this action it is proper for the State to inquire as to the time of the acceptance of the charter for the purpose of determining what powers were actually granted. If the charter had been accepted and the individuals organized under it prior to the adoption of the constitution of 1870, then the exemption might have gone with it; but we think it entirely possible to hold that by the acceptance of the charter, assuming it to have been within a reasonable time, but after the constitution was adopted, such acceptance (while subsequently recognized by the legislature in permitting it to

change its *situs*) must be taken in connection with the provisions of the constitution existing at the time, and that while the incorporators might take all the other rights, powers and privileges granted by the charter, so far as to give them the franchise to be a corporation and exercise the powers therein granted, the immunity of exemption would not pass under the grant. It might possibly have been held, in a direct attack of the State upon the charter, that there had been an unreasonable delay in accepting it, and that consequently there was in law no corporation under the charter. That course was not taken, and the legislature, after the assumed organization under the charter in 1884, passed an act changing the name of the corporation and permitting it to change its *situs*. It might, therefore, be claimed that it thereby recognized the existence of the corporation under the charter, but in subordination to the constitution and laws existing at the time when the charter was accepted.

We think upon these facts the exemption from taxation did not pass to the corporation, and the assessments were in consequence legal and valid.

The judgment is, therefore,

Affirmed.

PLANTERS' INSURANCE COMPANY *v.* TENNESSEE AND SHELBY COUNTY, No. 679, by stipulation, is to abide the event of this cause.

HOME INSURANCE AND TRUST COMPANY *v.* TENNESSEE FOR THE USE OF MEMPHIS.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 672. Argued and submitted January 20, 21, 22, 1896. — Decided March 2, 1896.

The charter of the Memphis Life and General Insurance Company contained a provision "that there shall be a state tax of one half of one per cent upon the amount of the capital actually paid in." The charter of the Home Insurance and Trust Company authorized that company to "or-

Statement of the Case.

ganize with all the forms, officers, terms, powers, rights, reservations, restrictions and liabilities given to and imposed upon the Memphis Life and General Insurance Company." *Held*, that the Home Company was not subject to the provision respecting taxation in the charter of the Memphis Life Company.

THE plaintiffs below sought by this bill to recover certain taxes against the Home Insurance Company, or its shareholders, under the general revenue laws of the State, at a greater rate than the plaintiffs in error claimed they are liable to pay. This case was also tried on an agreed statement of facts, by which it appears that on the 29th day of February, 1856, the legislature of Tennessee passed an act incorporating the Home Insurance Company. On March 20, 1858, the legislature passed an act, the fourteenth section of which provides: "That the name of the Home Insurance Company of Memphis be changed to that of the Home Insurance and Trust Company, and said company may organize with all the forms, officers, terms, powers, rights, reservations, restrictions and liabilities given to and imposed upon the Memphis Life and General Insurance Company, provided nothing herein contained shall in anywise be construed to release said company from any existing liability."

The present company organized under this charter. The Memphis Life and General Insurance Company, referred to in the above section, was chartered March 2, 1854, the thirtieth section of which reads: "That there shall be a state tax of one half of one per cent upon the amount of the capital actually paid in." It is conceded that the Home Insurance Company has regularly paid this tax. The Supreme Court of Tennessee held that the shares of stock, the capital stock, the surplus and franchises of the company were subject to taxation, and that the exemption from taxation claimed by it and its shareholders was not well founded. The court rendered a decree against the company under the stipulation, by which the company assumed the liability of its shareholders for taxes against them, from which decree plaintiffs in error have prosecuted this writ of error.

Syllabus.

Mr. Frank P. Poston, for plaintiffs in error, submitted on his brief.

Mr. S. P. Walker, (with whom was *Mr. C. W. Metcalf* and *Mr. F. T. Edmondson* on the brief,) for defendants in error.

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

It is quite questionable whether section 30 of the act incorporating the Memphis Life and General Insurance Company grants to that company any immunity from taxation. Without discussing or deciding that question, however, we think that, assuming the exemption to exist in favor of that company, it did not pass to the Home Insurance Company by virtue of the fourteenth section of the act of 1858, above quoted. We think the words contained in that section, referring to the Memphis Life and General Insurance Company, are of no broader significance than those referred to in the case of *Memphis* v. *The Phœnix Insurance Company*, just decided. Upon authority of that case, therefore, this judgment must be

Affirmed.

Home Insurance and Trust Company *v.* Tennessee and Shelby County, No. 673. Error to the Supreme Court of the State of Tennessee. Mr. Justice Peckham. This case is precisely similar to the last preceding one, and must be governed by our decision in that. Judgment is therefore

Affirmed.

DISTRICT OF COLUMBIA *v.* LYON.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 135. Argued and submitted December 20, 1895. — Decided March 2, 1896.

Land in the city of Washington was sold for non-payment of certificates issued by the city goverment for the cost of local improvements, and was bought in by the holder of the certificates for the sum which they

Statement of the Case.

represented. The sale was set aside for defects caused by the negligence of the officers of the city government in failing to make assessments as required by law. The purchaser then sued the District of Columbia, which had succeeded to the city government of Washington, to recover the value of the original certificates. *Held*, that as the work was done in pursuance of a valid contract, of which the city and the District received the benefit, and as the required assessment had not been made, through the failure of the city and the District, the District became liable, and the certificates were valid obligations against it.

THIS was an action of assumpsit to recover from the District of Columbia the sum of $4082.70, with interest from October 5, 1881, and was tried, by stipulation, without a jury, by the Supreme Court of the District of Columbia in general term. Judgment was rendered in plaintiff's favor, March 28, 1892, and thereupon this writ of error was sued out. The opinion of the court by James, J., is reported, 20 D. C. 484.

Under the act of Congress of February 23, 1865, c. 48, 13 Stat. 434, the corporation of Washington had ample power and authority to make local improvements and to levy and collect taxes to pay for the same.

On November 2, 1869, the corporation of Washington passed an act for the improvement in question, as follows:

"Be it enacted, . . . That the mayor may be, and he is hereby, authorized and requested to cause the curbstones to be set and the footways and gutters paved on the north side of P street north, between Sixteenth street west and Rock Creek; the work to be contracted for and executed in the manner and under the superintendence provided by law; and to defray the expenses of said improvement, a special tax, equal to the cost thereof, is hereby imposed and levied on all lots or parts of lots bordering on the line of the improvement; the said tax to be assessed and collected in conformity with the provisions of the act approved October 12, 1865." (Acts 67th Council, c. 236, p. 116.)

The act of October 12, 1865, referred to, extended prior acts of May 23 and 24, 1853, to special improvements thereafter made, and provided that the cost and expense of every local improvement, "unless otherwise provided for in the act or acts ordering the same, shall be levied, assessed, collected, and

paid, and the payment thereof enforced," as provided in those acts. (Webb's Digest, 360–2.)

The act of May 23, 1853, Webb's Digest, 155, provided for proposals for setting curbstones, etc.; petition for the improvement and plan of the property; superintendence by a commissioner of improvements with two assistants appointed from among those interested in the improvement; that the commissioner of improvements should proceed to execute the work "immediately after the expiration of forty days from the passage of any act laying a tax for the purpose of setting the curbstone and paving the footway on any avenue or street, . . . and according to the proper graduation in front of the lot or lots thereby taxed; and it is hereby understood that the said lot or lots shall alone be answerable for the amount taxed for such improvement;" unless the owner should do the work himself, "in which case the tax laid for the purpose shall become released;" that upon the completion of the work the commissioner "shall deposit with the register a statement exhibiting the cost of setting the curbstone and paving the footway in front of each lot or part of lot separately, and the amount of tax to be paid by each proprietor of said lots or parts of lots, and the register shall then, without delay, place in the hands of the collector of taxes a list of the persons chargeable with such tax, together with the amount due by each person; and the collector shall, within ten days after receiving such list, give notice in writing to each proprietor, . . . to pay within thirty days, and on default collect the tax, with ten per centum interest, 'in the same manner as other taxes upon real property are by law collected;' and that the work should be paid for by certificates of stock, commonly known as 'paving stock,' issued by the mayor and given to the contractors, and redeemable from time to time as the taxes were collected."

None of the provisions of the act of May 24, 1853, are important in connection with this case.

The act of June 10, 1867, Webb's Digest, 467, provided for the appointment of a superintendent and inspector of paving of footways, etc., and enacted that "the said superintendent and

inspector shall also be charged with the duty of making all assessments on lots or parts of lots bordering on any street, alley, or avenue, which shall have been paved."

A later act on the subject, that of October 28, 1867, (65th Council, c. 6,) provided "that from and after the passage of this act, all taxes assessed on private property . . . for the laying of foot pavements and gutters, curbing and paving alleys, shall be collected as follows: one fourth of such assessment within thirty days after the service of the notice by the collector of taxes, and the remaining three fourths in three equal annual payments, for which deferred payments, it shall be the duty of the mayor to issue certificates of indebtedness bearing interest at the rate of ten per centum per annum."

By act of Congress of February 21, 1871, c. 62, § 40, 16 Stat. 419, 428, it was provided that "the charters of said cities (Washington and Georgetown) severally . . . shall be continued for the following purposes, to wit:

"For the collection of all sums of money due to said cities respectively; . . . for the enforcement of all contracts made by said cities respectively, and all taxes, heretofore assessed, remaining unpaid; . . . for the collection of all just claims against said cities, respectively; . . . for the enforcement of all legal contracts against said cities, respectively, . . . until the affairs of said cities, respectively, . . . shall have been fully closed;" . . . and (sec. 41) "upon the repeal of the charters of the cities of Washington and Georgetown, the District of Columbia be and is hereby, declared to be the successor of said corporations and all the property of said corporations, and of the county of Washington, shall become vested in the said District of Columbia."

From the agreed statement of facts, supplemented on the hearing below by the addition of a single fact by consent of counsel for both parties, it appeared that one Henry Birch set the curbstone and paved the footway and gutter in front of lots one to twelve inclusive in square 156, under a valid contract, executed in 1870, with the corporation of Washington, covering the improvement in front of other lots as well; that the work was duly completed and accepted on or about

November 17, 1870, and that its cost, to be paid to Birch, was $2054.10, no part of which had ever been collected or paid; that the municipal officers failed to comply with the requirements of law relating to assessment and notice; that the superintendent and inspector of paving and footways withheld the statement of the cost of the work from the register and the assessment from record until November, 1871, at "the sole request and procurement of the owner of said lots, whereby, he, the owner, was enabled to sell and did sell said lots without any record notice of such assessment, to the purchaser," namely, October 2, 1871. In the meantime and after the work was completed, the corporation of Washington had been succeeded by the government of the District of Columbia, and the offices under the corporation of Washington had been abolished, and the superintendent and inspector was without any authority to make the assessment against these lots, yet on or about November, 1871, "the records were erased and altered, whereby an assessment against said lots was interpolated over and above the signatures already made of the mayor, ward commissioner and other officers of the corporation, presumably to make it appear that they had approved the same, when, as a matter of fact, they had not."

It is explained in *Lyon* v. *Alley*, 130 U. S. 177, that the superintendent entered the work under Birch's contract with the proper proportionate charge against each lot as to all other lots except those in question, and that the change in the record was made by an interlineation in red ink, signed by the officer, and reading "Entered Nov. 17, 1870. This work was done at this date, but by request of the owner, not entered until Nov. 1871."

March 9, 1872, the District of Columbia issued and delivered to Birch four certificates of indebtedness against these lots for the cost of the work, signed by the governor and register, and Birch sold and transferred them to plaintiff for value before maturity. The certificates stated that there was due from the corporation of Washington to Birch and his assigns the sums named, bearing interest from November 17, 1871, at ten per cent, being issued under the corporation

ordinance of October 28, 1867, for setting the curbstone and paving the footway in front of the lots in question, and that the principal and interest was to be paid "out of the special tax fund, agreeably to the terms of the above recited act." On June 7, 1874, these lots were advertised for sale by the collector of taxes for non-payment of the assessment or certificates, whereupon the sale was enjoined at the instance of the then owner by a temporary restraining order of the court, but neither Birch nor plaintiff were made parties to said cause and neither of them had any knowledge of the order passed therein. The collector of taxes, upon the service of the temporary injunction, made no entry or memorandum thereof against these lots, but by mistake did so as to the same numbered lots in another square. October 5, 1881, the collector of taxes again advertised the lots for sale and sold them for the non-payment of the assessment or certificates to plaintiff, and there was issued to him, upon his surrendering the certificates, which were cancelled, and paying three dollars in money, twelve tax sale certificates. At this time, to wit, October 5, 1881, plaintiff had no knowledge whatever of the restraining order or any of the proceedings in the case in which it was granted, and "neither he nor his assignor, Birch, were aware of any invalid proceedings connected with said assessment, and said purchase was involuntary on the part of plaintiff and made to protect his interest in said certificates of indebtedness and save the same from sacrifice." The certificates of indebtedness thus surrendered "were computed and accepted as valid by the District of Columbia at said sale at and for the sum of $4079.70, which, with $3 paid in cash, made $4082.70 as the purchase price paid for such lots on October 5, 1881, by this plaintiff."

It further appeared that John B. Alley, having become owner of the lots, filed a bill against plaintiff to set aside the tax sale, and that in February, 1885, the Supreme Court of the District of Columbia granted the relief prayed, 3 Mackey, 456, and that its decree was affirmed on appeal, 130 U. S. 177; and it was agreed that "the assessment was illegally levied, and the collector of taxes was without authority and jurisdic-

tion to sell, and said sale was not made according to law and was void."

Plaintiff first learned of the invalid proceedings connected with said assessment and sale in the early part of 1882, and at once made application to defendant for a return of the certificates of indebtedness and the money accepted by the collector of taxes as the purchase price of said lots, tendering in return the certificates of tax sale, but his application was refused.

And it was stipulated that if the court should be of opinion that plaintiff was legally entitled to recover, it might give judgment in his favor for the amount paid by him at the sale, $4082.70, with interest thereon from October 5, 1881.

Mr. Sidney T. Thomas and *Mr. Andrew B. Duvall*, for plaintiff in error, submitted on their brief.

Mr. Isaac S. Lyon in person for defendant in error.

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

The Supreme Court of the District of Columbia held that the effect of the applicable acts "was to charge the municipality, not with a direct indebtedness for the work done under its ordinance, but with the duty to work out a payment therefor by seeing to it that the cost should be charged as a lien upon adjoining lots, and by enforcing this lien and collecting the special tax from the lot owners;" that the District "became invested with authority, and was charged with the duty, to secure such liens and collect and pay over to the contractor such taxes, in payment for work done under an ordinance of the city of Washington. This power could have been exercised and this duty could have been performed in the present case at any time before the 2d day of October, 1871, when it was cut off by the sale of the lots in question to an innocent purchaser;" that "if the resource of payment out of the special tax could have been secured by the District,

and was lost by its omission, a duty to pay the contractor would fairly belong to the District, and an issue of certificates of indebtedness to him would not be a void act;" that these certificates were negotiable and were assigned for value to an innocent purchaser; that plaintiff acted in good faith in making the purchase at the tax sale; that the collector did not act as plaintiff's agent for the collection of the certificates, but in the exercise of public functions and for the District, and that as the District had received and retained the proceeds of the transaction, it had treated the sale as made on its account; and, in conclusion, that as the certificates were valid, and between the parties were purchase money, and as the sale gave nothing to the plaintiff, but the District retained and had disabled itself to return the certificates, it was liable for the amount thereof.

We concur in these views. The work was done in pursuance of a valid contract, and the city, and the District, received the benefit thereof. As the city, and then the District, failed to make the required assessments, the District became liable and the certificates of indebtedness were valid obligations. *Memphis* v. *Brown*, 20 Wall. 289, 310, 311; *Hitchcock* v. *Galveston*, 96 U. S. 341, 360, 361; *Chicago* v. *People*, 56 Illinois, 327; *Kearney* v. *Covington*, 1 Met. (Ky.) 339; *Cumming* v. *Mayor*, 11 Paige, 596; *Reilly* v. *Albany*, 112 N. Y. 30; *Fisher* v. *St. Louis*, 44 Missouri, 482; *Commercial Bank* v. *Portland*, 24 Oregon, 188; *Cole* v. *Shreveport*, 41 La. Ann. 839; *Morgan* v. *Dubuque*, 28 Iowa, 575; *Fort Worth City Co.* v. *Smith Bridge Co.*, 151 U. S. 294, 302.

The certificates admitted the indebtedness and postponed payment until the amount thereof could be realized from an assessment, which it turned out the District could not then lawfully make, though it could have been done prior to October 2, 1871; and there is no pretence that the particular means of payment failed through any laches or fault on the part of Birch or the plaintiff. The tax sale was void but the agreed case shows that plaintiff purchased thereat involuntarily and in good faith to protect his interest in the certificates and paid the full amount in these due bills. He was

not bound to take the risk of losing his money because of the invalidity of the assessment and the want of authority in the officer to sell, an officer not acting for him but for the District, and no adequate reason is perceived for cutting him off from reclaiming his certificates and recovering thereon, in view of this total failure of consideration without fault on his part.

Judgment affirmed.

AINSA *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 429. Argued October 25, 28, 1895. — Decided March 2, 1896.

In order to the confirmation of a Mexican grant by the Court of Private Land Claims, it must appear not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States; and by the treaty no grant could be considered obligatory which had not been theretofore located.

The grant under which the plaintiff in error claims was a grant of a specific quantity of land, to wit: seven and a half sitios and two scant caballerios within exterior boundaries, and not a grant of the entire eighteen leagues contained within those exterior boundaries; and as location was a prerequisite to any action by the Court of Private Land Claims, and as the grant had not been located at the date of the Gadsden treaty, it cannot be confirmed.

This was a proceeding on behalf of the United States, instituted by direction of the Attorney General, in the Court of Private Land Claims, under the third clause of section eight of the act of March 3, 1891, c. 539, 26 Stat. 854. The petition alleged that defendants were asserting a claim to the premises in dispute under an alleged Mexican land grant by virtue of the treaty of December 30, 1853, known as the "Gadsden Purchase," and that the title of defendants and each of them was open to question in several particulars set out in the petition. And it was prayed that the defendants be notified to

show cause why the alleged grant should not be declared null and void, and that the title to said land might be quieted and forever settled, and for general relief.

Separate answers were filed by Santiago Ainsa, administrator of Frank Ely, and by Juan Pedro Camou and George H. Howard. Defendants admitted that they claimed the land as tenants in common, and each set up and pleaded his title and asked confirmation of his claim. The New Mexico and Arizona Railroad Company claimed its right of way under them.

The answer of Camou and Howard stated among other things:

"That, as appears and is shown from and in the said official survey, the minutes whereof are contained in the aforesaid testimonio, the form of the same was nearly square, the northern and southern boundaries conforming, of necessity, angularly with those of the Casita Rancho and the Tumacacori and Calabasas tracts; that within the bounds, natural objects, and monuments set forth and established by the said official survey, there is an excess of about —, more or less, some 4631 hectaras, 21 aras, and 47 centiaras, or about — of such said excess, surplus, or demasias, being in that portion of grant lying and being in the State of Sonora, all of which is set forth and shown in the resurvey of the grant and plot thereof had and made A. D. 1886, by the Mexican government upon the petition of your petitioner, Camou, to purchase the said demasias that lay within the Republic of Mexico; which said resurvey and plot thereof and the proceedings thereon, as well as the final sale and grants by the said Republic of Mexico — petitioner Camou of the said demasias within the said republic, and a final recognition, expressly considered and given, of the aforesaid original grant of —, made A. D. 1843 by the treasurer general of the department of Sonora, are contained, shown, and set forth in the duly authenticated original testimonio, which was made and delivered unto the said Camou by the said republic as complete and final evidence of title, a copy of which is filed herein and herewith, marked as 'Exhibit B.'"

Camou also filed an amended answer, which alleged that

the tract in question had been duly located and recorded in the archives of Mexico, prior to the twenty-fifth of September, referred to in article VI of the Gadsden treaty, and that his grantors and predecessors in interest, who were the owners of the grant at the time of the adoption of the treaty of Guadaloupe Hidalgo and of the Gadsden treaty, were Mexicans and citizens of the Republic of Mexico, and further alleged that the validity of the grant was examined into by the United States surveyor general for Arizona, who made a report thereon, a certified copy whereof, dated February 25, 1881, was made part of his answer. This report states that the grant was "for the exact quantity of seven and one half square leagues and two short caballerias, notwithstanding the petition was for the vacant land lying between the northern boundary of Casita and the western boundary of rancho Tumacacori;" that the survey "fixed the quantity at exactly seven and one half square leagues and two short caballerias;" and that "after survey every act in the proceedings up to and including the formal execution of the grant was upon the basis of the exact quantity ascertained by survey." The surveyor general called attention to the importance attached by the Mexican government to the quantity or area of grants of land as shown by the action of the procurator fiscal, hereinafter referred to, in correcting the error of the appraisers in omitting to value the two short caballerias, which, being done, "the grant was executed for the definite quantity heretofore stated." In his opinion, as the petition showed that the petitioner wanted the vacant land bounded on the south by the Casita and northerly by the Calabazas without special reference to other boundaries, the claim should be made to bind those ranchos with the easterly and westerly lines so established as to include exactly seven and one half square leagues and two caballerias, and he recommended confirmation of so much of the claim as should be found in Arizona on a survey made as thus indicated.

Upon the trial the court ruled that the object of the proceeding by the government was simply to bring in the parties in order that the claimants' title might be confirmed if it were

found that their grant was valid; that, moreover, the defendants had prayed for such confirmation; and that the burden of proof was upon the defendants. They thereupon offered in evidence a titulo of the land in question, entitled "Title to seven and one half sitios and two short caballerias of land for raising cattle and horses, contained in the vacant public lands between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, in the upper Pima country, issued to Don José Elias and his parents, Don Francisco Gonzales and Doña Balvanera Redondo, residents of the town of Imuris." From this it appeared, although the petition is not in the record, that May 6, 1841, Don José Elias and his parents applied "for the resurvey of the lands of the ranch of Casita, of which they are the owners and possessors, and which are situated in the jurisdiction of the town of Imuris, and also for the survey, appraisement, and publication of the vacant public lands which they say they need." This part of the application is also described in the proceedings as being "for the survey, appraisement and publication, offer and sale of seven and one half sitios and two short caballerias of land for raising cattle and horses, which comprise the vacant public lands situated between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas, in the upper Pima country, in the district of San Ignacio." The application was granted by the superior board of the treasury of the department of Sonora, May 22, 1841, and a resurvey of the ranch Casita was ordered, as also a survey of the public lands sought to be purchased, and the order directed that separate expedientes should be made of both operations. This action of the board was certified to the superior chief of the treasury, May 26, 1841, who on that day commissioned Don Francisco Navamuel to make the surveys. He was directed to resurvey for Don José Elias and his parents the lands of Casita, "giving them the area or number of sitios that legally belong to them, with due separation of the sitio or sitios that result in excess within the lawful boundaries of said lands of Casita. And at the same time said com-

missioner shall execute, in separate expedientes, the proper survey, appraisement, and publication of the vacant public lands the parties in interest apply for, after the indispensable judicial information which said commissioner, under his own strictest responsibility, shall cause to be taken before a competent judge and shall aggregate to the original proceedings, and which shall be that of three impartial, capable and upright witnesses of practical intelligence, by which it is legally and sufficiently proved that the parties in interest need such vacant public lands and have an abundance of stock to stock them with." The commissioner was required to act in strict compliance with the laws of Sonora of May 20, 1825, and July 11, 1834, and to adjust the sitio or sitios contained in the lands of Casita; their overplus, if any; and the vacant public lands, strictly by the regulations, giving to each sitio the area of twenty-five million square varas, and he was cautioned as soon as the operations as to the excess or overplus resulting within the lawful boundaries of Casita were completed, that that excess should not be published, but appraised in accordance with article 2 of decree No. 51 of May 12, 1835. The commissioner procured evidence that Gonzales and his wife had four thousand head of cattle more or less, and proceeded to resurvey the ranch of Casita, and then to survey the vacant public lands. As to this survey he reported that he started at the north cross monument of Casita and directed himself "along the public road that goes toward the north to the presidio of Tubac," 340 cords, (17,000 varas,) "which ended on the high road, in a flat, where a wide canyon that comes down from the slope of the Pajarito mountains terminates," where he ordered a monument placed, "that of Calabazas being about a thousand steps further on on a high hillock which slopes down on the other side of said canyon." "Having asked the party how he wanted the land squared, he replied that he wanted twenty cords to the east; and thereupon they were measured for him twenty-two (22) cords from the monument which is in the high road, in a straight line guided by the compass, to a hillock that has many oak trees on its slope, and on the summit a pile of stones was placed as

a monument." Having returned to the cross monument on the high road, the commissioner measured west fifty cords, (twenty-five hundred varas,) where he "reached very broken ground, which it was impossible to measure with the cord," when he "made a scrupulous estimate, together with my assistants, of one hundred and fifty cords, until I arrived to where the Pajarito mountains turned to the north near the place they call Calaveras, said Pajarito mountains having been crossed and within the land surveyed, and there I ordered the party to place a pile of stones as a corner monument." He then returned to the place of beginning, and measured east twenty-two cords, (eleven hundred varas,) "which ended upon some hillocks at the trunk of an oak tree, where a pile of stones was placed," and from the same point he measured and estimated "in several stretches of rough ground, towards the west, two hundred (200) cords, which ended on a whitish ridge that has considerable pasture, near the so called Planchas de Plata, which ridge divides the streams that flow towards the ranch of Agua Caliente and those that go towards Agua Zarca. Thus the south boundary was closed with another two hundred and twenty-two (222) cords and is limited there by the ranch of Casita. In this manner was terminated the survey of the vacant public lands, which include seven and one half sitios, and the party, when it was made known to him, was satisfied and understood the area it encloses, and was warned to place, at the first opportunity, fixed monuments of stone and mortar." The land was then appraised, according to the state law of Sonora, at the minimum price of fifteen dollars per sitio, the amount being put at one hundred and twelve dollars, four reals; and publication was ordered in accordance with that law for thirty consecutive days, by the public crier, "in solicitation of bidders who may make a better valuation." The last publication was on December 10, 1841, when proceedings were suspended, on account of the absence of Don José Elias, until November 28, 1842, when they were referred, as required by the law of Sonora, to the attorney general of the treasury, who reviewed the same, and reported thereon that the survey was 340 cords

from the north to the south and 222 cords from east to west, which, reduced to varas, and multiplied, gave 188,700,000 square varas, making "seven and one half sitios and two caballerias, a little short, for raising cattle;" that the appraisement made no account of the two short caballerias, which were of the value of five reals ten grains at the rate of fifteen dollars per sitio, for which reason the total value should be one hundred and thirteen dollars, one real and ten grains; and recommended a sale "of said seven and one half sitios and two short caballerias of public land for raising cattle and horses, included between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas," to the highest bidder on three public offers. This was so ordered January 5, 1843, and after three public offers, January 5, 6, and 7, sale was made to Don José Elias and his parents. The description of the land offered was in these words: "There are going to be sold, on account of the public treasury of the department, seven and one half sitios and two short caballerias of land for raising cattle and horses, contained in the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country." In the third publication the translation uses, instead of the words "contained in the vacant public lands," the words "comprising the vacant public lands," and this difference of phraseology appears in several of the proceedings, that is, sometimes the seven and one half sitios are described as contained in the vacant public lands, and sometimes as comprising the vacant public lands. The documents in Spanish were not sent up.

The titulo then recites the receipt of one hundred and thirteen dollars, one real and ten grains, and that in the provisional memorandum book of receipts for the current year the receipt of that sum, "being the value of seven and one half sitios and two short caballerias of land for raising cattle and horses, contained in the vacant public lands between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country," was entered. Thereupon the treasurer of the department of

Sonora, at Arizpe, on January 7, 1843, executed the grant as follows: "Therefore, by virtue of the authority which the laws, regulations and superior orders that govern in the matter confer on me, by these presents, in the name of the Mexican nation, I grant, in due form of law, seven and one half sitios and two short caballerias of land for raising cattle and horses, contained in the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas, in the upper Pima country, in the district of San Ignacio, to Don José Elias, and to his parents, Don Francisco Gonzales and Doña Balvanera Redondo, residents of the town of Imuris, in said district, to whom I cede, give and adjudicate said lands, by way of sale, and with all the requisites, stability and permanence the laws establish, for themselves, their children, heirs and successors, etc."

Appended to the titulo appeared the following certificate signed by the chief clerk, which was offered in evidence by the defendants as a part thereof: "By supreme resolution of this day, the adjudication of the land referred to in the title issued on the 7th of January, 1843, is approved, under the provisions of article 3 of the law of December 3, 1855, and it is therefore legally confirmed: And in witness thereof and for the purposes that may be necessary this indorsement is made in the department of public works, in Mexico, on the 7th of July, 1886."

A memorandum was introduced in evidence, showing that the Toma de Razon or record book of land titles of Sonora contained an entry that on January 7, 1843, there was issued a title of grant for seven and one half sitios and two short caballerias of land for breeding cattle and horses, contained in or comprising the vacant public lands, situated between the north boundaries of ranch La Casita and the western boundary of the mission of Tumacacori and Calabazas, in favor of Don José Elias and his parents. It was admitted that certain field notes and a plat thereto attached were made in December, 1891, by a surveyor, now deceased, named Oury, and that, if living and present, he would testify that said field notes and plat contained a survey of the claim according to

the natural objects and other descriptions contained in the original survey, the total area being 78,868.34 acres, of which 25,899.09 were in the United States. These field notes and map were introduced in evidence.

The testimony on behalf of the United States tended to show that by accurate measurement commencing at the north cross monument of the ranch, La Casita, and measuring north along the Tubac road three hundred and forty cords of fifty varas each, the measurement would terminate in the Republic of Mexico three and fifty-four hundredths cords, something over four hundred and twelve feet, south of the line between Mexico and the United States; and that according to Oury's survey there were within the exterior boundaries named in the titulo and within the boundaries of Mexico twelve and twenty-one hundredths sitios, or about 52,969.25 acres, and within the exterior boundaries and within the United States five and ninety-six hundredths sitios, making in the aggregate eighteen and seventeen hundredths sitios within the exterior boundaries, or 78,868 acres, and that seven and one half sitios contained 32,744 acres.

There was also evidence to the effect, as sufficiently stated by counsel for the United States, that none of the monuments referred to in the titulo are now in existence, and that the monuments now found on the southern boundary of the grant, being the south cross monument, the southeast monument and the southwest monument, have been recently constructed and are new monuments; that the so-called north cross monument consists of a mound of earth and pebbles about eighteen inches high and ten or twelve feet in diameter, on top of which is a stone eleven or twelve inches square, on which is marked "N de E N X," and has not the appearance of being a monument, but appears more like an ant hill, and about twenty steps from this is a similar mound, except the stone; and that the northeast monument is a recently constructed pile of stone, without mortar, about four feet in diameter, built in circular shape; that the southwest corner is not where it ought to be as described by the titulo, and that no such place as "Calaveras," named as one of the calls for the northwest corner, was known in that part of the country.

Statement of the Case.

The United States also offered in evidence a transcript of the expediente referred to in the answer of Camou and Howard, being the same proceedings resulting in the order of July 7, 1886, a certificate of which was indorsed on the titulo and introduced in evidence by all of the defendants.

From these proceedings it appeared that on August 11, 1882, Don José Camou, Jr., through whom defendants Camou and Howard and others claimed, presented to the district judge at Hermosillo a petition alleging that he was a Mexican citizen, and that he was the owner of the ranch known as Los Nogales de Elias, situated on the boundary line of Mexico and the United States, between the ranches "La Casita," "Tumacacori," and "Calabazas," the overplus of which he denounced and sought to purchase under article eight of a general law of July 22, 1863, "with the understanding that if the other coproprietors of said ranch of 'Nogales' desire to share in this overplus, I do not object that the adjudication may be made in favor of all the owners thereof in the proportion to which they are entitled, provided they contribute to the expenses of the same." On August 17, 1882, it was ordered by the district judge of Sonora that the denouncement above referred to be admitted, and citizen Rosas was appointed as commissioner with instructions to resurvey the ranch called Los Nogales de Elias for the overplus so applied for, and he was required to report the true area of the ranch and the overplus of the same, if any, and was required to proceed under the law of July 20 and August 2, 1863. It was further recited that Rosas, in compliance with the order of the district judge, notified the parties in interest and the owners of the adjoining lands, and proceeded to a resurvey of the ranch according to its exterior boundaries as described in the titulo of the grant, and found within such exterior boundaries and monuments an excess within the Republic of Mexico of 4631 hectares, 21 ares, and 47 centiares, (or 2.64 sitios, being 11,443.73 acres,) over and above the seven and one half sitios sold in 1843. The report of this survey was made to the district judge and by him referred to the chief of the treasury acting as attorney general, who advised that said excess be adjudicated to José Camou,

Jr., subject to the approval of the board of public works, to which the matter was referred. That board required further explanation of the survey, which was made by Rosas on January 15, 1886, and thereafter the district judge was directed to suspend "approval of the adjudication until it becomes known whether or not it prejudices the growing town of Nogales, and likewise until the validity and legality of the title under which it is pretended to hold said ranch is established," in respect of which there was reason to entertain doubt, because the titulo of ownership issued to Don José Elias in the city of Arizpe by the departmental treasurer of Sonora, January 7, 1843, disclosed the fact "that the origin of the property or the original title was vicious and null, as the sale was made and the title issued by a departmental treasurer, and in the year 1842, when the bases of Tacubaya were in force, that is, when the national government was not only central but dictatorial, which two circumstances give the title in question the character of manifest nullity."

The objections appear to have been obviated, among other things, by securing from the President of the Republic of Mexico the order of July 7, 1886, already referred to, and the whole matter being again remitted to the district judge the surplus was regularly adjudicated to José Camou, Jr., who paid therefor the value, fixed at $555.74, and costs.

The Court of Private Land Claims held that under the original proceedings the right of the grantees was limited to the specific amount of land mentioned in the proclamation of sale and the grant; that the grant was for a specific quantity, and by its express language the quantity was made the controlling matter of the description; and that the intent of the granting officer to reserve to the government the excess over the amount granted within the boundaries was as clearly manifested as it could have been made by a reservation in express language. And that even though a grant such as the court held this to be was unknown to the Mexican law, still, what was actually effected was to be determined by the language made use of, and that the power of the officers to do what they did do need not be inquired into; that while a

parallelogram 340 cords in height and 222 cords in width, measured from the point designated by the commissioner as the cardinal point of survey, would be partly within the Territory of Arizona and partly within the State of Sonora, yet that the grant was specific as to quantity but not as to location, and the only effect of the proceedings was to designate certain boundaries within which the quantity of lands granted was to be located; that, of necessity, the location was to be determined by subsequent action, but no action was ever taken. The conclusion was that, at the time of the treaty of cession, the grant had not been located within the meaning of that instrument, and hence by its express terms could not now be recognized as of any validity; and that it was not such a grant as by the terms of the treaty the United States was bound to recognize and confirm, which by the terms of the act creating the court was the test of the rights of the parties.

The Court of Private Land Claims entered a decree "that the defendants, or either or any one of them, take nothing by their claim of lands lying north of the international boundary line between the United States and Mexico, and that the claims of the various defendants as made in their answers are hereby declared without merit and are disallowed." From this decree an appeal was prosecuted to this court.

Some definitions and explanations may properly be added to the foregoing statement.

A vara equals 32.9927 inches; a cordel, 137.95 feet, or 50 varas; a sitio contains 4338.464 acres; a caballeria, 105.75 acres; a hectare, 2.471 acres; a "sitio de ganado menor," or sheep ranch, 1928.133 acres. An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant of final title papers is attached to the testimonio and delivered to the grantee as evidence of title, and entry is made at the time in a book called the Toma de Razon, which identifies the grantee, date of the grant and property granted. The dictionaries define "Tomar razon," "to register, to take a memorandum of, to make a record of a thing," and "Toma de Razon," "memorandum book."

The "Gadsden Purchase" added a strip along the southern boundary of the Territory of New Mexico, and Arizona was detached and made a separate Territory in 1863, within which strip and Territory the land in controversy is situated.

Mr. Rochester Ford for appellants.

Mr. Solicitor General, *Mr. Matthew G. Reynolds*, and *Mr. Luman F. Parker* for appellees.

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

As remarked in *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80, 81, a case involving title to the ranchos of Tumacacori, Calabazas, and Huevavi, undoubtedly private rights of property within ceded territory are not affected by the change of sovereignty and jurisdiction, and are entitled to protection, whether the party had the full and absolute ownership of the land or merely an equitable interest therein, which requires some further act of the government to vest in him a perfect title. And this is so by the law of nations, "with or without any stipulation to such effect," *Strother* v. *Lucas*, 12 Pet. 410, 436, but when stipulations exist, the terms in which the high contracting parties have expressed themselves are to be observed.

By Article VIII of the treaty of Guadaloupe Hidalgo, February 2, 1848, Mexicans, established in territories previously belonging to Mexico and remaining for the future within the limits of the United States, as defined by the treaty, were free to continue where they then resided or to remove at any time to the Mexican Republic, "retaining the property which they possess in said territories, or disposing thereof, and removing the proceeds wherever they please;" and "in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy, with re-

spect to it, guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. 922, 929.

Article VI of the Gadsden treaty, December 30, 1853, is as follows: "No grants of land within the territory ceded by the first article of this treaty, bearing date subsequent to the day — twenty-fifth of September — when the minister and subscriber to this treaty on the part of the United States, proposed to the government of Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory, which have not been located and duly recorded in the archives of Mexico." 10 Stat. 1031, 1035.

The difference in language between the two treaties is readily seen. Grants previous to the cession, which have not been located, are by the terms of the latter treaty not to be respected or considered as obligatory, as matter of right, whatever the United States might see fit to do, as matter of grace, under particular circumstances. And grants which have not been located would seem manifestly to be grants of a specific quantity of land within exterior boundaries containing a larger quantity. This was a familiar class of Mexican grants, and is referred to by Mr. Justice Field in *Hornsby* v. *United States*, 10 Wall. 224, 232, where, delivering the opinion of the court, he said: "As we have had occasion to observe in several instances, grants of the public domain of Mexico, made by governors of the department of California, were of three kinds: 1st, grants by specific boundaries, where the donee was entitled to the whole tract described; 2d, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by outboundaries, where the donee was entitled out of the general tract only to the quantity specified; and, 3d, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence. The greater part of the grants which have come before this court for examination have belonged to the second class."

The mode in which private rights of property may be secured, and the obligations imposed upon the United States by treaties fulfilled, belongs to the political department of the government to provide. In respect to California, this was done through the establishment of a judicial tribunal, but in respect of the adjustment and confirmation of claims under grants from the Mexican government in New Mexico and in Arizona, Congress reserved to itself, prior to the passage of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims, 26 Stat. 854, the determination of such claims, enacting as to New Mexico "that the surveyor general for the territory, under the instructions of the Secretary of the Interior, should ascertain the origin, nature, character and extent of all such claims, and for this purpose might issue notices, summon witnesses, administer oaths and do all other necessary acts; and should make a full report on such claims, with his decision as to the validity or invalidity of each under the laws, usages and customs of the country before its cession to the United States; and that his report should be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm *bona fide* grants, and to give full effect to the treaty of 1848 between the United States and Mexico." *Astiazaran* v. *Santa Rita Mining Company*, *supra*; act of July 22, 1854, c. 103, § 8, 10 Stat. 308, 309. And similarly, as to the surveyor general of Arizona, by the act of July 15, 1870, c. 292, 16 Stat. 291, 304.

As to the claim in question, this officer made the report attached to one of the pleadings, but the claim was never confirmed. An authentic survey and final determination of the location and boundaries of such claims was contemplated in any event. *Stoneroad* v. *Stoneroad*, 158 U. S. 240. Then came the passage of the act of March 3, 1891, repealing the prior acts and creating the court whose decree is now under review.

By the first subdivision of section thirteen of this act it is provided that: "No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States

of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at such date already complete and perfect." Here, again, there are significant differences between this phraseology and that used in the act of March 3, 1851, c. 41, "to ascertain and settle the private land claims in the State of California," 9 Stat. 631, which provided that the board of commissioners thereby created, the district court, and this court, in deciding on the validity of any claim brought before them, should "be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable," that is, the decisions theretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities previous to the cession to the United States. *Fremont* v. *United States*, 17 How. 542, 553.

But, under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the Court of Private Land Claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States, and by the treaty no grant could be considered obligatory which had not been theretofore located.

It is contended on behalf of the United States that this grant was void because the departmental officers had no power, under the laws of Mexico in force when it purported to be made, to make it without the approval of the supreme government, which it is not claimed had been given; and also, if

otherwise valid, that confirmation could not be accorded because the evidence failed to show that it was duly recorded in accordance with the requirements of the Mexican laws; but we need not enter upon the consideration of either of these propositions, since, assuming that this was a valid grant made by the proper officers and duly recorded, we concur with the court below that it was the grant of a specific quantity of land and not of the entire eighteen leagues contained within the exterior boundaries, and not having been located at the date of the treaty could not be confirmed.

It is to be noted that the petition of Don José Elias does not appear in the expediente, and its nonproduction is nowhere accounted for. The recitals in other parts of the proceedings as to the contents of such a petition were not considered in *United States* v. *Cambuston*, 20 How. 59, 63, as conclusive or even satisfactory evidence of that fact; and appellants' argument treats the exact terms of the application as of importance, since they insist it was a petition for all the vacant public lands between the north boundary of Casita and the west boundary of Tumacacori and Calabazas. But the most that can be claimed is that the petition was for seven and one half sitios, as what was needed for the cattle of Don Elias and his parents, and that Don Elias may have assumed that that number of sitios covered all the vacant lands. And as, in our judgment, the expediente shows that what was directed to be appraised, what was appraised, what was directed to be sold, what was sold, what was paid for, and what purported to be granted, was seven and one half sitios and two short caballerias, while the alleged preliminary survey indicated general boundaries containing over eighteen sitios, we think, as the Court of Private Land Claims did, that the grant was of seven and a half sitios and two scant caballerias within exterior boundaries, and that location was a prerequisite to any action by the court.

Appellants insist that the grant of a certain quantity of land situated at some designated place, or within a larger tract described by outboundaries, was not known to the "State of the West," made up of Sonora and Sinaloa, and reference is made

to certain laws of May 20, 1825, and of July 11, 1834, as showing that lands in that State were to be surveyed before they were sold, and sold by metes and bounds as surveyed. The order of the superior board of the treasury of the department, set forth in the expediente, required compliance with the provisions of the law of July 11, 1834, and also with the regulations for surveying lands for raising cattle and horses made under the law of May 20, 1825, and as to any overplus within the lawful boundaries of Casita, required it not to be published but appraised in conformity with article 2 of decree No. 51 of May 12, 1835.

Article 30 of the law of 1825 provided that the owners of sitios should place at their boundary termini monuments of stone and mortar "as soon as possession thereof is given them; and if within three months from the date the survey is concluded they do not do so," that a fine should be exacted from them and monuments ordered constructed at their expense. Article 63 of the law of 1834 was to the same effect, and read: "It is the duty of owners of sitios to place upon the boundary lines of their estates, landmarks of stone as ordered by the statutes, as soon as they are in possession of their estates; and if within three months counting from the date that they receive their title, they have not complied with this regulation, they shall incur a penalty of twenty-five dollars, which they shall pay to the judge for the public funds, and moreover shall cause the said landmarks to be constructed at the cost of said proprietors."

And it is said that in Sonora, (and as respects lands acquired under the Gadsden treaty,) when public lands were parted with, the transaction constituted an executed contract of purchase rather than a grant. Conceding that the boundaries mentioned in these laws are not outboundaries but specific boundaries, they are boundaries ascertained by authentic survey of specific tracts taken possession of as so delineated, and it does not follow that these proceedings were anything more than the Court of Private Land Claims found them in effect to be, namely, a grant of a specific quantity of land, which was to be afterwards located.

Compliance with decree No. 51 of Sonora of May 12, 1835, with reference to the overplus in La Casita was required, as we have said, and moreover, the review of the proceedings by the attorney general of the treasury states that the commissioner proceeded "to the resurvey of the ranch of Casita, from which there resulted within this property the same nine sitios the original surveyor, José Olave, measured and estimated on the 20th day of April, 1742, and nine million two hundred thousand square varas more, which do not make half a sitio, and, even if they had reached that fraction, they should not be considered as overplus, under the provisions of the last clause of article 2 of decree No. 51 of the 12th of May, 1835, of the old State, and which is still in force."

That article is as follows:

"ARTICLE 2. Those are likewise '*bona fide*' owners who, under the descriptions given in their records of survey, occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement than that of paying for the excess in accordance with the quality of land and the price which prevailed when the land was measured and appraised; and only in case the owner does not want the excess, or when such excess is very great in the opinion of the government, upon the report of the treasury, shall such excess be awarded to any one denouncing or soliciting it; and such person shall bear the expense of the resurvey, if the excess has not been ascertained. In lands measured by calculation, (graduacion,) none shall be regarded as excess that does not exceed half a sitio."

It thus appears that the resurvey of grants was provided for to ascertain the excess over the quantity intended to be granted, that unless the excess was more than half a sitio it might be disregarded, and that if it exceeded that, the owner of the original grant might be allowed to take it at the valuation. The application of Don José Elias was for a resurvey of the Casita in order that he might obtain the overplus lands therein on an appraisal, whereas if that ranch had been acquired by purchase *ad corpus*, that is to say, all the lands included by certain metes and bounds, possession delivered

and monuments set up, it is not apparent how the necessity for having a resurvey could have existed; and so when in 1882 and 1886, the Mexican government was applied to by defendant Camou, under the law of July 22, 1863, his application proceeded upon the theory that the grant under consideration was a grant of a specific quantity within exterior limits, and what he sought and was accorded was an adjudication of the overplus on paying the value thereof "in conformity with the tariff in force at the time of the denouncement."

Certain articles of the law of July 22, 1863, treat of the ascertainment and disposition of excesses where the indicated boundaries are supposed to cover only a certain quantity of land which, when resurveyed, turns out to be much larger than as described in the titles; and such resurveys had been practised from an early day and were recognized by Don Elias himself in his application in respect of La Casita. Royal Decree, Oct. 15, 1754, sect. 7, Reynold's Span. & Mex. Land Law, 54; Law of July 11, 1834, chap. 9, sect. 3, Id. 187; Law of July 22, 1863, Hall's Mex. Law, 174.

In any view, whether treated upon the principles applicable to a voluntary grant or as a purchase and sale, appellants' contention that Don Elias and his parents took all the public lands north of Casita as one tract by metes and bounds could be sustained only on proof of a determination of such metes and bounds by actual survey and delivery of possession accordingly.

Navamuel was instructed to survey seven and one half sitios of the vacant public lands "situated between the north boundary of the ranch of Casita and the west boundary of the mission of Tumacacori and Calabazas," and to measure the land between the north boundary of one tract and the west boundary of another may be supposed to involve considerable difficulty. However, it is said that the mission of Tumacacori and Calabazas lay north of these lands, and the surveyor general of Arizona was of opinion that the claim should bind the ranchos of Casita and Calabazas, "with the easterly and westerly lines so established as to include exactly seven and one half square leagues and two caballerias." The proceedings

show that Navamuel understood that the sale was not to be of a particular tract for a sum in gross, but of a specific number of sitios at the upset price fixed by the appraisal of those sitios, and that he was not to survey the whole of an existing tract, but to delineate a tract containing the desired number of sitios. With that understanding he apparently attempted, partly by measurements and partly by conjecture, to survey a parallelogram of 340 cordels by 222 cordels, which would contain seven and one half sitios, running a little over, and so far from intending to include all the public lands, he consulted the party "as to how he wanted the land squared," that is, the land to come to him, and acted on his reply.

Appellants deny that Navamuel laid out a parallelogram containing seven and a half sitios, and insist that instead he designated the boundaries of a tract containing all the public lands, being somewhat over eighteen sitios. They say that the northwest and southwest corners were arrived at partly by estimation; that the height of the grant as described was 449.82 cords and not 340 as stated; and that the distance from the north cross monument to the northwest corner was over 470 cords instead of 200. Navamuel did not visit the western boundary, and the southwest corner as claimed seems on the evidence not to be where that corner should be according to the titulo. As to the northwest corner, Oury, in December, 1891, could find no place called Calaveras and no monument 200 cords west of the north cross monument, but as he did find an old monument of loose rock four hundred and seventy odd cords west at Calabazas pass, and because of Navamuel's reference to the Pajarito mountains in that connection, he concluded to accept that monument as the northwest corner; in other words, he fixed on a point twelve and a half miles west as the point Navamuel placed at five miles and a fraction. We fear that these speculations did injustice to Navamuel, but we think they make it quite clear that to apply the rules of metes and bounds to the entire tract of vacant public lands is quite inadmissible when taken with the other facts and circumstances.

In common law conveyances the words "more or less,"

while sometimes having practically no effect, are frequently added to prevent the precise quantity named from being conclusive on the parties, and may operate to make a sale of land one in gross instead of by the acre, but the bare fact that Navamuel estimated a portion of his measurements was not equivalent to stamping "more or less" on the transaction or rendering the specified quantity not of its essence.

So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain.

These considerations need not be elaborated nor the common law cases cited examined, inasmuch as we are of opinion on this record that the number of sitios specifically named was controlling.

How much land was appraised and sold and paid for? The minimum price at which the land could be appraised and sold was $15 per sitio. The price paid was at that rate for exactly seven and one half sitios and two caballerias. The commission to the appraisers was for the appraisement of seven and one half sitios; the appraisement was for seven and one half sitios; the procurator fiscal in his review of the proceedings pointed out that the appraisers had erred in taking no account of the two short caballerias, which he valued at five reals and ten grains, raising the total value from $112.50 to $113.15; the order for publication of notice referred to "the sitios surveyed for Don José Elias and Don Francisco Gonzalez" as "having now been appraised;" and the notices published were for the sale of "seven and one half sitios and two short caballerias of land appraised at $113, 1 real and 10 grains." The order striking off and selling the property to the purchasers, after reciting the assembling of the board, stated that the crier having announced that the seven and one half sitios and the two short caballerias of land were to be sold, and that thereupon the agent of Don José Elias and his parents came forward and again offered the one hundred and thirteen dollars, one real and ten grains, for which the land was

appraised, continued, "and the midday hour of twelve having sounded, for the last time the crier said: 'Going once, twice, three times; sold, sold, sold; may it do much good, good, good, to Don José Elias and his parents, Don Francisco Gonzalez and Doña Balvanera Redondo.' In these terms this act was terminated, and there was publicly and solemnly sold the seven and one half sitios and two short caballerias of land for raising cattle and horses, comprising the vacant public lands situated between the boundaries of Casita and those of the mission of Tumacacori and Calabazas in the upper Pima country, in the jurisdiction of the town of Imuris, for the sum of one hundred and thirteen dollars, one real and ten grains, in which they were appraised." It is true that in the translation before us the words "comprising the vacant public lands" are used, while in other parts of the proceedings the specified quantity is described as "contained in" or "comprised in" the vacant public lands, as for instance in the execution of the grant the words are "contained in the public lands." But we do not think this difference, in translation, or if existing in the original, can operate to make this an appraisement, advertisement, and sale of all the public lands north of Casita, no matter what their extent, but that these proceedings and the grant were plainly an appraisement, advertisement, sale, purchase, and grant of the specific quantity of seven and one half sitios and two caballerias scant. It is certain that the officers had no authority and did not intend to sell 78,868 acres for the purchase price of 32,744 acres; that in all the proceedings the transaction was limited to seven and one half sitios; that Navamuel determined what was needed by Elias as a cattle breeder, made his survey, approved the appraisement, and published for bids at "a better valuation," on that basis; and that the Mexican government has construed the grant in the same way in ordering a resurvey, and thereupon adjudicating the excess over seven and one half sitios.

This brings us to consider whether juridical possession was delivered to the grantee as asserted by appellants.

In *United States* v. *Pico*, 5 Wall. 536, 539, where there was

a concession by specific boundaries, and the words "in extent twelve square leagues" were added to the resolution of approval of the departmental assembly after the description of the tract ceded, it was held that these words did not create a limitation on the quantity granted, as they were evidently not used for any such purpose, but merely indicated a conjectural estimate of the quantity, and Mr. Justice Field observed that "when, in Mexican grants, boundaries are given, and a limitation upon the quantity embraced within the boundaries is intended, words expressing such intention are generally used," and that in case of doubt as to the intention to cede all the land within the designated boundaries, the doubt would be removed by the juridical possession delivered to the grantees, which "proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government specially designated for that purpose, and has all the force and efficacy of a judicial determination."

In *Malarin* v. *United States*, 1 Wall. 282, 289, Mr. Justice Field, again speaking for the court, in setting forth the act of juridical possession described in the expediente in that case, said: "Under the civil, as at the common law, a formal tradition or livery of seizin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurement and segregation in such cases, therefore, preceded the final delivery of possession. By the Mexican law various regulations were prescribed for the guidance in these matters of the magistrates of the vicinage. The conditions annexed to the grant in the case at bar required the grantee to solicit juridical possession from the proper judge. In compliance with this requirement, within four months after the issue of the grant, he presented the instrument to the judge of the district, and requested him to designate a day for delivering the possession. The judge designated a day, and directed that the adjoining proprietors be cited, and that measurers and counters be appointed. On the day designated the proprietors appeared,

and two measurers and two counters were appointed, and sworn for the faithful discharge of their duties. A line provided for the measurement was produced, and its precise length ascertained. The measurers then proceeded to measure off the land, the judge and the proprietors accompanying them. The measurement being effected, the parties went to the centre of the land, and there the judge directed the grantee to enter into the possession, which he did, and gave evidence of the fact 'by pulling up grass and making demonstration as owner of the land.' Of the various steps thus taken, from the appointment of the day, until the final act of delivery, a complete record was kept by the judge, and by him transmitted to the grantee after being properly entered upon the 'book of possessions.'"

In *Moore* v. *Steinbach*, 127 U. S. 70, 80, the grant required the grantee to "petition the proper judge to be put in juridical possession by him in virtue of this document, by whom the boundaries shall be marked out, on the limits of which he shall place the proper landmarks. The land now granted is of the extent of four square leagues, more or less, as shown by the map which accompanies the expediente. The judge who shall give him possession shall have it measured in conformity with the evidence, the surplus that results remaining in the nation for its proper use." This requirement of the grant was not complied with, and this court said: "The grantees were not invested with such title, and could not be, without an official delivery of possession under the Mexican government, and such delivery was not had, and could not be had, after the cession of the country, except by American authorities acting under a law of Congress."

Appellants' counsel contends that "the juridical possession of 'said seven and one half sitios and two short caballerias of land, comprising the vacant public lands between the boundaries of Casita and those of Tumacacori and Calabazas,' was, on January 7, 1843, the date of the grant, delivered by Ignacio Lopez, the treasurer general of the department of Sonora, in the presence of the two witnesses, Antonio Teran y Peralta and Joaquin Urias, to the grantees, in pursuance of the sur-

vey made November 24, 1841, and following days, in the presence of Marcello Bonilla, the coterminous owner, by which survey the land was segregated from the public domain."

But Ignacio Lopez was not a judicial officer, and had no authority to perform a judicial act; neither Lopez nor the attending witnesses nor the grantees were, on the seventh of January, 1843, upon the land, nor anywhere near it, but were at the city of Arizpe; the coterminous proprietors were none of them then called to give assent to the final act investing the grantees with title and possession, and there was, of course, no physical act on the part of the grantees accepting or taking possession of the grant. The attempt of counsel is to make out the act of juridical possession by reference to the date of the survey, which was more than a year before the land had been sold, bought, and paid for; nor was there at that time any pretence of the formal delivery of possession if it could have been done by anticipation. The application, it will be remembered, was for a resurvey of Casita, as well as for a survey of the public land sought to be acquired, and it appears from the expediente that the mission of Tumacacori and Calabazas was represented by Don Marcelo Bonilla on that occasion. And Navamuel also says that "in this manner was terminated the survey of the vacant public lands, which include seven and one half sitios, and the party, when it was made known to him, was satisfied and understood the area it encloses and was warned to place, at the first opportunity, fixed monuments of stone and mortar." But it still remained for the property to be sold and purchased, and possession to be taken, and though the applicant had the preference at the price fixed by the appraisement, a higher bid would have taken the property.

Nor are we prepared to accede to the suggestion that because, in the final execution of the grant, the purchasers were cautioned "to restrict and limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey," and to comply with the law as to monuments at their boundary termini, therefore it is to be inferred that the act of juridical possession

had already taken place though not disclosed by Navamuel's report.

The seven and one half sitios could undoubtedly have been located, juridical possession delivered, and monuments of stone and mortar put up, and the grantees would then have been limited to their metes and bounds thus ascertained; but the grantees did not do this, and, so long as these public lands remained in Mexico, were liable on resurvey to account for the excess over what they actually bought on such terms as the government imposed.

We have referred to the proceedings of 1882, 1886, in Mexico as furnishing persuasive evidence of the proper construction of this grant under Mexican law, and it may be further observed that the adjudication of the overplus required the location of the seven and a half sitios, which location Mexico, as the granting government, assumed it had the right to make, and made, out of the land within its jurisdiction. In this way the grant was satisfied by the receipt of all that the grantees had bought and were entitled to under the Mexican law, the result as to the overplus enuring to Camou's cotenants by the terms of his petition.

In any view no reason is perceived for disregarding the construction thus put upon the titulo, and as the land purchased was not located at the date of the cession, the United States were not bound by the treaty to recognize the claim as of right, nor could the Court of Private Land Claims confirm it.

The fact that a parallelogram of 340 cordels by 222 cordels, making seven and one half sitios and two caballerias, if correctly measured from the initial point of Navamuel's survey, would be partly within the Territory of Arizona, is immaterial.

Decree affirmed.

Mr. Justice Peckham was not a member of the court at the time this case was argued, and took no part in its decision.

DURHAM *v.* SEYMOUR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 769. Submitted January 13, 1896. — Decided March 2, 1896.

As a claim of invention, made in an application for a patent, is a right incapable of being ascertained and valued in money, no appeal lies to this court from a judgment of the Court of Appeals for the District of Columbia, affirming the decision of the Supreme Court of the District that the applicant was not entitled to a decree, under Rev. Stat. § 4915, authorizing the Commissioner of Patents to issue a patent to him for his alleged invention.

This was a bill brought by Caleb W. Durham, under the provisions of section 4915 of the Revised Statutes, in the Supreme Court of the District of Columbia, to obtain a decree authorizing the Commissioner of Patents to issue a patent to him for an improved drainage apparatus for buildings. The Supreme Court adjudged on the evidence that Durham was not entitled to a decree, and dismissed the bill, whereupon he carried the case by appeal to the Court of Appeals for the District of Columbia, and that court affirmed the decision of the court below. From this decree an appeal was taken to this court, and a motion was made to dismiss the appeal for want of jurisdiction.

Section 4915 is as follows: "Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the require-

ments of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

Section 8 of the act establishing the Court of Appeals of the District of Columbia and for other purposes, approved February 9, 1893, c. 74, 27 Stat. 434, provides:

"SEC. 8. That any final judgment or decree of the said Court of Appeals may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

The act of March 3, 1885, c. 355, 23 Stat. 443 reads thus:

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"SEC. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

Mr. Levin H. Campbell for the motion.

Mr. J. Nota McGill and *Mr. Don M. Dickinson* opposing.

Opinion of the Court.

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

Appeals to this court from the Court of Appeals of the District of Columbia are governed by section 8 of the act of February 9, 1893. It is essential to our jurisdiction that it should appear that the matter in dispute in the courts below was money to an amount exceeding five thousand dollars exclusive of costs, or some right, the value of which could be ascertained in money and exceeded that sum; or that the validity of a patent or copyright was involved; or that the validity of a treaty or statute of or an authority exercised under the United States was drawn in question. *South Carolina* v. *Seymour*, 153 U. S. 353, and cases cited.

The question here was whether Durham was "entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear." What Durham sought was to obtain an adjudication authorizing the Commissioner of Patents to issue a patent to him, and the matter in dispute was whether Durham was entitled to a patent as for a patentable invention.

Durham had presented his application for a patent, filed in due form, to the Commissioner of Patents in accordance with section 4888 of the Revised Statutes, which application was rejected by the Commissioner, and thereupon he appealed to the Supreme Court of the District of Columbia in general term, which affirmed the decision of the Commissioner. He then filed this bill in equity in accordance with section 4915 of the Revised Statutes, and although, as remarked by Mr. Justice Blatchford, in *Gandy* v. *Marble*, 122 U. S. 432, 439, it "is a suit according to the ordinary course of equity practice and procedure, and is not a technical appeal from the Patent Office, nor confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced upon the whole merits, yet the proceeding is, in fact, and necessarily a part of the application for the patent." Considered in this light it is clear that the validity of a patent was not involved. And we may add that it appears to us to be quite

inconsistent with the intention of Congress for this court to take jurisdiction on appeal of applications for patents in view of the provisions in relation to appeals from the Circuit Courts of Appeals under the act of March 3, 1891, c. 517, 26 Stat. 826. *United States* v. *Amer. Bell Telephone Co.*, 159 U. S. 548.

The matter in dispute was not money, and the only remaining inquiry is whether it was a right capable of being ascertained in money and appearing to be of the requisite pecuniary value?

The answer to this inquiry requires the application of the settled and necessary principle that the matter in dispute is, as was said by Mr. Justice Field in *Lee* v. *Watson*, 1 Wall. 337, 339, "the subject of the litigation — the matter for which the suit is brought," and that matter here was the issue of a patent, that is, an application to the courts below to hold the alleged invention patentable and authorize a patent to be issued.

It is true that "the discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires;" and that an assignment may, under circumstances, be made which will operate upon the perfect legal title which the discoverer had a lawful right to obtain, as well as upon the imperfect and inchoate interest which he may actually possess. *Gayler* v. *Wilder*, 10 How. 477, 493.

So rights growing out of an invention may be sold, whether the sale in any case carries with it anything of value or not. *Hammond* v. *Mason & Hamlin Organ Co.*, 92 U. S. 724, 728. But "until the patent is issued there is no property right in it, that is, no such right as the inventor can enforce. At all events there is no power over its use, which is one of the elements of the right of property in anything capable of ownership." *Marsh* v. *Nichols*, 128 U. S. 605, 612; *Brown* v. *Duchesne*, 19 How. 183.

The right to apply for a patent was being availed of in this proceeding and the invention cannot be regarded for jurisdictional purposes as in itself property or a right of property having an actual value susceptible of estimation in money.

Opinion of the Court.

Whether the alleged invention were patentable or not was the question, and that question had no relation to its value in money. If the invention were not patentable, Durham had suffered no loss; if the invention were patentable, it was not material whether it had or had not a money value.

The bill, properly enough, does not allege that any sum of money was in dispute, although there are averments that the value of the invention is generally recognized, and that sundry persons are deriving large profits in making the device sought to be patented. Evidence of that kind, though not controlling, is sometimes introduced in suits on patents as indicative of invention in the production of new and beneficial results, but it is not relevant here, nor are the affidavits presented on the question of value if the patent were granted. The matter in dispute must have actual value, and that cannot be supplied by speculation on the possibility that, in a given case, an invention might be held patentable.

In *Sparrow* v. *Strong*, 3 Wall. 97, jurisdiction was sustained on the ground that a mining claim acquired under mining rules and customs recognized by the laws of the Territory of Nevada, though the land where it existed had never been surveyed and brought into market, might be the subject of estimate in money; that the claim might perhaps have existed under the former governments of Spain or Mexico, and that, moreover, mining interests apart from fee simple rights in the soil, existed, before the act of Congress of February 27, 1865, under the implied sanction of the Federal government. The distinction between that case and the one before us is obvious.

We are of opinion that the matter in dispute in this case was not capable of being valued in money, and that the appeal must be dismissed.

It is suggested that jurisdiction was entertained in *Gandy* v. *Marble*, 122 U. S. 432; *Hill* v. *Wooster*, 132 U. S. 693, and *Morgan* v. *Daniels*, 153 U. S. 120, to the contrary of the conclusion at which we have arrived. But *Morgan* v. *Daniels* and *Hill* v. *Wooster* were appeals from Circuit Courts taken before the passage of the judiciary act of March 3, 1891, and when section 699 of the Revised Statutes was in force, which

Counsel for Parties.

allowed appeals from those courts irrespective of the sum or value of the matter in dispute in cases "touching patent rights"; and while we admit that a patent right does not exist while the proceeding to obtain it is pending, yet we think that such a proceeding constituted a case touching patent rights within section 699. And *Gandy* v. *Marble* was an appeal from the Supreme Court of the District of Columbia taken before the passage of the act of March 3, 1885, and when the final decrees of that court could be revised by this court on appeal in the same manner and under the same regulations as decrees of Circuit Courts. Rev. Stat. § 705; Rev. Stat. Dist. Col. § 846.

Appeal dismissed.

BALTZER *v.* NORTH CAROLINA.

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

No. 93. Argued February 3, 4, 1896. — Decided March 2, 1896.

The decision of the Supreme Court of North Carolina, made in an action to recover on bonds issued by the State in 1868, that the constitution of 1868, (in force when the bonds were issued,) giving the Supreme Court of the State jurisdiction to hear claims against the State, but providing that its decision should be merely recommendatory, to be reported to the legislature for its action, had been repealed by an amendment to the constitution made in 1879 which forbade the general assembly to assume or provide for the payment of debts incurred by authority of the convention of 1868, or by the legislature that year or in two sessions thereafter unless ratified by the people at an election held for that purpose, and that the court was without jurisdiction to render judgment of recommendation on a claim against the State whose validity was thus denied by the state constitution, did not in any way impair the obligation of contracts entered into by the State when the constitution of 1868 was in force.

THE case is stated in the opinion.

Mr. Simon Sterne for plaintiff in error.

Mr. James E. Shepherd and *Mr. Charles M. Busbee*, (with whom was *Mr. F. I. Osborne* on the brief,) for defendant in error.

Opinion of the Court.

MR. JUSTICE WHITE delivered the opinion of the court.

By an ordinance of the Constitutional Convention of the State of North Carolina, held in 1868, certain bonds were authorized to be issued in aid of the Chatham Railroad. Whilst there was some question raised on the subject, in the discussion at bar, it may be, for the purposes of this case, conceded that at the time the ordinance authorizing the bonds was passed, section 11, article 4 of the constitution of North Carolina, adopted in 1868, was in existence, and was as follows:

"*Claims against the State.* — The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory. No process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action."

In 1879 an amendment to the constitution of North Carolina was submitted by the legislature of that State to the people thereof, and this amendment was ratified by a popular vote in 1880. It is as follows:

"Nor shall the general assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, nor any debt or bond incurred or issued by the legislature of the year 1868, either at the special session of the year 1868 or at its regular sessions of the years 1868–'69 and 1869–'70, except the bonds issued to fund the interest on the old debts of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State at a regular election held for that purpose."

After the incorporation of this amendment in the constitution of the State, the plaintiff in error commenced in the Supreme Court of North Carolina an action against that State for the recovery of the amount of interest due on coupons forming part of certain bonds which had been issued under the ordinance of the Constitutional Convention of 1868,

above referred to. The attorney general of the State, reserving all its rights to plead to the jurisdiction, answered denying both the existence and validity of the bonds and coupons declared on, and pleading the statute of limitations of three and ten years. Thereupon a motion was made by the attorney general on behalf of the State to dismiss the action for want of jurisdiction. This motion prevailed, the court referring, as its grounds for dismissing the suit, to the reasons assigned by it in the previous cases of *Horne* v. *The State*, 84 N. C. 462, and *Baltzer* v. *The State*, 104 N. C. 165. The cases thus referred to held that the power of the court to recommend claims to the favorable consideration of the legislature had — *quoad* claims identical in legal nature with the coupons sued on — been repealed by the constitutional amendment to which we have referred, and that the court was without jurisdiction to render judgment of recommendation on a claim against the State when its validity was denied by the state constitution. To the judgment thus rendered this writ of error is prosecuted.

In *Railroad Co.* v. *Tennessee*, 101 U. S. 337, 339, this court was called upon to determine whether the repeal, by a State, of a statutory provision authorizing itself to be sued in its own courts, but which gave no power to the courts to enforce their judgments, and which enacted that when such judgments were rendered the money could only be obtained through an appropriation by the legislature, was an impairment of the obligation of a contract, entered into by the State whilst the authority conferred by the statute was unrepealed. In speaking on this subject this court, by Mr. Chief Justice Waite, said:

"The question we have to decide is, not whether the State is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the State had withdrawn its consent to be sued, and the only question now to be determined is whether that withdrawal

impaired the obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.

"The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract.

"Here the State has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained, but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfilment. The courts are powerless. Everything after the judgment depends on the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty.

"It is clear, therefore, that the right to sue, which the State of Tennessee once gave its creditors, was not, in legal effect,

a judicial remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given."

Subsequently, in the case of *Railroad Co.* v. *Alabama*, 101 U. S. 832, 834, the same question was presented on a state of facts, somewhat stronger in favor of the contention that there was a contract right, than that which had been considered in the foregoing case. There the facts were that the statute of the State, existing at the time the contract was made, not only authorized a judgment to be rendered against the State, but provided (we quote from the opinion) "that if a judgment should be rendered against the State, it was the duty of the comptroller, on the certificate of the clerk of the court, together with that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount, but no certificate could issue until six months after the recovery of the judgment. Code 1867, sec. 2536. It was also the duty of the treasurer to pay all warrants drawn on him by the comptroller under the authority of law; Code, sec. 442; but the constitution in force then and now provides in express terms that no money should be drawn from the treasury but in consequence of appropriations made by law. Const. 1834 and 1870, art. 2, sec. 24." Upon these facts, speaking through Mr. Chief Justice Waite, this court again said:

"We are unable to see any substantial difference between this case and that of *Railroad Company* v. *Tennessee*, *supra*. Under both the Tennessee and Alabama statutes the courts are made little else than auditing boards. If the funds are not voluntarily provided to meet the judgment, the courts are not invested with power to supply them. In Alabama, a warrant for the payment may be secured, but the State may stop payment by withholding an appropriation. Perhaps the judgment creditor may take one step further towards the collection in Alabama than he can in Tennessee; but both States may refuse to pay, that is, may refuse to make the necessary appropriation, and the courts are powerless to com-

pel them to do so. In neither State has there been granted such a remedy for the enforcement of the contracts of the sovereignty as may not, under the Constitution of the United States, be taken away."

The statute of North Carolina which we now consider, and which gave the courts of that State power to examine and recommend claims against it to the legislature, is much more restrictive than were the statutes of Tennessee and Alabama passed on in the cases just cited. Applying to this case the reasoning of this court in those cases expressed, it becomes clear that the authority given by the State of North Carolina to its court not being a part of the contract on which the plaintiff in error had a right to rely, its repeal did not impair the obligations of his contract in the sense conveyed by those words when used in the Constitution of the United States. This proposition so necessarily results from the authorities and is so self-evident in reason that it was not denied in the discussion at bar. Indeed, it was frankly conceded that the exercise by a State of the power to repeal a grant of authority to its courts to audit claims against itself, would not in any manner violate the obligations of contracts which had been entered into by the State at a time when the power existed. Yet, whilst this concession was made, it was asserted that the impairment of the obligation of the contract, here claimed to have been accomplished, arises from the fact that the state court erroneously held that the amendment to the state constitution repealed the court's authority to examine and recommend the claim presented to it, when in fact such repeal had not taken place. In other words, it was argued that although the right to have the claim examined and recommended was existing and unrepealed, the state court had impaired the obligations of the contract by holding that such right was nonexisting because repealed by a subsequent provision of the state constitution. But this is mere reasoning in a vicious circle, for the concession that the right could be taken away without violating the contract clause of the Constitution, necessarily implied that the decision of the state court as to repeal *vel non* in no way involved rights protected from impairment

under the Constitution of the United States. It is apparent that no rights under the Constitution of the United States arose in favor of the claimant from the provision conferring on the courts of the State the authority to examine and recommend, since all the benefits resulting therefrom could admittedly be withdrawn without violating the contract. To give effect to the contention of the plaintiff in error, we should be obliged to announce the contradictory proposition that where there were no rights under the Constitution of the United States to be impaired, yet a decision of the state court had impaired such rights. We should also be obliged to hold that although the State could at its will take away the right without impairing the contract, yet a decision by the court of last resort, of the State, that the right had been taken away was an impairment of the contract. The fallacy contained in the argument results from overlooking the fact that the moment it is admitted that the repeal of the right to have the claim examined and recommended is no impairment of the obligation of the contract secured under the Constitution of the United States, the question whether or not such right has been repealed becomes purely a question of state law to be determined by the state courts.

Judgment affirmed.

BALTZER AND TAAKS *v.* NORTH CAROLINA.

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

No. 52. Argued February 3, 4, 1896.—Decided March 2, 1896.

Baltzer v. *North Carolina*, *ante* 240, followed.

THE case is stated in the opinion.

Mr. Simon Sterne for plaintiff in error.

Mr. James E. Shepherd and *Mr. Charles M. Busbee*, (with whom was *Mr. F. I. Osborne* on the brief,) for defendant in error.

Statement of the Case.

MR. JUSTICE WHITE delivered the opinion of the court.

The claim presented in this case to the Supreme Court of the State of North Carolina differs somewhat from that relied on in that court in the case of *Hermann R. Baltzer* v. *The State of North Carolina*, No. 93 of the docket of this court. The question of the power in the state court to give the relief prayed for was by it decided adversely to the plaintiffs in error upon grounds identical with those considered by us in the case just decided. Our reasons for affirmance there expressed are conclusive of the issues here, and consequently the judgment is

Affirmed.

LYNCH *v.* MURPHY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 129. Argued December 18, 19, 1895. — Decided March 2, 1896.

Arndt v. *Griggs*, 134 U. S. 316, affirmed to the point that the duty of determining unsettled questions respecting title to real estate is local in its nature, to be discharged in such mode as may be provided by the State in which the land is situated, when such mode does not conflict with some special prohibition of the Constitution, or is not against natural justice.

Applying that doctrine to this case it is held that the decree in the equity cause of *Pippert* v. *English* was not void for want of personal service on English and his wife, as the laws relating to the District of Columbia permit service by publication upon absent defendants.

And further, as the evidence shows that Pippert had no knowledge of the attempt by Mrs. English to incumber the land in question by a deed of trust, the recording of the instrument did not give him constructive notice of it, as the formalities required by law to authorize the recording were not complied with.

That deed of trust was inoperative as a legal instrument.

There being no actual notice, and the recording of the defective deed not operating as constructive notice, the alleged equitable lien is wholly inoperative against those holding under the decree below.

THE complainant below was Christeina Murphy, who sued

in her own right and as executrix and trustee under the will of Peter Pippert, her deceased father. By her bill, complainant sought the cancellation of a deed of trust upon certain land in the city of Washington, devised by her father to complainant and to two of the defendants named in the bill, or, in the alternative, the reinstatement of a deed of trust for the benefit of said Pippert which had been cancelled by a judicial decree as hereinafter stated. The deed of trust attacked by the bill purported to have been executed in August, 1874, by Elizabeth English, to one Bean, to secure payment of four notes for $1000 each, payable to the order of James Lynch. It was averred, in substance, that at the time of the execution of the deed of trust the legal title to the land was in Elizabeth English and Andrew Schwartz, Sr., by virtue of a conveyance from Pippert, made July 27, 1874, and the land which it embraced was incumbered by a deed of trust to Pippert given to secure the unpaid purchase money, $10,390.42. It was also alleged that the deed from Pippert to English and Schwartz was annulled by a decree of the Supreme Court of the District of Columbia, in a suit instituted by Pippert to cancel his conveyance on the ground of alleged fraud practised upon him in the transaction. At the time of the institution of said suit the Bean deed of trust had been placed by Mrs. English on her three-fourth interest in the property, bought by herself and Schwartz from Pippert, and it was on the land records of the District of Columbia. Neither Lynch nor his trustee Bean were made parties to the suit.

Relief was sought as to the Bean deed of trust upon the ground that it was executed on behalf of Mrs. English by her husband, who had no proper or competent authority in law to execute the same; and it was urged at the trial, among other objections, that the power of attorney under which English assumed to execute the deed of trust was defective and was not entitled to record, because of the absence therefrom of a certificate of the official character of the officer before whom, in Michigan, Mrs. English acknowledged the instrument. It was further urged in the bill as ground of relief that the notes to Lynch were made without consideration,

and that the transaction was part and parcel of a scheme by which English attempted to defraud Pippert, as alleged in the suit of Pippert hereinbefore referred to, and that the defendant Jane Lynch, claiming to be the owner of the notes secured by said deed of trust, and the heirs at law of Bean, the deceased trustee, were threatening to enforce the deed of trust by advertising the premises for sale thereunder.

The controversy in this court being confined to the question of the validity of the apparent deed of trust to Bean, numerous allegations contained in the bill are unnecessary to be referred to.

Of the pleadings filed on behalf of the various defendants only that of Jane Lynch requires notice. In her answer she set up her ownership of the notes referred to in the Bean deed of trust, claiming that she received them from her husband on the day the notes bore date. She denied any knowledge of the suit to cancel Pippert's conveyance to Mrs. English and Schwartz, and averred that she had no knowledge of the decree in Pippert's suit until very recently, and further averred that her deceased husband parted with full consideration for the notes, and that the transaction was not fraudulent.

While averring that English did have proper and competent authority in law to execute the said deed of trust as the agent of his wife, Mrs. Lynch coupled such averment with the claim that the property purchased from Pippert was in fact paid for by the money of Alexander English, who kept his property in his wife's name so as to be out of the reach of his creditors, and that said English was the real principal, and in giving the deed of trust for the benefit of Lynch he was pledging his own property, though in the name of his wife, for a debt due by him and for which he received the consideration. We quote the following statements in the answer:

"Defendant further says that she is advised and believes, and, therefore, charges, that while the said deed of trust is not technically sufficient in law to constitute a valid deed of trust, yet that it was on the part of said English a pledge of property of which he was the real and equitable owner for a just debt which he owed the said James Lynch, and that the

said deed of trust constitutes an equitable mortgage upon the said premises which this defendant has the right to have enforced, and that the said Peter Pippert had notice thereof in his lifetime and before the filing of the suit by him hereinbefore referred to; that the complainant herein is not a purchaser thereof, but a mere volunteer, having taken the property as a gift and without paying any value therefor and with full notice of this defendant's claim, and this defendant says that complainant took the land subject to all the equities of this defendant and all other persons whomsoever. Defendant says that the said notes have never been paid, and that it is true that she threatened to enforce the said trust by a sale of said real estate because of the non-payment thereof."

After the cause was at issue, a decree was entered by consent of all parties, appointing a trustee to make sale and ordering a sale of the property affected by the bill. The following provision is contained therein:

"And whereas the said Jane Lynch, in consideration of the provision hereinafter made, is willing to consent to the decree of sale, now it is further ordered, adjudged and decreed that said John C. Heald, immediately upon the completion of such sale, shall pay into the registry of this court the sum of eight thousand dollars of the proceeds of said sale, and that the same shall be invested and reinvested under the direction of the court and held until the final determination of this cause in the court of last resort, and that said sum of eight thousand dollars and the notes, securities or property in which the same shall from time to time be invested and the increase thereof as to all parties interested in said real estate shall stand in the place and stead of said real estate, and that if in this proceeding it shall ultimately be decided that the defendant Jane Lynch had a valid lien upon said real estate at the time the bill in this case was filed for the sum of four thousand dollars, with interest as aforesaid, or only part thereof, then said sum of eight thousand dollars and the increase thereof, or so much thereof as shall be necessary, shall be applied for the satisfaction of such lien."

Opinion of the Court.

A sale of the property was had and the fund representing the Lynch claim was paid into the registry of the court.

After the taking of testimony the cause came on for hearing, and, on May 13, 1891, the court at special term entered a decree adjudging the deed of trust to Bean to be null and void; that the fund in the registry of the court belonged to the estate of Peter Pippert, and under his will passed to the complainant and the defendants Edward Marsh and Florence Marsh. On the appeal of Jane Lynch, the general term, on May 31, 1892, affirmed the judgment of the special term.

Thereupon Mrs. Lynch took an appeal to this court.

Mr. William G. Johnson and *Mr. Calderon Carlisle* for appellant.

Mr. A. S. Worthington, (with whom was *Mr. J. C. Heald* on the brief,) for Murphy, appellee.

Mr. Henry E. Davis for Edward Marsh and Florence Marsh, appellees.

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

The question for our determination is whether or not appellant had a valid lien, legal or equitable, upon the real estate in question at the time the bill of complaint was filed.

We will premise that the decree in the equity cause of *Pippert* v. *English et als.* was not void because English and his wife were not personally served with process. Constructive service by publication was authorized by § 787 of the Revised Statutes relating to the District of Columbia. *Hart* v. *Sansom*, 110 U. S. 151, relied upon as supporting the proposition that the rights of Mr. and Mrs. English in the land could not be effected by such constructive notice, and that the decree rendered thereon was not entitled to recognition in a Federal court, does not support the contention. The *Hart case* was explained in *Arndt* v. *Griggs*, 134 U. S. 316, in

which last case it was held that the duty of determining unsettled questions respecting the title to real estate was local in its nature, to be discharged in such mode as might be provided by the State in which the land was situated, where such mode did not conflict with some special inhibition of the Constitution and was not against natural justice; and we held (pp. 327–328) that nothing inconsistent with this doctrine was decided in *Hart* v. *Sansom*.

From the evidence contained in the record, we are satisfied that when Pippert instituted the action to annul his conveyance to Mrs. English and Andrew Schwartz, Sr., he did not have actual knowledge that Mrs. English or any one claiming to represent her had incumbered or attempted to incumber the land. The question then presents itself: Was the record of the alleged deed of trust to Bean constructive notice to Pippert? We are relieved from extended discussion in answering this question by the admissions made in the answer of defendant Lynch and in the brief of her counsel.

In the bill of complaint it is charged that Alexander English was without any proper or competent authority in law to execute said deed of trust. This refers to the authority of English to execute the deed of trust, as the attorney of his wife. This allegation is admitted by the answer, for while it is averred therein, "upon information and belief, that said Alexander English did have proper and competent authority in law to execute the trust to said William W. Bean," it proceeds to aver in connection with this allegation that "the true facts in relation thereto" were, in substance, that the payment made by English when the property was purchased from Pippert was made with money belonging to English personally, that he had personally received the benefit of the consideration from Lynch, and that the said deed of trust, "while not technically sufficient in law to constitute a valid deed of trust, . . . was on the part of said English a pledge of property of which he was the real and equitable owner for a just debt which he owed to said James Lynch, and that the said deed of trust constitutes an equitable mortgage upon the said premises which this defendant has the right to have enforced."

In the brief of counsel for appellant the matter is thus stated: "The only remaining objection to the Lynch trust is the defective character of the instrument. It is admitted in the answer that the instrument is inartificially drawn and as a mortgage is technically defective." And the argument then proceeds to maintain that the evidence clearly established a good equitable mortgage in favor of appellant.

In the face of these concessions it becomes unnecessary to determine what were the particular defects rendering the writing in question legally invalid.

Having concluded that the deed of trust was inoperative as a legal instrument, we recur to the question whether or not its spreading upon the land records of the District constituted constructive notice. As said by Pomeroy in § 652 of his work on Equity Jurisprudence:

"The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved, so as to entitle it to be recorded. The statutes generally require, as a condition to registration, that the instrument should be legally executed, and that it should be formally acknowledged or proved, and a certificate thereof annexed. If a writing should be placed upon the records with any of these preliminaries entirely omitted or defectively performed, such a record would be a mere voluntary act, and would have no effect upon the rights of subsequent purchasers or incumbrancers."

Story (Eq. Jur. 13th ed. § 404) states the doctrine thus:

"The doctrine as to the registration of deeds being constructive notice as to all subsequent purchasers, is not to be understood of all deeds and conveyances which may be *de facto* registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud."

It follows that the recording of the instrument under con-

sideration was a mere nullity in a jurisdiction such as the District of Columbia, (Rev. Stat. Dist. Col. § 440,) where particular formalities are required to authorize the recording. To the cases referred to by the authors first cited may be added *Dohm* v. *Haskin*, 88 Michigan, 144, and *Musgrove* v. *Bonser*, 5 Oregon, 313, 315–316, the defect in the recorded instrument, in both cases, being the absence of a certificate as to the official character of the officer before whom a deed was acknowledged. See, also, 3 Washburn Real Prop. * 592; Wade, Notice, §§ 124, 125, 126.

The effect of the decree in Pippert's suit, annulling his conveyance to Schwartz and English, was that Pippert, as the consideration of such cancellation, surrendered the benefit of his vendor's lien and the security of the deed of trust. When this result was accomplished the unpaid purchase money amounted to $10,390.42, and was in fact but $500 less than the entire consideration for the sale, and practically represented the full value of the property. By the reconveyance to him, under the decree, Pippert stood in the position of a *bona fide* purchaser of the property for value; and, as we have found he did not have actual or constructive notice of the real or supposed equity of Mrs. Lynch, there would seem to be no ground upon which to base the claim that at the time of the institution of this suit Mrs. Lynch had an equitable mortgage or lien upon the property. Let us assume, for the sake of the argument, that, as claimed by counsel for the appellant, Alexander English should be regarded in equity as having been the real owner of the property at the time of the transaction with Lynch, though the legal title was in his wife; that Lynch paid to English full consideration for the cash paid and notes delivered by English, and that Lynch accepted the notes on the faith of the security of the property in question. As against English it is clear, under the authorities, that from the nature of the transaction, upon the hypothesis we have stated, a lien would have arisen in equity against English's interest in the land. Jones on Mortgages, §§ 162, 163, 166, 168, 169; Story Eq. Jur. §§ 1020, 1231; *Peckham* v. *Haddock*, 36 Illinois, 38; *McClurg* v. *Phillips*, 49 Missouri, 315; *Gale* v.

Morris, 29 N. J. Eq. 222, 224. But a *bona fide* purchaser for value of property, subject to an equitable mortgage, without notice of such mortgage, takes the property free of the equitable mortgage. Jones on Mortgages, § 162, p. 139, citing *Watkins* v. *Reynolds*, 123 N. Y. 211. *Watkins* v. *Reynolds* was a case where a *cestui que trust* for life executed a mortgage in fee on the trust estate, and, after her death, the remainderman in fee executed, under seal, an unattested paper covenanting for sufficient consideration that the mortgage should continue to be a lien on the land. Afterwards he sold and conveyed to another, who paid a sum in cash, and contracted to assume certain mortgages and pay certain debts of the vendor to third persons, equal in amount to the remainder of the purchase price. The cash payment and part of these debts were made before the purchaser had actual notice of the agreement to continue the mortgage lien. Upon this state of fact the court, speaking through Peckham, J., held that since the purchaser's agreements were made before notice, and remained in full force after notice, there was no equitable lien against the property in favor of the mortgagee for the purchase money unpaid at the time of such notice.

That notice to Pippert, actual or constructive, was an element essential to the survival of the lien as against Pippert, is admitted in the answer of Mrs. Lynch, expressed by the averment that Pippert had notice of the existence of the supposed deed of trust. As that allegation was not established by the evidence, but the contrary was proven, it follows that the claim of a lien or a mortgage upon the property in favor of Mrs. Lynch has not been made out. And this conclusion inevitably results from the following additional considerations.

Pippert instituted and prosecuted his suit for cancellation of his conveyance against all persons known to him as claiming an interest in or incumbrance on the property. He did what the law required, in order to make his judgment binding upon all the world, and when the court divested Mrs. English of all her interest in the property, appellant's alleged rights, acquired through her, not having been legally recorded before judgment, were divested by the decree as effectually as if ap-

pellant had been a party. There being no actual notice, and the recording of the defective deed not operating as constructive notice, the alleged equitable lien is wholly inoperative against those holding under the decree.

The decree of the general term of the Supreme Court of the District of Columbia must be

Affirmed.

MR. JUSTICE BREWER, not having heard the argument, took no part in the decision of this cause.

HAMILTON *v.* BROWN.

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

No. 241. Submitted November 2, 1894. — Decided March 2, 1896.

Upon proceedings under the statute of Texas of March 20, 1848, c. 145, for the escheat of land of a person who is dead, in which the petition describes the land, gives his name, and alleges that he died intestate and without heirs, that no letters of administration upon his estate had been granted, that there is no tenant or person in actual or constructive possession of the land, nor any person, known to the petitioner, claiming an estate therein, and that the land has escheated to the State of Texas; and an order of notice to all persons interested in the estate has been published, as required by the statute; and, after a hearing of all who appear and plead, judgment is entered, describing the land, and declaring that it has escheated to the State; the judgment is conclusive evidence of the State's title in the land, not only against any tenants or claimants having had actual notice by *scire facias*, or having appeared and pleaded, but also against all other persons interested in the estate and having had constructive notice by publication.

The constitution of Texas of 1869, art. 4, sect. 20, declaring it to be the duty of the comptroller of public accounts to "take charge of all escheated property," did not affect pending proceedings for escheat under the statute of March 20, 1848, c. 145, so far as concerned the vesting of the title to the land in the State, even if it should be held to repeal the provisions for a subsequent sale of the land by the sheriff.

Statement of the Case.

The constitution of Texas of 1869, art. 10, sect. 6, forbidding the legislature to grant lands except to actual settlers, did not affect judicial proceedings to declare and enforce escheats.

THIS was an action brought April 12, 1890, in the Circuit Court of the United States for the Western District of Texas, by Joseph F. Hamilton, a citizen of Missouri, Lewis Hamilton, and Mary A. Post, joined by her husband George Post, citizens of Illinois, Walter B. Hamilton, and Elizabeth Fulton, joined by her husband John G. Fulton, citizens of Kansas, and John F. Hamilton, a citizen of Colorado, against J. T. Brown and twenty-five others, all citizens of Texas, and living in the county of Fayette, within the Western District of Texas, to recover land in that county.

The petition alleged that the land consisted of one league, described by metes and bounds, granted to Walter F. Hamilton by the Republic of Mexico on April 30, 1831; that on April 13, 1888, the plaintiffs were the owners in fee simple of the land, and entitled to the possession thereof; and that the defendants on that day unlawfully entered thereon and dispossessed the plaintiffs, and had ever since withheld the possession from them.

The defendants, in a supplemental answer, "say that plaintiffs ought not to have or maintain this action against them, because they say that on the 30th day of March, 1861, one Edward Colier, at that time the lawful district attorney of what was then the first judicial district of Texas, acting for and under authority of the State of Texas, filed in the name and by the authority of the State of Texas a petition and began a suit in the district court of Fayette County, Texas, the object and purpose of which suit was to have said district court of Fayette County declare and adjudge that the league of land described in plaintiffs' petition in this suit had escheated to the State of Texas, and to have the title to the same divested out of the said Walter Hamilton and his heirs, and have it vested in the State of Texas; that in said petition plaintiff alleged that Walter Hamilton, late a resident of Fayette County, in said State, died on the — day of ———, ——, intestate, and without heirs, and that no letters of adminis-

tration have ever been granted upon said decedent's estate in Fayette County, in which succession should according to law have been opened; that said decedent died seized and possessed of the league of land which is described in the petition of plaintiffs in this suit and which is fully described in said petition; that said Walter Hamilton was the last person seized and possessed of said land; that there are no tenants upon said tract of land, and no person is either in actual or constructive possession of said tract of land or any part thereof, nor is there any person, claiming the estate in and to said tract of land, known to petitioner; that no person has paid the taxes on said land or any part thereof; that the estate in and to said tract of land has escheated to the State of Texas, and praying for the grant of writ of possession in and to said tract of land to said State; that afterwards, to wit, on the 18th day of May, 1861, the said district court of Fayette County, Texas, made an order in said suit and caused it to be enrolled in the minutes of the said court, commanding the publication for four successive weeks in a newspaper printed in the State of Texas of a notice setting forth the substance of the allegations of said petition and requiring all persons interested in the estate of said Walter Hamilton to appear and show cause at the next term of said court why the said league of land should not be vested in the State of Texas; that pursuant thereto a notice setting forth at length said order and the substance of said petition was issued by the clerk of said court and published, as required by law, for four successive weeks in a weekly newspaper called the New Era, printed and published in La Grange, in Fayette County, Texas; that sundry persons intervened in said suit, and set up claims to parts of said league of land; that said suit was continued from term to term of said court until the July term thereof in 1871, when there was a trial had, and judgment entered there to the effect that the league of land in controversy in this suit is escheated unto the State of Texas, and the title thereto is divested out of the said Walter Hamilton and his heirs, and forever vested in the State of Texas. A true and correct copy of said judgment, certified to under the hand

and seal of the clerk of the district court of Fayette County, Texas, is hereto attached and is made a part hereof.[1] That said judgment has never been reversed or vacated, but now remains in full force and effect; that, by and because of said judgment, the said Walter Hamilton, and all persons claiming through or under him, are estopped and barred of the right to have or maintain this action for the recovery of said land.

"And these defendants further say that afterwards, to wit, on the 7th day of August, 1872, pursuant to the commands of said judgment, the clerk of the district court of Fayette County, Texas, issued and delivered to the sheriff of Fayette County, Texas, an order of sale, commanding him to seize the said league of land, and sell it in manner as directed in the said judgment, and make disposition of the proceeds arising from the sale as provided therein; that said land was so seized and sold by said sheriff, and that these defendants and those under whom they claim became the purchasers of the parts of said league claimed by them at such sale, paid the amounts

---

[1] The judgment annexed was as follows: "It is thereupon ordered, adjudged and decreed by the court, that the league of land described and set forth in plaintiff's petition as follows, to wit, [giving the description by metes and bounds] be, and the same is hereby, declared escheated unto the State of Texas, and the title thereto is hereby divested out of the said Walter Hamilton, his heirs and assigns forever, and vested in the State of Texas. It is further ordered by the court, that the clerk of this court do issue a writ, directed to the sheriff of Fayette County, Texas, commanding him, the said sheriff, to seize and sell the above described league of land as under execution, without appraisement, for cash in United States currency, on the first Tuesday in some month, after giving notice of sale as the law directs, in lots of not less than ten nor more than forty acres, and turn over the proceeds of said sale, after deducting therefrom the expenses and costs of the same, to the comptroller of public accounts for the State of Texas, taking therefor his duplicate receipt, one of which he shall file among the papers of this cause. It is further ordered by the court, that the plaintiff, the State of Texas, do have and recover of the intervenors herein, to wit, J. G. Brown, J. J. Short, Wm. Short, and —— Short, her costs of suit in this behalf had and expended, for which execution may issue. It is further ordered that the costs incurred herein by the plaintiff be taxed against the State of Texas, and certified by the clerk of this court to the comptroller of public accounts, to be paid by the treasurer upon the warrant of said comptroller."

of their respective bids to the said sheriff, and received from him deeds conveying the same to them; that for this reason, also, these defendants say that said plaintiffs are estopped from and barred of the right to have or maintain this action."

The plaintiffs, by an amended supplemental petition, demurred generally to this answer as insufficient in law, and also specially excepted to it as follows:

1st. "The escheat proceedings and final judgment obtained therein, set out in defendants' said answer, were begun and prosecuted under and by virtue of an act of the legislature of the State of Texas, entitled 'An act to provide for vesting in the State escheated property,' passed March 20, 1848, there being at the date of the filing of said escheat proceedings no other law or statute authorizing escheats; which said act was repealed and annulled by the constitution of the State of Texas of 1869, long prior to the date when the escheat judgment, pleaded and relied upon by defendants to defeat plaintiffs' title, was obtained; in this, that the law of 1848, sect. 11, provides that the sheriff of the proper county shall seize the real estate escheated to the State, and sell the same in the manner therein provided, while the constitution of 1869, art. 4, sect. 20, provides that the comptroller of the State 'shall take charge of all escheated property, keep an accurate account of all moneys paid into the treasury, and of all lands escheated to the State,' which provisions are contradictory and conflicting."

2d. If the act of 1848 was not repealed and annulled entirely, then section 11 thereof was repealed and annulled by that provision of the constitution of 1869, "and, there being no other provisions in said act by which compensation is made to the heirs of the intestates whose property has been escheated, the balance of the said act is not self-acting, and is one of confiscation, and therefore in violation of the Fifth Amendment of the Constitution of the United States and section 14 of the bill of rights of the constitution of 1869," by which "no person's property shall be taken or applied to public use without just compensation being made, unless by consent of such person."

3d. The act of 1848, if not repealed by the constitution of 1869, "was and is in contravention and violation of sect. 10, art. 1, of the Constitution of the United States of America, which provides that 'no State shall pass any bill of attainder or law impairing the obligation of contracts,' in that said law impairs the obligation of the contract between the State of Texas and Walter F. Hamilton and his heirs by virtue of the grant under which they hold said land, and seeks to forfeit or confiscate the private property of said Hamilton, the land, by appropriating it to the common fund without making due compensation therefor."

The court overruled the general demurrer and the special exceptions to the answer, and, upon the plaintiffs declining to introduce any evidence to support their cause of action, rendered judgment for the defendants.

The plaintiffs tendered and were allowed a bill of exceptions to the rulings and judgment of the court, and sued out this writ of error.

Mr. H. E. Barnard and *Mr. Floyd McGown* for plaintiffs in error.

Mr. S. R. Fisher and *Mr. T. W. Gregory* for defendants in error.

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

This was an action to recover land in the county of Fayette and State of Texas.

The petition alleged that the land was granted in 1831 by the Republic of Mexico to Walter F. Hamilton, and that on April 13, 1888, the plaintiffs were the owners in fee simple and entitled to the possession thereof, and the defendants then ousted them.

The defendants, in their answer, relied on proceedings in escheat, commenced in 1861, and in which judgment was rendered in 1871.

In those proceedings, as set forth in the answer, the attor-

ney for the State alleged that Walter Hamilton died, intestate and without heirs, seized and possessed of this land, and that the estate in the land escheated to the State of Texas; the court ordered publication of notice to all persons interested in the estate of Walter Hamilton to appear and show cause why the land should not be vested in the State; after due publication of the order of notice, sundry persons intervened in the suit, and set up claims to parts of the land; the case was continued from term to term until July term 1871, when a trial was had, and judgment entered that the land "be, and the same is hereby, declared escheated unto the State of Texas, and the title is hereby divested out of the said Walter Hamilton, his heirs and assigns forever, and vested in the State of Texas."

The answer alleged that that judgment had never been reversed or vacated, but remained in full force; and that, because of such judgment, Walter Hamilton, and all persons claiming through or under him, were estopped and barred of the right to maintain this action.

The answer further alleged that in 1872, pursuant to the commands of that judgment, the sheriff sold the land by auction, and the defendants and those under whom they claimed became purchasers of parts of the land at such sale, and paid the amounts of their respective bids to the sheriff, and received from him deeds conveying the land to them; and that, for this reason also, the plaintiffs were estopped and barred to maintain this action.

Although it is not directly stated, either in the petition or in the answer, that the plaintiffs claimed the land as heirs of Walter Hamilton, or Walter F. Hamilton, yet it is evident that it was so understood and intended. If the plaintiffs did not claim in his right, then, on the one hand, the Mexican grant to him in 1831, upon which they relied, both in the petition and in the exceptions to the answer, was immaterial; and, on the other hand, neither the judgment in escheat in 1871, nor the sheriff's sale in 1872, set up in the answer, would meet the allegation in the petition that the plaintiffs owned the land in 1888. And it is assumed, in the briefs of both

parties, that the Walter F. Hamilton named in the petition and the Walter Hamilton named in the answer were the same person; and that the question to be decided is whether the judgment in escheat, or the sheriff's sale under that judgment, bars the plaintiffs claiming as his heirs.

By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign lord; but the King's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. *Attorney General of Ontario* v. *Mercer*, 8 App. Cas. 767, 772; 2 Bl. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the Court of Chancery, but was really a proceeding at common law; and, if it resulted in favor of the King, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse, in the nature of a plea or defence to the King's claim, and not in the nature of an original suit. Lord Somers, in *The Bankers' case*, 14 Howell's State Trials, 1, 83; *Ex parte Webster*, 6 Ves. 809; *Ex parte Gwydir*, 4 Maddock, 281; *In re Parry*, L. R. 2 Eq. 95; *People* v. *Cutting*, 3 Johns. 1; *Briggs* v. *Light-Boats*, 11 Allen, 157, 172. The inquest of office was a proceeding *in rem;* when there was a proper office found for the King, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the King's favor. Bayley, J., in *Doe* v. *Redfern*, 12 East, 96, 103; 16 Vin. Ab. 86, pl. 1.

In this country, when the title to land fails for want of heirs and devisees, it escheats to the State as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular State. 4 Kent Com. 424; 3 Washb. Real Prop. (4th ed.) 47, 48.

By the constitution of 1836 of the Republic of Texas, art. 4, sect. 13, it was provided that the legislature should, "as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in

their judgment, may require." 2 Charters and Constitutions, 1757. And by the statutes of Texas, from the time of its existence as an independent republic, the common law of England, so far as not inconsistent with the constitution and laws of Texas, has been declared to be, together with such constitution and laws, the rule of decision, and to continue in force until altered or repealed by the legislature. Texas Stat. January 20, 1840, Paschal's Digest, (4th ed.) art. 978; Rev. Stat. of 1879, § 3128; *Courand* v. *Vollmer*, 31 Texas, 397; *Barrett* v. *Kelly*, 31 Texas, 476.

By the constitution of the State of Texas of 1845, it was provided, in art. 4, sect. 10, that the district court should have original jurisdiction "of all suits in behalf of the State to recover penalties, forfeitures and escheats;" and in art. 13, sect. 4, as follows: "All fines, penalties, forfeitures and escheats which have accrued to the Republic of Texas under the constitution and laws shall accrue to the State of Texas; and the legislature shall by law provide a method for determining what lands may have been forfeited or escheated." 2 Charters and Constitutions, 1773, 1781.

By the settled course of decision in the Supreme Court of the State, no proceedings for escheat can be had, except under and according to an act of the legislature. *Jones* v. *McMasters*, 20 How. 8, 21; *Hancock* v. *McKinney*, 7 Texas, 384, 456; *Wiederanders* v. *State*, 64 Texas, 133.

The legislature, on March 20, 1848, passed a statute, entitled "An act to provide for vesting in the State escheated property." General Laws of Texas of 1847–48, c. 145, p. 210; Paschal's Digest, arts. 3657–3674.

By section 1 of that statute, (Pasch. Dig. art. 3657,) "if any person die seized of any real, or possessed of any personal estate, without any devise thereof, and having no heirs, or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest to the State." The purpose and import of the second clause of this section, concerning an owner absent for seven years and not known to exist, have been declared by the Supreme Court of the

State to be "that proof of absence of one who is not known to exist for the length of time mentioned is presumptive evidence of his death. It is not, therefore, a ground for escheat of itself, but evidence of one of the elements of title by escheat." *Hughes* v. *State*, 41 Texas, 10, 20. This is only important by way of explaining the scope of the statute, since, in the present case, both parties assume and rely upon the death of the former owner.

By section 2 (3658), when no letters testamentary or of administration appear to have been granted upon the estate of a person who has died without heirs, it is made the duty of the district attorney to file in the district court of the county "where such succession is required to be opened," which is as much as to say, where his estate would be administered, a petition setting forth "a description of the estate, the name of the person last lawfully seized or possessed of the same, the names of the tenants, or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim, and the facts and circumstances in consequence of which such estate is claimed to have escheated; praying for a writ of possession for the same, in behalf of the State."

Section 3 (3659) requires *scire facias* to be issued to all persons named in the petition as in possession of or claiming the estate, requiring them to appear and show cause why it should not be vested in the State. Section 4 (3660) further requires an order of notice to be published four weeks in a newspaper printed within the State, stating briefly the contents of the petition, and requiring "all persons interested in the estate" to appear and show cause why it should not be vested in the State. The order of notice by publication to all persons interested in the estate is essential to the jurisdiction of the court; and, if no such notice is shown by the record, a judgment for the State will be reversed on writ of error, even if sued out by parties who were named in the petition and appeared and pleaded in the cause. *State* v. *Teulon*, 41 Texas, 249; *Wiederanders* v. *State*, 64 Texas, 133; *Hanna* v. *State*, 84 Texas, 664, 667.

By section 5 (3661), "all persons named in such petition as tenants or persons in actual possession, or claimants of the estate," may appear and plead, and traverse the facts stated in the petition, or the title of the State; "and any other person claiming an interest in such estate may appear and be made a defendant and plead, by motion for that purpose in open court." By section 6 (3662), if no person, after notice as aforesaid, shall appear and plead, judgment shall be rendered by default for the State. By section 7 (3663), "if any person appear and deny the title set up by the State, or traverse any material fact in the petition, issue shall be made up and tried as other issues of fact." By section 8 (3664), "if after the issue and trial it appears, from the facts found or admitted, that the State hath good title to the estate, real or personal, in the petition mentioned, or any part thereof, judgment shall be rendered that the State shall be seized or possessed thereof, and, at the discretion of the court, recover costs against the defendants." By section 9 (3665), "if it appear that the State hath no title in such estate, the defendant shall recover his costs, to be taxed and certified by the clerk; and the comptroller of public accounts shall, on such certificate being filed in his office, issue a warrant therefor on the treasury of the State, which shall be paid as other demands on the treasury." And by section 10 (3666), "when any judgment shall be rendered that the State be seized or possessed of any estate, such judgment shall contain a description thereof, and shall vest the title in the State."

By section 11 (3667), "a writ shall be issued to the sheriff of the proper county, commanding him to seize such estate, vested in the State;" and "he shall dispose thereof at public auction, in the manner provided by law for the sale of property under execution." By section 12 (3668), a copy of the record and account of sale, exemplified under the seal of the court, is required to be deposited in the office of the comptroller of public accounts, and another copy recorded in the office of the recorder of the county; "and such record shall preclude all parties and privies thereto, their heirs and assigns."

By section 13 (3669), "any party who shall have appeared

to any proceeding, and the district attorney on behalf of the State, shall have the right to prosecute an appeal or writ of error upon such judgment."

Section 14 (3670) requires that "the comptroller shall keep just accounts of all moneys paid into the treasury, and of all lands vested in the State, under the provisions of this act."

Sections 15 (3671) and 16 (3672) provide that "if any person appear, after the death of the testator or intestate, and claim any money paid into the treasury under this act," as heir, devisee or legatee, he may, by petition in the district court for the county in which the estate was sold, and after notice to the district attorney, and proof that the petitioner is an heir, devisee, legatee or legal representative, obtain an order directing the comptroller to issue his warrant on the treasurer for payment thereof.

Section 17 (3673) simply relates to the duty of the district attorney to obtain from the clerk of any probate court moneys, or title papers to land, not claimed by any heir, devisee or legal representative of a deceased person.

By section 18 (3674), "all property, escheated under the provisions of this act, shall remain subject to the disposition of the State, as may hereafter be prescribed by law."

Sections 1770–1785 of the Revised Statutes of Texas of 1879 reënact, substantially and almost verbally, the provisions of the statute of 1848, except by requiring the publication of the order of notice for eight weeks, instead of four weeks as in section 4; by omitting sections 12 and 17; and by inserting the words "The proceeds of" at the beginning of section 18.

These proceedings for the escheat of the estate of a deceased person for want of heirs or devisees, like ordinary proceedings for the administration of his estate, presuppose that he is dead; if he is still alive, the court is without jurisdiction, and its proceedings are null and void, even in a collateral proceeding. *Griffith* v. *Frazier*, 8 Cranch, 9, 23; *Scott* v. *McNeal*, 154 U. S. 34; *Hall* v. *Claiborne*, 27 Texas, 217; *Withers* v. *Patterson*, 27 Texas, 491, 497; *Martin* v. *Robinson*, 67 Texas, 368, 375; *Caplen* v. *Compton*, 5 Texas Civ. App. 410. And if the death

of the former owner, intestate and without heirs, is not alleged in the petition, or is not proved at the trial, a judgment for the State is erroneous and reversible by appeal or writ of error. *Hughes* v. *State*, 41 Texas, 10; *Wiederanders* v. *State*, 64 Texas, 133; *Hanna* v. *State*, 84 Texas, 664.

But the whole object in proceedings for escheat, as in proceedings of administration, is to ascertain who are entitled to the estate of a deceased person; in proceedings of administration, to distribute the assets, after payment of debts, among those who come forward and prove themselves to be next of kin; in proceedings for escheat, to ascertain and determine, once for all, so far as concerns the title in the land itself, whether the former owner left no heirs or devisees, that being the single question on which depends the issue whether or not the land has escheated to the State.

Consequently, when (as is admitted in the present case) the former owner was dead; and in the proceedings for escheat (as shown by the record on which the defendants rely) the petition describes the land, gives the name of the former owner, and alleges that he died intestate and without heirs, that no letters of administration upon his estate had been granted, that there is no tenant or person in actual or constructive possession of the land, nor any person, known to the petitioner, claiming an estate therein, and that the land has escheated to the State of Texas; and an order of notice to all persons interested in the estate has been published, as required by the statute; and, after a hearing of all who appear and plead, judgment is entered, describing the land, and declaring that it has escheated to the State; the judgment is conclusive evidence of the State's title in the land, not only against any tenants or claimants having had actual notice by *scire facias*, or having appeared and pleaded, but also against all other persons interested in the estate and having had constructive notice by publication.

That such is the effect of the judgment in favor of the State is clearly shown by the decision in *Wiederanders* v. *State*, above cited, in which the reasons for holding that, if the notice required by the statute to all persons interested in the estate

had not been published, the court had no jurisdiction to enter judgment, even against persons who actually appeared and contested the claim of the State, were stated by the court as follows:

"The purpose for which proceedings of this character are instituted is to have a judicial declaration, in the form of a solemn judgment made by a court having jurisdiction of the subject-matter, and of the persons in interest in so far as publication can give it, that the facts exist which, under the law, cast title upon the State to property which, at some former time, (in case of lands) it had clothed a person with title."

"The law now in force must be deemed to be a law providing a method for giving effect to escheats. R. S. 1770–1788."

"We are of the opinion that the publication of notice, required by the statute, is made necessary to the exercise of the general jurisdiction conferred, and that without it the district court had no jurisdiction to try the case.

"The object of such a proceeding is not simply to have a decree declaring the escheat, and vesting the title in the State; but by and through process, to be issued under the judgment, to divest not only the title of persons entitled to take the property of the deceased as his heirs, if perchance any such there be, but also by a sale to divest the title of the State, and to start, and confer upon the purchaser, a new title deraigned directly from the sovereign of the soil. R. S. 1777–1780.

"The proceeding, while not strictly a proceeding *in rem*, has many of its characteristics; yet the statute does not direct a seizure of the thing, which, in some cases, has been held to support a judgment strictly *in rem*. It applies to personalty, as well as realty. The mere institution of the proceeding creates no presumption that there is no one capable of taking the estate under the rules regulating the descent of estates of deceased persons; the presumption is to the contrary; and the effect of the judgment, if rendered after all persons interested in the estate are notified of the pendency and purpose of the proceeding, in the only manner in which they can be, if unknown, is to destroy that presumption, and to make the title of the State clear.

"From the time the property is sold under a valid decree, the claim of the person who might have taken it, as heir, devisee or legatee, is against the proceeds of the property, which must be paid into the state treasury, (R. S. 1780–1785,) and to recover even that, he is driven to a suit.

"It certainly is not the intention that the purchaser of escheated lands shall be subjected to the peril of losing them after they have been regularly escheated and sold, if an heir, devisee or legatee shall subsequently make claim; nor that personalty which, from day to day, changes hands, shall be subject to the claim of such persons, however valid such claim may have been if asserted in proper time and place. Yet such results would follow if the jurisdiction of the court is not so brought into exercise, by a substantial compliance with the requisites of the statute, as to clothe it with power, by its judgment, to conclusively settle the title to the property as against all persons." 64 Texas, 135–138.

The like opinion was expressed by Chief Justice Shaw upon the effect of proceedings under a similar statute of Massachusetts, in a case in which it was held that a conveyance of real estate of a citizen dying intestate and without heirs could not be made by the Commonwealth until the rendition of judgment in its favor upon an inquest of office. The Chief Justice said: "Where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is that he had heirs, and this presumption will be good against the Commonwealth until it institutes the regular proceedings by inquest of office, by which the fact, whether the intestate did or did not die without heirs, can be ascertained, and if this fact is established in favor of the Commonwealth, it rebuts the contrary presumption, and the Commonwealth, by force of the judgment, and of the statute before cited, becomes seized in law and in fact. In such case, therefore, the court are of opinion that an inquest of office is necessary, and that the Commonwealth cannot be deemed to be seized without such inquest. *Jackson* v. *Adams*, 7 Wendell, 367; *Doe* v. *Redfern*, 12 East, 96. So far as this depends upon general principles, it seems to be a rule highly reasonable in

itself, and tends greatly to the security and regularity of titles. By the mode of taking inquests, prescribed by the law of this Commonwealth, St. 1791, c. 13, § 2, general notice is to be given of the claim of the Commonwealth, any person is admitted to traverse it, a trial by jury is to be had, and costs are given to the prevailing party. These are highly reasonable and equitable provisions, and it is manifestly for the quiet of the Commonwealth and the security of the citizen, that they should be pursued, before the Commonwealth shall be permitted to take into its own custody and dispose of estates, upon a claim which, if not doubtful, is at least not apparent." *Wilbur* v. *Tobey*, 16 Pick. 177, 180.

The constitution of Texas of 1866, art. 4, sect. 6, contained a provision, similar to that of the constitution of 1845, as to the jurisdiction of the district court over escheats; and contained no other provision on the subject of escheats. 2 Charters and Constitutions, 1789. That constitution, as was admitted by the plaintiffs, did not take away the power of the legislature over the subject, or affect the statute of 1848 or proceedings under it.

But it was strenuously contended that this statute was repealed by the constitution of 1869, which — while embodying, in art. 5, sect. 7, the provision of the former constitutions as to the jurisdiction of the district court over escheats; and repeating in art. 4, sect. 20, the provision of art. 5, sect. 23, of the constitution of 1866, establishing the office of comptroller of public accounts, to be elected by the qualified voters of the State, for the term of four years — also defined the comptroller's duties as follows: "He shall superintend the fiscal affairs of the State; give instructions to the assessors and collectors of the taxes; settle with them for taxes; take charge of all escheated property; keep an accurate account of all moneys paid into the treasury, and of all lands escheated to the State; publish annually a list of delinquent assessors and collectors, and demand of them an annual list of all taxpayers in their respective counties, to be filed in his office; keep all the accounts of the State; audit all the claims against the State; draw warrants upon the treasury in favor of the public

creditors; and perform such other duties as may be prescribed by law." 2 Charters and Constitutions, 1794, 1809, 1811.

This definition of the duties of the comptroller in the constitution of 1869 nearly follows the words of the statutes existing at the time of its adoption. Paschal's Digest, arts. 5414, 5424, 5426, 3670, 5194, 5416, 5418, 5420. The principal difference is in substituting, for the words of section 14 of the act of 1848, requiring the comptroller to "keep just accounts of all moneys paid into the treasury, and of all lands vested in the State, under the provisions of this act," the words, "take charge of all escheated property; keep an accurate account of all moneys paid into the treasury, and of all lands escheated to the State."

As the constitution of 1869 repeats, in so many words, the provision of former constitutions, by which the district court is vested with original jurisdiction of all causes in behalf of the State to recover escheats; and as the statute of 1848 made it the duty of the comptroller to keep accounts, not only of all moneys paid into the treasury, but also of all lands vested in the State, under its provisions; it is difficult to see how the insertion of the general words "take charge of all escheated property," in the definition of the comptroller's duties in the constitution of 1869, either increased his powers, or diminished those of the district court, in relation to escheats.

The whole object of inserting in the constitution a definition of the principal duties of the comptroller would seem to have been to fix by the fundamental law a matter which would otherwise have been subject to the discretion of the legislature.

The only doubt thrown upon this arises out of the opinion delivered in *Hughes* v. *State*, above cited, in which Mr. Justice Moore said: "Whether this statute had not been repealed by the provision in the constitution of 1869, which we have cited, may, we think, admit of serious question; but as it is not necessary to the determination of the present case, we are not called upon at present to determine it. We think, however, that it is quite evident this section of the constitution is in conflict with, and therefore revokes, the authority conferred

by the statute of 1848 upon the court to order the sale of escheated land, if such, indeed, can be held to be the proper construction of this statute in view of the conflicting provisions of its different sections." 41 Texas, 18, 19.

But the weight of that suggestion is much lessened, if not wholly counterbalanced, by several considerations. The decision in that case was put upon the distinct ground that the petition and the proof were both insufficient. In another case, decided at the same term, in which the opinion was delivered by the same judge, as well as in an earlier case of a writ of error to review the very judgment now pleaded, and in at least two later cases, above cited, in each of which this proposition, if sound, would have been decisive, it was not even mentioned. *State* v. *Teulon*, 41 Texas, 249; *Brown* v. *State*, 36 Texas, 282; *Wiederanders* v. *State*, 64 Texas, 133; *Hanna* v. *State*, 84 Texas, 664. And after the constitution of 1869 had been in force for ten years, the legislature, in revising and codifying the statutes of the State, reënacted all the material provisions of the act of 1848, both as to obtaining a judgment declaring the land to have escheated, and as to a subsequent sale of the land by the sheriff; and clearly manifested its understanding and intention that the provisions for such a sale did and should remain in force, by prefixing the words "The proceeds of" to the last section, which had directed "all property escheated in accordance with the provisions of" the act to "remain subject to the disposition of the State, as may hereafter be prescribed by law." Rev. Stat. of 1879, § 1785.

The plaintiffs somewhat relied on art. 10, sect. 6, of the constitution of 1869, which provides that "the legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual sellers upon the same, and in lots not exceeding one hundred and sixty acres." 2 Charters and Constitutions, 1816. But this evidently relates only to legislative grants of land, and not to judicial proceedings to declare and enforce escheats.

Even if the suggestion in *Hughes* v. *State*, above cited, that art. 4, sect. 20, of the constitution of 1869, relating to the

comptroller of accounts, "is in conflict with, and therefore revokes, the authority conferred by the statute of 1848 upon the court to order the sale of escheated land," should be considered as well founded, it would affect only section 11 of the statute, authorizing the sale, and so much of the subsequent sections as concern that subject; and would leave unaffected the preceding sections, providing for a judgment to be rendered, upon due allegation and proof, and after notice to all persons interested, ascertaining and declaring that the land has escheated to the State, and vesting in the State the title to the land. The provisions looking to a judgment vesting title to the land in the State are distinct and severable from the provisions for a sale, and a conversion into money, of the land after it has vested in the State; and if the latter provisions are for any reason invalid, they may be considered as stricken out, and the former provisions stand good. *Field* v. *Clark*, 143 U. S. 649; *Zwernemann* v. *Von Rosenberg*, 76 Texas, 522. And the judgment set up in the answer in this case, so far as it determined that the title of the land had vested by escheat in the State, was valid, even if the order for a sale of the land was not. *Ludlow* v. *Ramsey*, 11 Wall. 581.

It follows that, if the sale and conveyance by the sheriff to the defendants were invalid and vested no title in them, the previous judgment, ascertaining and declaring the escheat, vested a good title in the State of Texas against all persons claiming as heirs or devisees of the former owner; and that judgment, although it does not prove the title to be in the defendants, proves it to be out of the plaintiffs, and affords a complete defence to this action. *Love* v. *Simms*, 9 Wheat. 515, 524; *Christy* v. *Scott*, 14 How. 282, 292; *Doswell* v. *De La Lanza*, 20 How. 29, 33.

As to personal property, indeed, a judgment *in rem*, after notice by publication only, might not bind persons who had no actual notice of the proceedings, unless the thing had been first seized into the custody of the court. *The Mary*, 9 Cranch, 126, 144; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Hilton* v. *Guyot*, 159 U. S. 113, 167. But it was within the power of the legislature of Texas to provide for determining and quieting the

Syllabus.

title to real estate within the limits of the State and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons. *Phillips* v. *Moore*, 100 U. S. 208, 212; *Arndt* v. *Griggs*, 134 U. S. 316; *Hardy* v. *Beaty*, 84 Texas, 562, 569.

When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the State, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the State or from a private person.

Judgment affirmed.

DAVIS *v.* ELMIRA SAVINGS BANK.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 415. Argued January 13, 14, 1896. — Decided March 2, 1896.

Section 130 of chapter 689 of the laws of New York of 1892, providing for the payment by the receiver of an insolvent bank, in the first place, of deposits in the bank by savings banks, when applied to an insolvent national bank, is in conflict with § 5236 of the Revised Statutes of the United States, directing the Comptroller of the Currency to make ratable dividends of the money paid over to him by such receiver, on all claims proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and is therefore void when attempted to be applied to a national bank.

Statement of the Case.

In March, 1893, the Elmira National Bank, a banking association organized under the laws of the United States, and doing business in the State of New York, suspended payment, and the Comptroller of the Currency of the United States appointed Charles Davis, plaintiff in error, the receiver thereof. The Elmira Savings Bank, which was incorporated under the laws of the State of New York, from November, 1890, kept a deposit account with the Elmira National Bank, and at the time of the appointment of the receiver of the latter corporation there was to the credit of this account of the Savings Bank the sum of $42,704.67. The opening of the deposit account by the Savings Bank was sanctioned by the general banking laws of the State of New York, as expressed in sections 118 and 119 of chapter 689 of the laws of 1892, which were as follows:

2 Laws of 1892, p. 1898, c. 689. "§ 118. Available fund for current expenses, how loaned. — The trustees of every such corporation shall as soon as practicable invest the moneys deposited with them in the securities authorized by this article; but for the purpose of meeting current payments and expenses in excess of the receipts, there may be kept an available fund not exceeding ten per centum of the whole amount of deposits with such corporation, on hand or deposit in any bank in this State organized under any law of this State or of the United States, or with any trust company incorporated by any law of the State; but the sum so deposited in any one bank or trust company shall not exceed twenty-five per centum of the paid-up capital and surplus of any such bank or company. . . ."

Ib. "§ 119. Temporary Deposits. — Every such corporation may also deposit temporarily in the banks or trust companies specified in the last section the excess of current daily receipts over the payments, until such time as the same can be judiciously invested in the securities required by this article. . . ."

In the process of liquidating the affairs and realizing the assets of the National Bank all its circulating notes were provided for, and the receiver had on hand in cash for distribution among its creditors a sum exceeding the amount due as afore-

said to the Savings Bank. Thereupon the latter demanded of the receiver payment of the sum to the credit of its deposit account in preference to the other creditors of the National Bank, basing its demand on a provision of the general banking law of the State of New York, which is as follows:

Ib. 1903. "§ 130. DEBTS DUE SAVINGS BANKS FROM INSOLVENT BANKS PREFERRED. — All the property of any bank or trust company which shall become insolvent shall, after providing for the payment of its circulating notes, if it has any, be applied by the trustees, assignees or receiver thereof, in the first place, to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized to be so deposited by the provisions of this chapter, and subject to any other preference provided for in the charter of any such trust company."

The receiver, under the authority of the Comptroller of the Currency of the United States, declined to accede to this demand, predicating his refusal on the provisions of sections 5236 and 5242 of the Revised Statutes of the United States, which are as follows:

"§ 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"§ 5242. All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees

in its favor; all deposits of money, bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. . . ."

In consequence of this refusal the Savings Bank brought an action in the Supreme Court of the State of New York to enforce the payment by preference, which action was resisted by the receiver. Ultimately the case was taken to the Court of Appeals of the State of New York, where the claim of preference, asserted by the Savings Bank, was maintained. The case is reported in 142 N. Y. 590. To that judgment the present writ of error is prosecuted.

Mr. Edward Winslow Paige for plaintiff in error.

Mr. Augustus S. Hutchins filed a brief on behalf of the Metropolitan Savings Bank.

Mr. James C. Carter and *Mr. Edward G. Herendeen* for defendant in error.

The Court of Appeals of New York held in this case that the New York statute applies to national as well as to state banks. This construction is, of course, binding on this court. *Christy* v. *Pridgeon*, 4 Wall. 196; *People* v. *Weaver*, 100 U. S. 539.

Clearly the legislature intended that national banks should be on the same footing as state banks as to right to receive deposits of savings banks. But this intention would wholly fail of purpose, if such deposits were preferred when held by insolvent state banks and were not preferred when held by insolvent national banks.

That act is within the proper sphere of state legislation. The theory upon which the constitutionality of national bank

legislation was finally upheld, is a narrow one, necessarily involving sharp and closely confined limitations. Of the cases on this subject, the leading one is *National Bank* v. *Commonwealth*, 9 Wall. 353. From the opinion in that case, the United States Supreme Court, in so recent a case as *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 551, referring to such limitation, quotes approvingly as follows: "That limitation is that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone on the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. . . . So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. *It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.*" See also *Waite* v. *Dowley*, 94 U. S. 527.

The contract which the state statute compelled the bank to make with the defendant in error in this case is one made in respect to an ordinary transaction between the bank and a depositor. Such a contract in no respect impairs the utility of the national bank as an agent of the United States, and is to be considered as made with reference to the law of the State, and as subject to its provisions. *Odgen* v. *Saunders*, 12 Wheat. 213; *Baldwin* v. *Hale*, 1 Wall. 223; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550. The highest court of the State has decided that it gave to the defendant in error an equitable lien which operated as an equitable assignment of the assets of the national bank upon insolvency for the purpose of securing the payment of the deposit in full, and that construc-

tion is binding on this court. *Louisiana* v. *Pillsbury*, 105 U. S. 278; *Morley* v. *Lake Shore & Michigan Southern Railway*, 146 U. S. 162, 166.

It is not material that the fund so assigned should be in existence. *Peugh* v. *Porter*, 112 U. S. 737, 742. According to the general doctrine of equity, established beyond any doubt by the highest judicial authority, the equitable assignment or the equitable lien upon property to be acquired in the future, is valid and enforceable not only against the contracting party himself, but also against subsequent judgment creditors, assignees in bankruptcy, and all other *volunteers* claiming or holding under him and against subsequent purchasers from him with notice of the assignment or lien. When chattels are sold or exchanged, the lien will attach to those substituted. 3 Pom. Eq. Jur. § 1291.

Assignees in bankruptcy take only such rights as the bankrupt had, and are affected with all the equities which would affect the bankrupt himself. Courts of equity support assignments of choses in action, interests and expectations not only, but also of things which have no present actual potential existence but rest in mere possibility only.

An agreement to charge, or to assign, or to give security upon, or to affect property not yet in existence, or in the ownership of the party making the contract, or property to be acquired by him in the future . . . constitutes an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of contract. 3 Pom. Eq. Jur. §§ 1236, 1237.

This equitable assignment only differs from a pledge in that the fund is not yet definitely fixed. Such a pledge or mortgage is permitted when made for present consideration, though it may operate to give a preference. So the *present assignment* of a fund to be thereafter definitely ascertained, must be permitted, though it operate as a preference.

This constitutes a present right of property which the legislature cannot constitutionally impair. *Mather* v. *Bush*, 16

Johns. 233, 252; *Roosevelt* v. *Cebra*, 17 Johns. 108; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 198.

Any statute is unconstitutional as impairing the obligation of contracts which introduces a change into the express terms of the contract, its legal construction, its validity, its discharge, or (within certain limits) its enforcement.

The prohibition of the Constitution against state laws impairing the obligation of contracts, applies to implied as well as to express contracts. *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131.

In any case the lawful repeal of a statute cannot constitutionally be made so as to destroy contracts which have been entered into under it, or to affect substantially the rights obtained by virtue of the statute. Cooley's Const. Lim., 3d ed., pp. 289, 290, 291, and 292.

The right of the Savings Bank to deposit in the National Bank only existed by permission of the statute. That permission is conditioned on an equitable assignment, as collateral security for the deposit, of the assets of the National Bank on hand at the time of its insolvency.

The contract made by the operation of the state statute between the Savings Bank and the National Bank at the time the deposit was made, constituting an equitable lien or equitable assignment, is not in conflict with the national bank act, or with any provision of any Federal statute. The Federal statute has been construed to recognize all prior equitable and legal liens. *Scott* v. *Armstrong*, 146 U. S. 499.

It has been uniformly held that the receiver is a statutory assignee of the bank, and gets no better title than the bank had, and takes the funds in the plight in which they were held by the bank immediately prior to his appointment, and must turn them over accordingly unaffected by the provisions of the national bank act, as to ratable distribution. He takes the property *cum onere*.

In *Scott* v. *Armstrong*, this court held that the receiver of a national bank took the assets as a mere trustee and not as a purchaser for value; and that in the absence of a statute to the contrary, demands and choses in action which belonged to

the bank were in his hands subject to all claims and advances that might have been interposed as against the bank before the liens of the United States and general creditors attached.

Even under the stringent provisions of non-preferential bankrupt laws, it has been uniformly held that collateral given at the time of the passing of a present sufficient consideration, even though the possibility, or even probability, of future insolvency was in the minds of the parties at the time, will be sustained, and contractual rights or equities existing at such a time will be afterward upheld when insolvency occurs.

The contract in question was not made in contemplation of insolvency. The lien created by it was not a secret lien. It worked no harm to other depositors. Without it the bank could not have obtained the deposit. The National Bank might have refused to accept the deposit under these terms, but the Savings Bank had no discretion. It could only deposit upon the conditions of this statutory contract. The use of that deposit was to the advantage of all of the depositors of the depository bank. The assets of the bank were thus increased by every dollar for which the lien is claimed, and no harm could possibly result by this transaction to the other creditors of the bank.

It is no answer to the contention of the defendant in error in this case to say that such a contract could be made with every one and proportionate distribution thereby defeated. We are dealing with a right given by the State of New York to one class of creditors only; a right founded in the highest conception of public policy, and in line with the theory of all savings bank legislation, which is to surround the funds of savings banks with every possible protection. The Savings Bank is limited in its powers. It is not permitted to make any other contract of deposit with the National Bank. If this case should be held to be an exception to a general rule it would work no harm, for it would be an exception founded upon the broad principles of public policy and justice.

Opinion of the Court.

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

National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

The question which the record presents is, does the law of the State of New York on which the Savings Bank relies conflict with the law of the United States upon which the Comptroller of the Currency rests to sustain his refusal? If there be no conflict, the two laws can coexist and be harmoniously enforced, but if the conflict arises, the law of New York is from the nature of things inoperative and void as against the dominant authority of the Federal statute. In examining the question it is well to put in juxtaposition a summary statement of the Federal and state statutes. The first directs the Comptroller "from time to time, after full provision has been made for the refunding to the United States of any deficiency in redeeming the notes of such association, . . . to make a ratable dividend of the money paid over to him . . . on all such claims as may have been proved." The second, the state law, directs "the trustee, assignee or receiver" of "any bank or trust company which shall become insolvent" to apply the assets received by him, "in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized" by law.

It is clear that these two statutes cover exactly the same subject-matter. Both relate to insolvent banks; both ordain

that the right of preference on the one side and the duty of ratable distribution on the other shall only result from insolvency; both cover the assets of such banks coming, after insolvency, into the hands of the officer or person authorized to administer them. It is equally certain that both statutes relate to the same duty on the part of the officer of the insolvent bank; the one directs the representative to make a ratable distribution; the other requires, if necessary, the application of the entire assets to payment in full, by preference and priority over all others of a particular and selected class of creditors therein named. We have, therefore, on the one hand, the statute of the United States, directing that the assets of an insolvent national bank shall be distributed by the Comptroller of the Currency in the manner therein pointed out, that is, ratably among the creditors. We have on the other hand, the statute of the State of New York giving a contrary command. To hold that the state statute is operative is to decide that it overrides the plain text of the act of Congress. This results, not only from the fact that the two statutes, as we have said, cover the same subject-matter, and relate to the same duty, but also because there is an absolute repugnancy between their provisions, that is, between the ratable distribution, commanded by Congress, and the preferential distribution directed by the law of the State of New York.

The conflict between the spirit and purpose of the two statutes is as pronounced as that which exists between their unambiguous letter. It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. This public aim in favor of all the citizens of every State of the Union is manifested by the entire context of the national bank act.

In *Cook County National Bank* v. *United States*, 107 U. S. 445, 448, speaking through Mr. Justice Field, the court said: "We consider that act as constituting by itself a complete system for the establishment and government of national

banks. . . . Everything essential to the formation of the banks, the issue, security and redemption of their notes, the winding up of the institutions, and the distribution of their assets, are fully provided for."

In *National Bank* v. *Colby*, 21 Wall. 609, 613, 614, the court said:

"As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank. . . .

"The fifty-second section, further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or 'with the view to the preference of one creditor over another, except in the payment of its circulating notes,' shall be utterly null and void.

"There is in these provisions a clear manifestation of a design on the part of Congress: 1st, to secure the government for the payment of the notes, not only by requiring, in advance of their issue, a deposit of bonds of the United States, and by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2d, to secure the assets of the bank for ratable distribution among its general creditors.

"This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings."

Nearly twenty-five years ago (in September, 1871) the Secretary of the Treasury submitted to the Attorney General of the United States the question of whether the ratable division provided for in the act of Congress deprived the United States, as a creditor of an insolvent national bank, of the power to avail of the preference given by the statute, which provides that the United States shall be preferred out of the effects of an insolvent debtor. (Act of March 3, 1797, c. 20, § 5, 1 Stat. 515.) The opinion of the Attorney General was that the ratable distribution required, when read in connection with other

sections of the national bank law, deprived the United States of all preference, except that given for the payment of the notes issued by such banks. 13 Opinions, 528.

This construction has been the rule administered by the Comptrollers of the Currency in the liquidation of national banks, from that date, and was directly sustained in *Cook County National Bank* v. *United States*, *ubi supra*, where Mr. Justice Field, as the organ of the court, said: "The sections directing ratable distribution provide for the distribution of the entire assets of the bank, giving no preference to any claim, except for moneys to reimburse the United States for advances in redeeming the notes." After holding that the United States could not exercise as a creditor the preference in its favor created by a general law of the United States, the conclusion is thus summed up: "These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed as directed by ratable dividends to all holders of claims, that is, to all creditors." Thus, although for many years in the administration of the act, under a construction given by the Attorney General of the United States, sanctioned by the decisions of this court, the ratable distribution provided by the act of Congress has been deemed so important as to repeal, in so far as it prevented ratable distribution, the general preference given the United States by its own statute, the contention now advanced maintains that this ratable distribution is of so little consequence that it can be overthrown and rendered nothing worth, by the provisions of a general insolvent statute of the State of New York. In other words, that the statute of the State of New York operating upon the national bank law is more efficacious than would be a statute of the United States.

Nor is it an answer to say that the *ratio decidendi* of the ruling in *Cook County National Bank* v. *United States* was the fact that the statute provided that the United States should take security for the debts to become due them by a national bank. In the case presented by the Secretary of the

Treasury to the Attorney General for consideration the security in favor of the United States was inadequate, and therefore the question which arose was the right of the United States to collect an unsecured claim in disregard of the rule of ratable division. And such was the state of facts contemplated by the opinion of this court in the *Cook County case.* This makes it evident that the controlling thought which gave rise to the interpretation sanctioned by this court was the fact that to have allowed the preference in favor of the United States ordained by one of its statutes would have destroyed the rule of ratable distribution established as a protection to and for the benefit of all the creditors of a national bank.

It is certain, that in so far as not repugnant to acts of Congress, the contracts and dealings of national banks are left subject to the state law, and upon this undoubted premise, which nothing in this opinion gainsays, the proposition is advanced that the deposit here considered of the Savings Bank with a national bank imported a contract to pay the claim of the former with the preference allowed by the New York statute. But this overlooks the plain terms of the New York law. That statute does not profess to deal with the bank and its relations as a going concern; it wholly and exclusively undertakes to regulate the distribution of the assets after insolvency. Insolvency, and insolvency alone, is made the criterion from which the preference is to arise. Indeed, the statute, in terms, directs its mandate to discharge the claim with preference, not to the bank *eo nomine*, but to the assignee, trustee or agent, charged with administering its effects after insolvency has become flagrant. The claim of contract, therefore, conflicts with the very terms of the statute upon which it is based, and there is, therefore, no room for implying a contract. If such implication, however, could be invoked it must rest on the contention that inasmuch as the state statute gave a savings bank making a deposit the right to be preferred in case of insolvency, therefore the general state law must be presumed to have entered into the contract of the parties, and hence also engender the presumption that

in case of insolvency such deposit should be preferred. If the law of the State is to be read into the contract, then, of course, the law of Congress should also be read into it. We should thus have to consider all the deposits as made with an implication that they were subject to the Federal law, and hence the conflict between the two laws would become evident, and the Federal law, being paramount, would prevail.

The New York statute does not profess, however, to change the legal relation which results from a deposit made in a bank. The deposit of money by a customer with his banker is one of loan, with a superadded obligation that the money is to be paid when demanded by a check. *Scammon* v. *Kimball*, 92 U. S. 362; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252. The argument, therefore, of implied contract, not only is contrary to the letter of the New York statute, but also destroys the very essence of the legal relation resulting from the dealings between the parties. Nor is the repugnancy between the state statute and the act of Congress removed by the contention that inasmuch as ratable distribution applies only to that which belongs to the bank, therefore there is no conflict between the state statute and the act of Congress. This argument can only mean that the effect of the state statute is to make the Savings Bank, in the event of insolvency of the National Bank, the owner of a sum equivalent in amount to the sum of money which was by it deposited. But to say this aggravates the conflict between the state law and the act of Congress. If the state statute is to be read as saying that whenever the persons named therein deposit money with a national bank they shall be treated as the owners of an equal sum of the assets of the bank when it becomes insolvent, then the state statute precludes, in a most flagrant way, the possibility of the ratable distribution ordered by the act of Congress. True it is that where, by state law, a lien is made to result from a particular contract, that lien, when its existence is not incompatible with the act of Congress, will be enforced. True, also, where a particular contract is made by a national bank which from its nature gives rise at the time of the contract to a claim on a specific fund, such claim, if not violative

of the act of Congress will be allowed. To that effect are the authorities relied on.

Thus it was said by this court in *Scott* v. *Armstrong*, 146 U. S. 499, when dealing with the question of set-off: "The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor, does not belong to the bank." So in the case of *San Diego County* v. *California Nat. Bank*, 52 Fed. Rep. 59, it was decided that the funds received by a national bank, which the party depositing had no authority of law to deposit, were not part of the assets to be "ratably distributed," but must be returned in full to the rightful owner. And, again in *Massey* v. *Fisher*, 62 Fed. Rep. 958, which was a case where an endorser paid the amount of a note to a bank and took a receipt, but before he took the note from the bank the bank failed, the substance of the decision was, that the money did not belong to the bank, but was held by it in trust; and, of course, in that case, it was not part of its assets.

None of these cases are apposite here. On the contrary, by an affirmative, pregnant with a negative, they deny the preference which is now advanced. This clearly results from the context of the opinions in these cases. They all reason to demonstrate that from the particular facts stated the relation was not that of an ordinary creditor, but was one giving rise to a specific lien or right resulting from the contract, and which was in being before the insolvency took place. Here there is no such condition; there is simply an ordinary creditor asserting the right to a preference arising from an insolvent law. This distinction is well illustrated by *Scott* v. *Armstrong*, *supra*, cited and relied on in the opinion of the court below. In that case the facts as to the set-off, which was allowed, are thus stated: "The credits between the banks were reciprocal and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credit, and the principle applicable to mutual credits applied."

The difference between *Scott* v. *Armstrong* and the pres-

ent case is this: There this court was called on to determine whether a claim which had been extinguished, by operation of law, prior to the insolvency was still due after the insolvency, but here the question is whether a claim existing at the time of the insolvency and up to that date unsecured shall, by the operation of an insolvent statute, be converted after the insolvency into a preferred claim to be paid by preference over all other creditors. This distinction between the two questions was clearly stated in *Scott* v. *Armstrong*, where, speaking through Mr. Chief Justice Fuller, this court said: "The state of case where the claim sought to be off-set is acquired after the act of insolvency, is far otherwise for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the objects of these provisions (the act of Congress). The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent assets in the manner prescribed. *Venango National Bank* v. *Taylor*, 56 Penn. St. 14; *Colt* v. *Brown*, 12 Gray, 233."

Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of Congressional legislation. Much was said in argument as to the public policy embodied in the law of the State of New York and the wisdom of upholding it. Our function is judicial and not legislative. Did we, however, consider motives of public policy, we should not be unmindful of the wise safeguard, in favor of all the people of the United States, resulting from the provision which secures to every one dealing with a national bank a ratable distribution of the assets thereof, thereby stimulating confidence and uniformity of treatment.

Judgment reversed and case remanded to the Court of Appeals of the State of New York with instructions to remit the cause to the court in which it originated with directions to dismiss the action.

LEIGHTON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 413. Argued November 12, 13, 1895. — Decided March 2, 1896.

The party who, under the provisions of § 4 of the act of March 3, 1891, c. 538, 26 Stat. 853, elects to reopen before the Court of Claims a case under that act heard and determined by the Commissioner of Indian Affairs, thereby reopens the whole case, irrespective of the decision by the Commissioner, and assumes the burden of proof.

The jurisdiction conferred upon the Court of Claims by the first jurisdictional clause in the first section of that act is confined to property taken by Indian tribes in amity with the United States; and as it appears in this case that the Indians who committed the injury to the claimant were at the time engaged in hostilities against the United States, the Court of Claims was without jurisdiction to render a judgment against the United States, even though the hostilities were carried on for the special purpose of resisting the opening of a military road.

The same result is reached practically if the claim is regarded as within the jurisdiction of that court under the second jurisdictional clause of the first section of that act.

There is nothing in the legislation prior to the act of 1891 which binds the government to the payment of this claim.

THIS case is before us on appeal from a judgment of the Court of Claims, dismissing the claimant's petition. The amended petition on which the case was tried, after stating the facts of the depredation, the citizenship of the claimant, and the amity of the Indian tribe, alleged that the claim had been filed in the Interior Department, allowed on December 5, 1873, for $3025, and reported to Congress, March 27, 1874; and, again, on November 29, 1887, allowed for $2500, and reported to Congress. It further alleged that the property was worth $5005, and for that sum prayed judgment.

After the commencement of the suit in the Court of Claims the claimant filed this election to reopen:

"Now comes the claimant, Alvin C. Leighton, and elects to reopen the claim set forth in the petition in this cause and try the same before the court.

"And he avers that the allowance made in said claim was

erroneous in this respect, that the Commissioner of Indian Affairs and the Secretary made an allowance of $2500 by fixing the value of the mules, on account of which claim is made in said petition, at $125 and of the horses at $100 each, whereas the allowance should have been for $5005, the value of the mules being $255 each and of the horses $185 each.

"And the claimant refers to the evidence taken under the rules of this court as well as that presented to the Interior Department in support of this allegation of error.

"The claimant does not seek to disturb the findings or award of the Commissioner of Indian Affairs and Secretary of the Interior in any other respect than as above set forth, but admits that the same are correct in all other respects."

This was done under authority of the last part of section 4 of the act of March 3, 1891, c. 538, 26 Stat. 851, 853, which reads: "All unpaid claims which have heretofore been examined, approved and allowed by the Secretary of the Interior, or under his direction, . . . shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses, and the documentary evidence, including reports of department agents therein, may be read as depositions and proofs."

The United States having filed a traverse, the case was submitted to the Court of Claims, by which court findings of fact were made, and among them that the property was taken and carried away by Indians belonging to the Ogallalla band of the Sioux tribe; that at this time the Ogallalla band "was in separate treaty relations with the United States, under treaty dated October 28, 1865, proclaimed March 17, 1866, 14 Stat. 747, and were receiving annuities thereunder;" and that such band "under its principal chief, Red Cloud, was at the time of said depredation in armed hostility against the United States in resisting the military authorities in the opening of a military road, and the establishment thereon of military posts, and maintaining the same along what was known

as the 'Boazman Road,' extending from Fort Laramie, in Wyoming, to Fort Smith, in Montana," and was "not in amity with the United States."

Mr. William B. King, (with whom was *Mr. Charles King* on the brief,) for appellant.

Mr. John B. Sanborn filed a brief for appellant.

Mr. Assistant Attorney General Howry for appellees.

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

The first matter to be considered is the effect of the claimant's election to reopen the case. On his part it is contended that it only permitted a new inquiry as to the amount and value of the property taken and carried away; that the liability of the government had been settled by the award and allowance of the Secretary of the Interior, and was no longer a matter of dispute. On the other hand, it is claimed by the government that it opened for consideration and judgment both the amount of the depredation and the fact of liability precisely as though there had been no action on the part of the Secretary of the Interior. We think the contention of the government is correct. The statute gives either the claimant or the United States the right to reopen the case and try the same before the court — not a part, but the whole of the case. If neither party had elected to reopen, the claimant would have been entitled to a judgment for the amount of the allowance, such judgment to be paid as ordinary judgments of the Court of Claims. He would not have been required to furnish any further proof than the action of the Secretary, which action would have been sufficient, both as to the liability of the government and the amount of the loss. But when he elected to reopen, it was not within his power to reopen the case only partially, and, accepting the determination of the Secretary as conclusive upon the question of liability, ask simply an inquiry as to the amount of his loss and

judgment for a larger sum. There is no suggestion in the statute and no warrant therein for a partial reopening of the case. When reopened it stands a new case, to be considered and determined by the court. Of course, it is for the interest of the claimant to consider the question of liability settled and have the case opened only as to the amount of the loss. So, on the other hand, it might, in any case be for the interest of the government to have the amount concluded by the action of the Secretary, and the question of liability only opened for examination, but no such limitation is named in the statute. The case when opened is opened as a whole, and the only difference between this and any new case which has never been filed in the department and considered by the Secretary is that the party electing to reopen has the burden of proof.

Counsel for claimant further contend that the second clause of the first section of the act of 1891 gives jurisdiction to the Court of Claims of cases which have been "examined and allowed by the Interior Department;" that by section 5 it is provided: "The court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified." No other measure or condition of liability is named. Hence, given a case of which the Court of Claims has jurisdiction, (and a claim allowed by the Interior Department is one,) the only duty of the court is to ascertain the amount of the loss, the tribe of Indians by whom the wrong was committed, and render judgment against the United States and such wrong-doing tribe. In other words, the fact of jurisdiction determines the question of liability.

We cannot assent to any such construction. The anomaly which would be created thereby demonstrates its incorrectness, for the effect would be that, if the claim had never been filed in the department, it would be subject to the conditions

specified in the first clause of the section defining jurisdiction. If it had been filed and was either allowed or pending for examination on the 3d of March, 1885, none of such conditions of liability would exist, and the simple inquiry would be as to the amount of the loss. In other words, the mere act of the claimant in filing his claim in the department establishes the liability of the government. Of course, this is impossible. Further, by section 4, and that applies to every case, the Attorney General is required to "file a notice of any counter-claim, set-off, claim of damages, demand, or defence whatsoever of the government or of the Indians in the premises." Under this, every defence is open to the government. The clause quoted from section 5 does not determine the rule of liability, but only the duty of the court when the liability has been established. What, then, is the condition of liability in the case of an allowed claim, which either party shall elect to reopen? It must be found in some act of Congress, and is either that prescribed in the first clause of the first section of this act, or in some other statute.

The condition of liability prescribed in the first jurisdictional clause of the first section does not exist, because, by the finding, the Indians who committed the depredation did not belong to a tribe "in amity with the United States." It is true, counsel suggest that the Indians were carrying on hostilities for only a special purpose, to wit, resisting the opening of a military road. We fail to appreciate the argument that because hostilities were carried on for only a single purpose, and not for the mere sake of fighting generally, the tribe engaged in such hostilities was nevertheless still in amity. Indeed, beyond the fact of hostilities, the treaty between the different tribes of Sioux, including the Ogallalla band, executed by said band on May 25, 1868, and proclaimed February 24, 1869, 15 Stat. 635, implies the existence of war, for it commences with this declaration: "From this day forward all war between the parties to this agreement shall forever cease."

Neither do we find in the legislation prior to the act of 1891 anything which binds the government to the payment of this

claim. The act of June 30, 1834, sec. 17, 4 Stat. 731, and sec. 2156, Rev. Stat., which provide for compensation for depredations by Indians, each contains the limitation found in the first jurisdictional clause of the act of 1891 of "amity with the United States." The act of May 29, 1872, sec. 7, 17 Stat. 190, carried into the Revised Statutes as sections 445 and 466, contemplates a report by the Secretary of the Interior of the nature, character and amount of claims presented "under laws or treaty stipulations for compensation." The laws in force, as we have seen, mention only depredations by Indians belonging to a tribe "in amity with the United States." The last treaty with the Ogallalla band of Indians, prior to these depredations, was that of October 28, 1865, 14 Stat. 747, which contained, on the part of the Indians, an engagement that they were subject to the exclusive jurisdiction and authority of the United States, and also bound and obligated "themselves individually and collectively" "to cease all hostilities against the persons and property of its citizens." Now, if this treaty was not entirely superseded by hostilities which actually existed between the Ogallalla Indians and the United States, as is undoubtedly the rule when war arises between absolutely independent nations, it still is far from a promise on the part of the Indians to pay for damages caused during any such hostilities. While a breach of a contract similiar to this between individuals might very likely give rise to an action for damages, yet no such rule can be enforced in reference to obligations created by a treaty. It is a promise on the part of the tribe to keep the peace, and not a promise to pay if the peace is not kept. Especially should this be the construction in view of the fact that many of the treaties between the United States and Indian tribes contain not only a promise to abstain from hostilities, but also a specific stipulation that, in case of a breach of such promise, compensation shall be made out of the tribal funds, or otherwise. The absence of any such express provision in this treaty, the Indians being under the care of the United States and its wards, renders it improper to hold that by its terms the tribe had bound itself to pay for all damages which it might cause during a period

of actual hostilities. Nor is this a matter in which the government is uninterested. In case of an award by the Court of Claims the United States become in fact, if not in form, the primary and a solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate.

It follows, therefore, that though under the terms of the second jurisdictional clause the Court of Claims had jurisdiction over this claim, yet the case having been reopened by the claimant the Court of Claims properly proceeded to inquire into its merits, and correctly found that there was no law or treaty upon which to base a liability of either the United States or the Indians.

The judgment is

Affirmed.

MARKS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 352. Argued November 12, 1895. — Decided March 2, 1896.

When a petition filed in the Court of Claims alleges that a depredation was committed by an Indian or Indians belonging to a tribe in amity with the United States, it becomes the duty of that court to inquire as to the truth of that allegation, and its truth is not determined by the mere existence of a treaty between the United States and the tribe, or by the fact that such treaty has never been formally abrogated by a declaration of war on the part of either, but the inquiry is whether, as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States: and if it appears that the depredation was committed by a single individual, or a few individuals without the consent and against the knowledge of the tribe, the court may proceed to investigate the amount of the loss, and render judgment therefor; but if, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the

Counsel for Appellants.

petition is not sustained, and that the claim is not one within its province to adjudicate.

Johnson v. *United States*, 160 U. S. 546, affirmed to the point that, by clause 2 of section 1 of the act of March 3, 1891, c. 538, 26 Stat. 851, the jurisdiction of the Court of Claims was limited to claims which, on March 3, 1885, had either been examined and allowed by the Department of the Interior, or were then pending therein for examination.

On July 8, 1891, appellants, as claimants, filed their petition in the Court of Claims under the act of March 3, 1891, c. 538, 26 Stat. 851, to recover the sum of eleven thousand eight hundred dollars, the value of certain personal property charged to have been taken and destroyed by the Bannock and Piute Indians during the month of June, 1878, in Happy Valley, in the State of Oregon. Subsequently they filed an amended petition. In that it was alleged that the Bannock and the Piute Indians were "in amity with the United States" at the time of the taking and destruction of the property; that they were "chargeable for said depredation and under an obligation to pay for the same by reason of the provisions of the treaty of July 3, 1868, between the United States and the Shoshone (Eastern Band) and the Bannock tribe of Indians;" and further, that petitioners "presented their said claim to the Hon. Commissioner of Indian Affairs, No. 4915, July 27, 1888, for payment, but the same has not been returned or paid for." A traverse having been filed by the government, the case was submitted to the court, which, on February 27, 1893, made a finding of facts, and thereon entered judgment dismissing the petition. 28 C. Cl. 147. The seventh finding of fact was as follows:

"From these facts, the court finds the ultimate fact, so far as it is a question of fact, that the tribes or bands of Piute and Bannock Indians were not in amity with the United States at the time the depredations complained of were committed."

From the judgment thus entered in favor of the defendants the claimants duly appealed to this court.

Mr. A. H. Garland and *Mr. Charles A. Keigwin* for appellants. *Mr. William B. Matthews* and *Mr. R. C. Garland* were on their brief.

Opinion of the Court.

Mr. Assistant Attorney General Howry for appellees.

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

This case, like that of *Johnson* v. *United States*, 160 U. S. 546, recently decided, involves a construction of the Indian Depredation Act of March 3, 1891. The particular language to be considered is that found in the first clause of the act, which grants to the Court of Claims jurisdiction over claims for property "destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States." The seventh finding negatives the existence of amity, and if this stood alone there would be no room for discussion. But, as appears from its terms, it is based upon a series of facts stated in detail in prior findings, and is also to be taken in connection with the treaty entered into between the United States and the Bannock tribe of Indians of July 3, 1868, 15 Stat. 673, which contains, among other provisions, the following:

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor."

Turning to the prior findings, it is stated in the second that "the Bannock and Piute Indians made a raid" in which the property in controversy was destroyed, and also that "the Indians numbered between five hundred and six hundred, and were in a body or band moving in concert, having the form of an Indian military organization." Other findings (which consist largely of telegrams and reports from various officers of the army and other officials, narrating at length a series of military operations during the years 1877 and 1878, which documents are by section 4 of the act of 1891 made competent evidence, and which are too voluminous to be copied into this opinion) show that what was done by the Indians was done by them as tribes, and not by a single individual, or a few in opposition to the will of the tribes. They show that these Indians were actually engaged in hostility, and that they were finally conquered and captured only by the military forces of the United States. Indeed, counsel for the claimants practically admit this, for in their brief it is stated "that at various times in the spring of 1878 small bands left the reservation for the sake of obtaining food, until finally the majority of the tribe were absent; that in the month of June, 1878, the absentees began killing white people, after which date the several bodies of Indians carried on a raid over a large area in Idaho and Oregon, which was finally checked by the efforts of troops of the United States; that the troops were more or less actively engaged in suppressing the outbreak until the latter part of August, 1878; and that the Indians were captured and returned to their reservation shortly after the last-named date."

Their contention is rather that actual hostilities may exist without war between two nations; that war is a political status, and to be determined by the political department of the government, by matter of record, and never by oral testimony; that it is not pretended that there was ever any formal declaration of war by either the Bannock tribe of Indians or the United States government; that, therefore, the political relations established by the treaty of 1868 continued during all these hostilities, and the tribe was "in amity with the

United States;" and further, that subject and dependent people, like the Bannock Indians, are not capable of making war with the United States. In support of this contention is cited a number of declarations of publicists and decisions of courts, such as the following from Chancellor Kent: "But, though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. War, says Vattel, is at present published and declared by manifestoes. Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them. As war cannot lawfully be commenced on the part of the United States without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration." 1 Bl. Com. 55. And this from *People* v. *McLeod*, 1 Hill, 377, 407: "A state of peace and the continuance of treaties must be presumed by all the courts of justice till the contrary be shown; and this is *presumptio juris et de jure* until the national power of the country in which such courts sit officially declares the contrary."

Without questioning these declarations and decisions as applied to the relations between independent nations, we think they avail but little in the solution of the question here presented. That question is, what limitation did Congress intend by the words "in amity with the United States." The word "amity" is not a technical term. It is a word of common use; and such words when found in a statute must be given their ordinary meaning unless there be something in the context which compels a narrower or a different scope. Webster defines it "friendship, in a general sense, between individual, societies, or nations; harmony; good understanding; as, a treaty of amity and commerce." The last part of this definition shows that the phrase "in amity" is not the equivalent

of "under treaty." A "treaty" implies political relations; "amity" signifies friendship, actual peace.

The phrase "in amity with the United States" is one of frequent use in the legislation of Congress in reference to Indians. In the early act of May 19, 1796, c. 30, 1 Stat. 469, it appears twice, the sixth section reading as follows:

"That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing an Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death."

It is found again in the act of March 3, 1799, 1 Stat. 747; that of March 30, 1802, c. 13, 2 Stat. 139, 143; June 30, 1834, c. 160, 4 Stat. 728, 731, and elsewhere; appearing in the statutes, as stated by counsel, some fifty or sixty times.

The frequent use of this phrase in connection with the same subject-matter during all the legislative history of this country suggests, of course, a single and settled meaning. And, as said by Nott, J., in *Love* v. *United States*, 29 C. Cl. 332, 340: "What did it mean, in 1796, when the law declared it to be murder to kill an Indian of a tribe 'in amity with the United States?'" If that particular section had been in force during these hostilities it would not seriously be contended that the killing of a hostile Bannock by one of the soldiers of our army, even if done within the limits of the Bannock reservation, would have been murder, on the ground that the Bannock tribe was still under treaty relations, and, therefore, in amity with the government.

Further, there are obvious reasons why Congress did not use this phrase in any different sense than as theretofore used. At the time of the passage of the act, nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government. It is said by counsel that there appear in the statutes, prior to the act of March 3, 1871, c. 120, 16 Stat. 544, 566, declaring against further treaties, 666 treaties with Indian tribes. And it is a matter of history that all along our western frontier

there has been a succession of Indian wars, with great destruction of life and property, and yet seldom has there been a formal declaration of war on the part of either the government or the Indians. If the contention of the claimants were sustained, it would be practically tantamount to holding that by this language Congress had for the government assumed responsibility for all depredations committed by Indians domiciled within the territorial limits of the United States, subsequently at least to the year 1865, and given to the Court of Claims jurisdiction to determine and finally adjudicate the amount thereof.

If such had been its intent, it seems as though it would have expressed itself in different language, and not by a phrase so suggestive, from past use, of a more limited purpose.

Again, as often affirmed in the decisions of this court, the Indians are, in a certain sense, the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit. The act of 1891 contemplates that in the same suit the tribe by whom, or members of whom, the depredation is charged to have been committed, may be made a party defendant. In section 5 it is provided that the court, after determining the value of the property, "shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified." Section 6 reads as follows:

"The amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such annuity, fund or appro-

priation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe."

If this act requires the construction claimed, it is obvious to any one familiar with the history of the Indian, and even independently of what is said by counsel to be the record as to the multitude and amount of the claims presented, that the outcome would be, as to most if not of all of these tribes, that every dollar of annuity, if not every dollar of fund, would be swept away in satisfaction of these claims. We do not think this legislation is to be thus construed, and are of the opinion that all that Congress intended was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual, or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of citizens of the United States, such depredation might be investigated, and the amount of the loss determined and adjudicated by the Court of Claims. This is in harmony with the language of many of the treaties between the United States and the Indians, and, among others, that of the treaty between the United States and the Bannock tribe, heretofore quoted, which reads: "If bad men among the Indians shall commit a wrong or depredation," etc.

In the light of this conclusion, it may be said that when the petition filed in the Court of Claims alleges that a depredation was committed by an Indian or Indians belonging to a tribe in amity with the United States, it becomes the duty of that court to inquire as to the truth of that allegation, and its truth is not determined by the mere existence of a treaty between the United States and the tribe, or the fact that such treaty has never been formally abrogated by a declaration of war on the part of either, but that the inquiry is, whether as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States. If so, and the

depredation was committed by a single individual, or a few individuals without the consent and against the knowledge of the tribe, the court may proceed to investigate the amount of the loss, and render judgment therefor. If, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the petition is not sustained, and that the claim is not one within its province to adjudicate. It is doubtless true that the existence of a treaty implies a state of peace, and, if no other evidence were produced, the court might properly infer therefrom that the tribe was in amity with the United States; but, after all, it is a question of fact, to be determined by the testimony which may be introduced. That question was investigated by the Court of Claims in this case, and its conclusion, justified by the facts as shown by the various reports and documents in evidence, was undoubtedly correct. The Bannock tribe was not, at the time of these depredations, in amity with the United States, and, therefore, the Court of Claims properly refused to adjudicate upon the amount of the loss, or render judgment therefor against the United States.

Neither does this case come within the second jurisdictional clause of the act of 1891, for this was not a claim which had been examined and allowed by the Interior Department, or one which, on March 3, 1885, had been filed and was pending in said department for examination. *Johnson* v. *United States*, 160 U. S. 546. The conclusion reached in that case in reference to the scope of this second clause has been challenged, and it has been said that such second clause should be construed in connection with this language in section 2: "No claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior, or other officer or department of the government;" and that, so construed, neither the time nor the fact of filing in the Interior Department is material. No such construction can be sustained. It would in effect make the statute read as granting jurisdiction over all cases which, on March 3, 1885, had been examined and allowed by the Interior Department, and

over all then filed in that department but not yet examined and allowed, with a proviso that it is immaterial whether the claim was ever filed in the department. The antagonism between the grant and the proviso is fatal to such a construction. The act of March 3, 1885, defines claims not by their nature but by their status as filed and allowed or simply filed. And to say that filing is immaterial when filing is the descriptive matter is to destroy the significance of the clause. Full scope can be given for the operation of these words in section 2 by connecting them with the first jurisdictional clause, which is a general grant of jurisdiction over all claims for property of citizens taken or destroyed by Indians in amity with the United States.

These are the only matters requiring consideration, and no error appearing in the conclusions reached by the Court of Claims, its judgment is

Affirmed.

DURLAND *v.* UNITED STATES.

SAME *v.* SAME.

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

Nos. 528, 529. Argued October 29, 1895. — Decided March 2, 1896.

The provision in Rev. Stat. § 5480, as amended by the act of March 2, 1889, c. 393, 25 Stat. 873, that "if any person having devised or intending to devise any scheme or artifice to defraud . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement, in any post office, branch post office, or street or hotel letter-box of the United States, to be sent or delivered by the said Post Office Establishment, or shall take or receive any such therefrom, such person so misusing the Post Office Establishment shall, upon conviction, be punishable," etc., includes everything

Statement of the Case.

designed to defraud by representations as to the past or present, or suggestions and promises as to the future; and it was enacted for protecting the public against all intentional efforts to despoil, and to prevent the post office from being used to carry them into effect.

The refusal to quash an indictment on motion is not, generally, assignable for error.

The omission in an indictment for violating the above act to state the names of the parties intended to be defrauded, and the names and addresses on the letters, is satisfied by the allegation, if true, that such names and addresses are to the jury unknown.

The offence described in the statute is committed when the contriver of a scheme to defraud, with a view of executing it, deposits letters in the post office which he thinks may assist in carrying it into effect, whether they are so effective or not.

The objection that an indictment is multifarious is presented too late, if not taken until after the verdict.

THESE cases have so much in common that they may be considered together. Each is the record of the conviction of the plaintiff in error in the District Court of the United States for the Eastern District of Pennsylvania of a violation of section 5480, Rev. Stat., as amended by the act of March 2, 1889, c. 393, 25 Stat. 873. In neither record is preserved the testimony given on the trial, or the charge to the jury. The only questions for consideration are those which arise on the indictments. In the first, the indictment charged that defendant "did knowingly, wilfully and falsely devise a scheme and artifice to defraud, that is to say, by divers false pretences and subtle means and devices to obtain and acquire for himself of and from divers persons to this grand inquest unknown, a large sum of money, to wit, the sum of fifty dollars each, and to cheat and defraud each of the said divers persons thereof by then and there representing, among other things, that the Provident Bond and Investment Company would upon the payment of a certain sum of money, to wit, the sum of ten dollars, and a further sum of five dollars monthly thereafter, by each of the said divers persons, issue to each of the said divers persons a bond in the words and manner following, to wit."

Giving a copy of the bond, the indictment proceeded:

"And that the said bonds would mature in accordance with

paragraphs third, fourth, fifth, sixth, seventh and eighth of said bond hereinbefore set out, and that the redemption value of the said bond when called and the sum of money payable therefor to the said divers persons by the said Provident Bond and Investment Company would be the sum specified and at the time named, and upon the payments of the sums of money named in the circular issued by the said Provident Bond and Investment Company, which is in the words and matter following, to wit:

"*A Nut for Lottery Cranks to Crack.*

"We give below our graduatory scale of redemption values, which is a complete refutation of the charge that a 'lottery' element enters into the methods of the Provident Bond and Investment Company. It will be observed that a steadily increasing cash value applies to every bond in force from its issue to redemption. That every bond of equal age has the same cash value.

"It is a further fact that every bond is non-forfeitable and interest-bearing, having both 'cash surrender' and loan values. Where does the lottery element come in?

"*Redemption Scale.*

"Scale of current redemption values under the current system of tontine investment, showing profit over total cost upon each $1000 bond from date of issue to face value; $500 bonds, one half of said amounts, both cost and profit."

After this followed the scale referred to in the last clause, which, commencing —

"No. of months in force.	Cost to holder, including premium.	Cash paid by Co. for redemption.	Profits over cost.	Per cent of profit.
1.....	$15 00			
2.....	20 00			
3.....	25 00	$30 00	$5 00	20
4.....	30 00	40 00	10 00	33
5.....	35 00	50 00	15 00	42.8
6.....	40 00	60 00	20 00	50 "

ran up to and included ninety-one months. After the scale appears the balance of the circular, as follows:

"Such is the legitimate operation of 'the current system of tontine investment,' of which the Provident Bond and Investment Company is the exponent and its president is the author.

"N.B. — The basic principle of the above table is copyrighted. Infringements without due authority of the author will be prosecuted."

And then the indictment, in its first count, closed with these words:

"Whereas in truth and in fact the said John H. Durland, being then and there the president of the said Provident Bond and Investment Company, did not intend that the said bonds would mature in accordance with paragraphs third, fourth, fifth, sixth, seventh and eighth of the said bond, and that the redemption value of the said bond when called and the sum of money payable therefor to the said divers persons by the said Provident Bond and Investment Company, would be the sum specified and at the time named and upon the payments of the sums of money named in the circular issued by the said Provident Bond and Investment Company, as he, the said John H. Durland, then and there well knew, and the said John H. Durland intended then and there by said false representations to obtain for his own use the sum of money paid by each of the divers persons for said bond, to wit, the sum of fifty dollars each, which said scheme and artifice to defraud was to be effected by him, the said John H. Durland, opening a correspondence and communication with each of the said divers persons by means of the Post Office Establishment of the United States and by inciting such divers persons to open communication with him, the said John H. Durland, so devising and intending; and he, the said John H. Durland, did heretofore, to wit, upon the day and year aforesaid, so devising and intending in and for executing such scheme and artifice to defraud and attempting so to do, place and cause to be placed in a post office of the United States at Philadelphia to be sent and delivered by the said Post Office Establishment,

divers letters and packets, to wit, twenty letters and circulars, directed respectively to the said divers persons, the names and addresses of whom are to this grand inquest unknown, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America."

In the second case the indictment charged substantially the same scheme to defraud, but specified that the purpose of the defendant was "to obtain and acquire for himself of and from another person, to wit, one W. S. Burk, at Chester, Pennsylvania, a large sum of money, to wit, the sum of sixty dollars, and to cheat and defraud the said W. S. Burk thereof." And then that "said scheme and artifice to defraud was to be effected by him, the said John H. Durland, opening a correspondence and communication with another person, to wit, the said W. S. Burk, residing within the United States, to wit, at Chester, Pennsylvania, by means of the Post Office Establishment of the United States and by inciting the said W. S. Burk to open communication with him, the said John H. Durland, so devising and intending; and he, the said John H. Durland, did heretofore, to wit, upon the day and year aforesaid, so devising and intending in and for executing such scheme and artifice to defraud and attempting so to do, place and cause to be placed a letter in the Post Office Establishment of the United States, to wit, the post office at Philadelphia, Pennsylvania, within the above district, which said letter was then and there addressed and directed as follows, to wit: 'Mr. W. S. Burk, Chester, Pa.,' profert whereof is now made, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America."

The bond, a copy of which was in each indictment, is entitled a "Current-Tontine Investment Option Bond," purported to be issued by the Provident Bond and Investment Company, whose capital was named as one hundred thousand dollars, and was a promise on the part of the company to pay one thousand dollars upon nine conditions; the first being a monthly payment of $5, failure to make any such monthly

payment working a forfeiture; second, that the company would retain fifty cents for expenses; of the net remainder, twenty-five per cent was to be carried to a reserve and seventy-five per cent was to constitute a redemption fund. The third and fourth conditions were as follows:

"Third. (*a.*) This bond will mature when the net monthly instalments (exclusive of expense fund) together with its apportionment of reserve credits, equal its face value. (*b.*) It may be redeemed by the company at any time before its maturity, at any time after three regular monthly payments have been made herefor, the holder hereby agreeing to surrender the same whenever called, upon receipt of its then redemption value."

"Fourth. The redemption value of this bond when called will be the sum specified under the 'Table of Current Redemption Values' printed on the back hereof, according with the number of months it has been in force at time of call."

The table mentioned in this fourth specification is the redemption scale which appeared in the circular heretofore referred to. The remaining stipulations were in reference to calls, special redemptions, conversion into certificates, return in case of death of all payments made to the redemption and reserve fund, and assignments. Section 5480, as amended by the act of March 2, 1889, so far as material to this case, reads as follows:

"If any person having devised or intending to devise any scheme or artifice to defraud . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet or advertisement, in any post office, branch post office, or street or hotel letter-box of the United States, to be sent or delivered by the said Post Office Establishment, or shall take or receive any such there-

from, such person so misusing the Post Office Establishment shall, upon conviction, be punishable," etc.

Mr. James M. Beck and *Mr. Hampton L. Carson* for plaintiff in error. *Mr. William F. Harrity* was on their brief.

Mr. Assistant Attorney General Whitney and *Mr. John L. Thomas*, Assistant Attorney General for the Post Office Department, for the defendants in error.

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

Inasmuch as the testimony has not been preserved, we must assume that it was sufficient to substantiate the charges in the indictments; that this was a scheme and artifice to defraud, and that the defendant did not intend that the bonds should mature, or that although money was received any should be returned, but that it should be appropriated to his own use. In other words, he was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such. So far as the moral element is concerned it must be taken that the defendant's guilt was established.

But the contention on his part is that the statute reaches only such cases as, at common law, would come within the definition of "false pretences," in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future. It is urged that there was no misrepresentation as to the existence or solvency of the corporation, the Provident Bond and Investment Company, or as to its modes of doing business, no suggestion that it failed to issue its bonds to any and every one advancing the required dues, or that its promise of payment according to the conditions named in the bond was not a valid and binding promise. And then, as counsel say in their brief, "it [the indictment] discloses on its face absolutely nothing but an in-

tention to commit a violation of a contract. If there be one principle of criminal law that is absolutely settled by an overwhelming avalanche of authority it is that fraud either in the civil courts or in the criminal courts must be the misrepresentation of an existing or a past fact, and cannot consist of the mere intention not to carry out a contract in the future."

The question thus presented is one of vital importance, and underlies both cases. We cannot agree with counsel. The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing. As said by Mr. Justice Brown, in *Evans* v. *United States*, 153 U. S. 584, 592, "if a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offence even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the States."

But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown

that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretence of a bond without a thought that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise. This, which is the principal contention of counsel, must be overruled.

The second, which applies more fully to the first than the second case, is that the indictment is defective in that it avers that in pursuance of this fraudulent scheme twenty letters and circulars were deposited in the post office, without in any way specifying the character of those letters or circulars. It is contended that the indictment should either recite the letters, or at least by direct statements show their purpose and character, and that the names and addresses of the parties to whom the letters were sent should also be stated, so as to inform the defendant as to what parts of his correspondence the charge of crime is made, and also to enable him to defend himself against a subsequent indictment for the same transaction. These objections were raised by a motion to quash the indictment, but such a motion is ordinarily addressed to the discretion of the court, and a refusal to quash is not, generally, assignable for error. *Logan* v. *United States*, 144 U. S. 263, 282.

Further, the omission to state the names of the parties intended to be defrauded and the names and addresses on the letters is satisfied by the allegation, if true, that such names and addresses are to the grand jury unknown. And parol evi-

dence is always admissible, and sometimes necessary, to establish the defence of prior conviction or acquittal. *Dunbar* v. *United States*, 156 U. S. 185, 191.

It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters, so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud. But still we think that as it stands it must be held to be sufficient. There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant "intending in and for executing such scheme and artifice to defraud and attempting so to do, placed and caused to be placed in the post office," etc. This, it will be noticed, is substantially the language of the statute. If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars. *Rosen* v. *United States*, 161 U. S. 29.

We do not wish to be understood as intimating that in order to constitute the offence it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor.

A final objection is that the indictment in the first case is multifarious because, as claimed, it includes many offences, and *In re Henry*, 123 U. S. 372, 374, is cited as authority therefor, in which, in reference to a case of this nature, Chief Justice Waite said: "Each letter so taken out or put in constitutes a separate and distinct violation of the act." This objection was not taken until after the verdict, and hence, if of any validity, was presented too late. *Connors* v. *United States*, 158 U. S. 408, 411.

These are the only objections which require consideration, and, finding no error in them, the judgment in each of these cases is

Affirmed.

WASHINGTON GAS LIGHT COMPANY *v.* DISTRICT OF COLUMBIA.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 40. Argued October 16, 17, 1895. — Decided March 2, 1896.

The duty is imposed upon the Washington Gas Light Company by the terms of its charter, the nature of its business, and the uses to which gas boxes placed in the sidewalks of the city of Washington are put, as an appliance ordinarily used by the company to connect its mains with a house where gas is to be used, to supervise and keep those gas boxes in order; and if an injury happens to a person by reason of one of those boxes being out of order and in need of repair and unsafe, and an action is brought against the District of Columbia to recover damages for such injury, and the Gas Company is notified and is given an opportunity to defend, and a trial is had resulting in a verdict and judgment for the plaintiff against the District, which the District is obliged to pay, the District has a cause of action against the Gas Company, resulting from these facts.

In such action, for the purpose of ascertaining the subject-matter of the controversy between the person who was injured and the District, and fixing the scope of the thing adjudged, the entire record, including the testimony offered, may be examined.

The judgment against the District, rendered after notice to the Gas Company, and after opportunity afforded it to defend, is conclusive of the liability of the company to the District.

In July, 1879, Marietta M. Parker sued the District of Columbia to recover damages for an injury to her person, alleged to have been suffered from stepping into a certain "deep and dangerous hole" in the sidewalk of one of the streets of the city of Washington. The declaration contained all the essential averments necessary to fix liability on the corporation. Prior to the bringing of the suit, when Mrs. Parker first made demand against the District, the latter notified the Washington Gas Light Company, spoken of hereafter as the Gas Company, that it would be expected to indemnify the District for any amount which it might be compelled to pay to Mrs. Parker, and when the suit was commenced the Gas Company was also informed, and opportunity was afforded

that company to defend. The proffer was not availed of, although on the trial of the cause, which resulted in a verdict and judgment against the District for five thousand dollars, officers of the Gas Company testified, and the counsel of that company was present during a portion of the trial, but purposely abstained from taking part in the defence. The action now here was brought by the District of Columbia against the Gas Company to recover over the amount of the judgment obtained by Mrs. Parker against the District, and which had been paid by it. The cause of action relied on to sustain this recovery was briefly as follows: That "the deep and dangerous hole," averred by Mrs. Parker to have existed, and which she alleged to have been the cause of her injury, and upon which her recovery was had, was proven on the trial of her case to have been an open gas box placed and maintained in the sidewalk by the Gas Company for its own use and benefit, and which it was its duty to repair; that this duty had been grossly neglected by allowing the box to remain unrepaired, thus causing the injury for which the city had been held liable. The declaration, moreover, averred notice to the Gas Company, and the fact that adequate opportunity was given it to defend, and the failure of the Gas Company to act in defence of the suit. To this demand the defendant (the Gas Company) filed a plea of the general issue, and by stipulation it was agreed that it might thereunder avail itself of any defence which it might have.

On the trial of the cause, before a jury, testimony was introduced tending to show that the gas box or stop-cock box in question was placed by the Gas Company in the sidewalk, in the city of Washington, in 1873, this gas box being one of the customary appliances used by the company when connecting its mains with a house where gas was to be used; that this box consisted of an iron cylinder, four inches wide and two and a half feet deep, with an iron cover. The box served the purpose of affording access to a cock in the service pipe, which latter conducted the gas from the main of the company to the gas meter in the house, whence it was carried to the burners. By means of this box or cylinder, on removing the cover there-

from with a key made for the purpose, the cock in the service pipe could be reached, and the gas be thus turned on or off from the house. It was, moreover, shown that this box was placed in the sidewalk so as to be level with its surface, and that the cover thereon was held in place by lugs which slipped into slots made for the purpose. In addition it was proven that the box was put in by the company in accordance with the general methods used for introducing gas, and in compliance with the form of structure pointed out by an ordinance of the Board of Common Council of the city of Washington, passed in March, 1868. Both parties introduced proof showing that the service pipe, the stop cock therein, and the gas box were put in at the request of the owner of the premises in front of which they were situated; that they were constructed by the Gas Company, which furnished the materials, and worked as any other plumber would have done, being paid therefor by the owner of the premises; and that in order to do this work, the company had first to obtain permission to open the street to make the requisite connections, and had paid to the District a permit fee of one dollar. There was, moreover, proof tending to show that when the gas box was first put in the work was skilfully done; that it was originally placed in a brick footway then existing and near the curbstone, but that subsequently the Board of Public Works of the District of Columbia widened the footway, and in consequence of this widening the gas box came to be about in the middle of the sidewalk.

Testimony was also introduced, tending to show that where the owners of private property paid the Gas Company the cost of laying lateral service pipes and connections with the street mains and discontinued the use of gas in the premises, they would not be permitted to remove the same; that an adjoining private property owner was never permitted to have a key to the gas box, and that the defendant has, so far as such property owners are concerned, maintained and exercised exclusive supervision and control of the same. There was evidence also introduced tending to show that the defendant had men employed whose duty it was to examine, about the first of

Statement of the Case.

each month, the condition of the meters in every house throughout the District into which gas had been introduced by the defendant, and that it was the duty of these employés to notice and report whether the gas boxes in the sidewalks were uncovered or out of order. The evidence moreover tended to establish that the superintendent of the Gas Company, when his attention had been called to the fact that gas boxes needed repair, had often caused such repair to be done by having the covers put on or doing any other required work. To the contrary, proof was also introduced tending to show that after the gas boxes were put in the Gas Company took no further care or charge of them.

The District offered in evidence the record of the suit brought by Mrs. Parker and made proof that it paid the amount of the judgment therein rendered. The testimony which had been given by Mrs. Parker on the trial of that case was also offered in evidence and admitted over objection, although no exception was reserved. This testimony tended to show that the sole cause of the injury for which she sued and had recovered was an open gas box in which, whilst walking on the street, her foot had become engaged. The deposition of Mrs. Parker taken in the case on trial was also offered in evidence by the District, and contained the following description of the accident:

"The accident occurred in front of 121 C street N.E., about 5 o'clock in the afternoon of March 10, A.D. 1879. The immediate cause of the accident was an open gas box in about the centre of the sidewalk; it was a perfect trap, as it was upon a level of the sidewalk, except at the side I stepped into, and there was a part of a brick sunk at least an inch and a half below the level of the walk so that any one in walking along could not see but the pavement was level until, like myself, when too late. Had not the half of the brick been sunken the open hole would not have been so dangerous; for, upon stepping into the hole, I tried to step back, when I found my box-toe shoe fast in the hole, and the sunken brick let my heel down with my entire weight, one and one half inches more than would have occurred had the pavement been perfect around the gas box."

The District moreover, after proving the death of H. Clay Smith, a witness who had testified in the original suit, and the loss of the notes of his testimony, offered to prove by the stenographer who had taken the original notes what had been Smith's testimony. This was objected to, and on its being overruled, exception was reserved. The stenographer testified that Smith had on the original trial sworn that he lived within a few doors of the place where the Parker accident happened, and had noticed the gas box which caused the accident to be out of order "for two or three weeks prior to the accident to Mrs. Parker, and that he did not know how the top of the box came off, but he had noticed it."

At the close of the testimony offered in behalf of the District, the defendant company requested a peremptory instruction in its favor, which was refused and exception was taken. The plaintiff then asked for the following instructions: First. That the obligation of supervising and keeping the gas box in order rested on the Gas Company, and that if it had neglected so to do after actual notice of its being out of order, or after such condition had existed for a sufficient length of time to have enabled the company, with reasonable diligence, to have discovered it, the Gas Company was liable. Second. That if the company had notice of and opportunity to defend the original suit, it was bound by the judgment therein rendered. These instructions were given. The defendant company asked for several instructions, which were refused, and exceptions were reserved consequent on such refusal. They were, first, that the Gas Company was not obliged to keep the box in order; second, that, even if it was originally so bound, the widening of the footwalk by the city and the consequent shifting of the box to the middle of the sidewalk, had relieved it of such obligation; third, that if the jury found from the evidence that the injury of Mrs. Parker was caused in whole or in part from a defect in the sidewalk alongside of the gas box, the defendant should have a verdict; fourth, if the jury found from the evidence that the injury for which Mrs. Parker recovered was caused by the fault of both parties to the suit, the defendant was also entitled to a verdict. This last request

the court declined to give on the ground that it was already covered by a general instruction given. The court in its general charge instructed the jury substantially as follows: That the primary duty rested on the Gas Company to repair and keep the gas box in order; hence, if the District had been compelled to pay as a result of the negligence of the Gas Company in discharging its legal obligation, the District was entitled to recover the amount; that notice having been given of the demand made by Mrs. Parker and of the suit brought by her, and an opportunity having been afforded the Gas Company to defend the same, the judgment in such suit was the thing adjudged against the defendant company as to the matters which it concluded. It also instructed that as the original action was for an accident caused by a "deep and dangerous hole," it was lawful and necessary to go beyond the face of the complaint and ascertain from the evidence whether the deep and dangerous hole referred to was the gas box of the defendant company; that the jury were to determine by an examination of the testimony offered in that case whether the verdict in the first suit was alone based on the gas box; if so, the District was entitled to recover. If, on the other hand, the jury found that the controversy in the first suit involved the question of liability on the part of the city for the gas box, and also for defective bricks around it, then it was the duty of the jury to ascertain whether the judgment which had been rendered against the city was because of the defective gas box or because of both the defect in the gas box and the bricks, and if the jury found that the judgment had been rendered in the former suit solely on the ground of the defective gas box, that judgment would be conclusive. If there was doubt on what ground the jury, in the previous suit, found its verdict, if the question of the gas box and bricks was before it, then the judgment would not be conclusive, and it would be an open question for the jury to weigh the evidence which might be produced on the subject irrespective of the former judgment. If in that contingency the jury was satisfied that the injury could not have happened but for the depression in the sidewalk occasioned by the bricks, or that the

injury was aggravated by that fact so that "they could not apportion the injury between the gas box and the sidewalk, quite a grave question presents itself." On this grave question the court instructed "if you can come to the conclusion that this depression in the sidewalk was one of the joint causes of the injury, I feel bound to say that I do not see how the District of Columbia could recover damages from the Gas Company. If, on the other hand, you are satisfied that the defect in the pavement played no conspicuous part in the injury, but that it was wholly due to the exposed condition of this gas box, then only one question remains, and that is whether the Gas Company was negligent in regard to the condition of that box, and whether its exposed condition was due to the negligence of the company." On the subject of negligence of the Gas Company, the court instructed that the former judgment did not conclusively fix upon the defendant the charge of negligence; that the negligence of the company might be ascertained from two conditions, either proof of actual negligence or of such failure to repair for a sufficient length of time as would justify the implication of negligence. There was a verdict and judgment for the plaintiff, the District of Columbia, and, on appeal, it was affirmed by the Supreme Court of the District, sitting in general term. The opinion of the general term is reported in 20 Dist. Col. 39. Thereafter the case was brought by error here.

Mr. Walter D. Davidge and *Mr. William B. Webb* for plaintiff in error.

Mr. Sidney T. Thomas and *Mr. Andrew B. Duvall* for defendant in error.

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

The questions raised by the various assignments of error are, First, did the legal obligation primarily rest on the Gas Company to repair and keep the gas box in good order? Second, was that company liable over to the District in consequence

of its failure to do so? Third, was the testimony of Smith, the witness in the original suit, admissible? Fourth, was the judgment rendered against the District conclusive against the Gas Company?

We will consider these questions in the order stated.

First. Did the legal duty rest primarily on the Gas Company to repair and keep the gas box in order?

The Gas Light Company was incorporated by an act of Congress, approved July 8, 1848, and it was empowered "to manufacture, make, and sell gas . . . to be used for the purpose of lighting the city of Washington, or the streets thereof, and any buildings, manufactories, or houses therein contained and situate, and to lay pipes for the purpose of conducting gas in any of the streets, avenues, and alleys of said city; . . . *Provided, however*, That the said pipes should be laid subject to such conditions and in compliance with such regulations as the corporation of Washington may from time to time prescribe."

The trial court instructed the jury that the gas box was a part of the apparatus of the company, and hence it was its duty to exercise proper care over it and thus to prevent injury to persons using the sidewalk. The contention that this instruction was erroneous is based on the assertion that the gas box was not and could not become a part of the apparatus of that company, because under its charter only those things which were necessary in the manufacture of gas and which were needed to convey it after manufacture into and through the streets can be treated as part of its works. The proposition is without foundation. The plain object contemplated by the formation of the Gas Company was the supplying of the gas, to be by it manufactured, to consumers, and it is obvious that this could not be done without making a connection between the street mains and abutting dwellings. When such connections are made with the mains they receive from them and convey into dwellings highly inflammable material, which flows by an uninterrupted channel from the mains themselves into such dwellings. It must, therefore, have necessarily been contemplated that such connections with the

mains, as were from their very nature incidental to and inseparably connected with the consumption of gas, should be a part of the apparatus of the Gas Company and be under its control rather than under that of the city or the property owner. Indeed, the control by the Gas Company of the connection from its mains to the point of use is as absolutely necessary to make it possible for such company to carry out the very purpose of its charter as are the retorts and mains. Moreover the provision of the charter already quoted shows that it was thereby contemplated that the connections between the company's mains and the places where the gas was to be consumed should be made by the Gas Company and become a part of its apparatus. The charter does not confer the power to lay pipes upon those desiring a supply of gas, but gives such power to the company.

The danger of serious damage to the public at large and to the property of individuals and to the mains and other works and apparatus of the company, by the intermeddling of third parties, would be precisely as great in the case of the lateral service pipes and the gas boxes placed in the sidewalks as in the case of interference with street mains. The necessity for affording protection to the company against such interference undoubtedly led to the enactment of the eighth section of the company's charter, wherein it is provided:

"That if any person or persons shall wilfully do, or cause to be done, any act or acts whatever, whereby the works of said corporation, or any pipe, conduit, plug, cock, reservoir, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured, or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of the damage sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, in any action of debt, to be brought in any court having cognizance thereof."

The authority of the company over the gas boxes and its correlative duty to supervise and keep them in order thus deduced from the terms of the charter, the nature of its

business, and the use to which the gas boxes are applied, is also sustained by authority. In *Commonwealth* v. *Lowell Gas Light Company*, 12 Allen, 75, 77, 78, the court in considering the question of what was the machinery and appliances of such a company, said:

"The mains or pipes laid down in the streets and elsewhere to distribute the gas among those who are to consume it were clearly a part of the apparatus necessary to be used by the corporation in order to accomplish the object for which it was established. They constituted a part of the machinery by means of which the corporate business was carried on, in the same manner as pipes attached to a pump or fire engine for the distribution of water, or wheels in a mill, which communicate motion to looms and spindles, or the pipes attached to a steam engine to convey and distribute heat and steam for manufacturing purposes, makes a portion of the machinery of the mill in which they are used. Indeed, in a broad, comprehensive and legitimate sense, the entire apparatus by which gas is manufactured constitutes one great integral machine, consisting of retorts, station meters, gas holders, street mains, service pipes, and consumers' meters, all connecting and operating together, by means of which the initial, intermediate and final processes are carried on, from its generation in the retort to its delivery for the use of consumers."

It would be unreasonable to infer that Congress, when it authorized the use of the streets or sidewalks for the purposes of the Gas Company's business, contemplated that the city of Washington or its successor, the District of Columbia, should keep in repair such apparatus, the continued location of which in the sidewalks of the city was permitted, not only as an incident to the right to make and sell gas, but also for the pecuniary benefit of the Gas Company. We conclude, therefore, that the duty was imposed upon the Gas Company to supervise and keep the gas box in repair. This duty not only does not conflict with the charter of the company, but on the contrary is sanctioned by its tenor, and is imposed as an inevitable accessory of the powers which the charter confers. Nor do we think that this duty was affected by the circum-

stances that the cost of the labor and materials used in the construction of the connection and gas box was paid by an occupant or owner of property who desired to be furnished with gas. As the service pipe and stop cock was a part of the apparatus of the company and was used for the purpose of its business, it is entirely immaterial who paid the cost, or might in law, on the cessation of the use of the service pipe and gas box by the company, be regarded as the owner of the mere materials. Certainly, it would not be claimed that if the box and its connections became so defective or out of repair that gas escaped therefrom and caused injury, that the company could legally assert that it was under no obligation to take care of the apparatus, because of the circumstance that it had been compensated by others for its outlay in the construction of the receptacles from which the gas had escaped.

The argument seeking to distinguish between the service pipe and other appliances of the Gas Company and the gas box, so as to make the company liable for the one and not for the other, is without merit. All these appliances were parts of the one structure, put in position and used together for the purposes of the company. There is nothing in the record even tending to show that such box was not one of the usual appliances of a gas company. It was manifestly treated as one of such instrumentalities, since it was put in the sidewalk as part of the works constructed for the purpose of introducing gas into the premises.

Nor are the foregoing conclusions weakened by the provisions of the city ordinance of March, 1866. That ordinance made it obligatory to construct service connections with the mains wherever the streets were ordered paved without regard to an existing or immediately expected necessity for such service. The purpose of the ordinance was to secure connections for both gas and water before streets were paved, thus obviating the tearing up of the pavement when once laid. Whether the company, under its charter and the laws relating thereto, would be compelled to make or allow to be made indefinite service connections with vacant property, need not be considered, because its determination bears no relation to the ques-

tion whether the company is bound to keep its appliances when constructed in safe condition. In leaving this branch of the case, however, we add that it is clear from the proof that the gas box in question was not constructed in consequence of a duty imposed by this ordinance. It was put in place by the company voluntarily, at the request of the property owner for service. The work was done by the company upon a permit given by the District allowing the opening of an existing street and the sidewalk thereon.

Second. Had the District a cause of action against the Gas Company resulting from the fact that it had been condemned to pay damages occasioned by the defective gas box, which it was the duty of the Gas Company to supervise and repair?

An affirmative answer to this proposition is rendered necessary by both principle and authority. This court said in *Chicago* v. *Robbins*, 2 Black, 418, 422: "It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer." And the same doctrine is reiterated in almost the identical language in *Robbins* v. *Chicago*, 4 Wall. 657, 670.

The principle thus announced qualifies and restrains within just limits the rigor of the rule which forbids recourse between wrongdoers. In the leading case of *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24, 32, the doctrine was thus stated: "Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offence. The rule is, *in pari delicto potior est conditio defendentis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. In respect to offences, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty,

and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

In *Brooklyn* v. *Brooklyn City Railroad*, 47 N. Y. 475, 487, the same rule was applied, the court saying: "Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damage paid by reason of the offence in which both were concerned in different degrees as perpetrators." All the cases referred to involved only the right of a municipal corporation to recover over the amount of the damages for which it had been held liable in consequence of a defective street, occasioned by the neglect or failure of another to perform his legal duty. The rule, however, is not predicated on the peculiar or exceptional rights of municipal corporations. It is general in its nature. It has been applied to public piers. *Oceanic Steam Navigation Co.* v. *Compania Transatlantica Espanola*, 144 N. Y. 663; *Ib.* 134 N. Y. 461. To the right of a property owner to recover for damages which he had been compelled to pay for a defective wire attached by a Gas Light Company to the chimney of the owner's house. *Gray* v. *Boston Gas Light Co.*, 114 Mass. 149. To the right of a master to recover over the damages which he had been obliged to pay in consequence of a servant's negligence. *Grand Trunk Railway Co.* v. *Latham*, 63 Maine, 177; *Smith* v. *Foran*, 43 Connecticut, 244. Indeed, the cases which illustrate the rule and its application to many conditions of fact are too numerous for citation, and are collected in the text books. Wharton Neg. 246; 2 Thomp. Neg. 789, 1061; Sherman & Redfield Neg. (4th ed.) sec. 301; 2 Dillon Municipal Corporation, sec. 1035, and cases there referred to in note.

Third. Was the testimony of Smith, the witness in the original action, admissible for the purpose of throwing light on the record of that action, in order to show the subject-matter there in controversy, and thereby to assist in the ascertainment of what was concluded by the judgment therein rendered?

No question is made as to the adequacy of the foundation laid for the introduction of the secondary evidence; the sole controversy presented is the admissibility of the testimony. The bill of exceptions is general and specifies no particular objection. Clearly, even although it be conceded that the testimony of the witness given on the first trial was *res inter alios* as to the defendant in this action, and was, therefore, not admissible as going to establish substantive facts, yet obviously it was competent for the purpose of throwing light upon the record of the first action, and thus elucidating the determination of the question of what was the subject-matter covered by the judgment rendered in that action. The contention of the plaintiff was that the judgment in the first action was based on the liability of the District for the defective gas box, and was conclusive as against the defendant in this suit. The elementary rule is that for the purpose of ascertaining the subject-matter of a controversy, and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined. *Russell* v. *Place*, 94 U. S. 606, 609, 610; *Cromwell* v. *County of Sac*, 94 U. S. 351, 355, 356; *Lewis* v. *Ocean Navigation & Pier Co.*, 125 N. Y. 341, 348; *Littleton* v. *Richardson*, 34 N. H. 179, 188; Freeman on Judgments, § 273, and authorities there cited.

Fourth. Was the judgment against the District rendered after notice to the Gas Company, and opportunity afforded it to defend, conclusive of the liability of the Gas Company to the District?

As a deduction from the recognized right to recover over, it is settled that where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action. There is here no question of the sufficiency of the notice, or of the ample adequacy of the opportunity given the Gas Company to defend the suit had it elected to do so.

In both *Chicago* v. *Robbins* and *Robbins* v. *Chicago*, *ub. sup.*, this court, after announcing the rule as to the liability over in the language already quoted, also held that where, in the

first suit, proper notice was given to the party liable over, the first judgment would be conclusive against the latter in the action to recover over. In *Boston* v. *Worthington and others*, 10 Gray, 496, 498, 499, the language of the court in *Littleton* v. *Richardson*, 34 N. H. 179, 187, was quoted and adopted:

"When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

In *Oceanic Steam Navigation Co.* v. *Compania Transatlantica Espanola*, 144 N. Y. 663, 665, the rule is thus stated: "It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim, and that the action is pending, with full opportunity to defend or to participate in the defence. If he then neglects or refuses to make any defence he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record. *Village of Port Jervis* v. *First Nat. Bank*, 96 N. Y. 550; *City of Rochester* v. *Montgomery*, 72 N. Y. 65; *Albany City Savings Inst.* v. *Burdick*, 87 N. Y. 40, 45; *Andrews* v. *Gillespie*, 47 N. Y. 487; *Chicago* v. *Robbins*, 2 Black, 418; *Heiser* v. *Hatch*, 86 N. Y. 614."

The foregoing rulings are supported by many decided cases. *Portland* v. *Richardson*, 54 Maine, 46; *Veazie* v. *Penobscot Railroad*, 49 Maine, 119; *Reggio* v. *Braggiotti*, 7 Cush. 166; *Westfield* v. *Mayo*, 122 Mass. 100; *Littleton* v. *Richardson*, 34 N. H. 179, 187, and authorities there cited; *Westchester* v. *Apple*, 35 Penn. St. 284; *Catterlin* v. *Frankfort*, 79 Indiana, 547; see also 2 Dillon on Municipal Corporations, sec. 1035, and authorities there cited.

The contention of the plaintiff in error, however, is that although it be conceded that the judgment rendered against

the District in the first suit is conclusive, yet the judgment in this action to recover over should be reversed for the following reasons:

First, because giving to the judgment first rendered all the effect to which it is entitled, it did not conclude the question of whether the Gas Company was negligent. And that aside from the effect of the judgment there was no evidence tending to show negligence, except the testimony of the witness Smith, which, if admissible to aid in the ascertainment of what was the thing adjudged by the judgment in the former action, yet was not competent to establish the existence of negligence as a substantive fact, apart from the probative force of the judgment itself. Second, that the judgment in the first suit was not conclusive as to whether the broken brick (for which the Gas Company was clearly not liable) had contributed to the accident, and therefore there was error in this particular in the instruction given by the trial court to the jury.

As to the first of these two contentions, the trial court instructed the jury that, although the judgment in the first action was binding on the Gas Company, it was not conclusive as to the negligence of that company, but that such negligence could be inferred by the jury from the testimony of Smith, thus treating that testimony as possessing intrinsic proving power. Both these rulings were erroneous. The testimony of Smith taken in the first suit was *res inter alios*, and therefore incompetent against the Gas Company as independent testimony. The fact that it was admissible for the purpose of determining the scope of the thing adjudged in the suit in which it was given, did not justify its being used for a distinct and illegal purpose. Error, however, in this particular was in no sense prejudicial if the judgment in the first action conclusively established the negligence of the Gas Company. The liability of the District for the injury inflicted by the defective gas box depended on whether it had been guilty of negligence. But the neglect of the District to repair the gas box being one of omission as distinguished from the active doing of a negligent act, this

negligence, in the absence of a statutory rule to the contrary, could only have resulted from two conditions of fact — failure to repair after due notice of the defect, or proof of the existence of the defect for a sufficient lapse of time so as to justify the implication of knowledge and the resulting presumption of negligence. The elementary rule is thus stated in Dillon on Municipal Corporations, (§ 1024,) where a copious list of adjudicated cases is found: "Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for defects occasioned by the *wrongful acts of others;* but as, in such case, the *basis of the action is negligence, notice to the corporation of the defect* which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability."

In the action against the District there was no evidence tending to show actual notice of the uncovered gas box. Indeed, the only proof tending to show negligence was the testimony of the witness Smith that the gas box had been observed by him to be uncovered for a considerable time prior to the accident. The verdict, therefore, against the District necessarily determined that the defect in the gas box had existed for such a length of time as to impute negligence to those whose duty it was to keep it in repair. The finding of this fact in the first action was an essential prerequisite to a judgment against the District. The length of time required to imply knowledge and negligence on the part of the District is also sufficient in law to imply such knowledge and negligence on the part of the Gas Company. It follows, therefore, that the judgment against the District conclusively established a fact from which, as the duty to repair rested on the Gas Company, its negligence results.

The proposition that the judgment, although conclusive, does not determine the negligence of the Gas Company, is a mere sophistry, since, on the one hand, it admits the estoppel resulting from the judgment, and on the other denies a fact

upon which the judgment depends, and without which it could not exist. It is true that in *Chicago City* v. *Robbins*, *ub. sup.*, in speaking of the conclusiveness of the judgment rendered against the city, the court said (p. 423): "Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened." But in that case the liability of the city rested on actual notice of the defect in the street and not on implied negligence based on the continued existence of the defect which caused the injury; therefore the essential fact on which the judgment against the city rested did not as a legal consequence imply negligence on the part of Robbins. Here, of course, a different state of fact gives rise to a different legal result. *City of Rochester* v. *Montgomery*, 72 N. Y. 65; *Carpenter* v. *Pier*, 30 Vermont 81, 87; *Village of Port Jervis* v. *First National Bank of Port Jervis*, 96 N. Y. 550.

The error which it is asserted the trial court committed on the subject of the broken brick at the side of the gas box, and its alleged contribution to the accident, may be conceded without creating cause for reversal. There was no evidence tending, either in the first action or in this, to show actual notice to the District of the defective brick, nor was there evidence tending to show the existence of the defect, for such length of time as to impute knowledge and negligence to the District. One or the other of these conditions being essential to establish negligence and thereby render the District liable for any accident to which the broken brick may have contributed, it follows that in neither of the actions was there any evidence which would have supported a judgment against the District because of the defective brick.

Judgment affirmed.

SCHROEDER *v.* YOUNG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 458. Submitted January 9, 1896. — Decided March 2, 1896.

While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience.

If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner permitted to redeem.

There are other facts in this case, stated in the opinion, in addition to the grossly inadequate price realized for the property, that afford ample justification for the action of the court below in permitting the plaintiff to redeem upon equitable terms, and ordering a reconveyance of the property.

Quære, whether issue of an alias for the original amount of the judgment, after the return of a prior execution, satisfied to the amount of nearly one half of such judgment, the sale of property thereunder to an amount more than sufficient to satisfy the amount actually due, and payment of the excess to plaintiff's attorneys will not invalidate the entire proceedings?

Whether the levy upon the interest of a co-tenant in a specific part, designated by metes and bounds, of a certain larger quantity of land is valid, is not decided.

Before the time had expired to redeem from the execution sale, the plaintiff was told by the defendant that he would not be pushed, that the statutory time to redeem would not be insisted upon, and, believing it, acted and relied upon such assurance. *Held*, that under such circumstances the purchaser was estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration; and that there was a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident or mistake, which might be exercised, notwithstanding the statutory period for redemption has expired.

THIS was a complaint in the nature of a bill in equity, originally filed in the Third Judicial District Court of the

Statement of the Case.

Territory of Utah, by John M. Young against Frank E. Stephens and wife and Albert T. Schroeder and wife, as defendants, to set aside and cancel certain execution sales of real property in Salt Lake City as fraudulent and void, and for permission to redeem from such sales, notwithstanding the expiration of the statutory time for redemption, and for a decree compelling the defendants to convey to the plaintiff the property mentioned, upon just and equitable terms.

The material facts in the case were that, on March 6, 1891, Clark, Eldredge & Co., a corporation, obtained judgment by default in said court against the appellee John M. Young, Henry Goddard, and George Goddard in the sum of $1673.36, with $30.60 costs. Frank B. Stephens and Albert T. Schroeder, partners and the principal defendants, were the attorneys for Clark, Eldredge & Co. in such action. The plaintiff John M. Young was the owner of the undivided one half of two parcels of land in Salt Lake City, and plaintiff's sister, Lydia Y. Merrill, was the owner of the other undivided one half of the said parcels. Their title was derived from the will of their father, and, as to the greater part of such property, was subject to a right in Sarah Milton Young and Ann Olive Young to receive each one fourth of the money arising from said property during their respective lives.

On April 29, 1881, an execution was issued in said action of Clark, Eldredge & Co. against John M. Young, directing the marshal of the United States, if sufficient personal property could not be found to satisfy the judgment, to levy upon the real estate belonging to Young and his co-defendants in such action; and on May 7, 1891, the marshal gave notice that he attached and levied on all the right, title, claim, and interest of the said John M. Young and his co-defendants in and to that parcel of land described as beginning 101 feet north, and 39½ feet east of the S.W. corner of lot 2, block 70, plat "A," Salt Lake City survey, and running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning; and also on that part of the same lot described as beginning 32½ feet west from the S.E. corner of the said lot, running thence west 38 feet, thence north 98⅓

feet, thence east 38 feet, thence south 98½ feet to the place of beginning; and also on a part of lot 12, block 8, five acre plat "A," Big Field survey.

Afterwards, on July 25, 1891, the marshal certified that he had sold the property described in the notice to John Clark, and, deducting his commissions and expenses of sale, paid the balance realized upon said sale, viz., $962.36, to the attorneys of Clark, Eldredge & Co., and further returned that there was still due and unpaid on said judgment the sum of $886.90. The John Clark mentioned in the return was a director and the principal stockholder of Clark, Eldredge & Co. Afterwards, on July 28, an alias execution issued from the said court in such action for the full sum of $1673.36, and $30.50 costs, by virtue of which the marshal levied upon a certain other parcel of the same lot described as beginning 64½ feet west of the N.E. corner of said lot 2, running thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90¾ feet, thence east 31¼ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning; and on August 25 the marshal returned that he had sold these premises to the defendants Stephens and Schroeder for the sum of $828.70, and further certified that the judgment obtained by said corporation was still unsatisfied to the extent of $100.

On September 30, said marshal made a further return to the last mentioned writ, in which he certified that he sold all of lot 12, block 8, five acre plat "A," Big Field survey, situate in Salt Lake County, and also a certain parcel of land described as beginning 39 feet east and 81 feet north of the S.W. corner of said lot 2, running thence north 209 feet, thence east 16½ feet, thence south 209 feet, thence west 16½ feet to the place of beginning, to Stephens and Schroeder for the sum of $136, and that, deducting the costs and expenses of said last levy, amounting to $30, paid the balance, $106, to the attorneys of Clark, Eldredge & Co., and returned said writ fully satisfied.

The court found that all that part of lot 2 as described in

this statement, a plat of which appeared in the record, constituted a single parcel of land, and should have been regarded and treated as such, and not as being divided into separate lots or parcels, and that the first parcel sold being 15½ by 28 feet had no ingress or egress, and that the same as sold would necessarily be sacrificed on such sale on account of its location, but that at the time of the sale of this parcel, neither Stephens nor Schroeder had actual knowledge of any other realty owned by plaintiff.

The other material facts are stated in the opinion of the court.

Before the case was called for argument, the suit was settled so far as the defendants Stephens and his wife were concerned, leaving Schroeder and his wife sole defendants. The case coming on to be heard upon pleadings and proofs, the District Court made a decree permitting the plaintiff Young to redeem the property upon paying to the defendants the sum of $723.25, less certain costs, but subject to one half of a mortgage executed by the defendants, who were ordered to execute and deliver to plaintiff a deed of the property. From this decree an appeal was taken to the Supreme Court of the Territory, which affirmed the decree of the District Court, whereupon appellants prayed and were allowed an appeal to this court.

Mr. A. T. Schroeder and *Mr. James B. Edmonds* for appellants.

Mr. Parley L. Williams for appellee.

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

Plaintiff relies mainly for a decree in this case upon the fact that his interest in the property in question, which the trial court found to be worth $26,000, was sacrificed at these several judicial sales to pay a judgment of little more than $1700.

While mere inadequacy of price has rarely been held suffi-

cient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such manner that their full value could not be realized; if bidders have been kept away; if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale may be set aside, and the owner permitted to redeem.

Thus, in *Byers* v. *Surget*, 19 How. 303, 306, lands to the amount of 14,000 acres, and estimated at from $40,000 to $70,000 in value, were sold by the sheriff in satisfaction of a judgment for costs of $39, to the attorney for the successful party, and conveyed to him for $9.31½. The sale was pronounced to have been fraudulent and void, and a reconveyance of the property was decreed. It appeared that the owner of the property had no knowledge of the suit until he was informed of the sale of the land; that the attorney for the successful party, the defendant, assumed himself the power to tax the costs, the right of selecting the final process, of prescribing the description and quantity of the property which he chose to have seized in satisfaction, of directing the sheriff as to the various steps to be taken by him, and of becoming the purchaser himself for the petty sum of $9.31½. Of this proceeding, Mr. Justice Daniel, in delivering the opinion of the court, remarks: "Such is the history of a transaction which the appellant asks of this court to sanction, and it seems pertinent here to inquire under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused, or even palliated."

In *Graffam* v. *Burgess*, 117 U. S. 180, 186, two judgment

creditors became the purchasers for about $150 of unincumbered property worth at least $10,000, although the judgment debtor had $3000 worth of furniture and personal property in the house subject to levy. During the temporary absence of the complainant, the defendants entered upon the premises, broke into the house and took possession of it on behalf of the purchasers, removed the furniture and other personal property, including the wearing apparel of the complainant, took possession of her personal correspondence and papers and the sum of $170 in money, and still retained possession of the property at the time of the filing of the bill. The court found that the complainant was ignorant of the issue of the execution or of the sale of the property, that the purchasers knew that she was unconscious of it, and endeavoured to keep her so, and took an inequitable advantage of her ignorance to get possession of it. In reply to the argument that the proceedings were regular, Mr. Justice Bradley observed: "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law." The court commented most severely upon the conduct of the purchasers, and found no difficulty in setting aside the sale, although four members of the court dissented upon the ground that the complainant had failed in her duty to redeem from the sale within the time limited by law.

In *Howell* v. *Baker*, 4 Johns. Ch. 118, a farm worth $2000 was sold under a judgment and execution, on which not more than $80 were due, to the attorney of the plaintiff, who attended the sheriff's sale, for $10. The sale was held upon a stormy day, when no person but the attorney and the deputy sheriff were present, and it was held that these facts, connected with the gross inadequacy of price, were sufficient to authorize the purchaser to be held as trustee for the respective interests of the parties to the execution, and the bidder was allowed to redeem on equitable terms. A large number of other cases are also cited by Mr. Justice Bradley in his

opinion in *Graffam* v. *Burgess*, and the general proposition laid down, as above stated, that if, in addition to inadequacy of price there be other circumstances throwing a shadow upon the fairness of the transaction, the judgment debtor will be allowed to redeem.

There are other facts in this case than the grossly inadequate price realized for this property, that afford ample justification for the action of the court below in permitting the plaintiff to redeem upon equitable terms, and ordering a reconveyance of the property.

1. The property was sold to Stephens and Schroeder, who had acted as attorneys for the judgment creditor throughout the entire transaction, and had been fully paid by the corporation for their services. In this connection the trial court further found that Stephens furnished the officer a description of the property to be levied upon and sold, and that he accordingly did levy upon and sell as he was directed by Stephens according to such description. Add to this the further finding that at neither of the sales was there any other bidder and no other person present than Stephens and the officer conducting the sales, and we can readily appreciate how inevitable it was that the property should be sacrificed. Although there is no general rule that an attorney may not purchase at an execution sale, provided it be not done to the prejudice of his own clients, *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, 300, such purchase in itself is calculated to throw a doubt upon the fairness of the sale, and as is quaintly said of such sales by the Court of Appeals of Kentucky in *Howell* v. *McCreery*, 7 Dana, 388: "Public policy and the analogies of law require that they should be considered *per se* as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts." See also *Hall* v. *Hallet*, 1 Cox, 134; *Jones* v. *Martin*, 26 Texas, 57; *Byers* v. *Surget*, 19 How. 303; *Blight's Heirs* v. *Tobin*, 7 T. B. Mon. 612.

2. The alias execution of July 28 was not only issued for the full amount of the original judgment, $1673.36 and $30.50 costs, without deducting $962.36, realized upon the first exe-

cution, but under it the marshal sold, under the directions of Stephens and Schroeder, property for an amount in excess of the amount remaining unpaid on the judgment, and collected the excess and paid it over to Stephens and Schroeder, who retained it. In this connection the trial court made the following finding: "At the time of the last sale, to wit, September 30, 1891, there was a balance due Clark, Eldredge & Co. of only $25.57, and their judgment had been satisfied except said sum, and to satisfy said balance property was sold as aforesaid, amounting in all to $136, $106 of which was paid by the United States marshal to said Stephens and Schroeder." Upon no theory were the judgment creditors entitled to any more than the amount of their claim, and if, as may sometimes happen, the property be sold for more than the amount of the execution, the residue should be returned to the judgment debtor.

There is reason for saying that the issue of an alias execution for the original amount of the judgment, after the return of a prior execution, satisfied to the amount of nearly one half of such judgment, the sale of property thereunder to an amount more than sufficient to satisfy the amount actually due, and the payment of the excess to the plaintiff's attorneys, invalidate the entire proceedings — the rule in some States being that a levy for an amount exceeding the amount of the judgment or the amount actually due upon the judgment with interest and costs is void. 2 Freeman on Executions, § 381; *Glidden* v. *Chase*, 35 Maine, 90; *Pickett* v. *Breckinridge*, 22 Pick. 297; *Peck* v. *Tiffany*, 2 N. Y. 451; *Hastings* v. *Johnson*, 1 Nevada, 613; *Patterson* v. *Carneal*, 3 A. K. Marsh. 618. But, however this may be, there can be no doubt that this alias execution and the proceedings thereunder were irregular so far as Stephens and Schroeder were concerned, though perhaps not to the extent of invalidating the title of a *bona fide* purchaser. *Stead's Executors* v. *Course*, 4 Cranch, 403; *French* v. *Edwards*, 13 Wall. 506; *Groff* v. *Jones*, 6 Wend. 522; *Tiernan* v. *Wilson*, 6 Johns. Ch. 411.

3. The court below was also of opinion that the property of the debtor was sacrificed by the manner in which the sales

were made, and particularly by the successive sales of his interest in different parts of lot 2, block 70, held in common with his sister, Lydia Y. Merrill, and that a proper regard for his interests required that his entire right to the whole land thus held in common should have been sold at one time. This, however, raises a question as to which the authorities are not entirely in harmony, viz., whether the levy upon the interest of a co-tenant in a specific part, designated by metes and bounds, of a certain larger quantity of land is valid. In view of the other manifest irregularities, we do not feel called upon to express an opinion upon this point.

There is one finding, however, in respect to these sales, which, taken in connection with the facts that the defendants were the attorneys for the judgment creditors, furnished the officer selling the property with the description of the property to be levied upon and sold, and became the purchasers of the property either directly from the marshal, or indirectly through their client Clark, which is in itself sufficient to justify the action of the court below in vacating the sales and permitting the plaintiff to redeem, viz., that "before any of said property was sold, said Stephens, who was the sole bidder at each of said sales, formed the intention that, regardless of the value of the various pieces of property to be sold, and that were sold, he would leave a balance after each sale, so that all of the plaintiff's property would be sold, and he so bid at the various sales as to accomplish, and did accomplish, said object and purpose." As Stephens was appellant's partner in the practice of law, and in the prosecution of the claim of Clark, Eldredge & Co., and bought the property in for himself and partner, who now sets up title in himself by virtue of such purchase, it is clear that he is bound by Stephens' acts and representations. Certainly he cannot set up a title acquired by Stephens' assistance, and at the same time repudiate his acts in connection with the acquisition of such title.

There are other circumstances, also, found by the court below, which, taken in connection with the grossly inadequate price paid, render it still more inequitable that purchasers standing in the position of the defendants in this case

should insist upon the letter of the bargain, and throw something more than a mere doubt upon the fairness of the transaction. Before the time had expired for redemption Stephens and Schroeder requested the collector of taxes of that county to allow them to bring suit against the plaintiff to recover the taxes owing by him for the year 1890, on the part of lot 2 described in the complaint, and agreed that, if the collector so consented, they would bring the suit, and make the collection free of cost to the collector, an arrangement which was carried out according to its terms. On April 10, 1892, plaintiff offered to pay defendants the full amount of the judgment obtained by them, together with interest at the rate of one per cent per month, and also to liberally compensate them for all their services and trouble, give them $1000 besides as a bonus, and pay all their advances with interest if they would reconvey to him, which the defendants refused to do. Of a similar offer and refusal this court in 19 How. 310, 311, speaking through Mr. Justice Daniel, said: "Another pregnant proof of the design of the appellant to grasp and retain what no principle of liberality or equity could warrant, is the fact, clearly established, of his refusal after the sale to accept from the appellee, for the redemption of his lands so glaringly sacrificed, a sum of money considerably exceeding in amount the judgment for costs, with all the expenses incidental to the carrying that judgment into effect. The appellant, by his irregular and unconscientious contrivances, achieved what he conceived to be an immense speculation, and he determined to avail himself of it, regardless of its injustice and ruinous consequences to the appellee."

About the same time, the plaintiff, being ignorant of the fact that lot 12 had been sold and that the defendants had a deed therefor, informed the defendant Schroeder that he intended to redeem the lot from a sale that had been made for the taxes of 1891, and afterwards did so redeem said lot, and informed Schroeder that it had been done, the plaintiff being still ignorant that the defendants held a marshal's deed for it. Again, on April 24, plaintiff being still ignorant that defendants held a marshal's deed for lot 12, informed Schroe-

der that he intended to redeem said lot from a tax sale that had been made thereof for the taxes of 1890, and did subsequently redeem the same, and informed Schroeder of the fact, and that Schroeder never at any time informed him that he had obtained a deed for the lot. The court further found that defendants purposely and intentionally failed to inform the plaintiff that they had a title to the said lot at the time the plaintiff was redeeming the same from the tax sales. The court further found that the said attorneys, in violation of their duty to obtain the highest possible price for the property while acting in behalf of their clients, became the bidders upon said property, and so acted as to obtain the same for the least possible sum, so as to satisfy the judgment, and at the same time to sell all the property belonging to said Young. If these facts be not sufficient to justify a rescission of these sales, it is difficult to imagine what would be so considered.

4. Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security. *Guinn* v. *Locke*, 1 Head, 110; *Combs* v. *Little*, 4 N. J. Eq. 310; *Griffin* v. *Coffey*, 9 B. Mon. 452; *Martin* v. *Martin*, 16 B. Mon. 8; *Butt* v. *Butt*, 91 Indiana, 305; *Turner* v. *King*, 2 Ired. Eq. 132; *Lucas* v. *Nichols*, 66 Illinois, 41; *McMakin* v. *Schenck*, 98 Indiana, 264. In *Southard* v. *Pope's Ex'rs*, 9 B. Mon. 261, 264, it is said that "a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the defendant in execution, and authorize an application by him to a court of equity for relief."

Opinion of the Court.

Probably, if a motion had been made in the original case to set aside the sale upon the ground of mere irregularities, such motion would have to be made before the statutory period for redemption had passed; but in this class of cases, where fraudulent conduct is imputed to the parties conducting the sale, there is a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident or mistake, which may be exercised, notwithstanding the statutory period for redemption has expired. It is evident that, where a sale has culminated in the execution and delivery of a deed to the purchaser, which is not void upon its face, or a mortgage has been put upon the property, as in this case, no remedy is complete, which does not go to the cancellation of such deed, and the complete reinvestment of the title in the plaintiff. It also appears from the findings that appellant has received rents from the property, that various sums had been expended for taxes and other purposes, that an accounting was necessary in adjusting the rights of the parties, which could not be effectually carried on in a court of law. There can be no doubt of the jurisdiction of a court of equity in such case notwithstanding the expiration of the statutory time of redemption. *Graffam* v. *Burgess*, 117 U. S. 180; *Blight's Heirs* v. *Tobin*, 7 T. B. Mon. 612; *Day* v. *Graham*, 1 Gilman, (6 Ill.) 435; *Morris* v. *Robey*, 73 Illinois, 462; *Fergus* v. *Woodworth*, 44 Illinois, 374; *Bullen* v. *Dawson*, 139 Illinois, 633; *Jenkins* v. *Merriweather*, 109 Illinois, 647; *State Bank* v. *Noland*, 13 Arkansas, 299.

The appellant's brief deals largely with criticisms upon the findings and upon the admission of testimony, which we do not feel it necessary to discuss, as they do not involve the merits of the case, which rest upon the undisputed facts. It would be a reproach to a court of equity, if it could not lay hold of such a transaction as this is shown to be, and set aside a sale of property acquired under the forms of law and in defiance of natural justice.

The decree of the court below is, therefore,

Affirmed.

DOUGLAS *v.* WALLACE.

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

No. 611. Submitted January 27, 1896. — Decided March 2, 1896.

When there is color for a motion to dismiss on the ground of want of jurisdiction, and the claim is not so clearly frivolous as to authorize the dismissal, the court may consider and pass upon the question raised.

Claims of deputy marshals against a marshal for services stand upon the same footing as those of an ordinary employé against his employer.

THIS was a motion to dismiss a writ of error for want of jurisdiction, or to affirm the judgment of the Supreme Court of North Carolina upon the ground that the writ of error was sued out for delay merely, and the question upon which jurisdiction depended was so frivolous as not to need further argument.

The action was brought in the Superior Court of Iredell County, North Carolina, by the defendants in error, the firm of Wallace Bros., to recover of Douglas, the plaintiff in error, the amount of certain drafts drawn upon him by certain persons, and accepted by writing across said drafts "Accepted; payable when I receive funds to the use of" the drawer of the drafts. (Signed) "R. M. Douglas, U. S. Marshal." The matters involved in the action were referred to a referee, who found that the defendant Douglas was Marshal of the United States for the Western District of North Carolina for the years 1878 to 1881, and that during this time he had in his employment as deputy marshals J. T. Patterson, Jr., in whose favor he accepted a draft for $200; W. J. Patterson, in whose favor he accepted a draft for $325, and S. P. Graham, who had a claim against the Marshal for $98.82 for official services rendered to the Marshal, all of which were assigned to the plaintiffs. The referee further reported that there had been placed to the credit of Douglas in the Treasury Department of the United States the sum of $460.76 upon claims due him for the services of J. T. Patterson, Jr., performed prior to the

acceptance of his draft for $200, not subject to any previous order, and that the same was placed to his credit since the acceptance of the draft; that there had also been placed to his credit the sum of $2274.55, due him for the services of W. J. Patterson, rendered prior to the acceptance of his draft for $325, and that the same was subject only to two drafts for the aggregate sum of $600; that of the claim of $98.82, due to S. P. Graham for services rendered as deputy, $95.62 had been placed to the credit of the defendant in the Treasury Department since the acceptance of the claim by the defendant, the remainder of said claim having been allowed by the Government; that the vouchers so traded to the plaintiffs were for services rendered prior to the said acceptance, and before the same was transferred to the plaintiffs, and that the further sum of $2858.76 was placed to the defendant's credit and control in the Treasury Department for services rendered by Graham, out of which sum defendant received $900, leaving $1958.76 to the credit of the defendant since the acceptance. The referee accordingly reported that the plaintiffs were entitled to payment for the full amount of their claim.

Before the judgment of the court was rendered, the defendant moved that the action be dismissed, upon the ground that the evidence disclosed that the drafts and accounts declared upon were drawn upon claims, or an interest in claims, against the United States before their allowance, and were, therefore, null and void under Rev. Stat. § 3477, inhibiting the assignment of claims against the United States. This motion was overruled, the court proceeded to consider the case upon the report of the referee and exceptions thereto, and entered a judgment in favor of the plaintiffs, from which the defendant appealed to the Supreme Court of North Carolina, which affirmed the judgment of the court below. Whereupon defendant sued out this writ of error.

Mr. Robert M. Douglas, plaintiff in error, in person.

Mr. W. P. Montague for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

The only Federal question in this case was raised upon the motion of the defendant to dismiss, upon the ground that the evidence disclosed that the drafts and accounts declared upon were drawn upon claims, or an interest in claims, against the United States before their allowance, contrary to the provisions of Rev. Stat. § 3477, which declares that "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof," etc.

While we are of opinion that the claim of a Federal question thus presented is not so clearly frivolous as to authorize us to dismiss the case, within the rulings in *Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *New Orleans Waterworks*, 142 U. S. 79, 87; and *Hamblin* v. *Western Land Co.*, 147 U. S. 531, we think there was such color for the motion to dismiss as authorizes us to proceed to the consideration of the question involved.

Upon the merits, we think the position assumed by the defendant is wholly untenable. The deputy marshals, for whose services the drafts in question were accepted, not only had no claim upon the United States, and no part or share in any such claim, but they had no proper interest in any such claim. Their accounts, for which the drafts were accepted, were claims against the Marshal personally, and not against the United States, though they were paid out of the funds to be realized by the Marshal from the government. Although deputies are recognized by law as necessary to the proper administration of the Marshal's office, they receive from the government neither salaries nor fees, and the government has no dealings directly with them. The accounts are rendered by the Marshal, who charges not only for his own services,

but for those of each of his deputies, who are appointed by the Marshal personally and are accountable to him alone, though subject to be removed by the court at its pleasure. Rev. Stat. § 780. The Marshal makes his own bargains with his deputies, and is unrestricted in the amount he shall pay them, which may be either a salary or a proportion of the fees earned by them, except that, in computing the maximum compensation to which he is entitled, the allowance of no deputy shall exceed three fourths of the fees and emoluments received or payable for the services rendered by him. § 841. He is thus bound to charge himself with a quarter of the fees earned by each deputy. Their claims for services against the Marshal stand upon the same footing as those of an ordinary employé against his employer, and are not even contingent upon the Marshal collecting his own accounts against the United States, although in the present case the Marshal accepted the drafts in suit upon such contingency.

It is true that in a narrow sense of the word these deputies may be said to have had an interest in the claim of the Marshal against the United States, inasmuch as their drafts were not payable until the Marshal received funds for the use of the drawers, or rather applicable to the services rendered by the drawers; but this was rather a method of fixing a date for the maturity of the drafts than a contingency upon the happening of which the claims of the deputies should be payable. If, for instance, the Marshal were to give his grocer or other ordinary creditor a note, payable when a certain claim of his against the government were paid, such creditor might be said to be interested in the payment of the claim; but he could not, in the sense of the statute, be said to have an interest in the claim itself, since his debt existed entirely independently of the claim. Had the drafts in this case been surrendered and cancelled, the claims would still have existed against the Marshal personally, and, in the absence of any agreement to the contrary, might have been subject to enforcement. Their claims were for services rendered to the Marshal, though the amount of such claims was measured by the fees which the Marshal was entitled to charge the government for

Statement of the Case.

their services. Had the Marshal neglected to include them in his accounts their validity as claims against him would not have been affected, and if they chose to await payment of their claims until the Marshal received money applicable to their services, this was a matter of favor to him. The plaintiffs are no more the assignees of the deputies' claims against the government than the deputies were of a share or interest in the Marshal's claim against the government. Upon the theory of the defendant the deputies would be without remedy. They would have no claim directly against the government, because he stands between them; they would have none against him personally, since, by his acceptance of their drafts, they became assignees of a share or interest in his claim against the government.

The judgment of the Supreme Court of North Carolina is

Affirmed.

COCHRAN *v.* BLOUT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 116. Argued December 12, 13, 1895. — Decided March 2, 1896.

When the plaintiff in a bill in equity alleges facts material to his recovery, and the defendant in his answer denies them under oath, the burden of proof is thrown upon the plaintiff.

On July 21, 1890, George W. Cochran filed, in the Supreme Court of the District of Columbia, a bill of complaint against Isaac L. Blout, trustee, James P. Ryon, and Julius Lansburgh, whereby he sought a decree, in the nature of a decree for specific performance, to compel Lansburgh to convey to him an undivided one third equitable interest owned by Lansburgh in a certain square or tract of land in the city of Washington, and Blout and Ryon to join in said conveyance as holders of the legal title.

The facts out of which the controversy grew were substantially these:

Statement of the Case.

By virtue of certain deeds and agreements, not necessary here to state, on June 1, 1886, the legal title to square 980 in the city of Washington became vested in Isaac L. Blout, who executed a cotemporaneous declaration of trust, wherein he acknowledged that he held said square in trust for the following persons: For himself, one sixth; Julius Lansburgh, one third; Henry T. Tracy, one sixth; Morris Clark, one sixth, and the firm of Ryon & Tracy, composed of James P. Ryon and Burr R. Tracy, one sixth — each of said parties having paid his proportional part of the purchase money; and for the following purposes: The land was to be subdivided in such manner as might be agreed on by the parties in interest, such agreement to be expressed by the written signature of James P. Ryon, and to be sold either in whole or in part upon such terms as should be agreed upon by the parties in interest, such agreement to be expressed by the written signature of James P. Ryon, and upon the trust to convey the ground so sold to the purchaser or purchasers, and to pay over unto the parties in interest, according to their respective interests at the time of sale, or, if the parties in interest should so desire, to apply said proceeds of sale to the payment of certain described incumbrances on said tract.

In January, 1889, Lansburgh put the said square, with other property wholly his own, into the hands of Joseph T. Dyer, a real estate broker in the city of Washington, for sale at and for the sum of twenty-eight cents per square foot. On September 26, 1889, Dyer gave to George W. Cochran, the plaintiff, a paper in the following terms:

"WASHINGTON, D. C., *Sept.* 26, 1889.

"Received of George W. Cochran, Esq., a deposit of three hundred ($300) dollars, to be applied in part payment of purchase of all of square 980, sold him for 28 cents per square foot on following terms: One third cash, bal. in 1, 2, and 3 years, with interest at 6 per cent, payable semi-annually; property sold as a good title or no sale; all taxes to be paid to Nov. 30th, 1889. The purchaser is required to make full settlement in accordance with terms of sale within thirty

days from this date or deposit will be forfeited. Conveyancing at purchaser's cost.

"J. T. DYER,

"*Agent for Julius Lansburgh and others.*"

On that day Dyer gave a written notice of the sale to Lansburgh, and on the next day to Ryon & Tracy, who approved the same. The notice and approval were in form as follows:

"WASHINGTON, D. C., *Sept.* 26, 1889.

"Messrs. RYON & TRACY.

"DEAR SIRS: I have sold square 980 to George W. Cochran, Esq., for twenty-eight cents per square foot, one third cash, balance in 1, 2 and 3 years, 6 per cent, and have received a deposit of $300 to bind the sale; property sold as a good title. J. T. DYER.

"Sale approved: RYON & TRACY, Sept. 27, 1889.

"Approved: JULIUS LANSBURGH."

There was no third person present when Lansburgh signed this paper, and one of the disputed questions in this case is whether Lansburgh's approval was unconditional, or upon the verbal condition that it was not to bind him until concurred in by other parties in interest.

Blout and Clark, each holding a one sixth interest in the property, declined to approve the sale to Cochran. The firm of Ryon & Tracy, owning a one sixth interest, and Henry C. Tracy, owning a one sixth interest, were willing to carry out the sale as made. Lansburgh, having learned that some of the parties in interest refused to acquiesce in the sale, declined to convey his share.

Subsequently, on November 14, 1889, Cochran filed a bill against Blout and all the parties in interest, seeking to have specific performance of the contract of sale made by Dyer and approved by Ryon & Tracy and Lansburgh. Blout and Clark filed answers, alleging that they had not authorized Lansburgh or Dyer to make the sale to Cochran, and that they had never approved or ratified the same.

Opinion of the Court.

Ryon & Tracy and Henry C. Tracy conveyed their respective interests in the square to Cochran. Evidence was taken, and Cochran, finding that he could not maintain his bill against Blout or Clark, dismissed his bill as against them; and subsequently, on July 21, 1890, filed the present amended bill.

Lansburgh answered, alleging that he had approved the sale with the understanding with Dyer that the latter should obtain the consent of Blout before his own approval should take effect. Blout answered, denying the right of Dyer to make the sale, and asserting his ignorance of other matters alleged in the bill.

James P. Ryon answered that he and Tracy had assigned and transferred to Cochran their interests in the trust property held by Blout, and expressing his willingness to sign a deed, to be executed by Blout, trustee, conveying Lansburgh's undivided one third interest in said square.

Issue was duly joined on these answers, and testimony was taken. The case was heard in the special term of the Supreme Court of the District of Columbia, and a decree was rendered for specific performance by Lansburgh as to his one third interest in the square. In the general term, on appeal by Lansburgh, the decree of the special term was reversed and the bill dismissed. From this decree of the general term Cochran appealed to this court.

Mr. Samuel Maddox and *Mr. A. S. Worthington* for appellant.

Mr. A. B. Duvall and *Mr. Leon Tobriner* for appellees.

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

In order to be able to enforce specific performance by Lansburgh, as prayed for in his amended bill of complaint, Cochran must show that, at the time he made the agreement with Dyer, Lansburgh either held himself out as the owner of the

entire square, or as having authority from his coöwners to sell the whole of it.

It is a conceded fact that Lansburgh was the owner of but one third interest in the land concerned, and it is clear that, on September 26, 1889, Dyer was aware that there were other owners. This appears from the fact that prior to that date Dyer reported to Lansburgh that one Holtzman had made a proposal to buy a part of the square, and had been told by Lansburgh that he was not the sole owner of the property, and would have to see others. The fact that the paper given by Dyer to Cochran was signed by the former as agent for Lansburgh and others was sufficient to show that Dyer was aware that Lansburgh was not the sole owner, and was notice to Cochran of that fact.

There remains, then, the other alternative. Did Lansburgh claim to have authority from his coöwners to act for them in selling the whole? If he did so, and if Dyer, acting upon such a representation, contracted, as agent for the owners, with Cochran for a sale of the entire tract, then it may be conceded that Cochran, upon compliance by him with the terms of the contract, might, on learning that some of the owners had not authorized Lansburgh to sell their interests and refused to be bound, hold Lansburgh to make good his representations by conveying his individual interest in the land sold.

In his amended bill of complaint Cochran charges that Lansburgh claimed to act under authority from the other owners in placing the lands in the hands of Dyer for sale. Lansburgh, in his answer, denies that he claimed to act for the others, and asserts that he fully informed Dyer that he would have to secure the approval of the other owners; that Dyer acted upon that information and endeavored vainly to procure their assent to the sale, and that his, Lansburgh's, approval of the sale was conditional on such assent.

In the issue thus formed as to this question of fact the burden is upon Cochran. He must overcome the responsive effect of the sworn answer, and satisfy a court of equity that the facts were as alleged by him. And this we think he has failed to do.

The testimony was conflicting, and our examination of it leads to the adoption of the conclusion of the Supreme Court of the District, and its decree dismissing the bill is accordingly

Affirmed.

SMITH *v.* McKAY.

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

No. 83. Argued December 20, 1895. — Decided March 2, 1896.

When, in a case appealed from a Circuit Court, the record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the Supreme Court, and that *said appeal was allowed*, and the certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied, it sufficiently shows that the appeal was granted solely upon the question of jurisdiction.

When the requisite citizenship of the parties appears, and the subject-matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches, and whether the court sustains the complainant's prayer for equitable relief, or dismisses the bill with leave to bring an action at law, either is a valid exercise of jurisdiction; and if any error be committed in the exercise of such jurisdiction, it can only be remedied by an appeal to the Circuit Court of Appeals.

In the Circuit Court of the United States for the District of Massachusetts, Gordon McKay, as trustee for the McKay Sewing Machine Association, *and a citizen of the State of Rhode Island*, filed a bill of complaint against Frank W. Smith and others, citizens of the State of Massachusetts, doing business as copartners in the firm name of Smith, Stoughton & Payne. The bill was brought upon a lease between said parties, bearing date January 23, 1878, whereby the complainant had granted to the defendants, in consideration of

rent or license fees, the right to use certain sewing machines and other patented devices belonging to the complainant. The bill alleged a failure by the defendants to comply with the terms of the lease, and prayed for a discovery, accounting, payment of rent, and for an injunction restraining the defendants from using the patented machines until they had fully paid the amount found to be due.

The defendants filed an answer responding to various allegations of the bill, and averring that the complainant, so far as he had any just cause of action, had a plain, adequate, and complete remedy at law. Subsequently the defendants filed a special motion to dismiss the bill for the alleged reason that the complainant had a plain, adequate, and complete remedy at law. After argument this motion was denied. The cause was heard upon the pleadings and proofs, and at the May term, 1889, an accounting was awarded, a master was appointed, and, on the coming in of his report, on December 22, 1891, a final decree was rendered that the complainant should recover damages in excess of the sum of five thousand dollars and cost of suit. From this decree an appeal was taken and allowed to this court, and error was assigned to the action of the Circuit Court in taking jurisdiction of the bill and in not dismissing the same for want of jurisdiction.

Mr. Causten Browne for appellants. *Mr. Payson Eliot Tucker* and *Mr. Charles Allen Tayber* were on his brief.

Mr. James J. Myers for appellee.

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

The appellants seek to have this court review the action of the Circuit Court in entertaining jurisdiction of a bill in equity in a case in which, as they allege, it appears that the complainant had a plain, adequate and complete remedy at law.

It is contended on the part of the appellee that we should dismiss this appeal, because the question of jurisdiction is not properly certified to this court.

The record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the Supreme Court, and that *said appeal was allowed.* The certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied. It, therefore, appears that the appeal was granted solely upon the question of jurisdiction, and this brings the case within the rulings in *Shields* v. *Coleman*, 157 U. S. 168, and *In re Lehigh Mining Co.*, 156 U. S. 322.

It is further contended by the appellee that this appeal should be dismissed, because there is no right of appeal to this court in such a case as the present one.

The appellants claim that this appeal is within the first class under section five of the Judiciary Act of March 3, 1891, providing that "in any case in which the question of the jurisdiction of the court is in issue, in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The position of the appellee is that only questions of Federal jurisdiction can be brought directly here; that if the Circuit Court has jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it has no jurisdiction on its equity side raises no question of jurisdiction within the meaning of the act under which this appeal is taken; and that whether a case has been made out by the plaintiff in equity or at law is not a question that puts in issue the jurisdiction of the court in the sense in which that phrase is used in the Judiciary Act.

The question thus raised has never been directly decided by this court. It did present itself in the case of *World's Columbian Exposition case*, 18 U. S. App. 42. That was a case in which the Circuit Court of the United States for the North-

ern District of Illinois had granted, at the suit of the United States, an injunction against the World's Columbian Exposition, a corporation of the State of Illinois, restraining the defendant from opening the exposition grounds or buildings to the public on Sunday. From this decree an appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, and that court, speaking through Chief Justice Fuller, presiding, stated and disposed of the question as follows:

"The appellees have submitted a motion to dismiss the appeal upon the grounds that the jurisdiction of the Circuit Court was in issue; that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the United States was drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States, and not to this court; and hence that this appeal, which is from an interlocutory order, cannot be maintained under the seventh section of the Judiciary Act of March 3, 1891.

"We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the Circuit Court was, therefore, not in issue within the intent and meaning of the act."

We regard this as a sound exposition of the law, and, applied to the case now in hand, it demands a dismissal of the appeal, on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainant's bill. The appellants' contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity, in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law.

When the requisite citizenship of the parties appears, and the subject-matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer

for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals.

The learned counsel for the appellants claims in his brief that the case of *Mississippi Mills* v. *Cohn*, 150 U. S. 202, sustains his present contention.

That was an appeal from the Circuit Court of the United States for the Western District of Louisiana, under the provisions of the act of February 25, 1889, c. 36, 25 Stat. 693. The court below dismissed the complainant's bill in equity on the ground that no relief could be had in equity because, under the practice prescribed by a state law, there was a remedy by an action at law. But this court held that the jurisdiction of Federal courts, sitting as courts of equity, cannot be enlarged or diminished by state legislation, and that hence the Circuit Court had committed error by allowing a state law to overturn the well-settled practice in the Federal court. In the condition of the Federal statutes at that time there was no Circuit Court of Appeals, and the plaintiff's remedy, given him by the act of February 25, 1889, was by appeal to this court. Should such a state of facts again arise the remedy would now be by appeal to the Circuit Court of Appeals.

The appeal from the Circuit Court is accordingly

Dismissed.

GRAVES *v.* SALINE COUNTY.

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

No. 510. Submitted December 2, 1895. — Decided March 2, 1896.

The defendant in error, a municipal county of Illinois, under authority from the State issued its bonds in payment of a subscription to stock in a railway company, made upon a condition which was never complied

Statement of the Case.

with, and which was subsequently waived by the county. It received certificates for the stock so subscribed for, and still holds them. It paid interest upon its bonds as maturing, and refunded them by an issue of new bonds for like amount under legislative authority. *Held*, that the bonds originally issued were binding and subsisting obligations of the county, and having been recognized as such by the county authorities by lifting them with new bonds under the refunding act, those funding bonds were valid and binding obligations upon the county in the hands of a *bona fide* holder for value before maturity.

Where there is a total want of power to subscribe for such stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defence by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds.

Where a municipality is empowered to subscribe with or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons.

THIS case came into the Circuit Court of Appeals for the Seventh Circuit, at October term, 1894, on an appeal from a decree of the Circuit Court of the United States for the Southern District of Illinois.

The original action was a suit in equity brought in the Circuit Court of Saline County, Illinois, by the county of Saline as complainant against the treasurer and auditor of public accounts of the State of Illinois and the collector of taxes and clerk of the county court of Saline County, to restrain the levy and collection of the tax required to be levied by the said auditor of public accounts of the State of Illinois, to pay the interest on one hundred registered refunding bonds of the said county.

Luther R. Graves, one of the holders of such refunding bonds, intervened in the Circuit Court of Saline County, and had the cause removed to the Circuit Court of the United States for the Southern District of Illinois, where the Society for Savings, D. B. Wesson, and William Burgoyne, other holders of such bonds, also filed intervening petitions. That court granted the injunction asked for by the county, and the case was then taken by appeal to the Circuit Court of Appeals of the Seventh Circuit, and thereupon the latter court certi-

fied to this court the following statement of facts and questions for its opinion and instructions:

The appellants were prior to the year 1883 *bona fide* holders for value and before maturity of certain bonds issued by the county of Saline to the Belleville and Eldorado Railroad Company and to the St. Louis and Southeastern Railway Company respectively. These bonds ($75,000 in amount to the former and $25,000 in amount to the latter company, and bearing interest at the rate of eight per centum per annum, payable semi-annually) were issued under authority of acts of the general assembly of the State of Illinois, passed in the years 1861 (Pr. Laws of Illinois, 1861, p. 485) and 1869 (Pr. Laws of Illinois, 1869, vol. 3, p. 238) and pursuant to an election duly ordered and held according to law on the 9th day of October, 1869, and in payment of subscriptions to stock in said companies respectively, dated January 15, 1870, duly authorized by said election, upon certain conditions, one of which was that said railroad should be commenced within one year and completed within three years from the date of subscription, and another of the conditions was that the St. Louis and Southeastern Railway should pass and a depot be established within one half-mile of the old court-house in Raleigh, and within one half-mile of the church in Galatia.

These bonds to the St. Louis and Southeastern Railway Company were dated January 1, 1872, payable twenty years after date, with option of paying five years after date, and were issued and delivered to that company February 1, 1872, and were purchased in open market by the appellants and for value and without notice, prior to the year 1876. The railroad was never constructed within one half-mile of the old court-house in Raleigh, or within one half-mile of the church in Galatia, but was constructed in a different direction, and the said condition was in no sense complied with, but was waived by the board of commissioners of said county after July 2, 1870.

The time for the completion of the Belleville and Eldorado Railroad was by the board of commissioners of the county of Saline after July 2, 1870, extended from time to time and

until October 20, 1877, and the bonds were issued and delivered on the 19th day of April, 1877, being dated March 9, 1877, and payable twenty years after the 1st day of January, 1873, with option of paying five years after date.

The amendment to the constitution of the State of Illinois, which went into effect July 2, 1870, provided "no county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donations to or loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

The bonds issued to the St. Louis and Southeastern Railway Company were valid obligations of the county in the hands of the appellants under the decisions of the Supreme Court in the cases of *Insurance Company* v. *Bruce*, 105 U. S. 328, and *Oregon* v. *Jennings*, 119 U. S. 74.

The bonds issued to the Belleville and Eldorado Railroad Company were void even in the hands of *bona fide* purchasers for value, within the decision of *German Savings Bank* v. *Franklin County*, 128 U. S. 526.

The bonds to the St. Louis and Southeastern Railway Company were issued before and those to the Belleville and Eldorado Railroad Company were issued after the decision of the Supreme Court of Illinois, in the case of *Town of Eagle* v. *Kohn*, 84 Illinois, 292, decided in 1876.

The validity of none of these bonds was at any time questioned by the county of Saline until December 30, 1889, and the county had annually paid the interest on all of these bonds from the time of their issue until they were exchanged for funding bonds of the county as hereinafter stated.

The county of Saline has always retained and now has the stock in said railway companies obtained by it for the bonds so issued to said railway companies respectively; but such stock is now and always has been wholly worthless and of no value.

Statement of the Case.

The general assembly of the State of Illinois, by act approved February 13, 1865, and by acts amendatory thereto approved April 27, 1877, and June 4, 1879, enacted as follows (Rev. Stat. Illinois, Cothran's annotated ed. 1881, p. 1119, 2 Starr & Curtis's Stats. c. 113, p. 1877):

"SEC. 1. That in all cases where any county, city, town, township, school district or other municipal corporation has issued bonds or other evidences of indebtedness for money, or has contracted debts, which are the binding, subsisting legal obligations of such county, city, town, township, school district or other municipal corporation, and the same, or any portion thereof, remain outstanding and unpaid, it shall be lawful for the proper corporate authorities of any such county, city, town, township, school district or other municipal corporation, upon the surrender of any such bonds or other evidences of indebtedness, or any number or portion thereof, to issue, in lieu or place thereof, to the owners or holders of the same, new bonds prepared as hereinafter directed, and for such amounts, upon such time, not exceeding twenty years, payable at such place, and bearing such rate of interest, not exceeding seven per centum per annum, as may be agreed upon with the owners or holders of such outstanding bonds or other evidence of indebtedness: *Provided*, That bonds issued under this act, to mature within five years from their date, may bear interest not to exceed eight per cent per annum. And it shall also be lawful for the proper corporate authorities of any such county, city, town, township, school district or other municipal corporation to cause to be thus issued such new bonds, and sell the same to raise money to purchase or retire any or all of such outstanding bonds or other evidences of indebtedness; the proceeds of the sales of such new bonds to be expended, under the direction of the corporate authorities aforesaid, in the purchase or retiring of the outstanding bonds or other evidences of indebtedness of such county, city, town, township, school district or other municipal corporation, and for no other purpose whatever. All bonds or other evidences of indebtedness, issued under the provisions of this act, shall show upon their face that they are issued under this act,

and the purpose for which they are issued, and shall be of uniform design and style throughout the state, to be prescribed by the state auditor, whose imperative duty it shall be to devise and prepare such uniform style and draft adapted to the classes of bonds herein provided for, namely, the first class to consist of bonds of which only the interest is payable annually; the second class to consist of those of which the interest and five per centum of the principal are to be paid annually; and the third class to consist of a graduated series, the first grade made payable, principal and interest, at the end of one year from the date of issue; the second at the end of two years, and thus to the end of the series, the class to be issued being at the option of the legal voters expressed as herein provided. In any case, the new bonds, or other evidences of indebtedness, authorized to be issued by this act, shall not be for a greater sum in the aggregate, than the principal and accrued or earned interest unpaid of such outstanding bonds or other evidences of indebtedness. And when such new bonds or other evidences of indebtedness shall have been issued, in order to be placed on the market and sold to obtain proceeds with which to retire outstanding bonds or other evidences of indebtedness, it shall be the duty of the state auditor, on the request of the corporate authorities issuing them, and at the expense of the corporation in whose behalf the issue is thus made, to negotiate the same, at not less than par value, and on the best terms which can be obtained: *Provided, always*, That any such county, city, town, township, school district or other municipal corporation issuing bonds under the provisions of this act, may, through its corporate authorities duly authorized, negotiate, sell or dispose of said bonds, or any part thereof, at not less than their par value, without the intervention of the auditor of state: *And provided further*, That no new bonds or other evidences of indebtedness shall be issued under this act, unless the same shall be first authorized, as hereinafter provided by a vote of a majority of the legal voters of such county, city, town, township, school district or other municipal corporation voting at some general election, or special election held for that purpose."

Statement of the Case.

Under and by virtue of this provision of law the board of commissioners of the county of Saline duly ordered an election to determine the question of issuing the bonds of the county for the purpose of paying and redeeming the bonds above stated issued to the St. Louis and Southeastern Railway Company and to the Belleville and Eldorado Railroad Company and to another railway company, respectively, and at such election duly held according to law on the 6th day of November, 1883, a majority of the legal voters of the county of Saline voting at such election voted in favor of such proposition. On the 15th day of November, 1883, the board of commissioners of the county, by order duly made and entered, ordered in compliance with such vote that one hundred and ninety-five bonds of said county, of $1000 each, be issued to take up and pay off the said bonds so issued to the St. Louis and Southeastern Railway Company, the Belleville and Eldorado Railroad Company and said other company; and the duly constituted officers of said county thereafter, on the 1st day of July, 1885, issued the bonds of said county in strict conformity with said act, to the amount in the aggregate of $100,000, to take up and pay off the said bonds so issued to the St. Louis and Southeastern Railway Company and to the Belleville and Eldorado Railroad Company, each of said bonds being of the tenor and effect following:

"UNITED STATES OF AMERICA. $1000.

"*State of Illinois, county of Saline, funding bond, issued under the act of* 1865, *as amended April* 27, 1877, *and June* 4, 1879.

"Twenty years after date, for value received, the county of Saline promises to pay to the bearer hereof, the sum of $1000 in lawful money of the United States, at the office of the treasurer of the State of Illinois, in the city of New York, with interest at the rate of six per cent per annum, payable annually, as shown by and upon the surrender of the annexed coupons, as they severally become due, reserving, however, the right to redeem this bond at any time after five years from date.

"This bond is one of a series of 195 of like tenor, issued

for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county, which remain outstanding and unpaid, under the provisions of an act of the general assembly of the State of Illinois, entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire and purchase their outstanding bonds, and other evidences of indebtedness, and provide for the registration of new bonds, or other evidences of indebtedness, in the office of the auditor of public accounts,' approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879, and in pursuance of a vote of the majority of the legal voters of said county, voting at an election legally called, under said act, the 6th of November, 1883.

"We hereby certify that all requirements of said acts have been fully complied with in the issue thereof.

"In testimony whereof, we, the undersigned officers of said county, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures this 1st day of July, A.D. 1885.

"W. G. FRITH,
"*Chairman of the County Board.*
"[SEAL.] W. E. BURNETT, *County Clerk.*"

Each of said bonds was duly registered according to law with the auditor of the State of Illinois, who endorsed upon each of said bonds the following:

"STATE OF ILLINOIS. $1000.
"*Saline County Bond.*

"Date of bond, July 1, 1885. Payable twenty years after date. Redeemable five years after date. Interest payable July 1, annually. Principal and interest payable at the office of the State treasurer of the State of Illinois, in the city of New York, and State of New York.

"AUDITOR'S OFFICE, ILLINOIS,
"SPRINGFIELD, *Nov. 23d*, 1885.

"I, Charles P. Swigert, auditor of public accounts of the

Statement of the Case.

State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire and purchase their outstanding bonds and other evidences of indebtedness, and to provide for the registration of new bonds, or other evidences of indebtedness, in the office of the auditor of public accounts,' approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879.

"I further certify, that the aggregate equalized valuation of property assessed for taxation in said county for the year 1885, were certified to this office as follows:

"Real estate, $1,362,931. Personal property, $477,340.

"In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office, the day and year aforesaid.

"[SEAL.] CHARLES P. SWIGERT,
"*Auditor Public Accounts.*"

The county of Saline appointed an agent to solicit the exchange of bonds, and obtained from the appellants and cancelled the old bonds respectively held by them, and issued to them the funding bonds in lieu thereof. The county of Saline thereafter, until the year 1890, paid the annual interest on such new issue of bonds.

Upon these facts the questions certified were as follows:

"First. Is the county of Saline estopped by the recital in the funding bonds to assert that the bonds issued to the St. Louis and Southeastern Railway Company, and to the Belleville and Eldorado Railroad Company, respectively, and for which the funding bonds were exchanged, were not binding, subsisting legal obligations of said county?

"Second. Are the funding bonds so issued by the county of Saline legal, valid and binding obligations upon said county in the hands of a *bona fide* holder for value before maturity?

"Third. If the court should be of opinion that the funding bonds are invalid, would it be competent for the court in this

cause, which is a suit in equity instituted by the county of Saline to restrain officers of the law from levying and collecting a tax as required by law to pay the interest upon the funding bonds, to grant the relief asked only upon condition that the county of Saline pay to the holders the amount of the valid bonds issued to the St. Louis and Southeastern Railway Company which were exchanged for the funding bonds?"

Mr. George A. Sanders and *Mr. William R. Bowers* for Graves, appellant.

Mr. Thomas C. Mather, *Mr. James A. Connolly*, and *Mr. John C. Mathis*, for Wesson and others, appellants.

Mr. Samuel P. Wheeler and *Mr. W. H. Boyer* for appellee.

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

Under the authority of certain acts of the general assembly of the State of Illinois, and in pursuance of an election duly ordered and held according to law, and in payment of a subscription to stock in the St. Louis and Southeastern Railway Company, the county of Saline issued bonds to the amount of $25,000, bearing interest at the rate of eight per cent, to the said railway company, bearing date January 1, 1872, payable twenty years after date. These bonds were delivered to the railway company February 1, 1872, and were purchased in open market by the appellants, for value and without notice of any defence, prior to the year 1876.

The contract of subscription contained a condition that the said St. Louis and Southeastern Railway should pass and a depot be established within one half-mile of the old courthouse in Raleigh and within one half-mile of the church in Galatia. The railroad was not constructed within the prescribed limits, but was constructed in said county in a different direction, and compliance with the said condition was waived by the board of commissioners of said county.

Opinion of the Court.

By the seventh section of the act of April 16, 1869, it is provided that "any county, township, city or town shall have the right, when making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds and subscriptions or donations shall be made, and such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with."

The constitution of Illinois, which took effect July 2, 1870, provides as follows: "No county, city, town, township or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

Such an election was held by the people of Saline County on October 9, 1868; and the subscription was made January 15, 1870.

The validity of these bonds so issued to the St. Louis and Southeastern Railway Company was continually recognized by the county of Saline by the payment of interest thereon and by the refunding of the same into new bonds of the county in July, 1885; and the said county has always retained and now has the stock in said railway company.

This state of facts brings the case, as respects the bonds originally issued to the St. Louis and Southeastern Railway Company, clearly within the decision of this court in the precisely similar case of *Insurance Co.* v. *Bruce*, 105 U. S. 328, 331, and where, per Mr. Justice Harlan, it was said:

"The statute did not make it obligatory on the town to impose conditions upon the performance of which its liability should depend. It conferred simply the right to do so, leaving the town at liberty to prescribe conditions or to make an unconditional subscription. Consistently with the statute the town could issue and deliver bonds for the subscription in

advance of the construction of any part of the road. But when conditions were prescribed, good faith and the obligations which everywhere arise out of negotiable securities required — if the town intended to rely upon them — that the public, who were expected to buy the bonds or to advance money upon them, should be informed by their recitals that the town had exercised its statutory right to impose conditions upon its liability. The officers both of the town and the railroad company knew, however, that bonds could not be negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad corporation. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town, and the officers or agents of the company, cooperated in putting out bonds negotiable in form, and with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals full of everything necessary to induce the public to buy the bonds. The statement, on the face of the bonds, that they were issued by virtue of the statutes of April 15, 1869, and April 16, 1869 — the first of which contains *an absolute requirement that the bonds be issued and delivered upon the subscription being voted*, while the second gives the *right*, but does not make it imperative, to impose conditions — and the further statement that the people had voted for subscription *and to issue bonds therefor*, fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of *bona fide* purchasers. Under these circumstances, the town, by every principle of justice, is estopped, as against a *bona fide* holder, to plead conditions, the existence of which was withheld from the public, either to facilitate the negotiation of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions. It should not now be heard to make a defence inconsistent with the representations contained in the

recitals upon its bonds, or upon the ground that the conditions imposed, of which purchasers had no notice, have not been performed."

Similar conclusions were reached in the case of *Oregon* v. *Jennings*, 119 U. S. 74, where, citing *Insurance Co.* v. *Bruce*, it was held that bonds issued by the town of Oregon, a municipal corporation of the State of Illinois, in compliance with a vote of the people held prior to the adoption of the Illinois constitution of 1870, in pursuance of a law providing therefor, were valid, although a condition as to the completion of the road was not complied with, because the recitals in the bonds were made by officers entrusted under the statute with the duty of determining whether the condition had been complied with, and the town was thereby estopped from asserting the contrary. The doctrine of the case of *County of Jasper* v. *Ballou*, 103 U. S. 745, is applicable. There it was held in a case arising, like this one, in the State of Illinois, that when the people of a county, at an election held under a refunding act, voted to issue new bonds to exchange for old ones, such a vote recognized the original bonds as binding and subsisting obligations, and that the county was therefore estopped from setting up that they were invalid because voted for at an election called by the board of supervisors instead of by the county court, and that where, at an election held according to law, the people of a county authorized their proper representatives to treat certain outstanding county obligations as properly authorized by law for the purpose of settling with the holders, and the settlement has been made, the validity of the obligations can be no longer questioned. There, as here, there was lawful power in the county to issue the original bonds, but there was an irregularity in the election, it having been called for by the wrong officers.

Applying these cases to the present one, we conclude that under the facts contained in the statement the bonds issued to the St. Louis and Southern Railway Company in July, 1872, were binding and subsisting obligations of Saline County, and having been recognized as such by the county authorities in 1885, by lifting them with new bonds under the

refunding act, the second question put to us by the Circuit Court of Appeals must, as respects said new bonds, be answered in the affirmative.

The history of the bonds originally issued to the Belleville and Eldorado Railroad Company is somewhat different. These bonds were issued and delivered on April 19, 1877, after the decision of the Supreme Court of Illinois in the case of the *Town of Eagle* v. *Kohn*, 84 Illinois, 292. The nature and effect of that decision were thus described in the case of *German Savings Bank* v. *Franklin County*, 128 U. S. 526, 538:

"That was a suit against the town of Eagle, brought by innocent holders for value, to recover on coupons cut from bonds issued by the town to a railroad company, December 1, 1870, in payment of a subscription to stock in pursuance of a vote of the people of the town had November 2, 1869. In that vote certain conditions as to time had been prescribed, upon which the bonds should be issued. Those conditions had not been complied with. The question arose in the case whether the declaration of the statute, that the bonds should not be valid and binding until such conditions precedent should have been complied with, was to be confined, in its operation, to the railroad company to which the bonds should have been issued, or whether it extended to innocent holders for value. The court held that although the statute did not declare that the bonds should be void, its declaration that they should not be valid and binding until the conditions precedent should have been complied with was an imperative and peremptory declaration that the bonds should not be valid and binding until the conditions named should have been complied with, even in the hands of innocent holders without notice; and it declared the bonds to be invalid in the hands of the plaintiffs. This interpretation of section 7 of the act of April 16, 1869, accompanied all bonds subsequently issued into the hands of whoever took them, whether a *bona fide* holder or not. This court must recognize this decision of the Supreme Court of Illinois as an authoritative construction of the statute made before the bonds were issued, and to be followed by this court."

If the present case stood only on the footing of the original conditional contract of subscription we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that the original bonds were uncollectible even by innocent holders. But we have here an additional feature, not present in the case of *German Savings Bank* v. *Franklin County*, or in the case of *Town of Eagle* v. *Kohn*, and that is found in the fact that in the year 1885, in pursuance of the Illinois funding bond act, approved February 13, 1865, as amended by acts approved April 27, 1877, and June 4, 1879, (Laws of Illinois, 1879, p. 229,) and in pursuance of a vote of a majority of the legal voters of Saline County as prescribed in said statutes, new bonds were issued and registered in manner as directed in the law, and were delivered to the holders of the original bonds, which latter were surrendered and cancelled. The county of Saline thereafter, until the year 1890, paid the annual interest on such new issue of bonds.

While it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities. It must be admitted, as well-settled law, that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defence by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet where the right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions.

But where the municipality is empowered to subscribe with

or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons. Such was the present case. The subscription was made on condition that the railroad should be commenced within one year and completed within three years from the date of the subscription, and it may be, under the doctrine of *Town of Eagle* v. *Kohn*, that the action of the board of commissioners in extending the period for commencing and finishing the railroad would not relieve the company from the condition, nor avail to estop the county as against *bona fide* holders of the bonds. But when, in pursuance of the funding laws, the question whether the outstanding original bonds issued to the Belleville and Eldorado Railroad Company should be refunded in new bonds was submitted to the same constituent body that authorized the original issue, and when, in accordance with the vote so taken, and in formal compliance with the other directions of the funding laws, negotiable securities were issued and delivered in payment of the outstanding bonds, we know of no principle of law which forbids the county of Saline from such honorable discharge of its liabilities in the hands of innocent holders. Such action on the part of the legal voters of Saline County may well be regarded as a declaration that there had been, by the actual construction of the railroad and the delivery of the stock, a substantial compliance with the original conditions. After such deliberate action, it is now too late for Saline County to seek the aid of a court of equity to enable it to avoid its contracts made in pursuance of a legislative grant of power, and the consideration of which has been received. In equity, time is usually not of the essence of the contract, and is never regarded as such when the contract has been fully executed, without objection. It may be fairly said that, while a municipal corporation may not ratify a contract into which it had no power to enter, and may not waive a condition put by the legislature upon the exercise of a given power, yet it

may well waive a condition made by itself and not a condition upon the exercise of the power. Such a waiver is not an attempt to ratify a void contract, but is rather an admission that the condition has been complied with in an equitable sense.

If these views are sound in respect to the bonds issued to the Belleville and Eldorado Railroad Company they apply with stronger reason to the bonds issued to the St. Louis and Southeastern Railway Company, because the subscription to the stock of the latter company and the issue of bonds in payment took place before the decision of the case of *The Town of Eagle* v. *Kohn*, and in circumstances, as we have seen, that rendered those bonds valid independently of the subsequent vote by Saline County to refund.

We, therefore, answer the second question put to us by the Circuit Court of Appeals in the affirmative, and this renders a formal answer to the other questions unnecessary.

SPALDING *v.* MASON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 55. Argued April 25, 26, 1895. — Decided March 2, 1896.

An interlocutory order or decree of the Supreme Court of the District of Columbia at special term may be reviewed by the general term on appeal, without awaiting a final determination of the cause; and, on appeal to this court from the final decree at general term, the entire record is brought up for review.

After a critical examination of the record, the court, on the facts, finds that the contract which forms the subject of controversy in this suit is a valid contract, and directs judgment for the defendant in error for the principal sum which it finds to be due him, but orders a correction to be made in the calculation of interest by the court below.

MASON filed his bill in equity in the Supreme Court of the District of Columbia for a discovery and an accounting by Harvey Spalding as to certain fees collected by the defendant,

in which Mason claimed a one fourth interest. The persons joined with Spalding in this court are the sureties upon an appeal bond given by Spalding at the general term, upon the affirmance of a judgment in favor of Mason, having entered judgment against all the parties who executed the appeal bond.

The interest in question was acquired by Mason under an agreement between himself and Spalding, executed June 3, 1880, which recited that Spalding had on hand about 1700 claims (and expected to receive enough more to make up 4000 claims) for moneys which was believed would be due from the government to postmasters and late postmasters upon a readjustment of salaries under the provisions of an act approved June 12, 1866, and was in need of funds to prosecute said claims and to urge the passage of bills then pending in Congress looking to their settlement. By the agreement Spalding sold to Mason for the consideration of $2500, payable in instalments, a one fourth interest in the fees to be collected from said claims, "free from charges for expenses in prosecuting said claims to collection," and Spalding agreed to obtain as many claims as he could secure in addition to those referred to in the contract as on hand or expected to be acquired.

The Congressional bills alluded to in the agreement failed of passage, but at the next Congress an act was passed and was approved March 3, 1883, which was similar to one of said bills which had failed of passage at the preceding Congress, "except two unimportant verbal alterations, with a proviso added as to the manner of application for readjustment of salaries thereunder and the manner of payment thereof."

The bill averred that defendant had collected a large sum of money as fees upon the claims in question and was largely indebted to complainant on account thereof, but that he had failed and refused to render a statement of the amount of the fees collected, and, in substance, the bill also averred that the defendant Spalding was liable to account to complainant not only for fees received by him from the four thousand claims referred to in the agreement as on hand and expected to be

obtained, but for all fees received by him from claimants whose rights depended upon the act of 1866 and the act of 1883.

In his answer Spalding averred that at the time of the negotiation for the sale to Mason of an interest in his business he had in his possession, and so informed Mason, lists of the names of some 7500 postmasters, who he was satisfied were embraced by the provisions of the bills then pending in the respective houses of Congress. He alleged, in substance, that upon the defeat of the House bill on January 17, 1881, the rights of Mason under the contract of June 3, 1880, ceased, and a new and oral contract was entered into between them, by which in consideration of his (Spalding's) agreement to make renewed efforts to procure favorable legislation and secure the collection of the claims in question, and the retention by complainant of an interest in the claims covered by the prior contract, complainant agreed to share in future expenses and make advances of money for such purposes; and it was averred that in consequence of such renewed efforts on defendant's part the act of March 3, 1883, became law. He alleged that Mason failed to keep his agreement in respect to advances, and for that reason, in September, 1882, he (Spalding) terminated the contract between them by notice to him, but that in consideration of the $2500 paid under the first contract he promised to pay Mason in case of eventual success ten thousand dollars, and it was averred that since said date he had conducted his business upon that footing.

The answer also alleged: "That besides the 1700 claims in defendant's hands on the 3d of June, 1880, he had received by the 17th of January, 1881, some 500; and also between the latter date and March 3, 1883, he had procured enough more of these to make in all 4208, all of these being included in the list of 7500 first above mentioned." It was charged that in administering the act of March 3, 1883, the Postmaster General adopted a construction of that act and of the act of 1866 which was entirely different from the construction of the act of 1866 assumed by complainant and defendant when entering into the contract of June 3, 1880, and from that

entertained by defendant when making up said list of 7500 persons who it was supposed would be entitled to claim relief. He averred that the effect of the construction given to the act of 1883 by the Postmaster General was not only to defeat claims mentioned in said list, but to create a class of new claims not contemplated at the time he made his original contract with Mason.

It was also averred that, in consequence of the new claimants whose rights arose solely from this new construction, defendant, subsequent to July, 1883, adapted his business thereto, and secured 20,000 cases of postmasters other than those who were upon the list of 7500 cases, or who had been thought of as having claims under the act aforesaid at any time before the month of May, 1883.

The answer concluded with a statement as to the fees collected from the 4208 claims, (out of the list of 7500,) etc., and averred that he (Spalding) had been put to an expense of about ten per cent in collecting said fees by reason of a proviso in the act of 1883 requiring payments to be made directly to the claimants, and denied "that excepting what may be due to the complainant upon the above statement after deducting therefrom what he has already received thereabouts, any debt is or will at any time be due to the said complainant by this defendant because of the contract of June 3, 1880, and subsequent dealing between the parties thereto."

An additional answer was subsequently filed giving a more detailed account of the receipts, etc., in connection with all the claims. Various sums were also set out claimed to have been expended after January 17, 1881 — the date of the alleged new and oral contract — for clerk hire, printing, office rent, postage, discounts, interest, etc., in prosecuting the business. It was specifically stated that "this statement does not include the ten per cent expended as in the original answer stated to collect fees that had been received."

Issue was joined by the replication of complainant, and evidence was taken in the cause. Upon the hearing, the court, on March 23, 1888, entered a decree which substantially rejected the complainant's demand for a right to share in any

other fees than those resulting from such claims as were included in the list of 7500 cases referred to in the answer, and contemplated and considered by the parties at the time the contract was made.

It adjudged in favor of the complainant that he was entitled to one fourth of each and every fee which had been collected or might thereafter be collected upon claims included in the list aforesaid, and that he was not chargeable with any part of the expenses of the business of securing and prosecuting such claims. The cause was referred to an auditor to state an account upon this basis. From this decree an appeal was taken by the complainant to the general term, and, on January 23, 1889, that tribunal affirmed the decree of the special term, and remanded the cause for further proceedings in accordance therewith. The opinion of the general term is reported in 18 Dist. Col. 115.

The hearing before the auditor was then proceeded with. He reported that Mason was entitled to share in the fees received by Spalding, as well from claims which had been forwarded to him by attorneys as in claims that had been received directly from claimants.

He also held that certain claims designated by half numbers, that were entered in a book which purported to contain the list of the 7500 cases heretofore referred to, constituted part of the said list of 7500 cases, and that complainant was entitled to share in the fees derived from said claims. He allowed deductions made by Spalding for bank discounts on collections of drafts for fees, as also sums paid attorneys for collecting fees, upon the theory that such charges were not expenses for securing and prosecuting the claims, which latter claim had been rejected by the court; but he declined to allow a claim made by defendant for a deduction of twenty per cent from complainant's share, for alleged expenses in collecting fees, on the ground that the same had not been sufficiently proven. Other matters included in the report are not in controversy in this court.

Exceptions were filed to the auditor's report on behalf of both parties.

Upon the amount found due by the auditor, as Mason's share of fees collected in accordance with the decree of reference, the auditor allowed interest as follows: He took the sum total of fees collected in each month and awarded interest to run from the beginning of the succeeding month, and on the payments made by Spalding to Mason on account of fees, he allowed interest from the date of payment.

The court, at the special term, overruled all of the exceptions, and approved and confirmed the report of the auditor, and entered judgment in favor of complainant for the sum of $16,304.82 (being the principal sum of $13,669.11, and interest to date of decree). The court also reserved the right to complainant to apply thereafter in this suit for an accounting as to fees which might subsequently be collected from claims embraced in the list of 7500, these being the only claims in which Mason was adjudged to have an interest.

On appeal the general term modified the judgment as to interest by providing that the interest on the principal sum should commence from August 9, 1887, the date of the demand by Mason for an accounting; set aside the reservation of a right in favor of complainant to apply in this action for a further accounting, and entered a decree for the amount found due against the defendant Spalding and the sureties on his bond for appeal. The cause was then brought here by appeal.

Mr. W. Willoughby for appellants.

Mr. W. L. Cole for appellee.

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

A preliminary objection has been advanced on behalf of the appellee against a review of the first judgment rendered by the general term, which determined the principles upon which the account was to be taken by the auditor. It is claimed that the appellants are concluded by the failure of the then defendant Harvey Spalding to appeal from the decree of the

special term, when an appeal had been taken by the complainant.

Section 772 of the Revised Statutes, relating to the District of Columbia, provides as follows:

"Any party aggrieved by any order, judgment or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the Supreme Court, and upon such appeal the general term shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just."

This section does not in terms confine the right of appeal from the special to the general term to merely final orders or final decrees in a cause. An interlocutory order or decree which involves the merits may be reviewed by the general term upon the appeal of a dissatisfied party without awaiting a final determination of the cause. It is not made obligatory upon a dissatisfied party to appeal, because the other party has done so; and we are of opinion that, upon an appeal to this court from a final decree of the general term (Rev. Stat. § 705) the entire record is brought up for review. *Hitz* v. *Jenks*, 123 U. S. 297; *District of Columbia* v. *McBlair*, 124 U. S. 320; *Grant* v. *Phœnix Mutual Life Ins. Co.*, 121 U. S. 105.

The errors specified in the brief of counsel are fifteen in number. The first six and number thirteen attack the correctness of the decision holding that the complainant was entitled to recover his proportion of the fees collected upon claims embraced in the list of 7500 referred to in the answer. Assignment seven covers the second exception taken to the report of the auditor; assignments eight and nine question the correctness of the finding "that the complainant is not chargeable with any part of the expenses of the business of securing and prosecuting" the claims contained in said list of 7500 cases; the tenth and eleventh assignments of error cover the fourth exception to the auditor's report; and the twelfth assignment alleges error in the allowance of interest.

Before taking up, for detailed examination, these assign-

ments of error, it will be necessary to consider the claims which the defendant Spalding represented at the time of the execution of the contract of June 3, 1880, and his construction of the rights of the claimants.

We quote the following statement from the brief of his counsel:

"Under the provisions of the act of June 22, 1854, c. 61, 10 Stat. 298, postmasters were paid for their services by commissions on the postage collected at their respective offices, which commissions were adjusted by the Auditor of the Post Office Department upon the returns for each quarter after the said returns had been made by the postmaster and received by the Department.

"By the act of July 1, 1864, c. 196, 13 Stat. 335, a complete change was made in the mode of regulating the compensation of postmasters. A salary system was adopted instead of the commission system. The salaries were fixed for two years in advance upon the basis of the business of the past two years, that is, the commissions upon the business of the past two years were computed at the rate fixed by the act of 1854, and the sum thus arrived at was made the fixed salary of the office for the ensuing two years, a readjustment of the salaries of every post office to be made upon this basis every two years."

Under the provisions of the act of 1864 it necessarily followed that where the business of an office rapidly increased the compensation earned by the postmaster fell below what he would have received if his pay had been calculated by commissions as under the act of 1854. It also followed that if the business of the office fell off, the incumbent might receive a larger compensation than he would have been entitled to under the previous act. The act of June 12, 1866, c. 114, 14 Stat. 59, directed the Postmaster General to readjust salaries of postmasters when the quarterly returns showed that the salary allowed the postmaster was ten per cent less than it would have been had the provision of the act of 1864 continued in force. The claims which Spalding was prosecuting resulted from this act of 1866, and the reason for their prose-

cution before Congress was the fact that the Postmaster General had not made a readjustment, and that this court had decided in January, 1878, that the Court of Claims had no jurisdiction to enter a judgment for any amount in favor of such claimants until after the Postmaster General had readjusted the salaries.

By an act approved March 3, 1883, c. 119, 22 Stat. 487, it was provided:

"That the Postmaster General be, and he is hereby, authorized and directed to readjust the salaries of all postmasters and late postmasters of the third, fourth and fifth classes, under the classification provided for in the act of July first, eighteen hundred and sixty-four, whose salaries have not heretofore been readjusted under the terms of section eight of the act of June twelfth, eighteen hundred and sixty-six, who made sworn returns of receipts and business for readjustment of salary to the Postmaster General, the First Assistant Postmaster General or the Third Assistant Postmaster General, or who made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was ten per centum less than it would have been upon the basis of commissions under the act of June twelfth, eighteen hundred and sixty-six, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made: *Provided*, That every readjustment of salary under this act shall be upon a written application signed by the postmaster or late postmaster or legal representative entitled to said readjustment; and that each payment shall be by warrant or check on the Treasurer or some Assistant Treasurer of the United States, made payable to the order of said applicant, and forwarded, by mail, to him at the post office within whose delivery he resides, and which address shall be set forth in the application above provided for."

Except as to one or two immaterial verbal alterations, this act of 1883 was similar to House bill 3981, mentioned in the contract between complainant and defendant, and which failed to pass, January 17, 1881, except that the House

bill did not embody the proviso found at the end of the act of 1883.

In making up the list of 7500 cases referred to, Spalding had construed the act of 1866 — as he subsequently did the act of 1883 — as entitling the claimants embraced in said list to a sum equal to the difference between the amount of any salary which, during a particular term, they had received, and the sum which they would have received, had they been paid commissions on the business done in the office at the rate prescribed by the act of 1854. The Postmaster General, in May, 1883 — and his opinion was concurred in by the Attorney General in February, 1884 — construed the act of 1883 in connection with the act of 1866 in a different manner. It is unnecessary for the purpose of this opinion to state or discuss the particulars in which the construction of the Postmaster General differed from that adopted by Spalding, or to indicate in any way which construction was correct. It is unquestioned, however, that the operation of the construction by the Postmaster General was that many of the persons whose claims were embraced in the list of 7500 cases referred to in the contract of June 3, 1880, were excluded from receiving any additional pay, and that rights arose in favor of others who were not supposed by Spalding to have claims at the time he prepared the list. Mason asserted a right to participate not only in the fees collected from the claims embraced in the list of 7500, but also in all other claims obtained by Spalding after the passage of the act of 1883. The general term, however, decided adversely to the contention of the complainant, and held that his share in fees was limited to cases embraced in the list of 7500, upon which claims the court held that the contract between complainant and defendant was based. In that construction complainant has acquiesced.

Assignments numbers one to six read as follows:

"1st. The court erred in allowing to the complainant an interest in all or any of the claims embraced in a list of 7500 claims mentioned in the answer of defendant.

"2d. The court erred in holding that the claims contemplated by the parties when they executed the contract of

June 3, 1880, were of such a nature that they could be regarded for the purpose of giving the complainant an interest therein, as the same claims that were actually prosecuted and collected under the act of 1883 and August 4, 1886.

"3d. The court erred in allowing the complainant $9972.88 as his share of fees collected by the defendant on claims paid at various dates between October 1, 1886, and May 1, 1889, as all of said fees were collected upon claims allowed and paid neither under authority of section 8 of the act of June 12, 1866, or under authority of the act of March 3, 1883, but under the sole authority contained in the act of August 4, 1886, 24, Stat. 308.

"4th. The court erred in not holding that the contract of June 3, 1880, became of no effect by the failure of passage of the bill in Congress mentioned therein, and in not holding that thereupon a new contract was made which became of no effect in charging the defendant with any liability thereunder by reason of the failure of the complainant to perform the same on his part, and by the putting an end thereto by the act of the defendant.

"5th. The court erred in holding that the complainant was entitled to one fourth of all fees which have been collected out of the said list of 7500 claims which were procured subsequently to January 17, 1881.

"6th. The court erred in holding that the complainant was entitled to one fourth of all fees which had been collected out of the list of 7500 claims which were procured subsequently to March 3, 1883."

As before stated, no appeal was taken by the defendant to the general term from the interlocutory decree at the special term fixing the principles upon which the account should be taken. At the hearing in general term he seems to have acquiesced in the view that the complainant was entitled to an account as to 4208 cases admitted in the answer to have been received by Spaulding for prosecution, and to have been embraced in his list of 7500 cases, from which he received fees, and concerning which he offered to account. On the hearing before the auditor no exception was taken to the

admission of evidence as to the fees calculated upon claims embraced in the list of 7500 cases except as to cases which were sent to him for prosecution by attorneys. And although the auditor reported that the "amount of fees received by him in the cases included in the order of reference" was the sum of $16,339.11, no exception was taken by Spalding to such finding.

It is insisted now, however, that a proper construction of the contract excludes the complainant from any share whatever in the fees collected upon the claims embraced in the list of 7500 cases. This is asserted, although the claimants had valid claims against the government under the act of 1866, either upon the theory which Spalding believed to be correct according to his construction of the act, or upon the theory actually put into practice by the Postmaster General under his construction of that act in connection with the act of 1883. The contract, it is contended, contemplated that a recovery by the claimants should be had upon the precise theory which Spalding and the complainant entertained when the contract of June 3, 1880, was made. We do not adopt such a narrow view of the terms of the contract between the parties in the absence of clear and unequivocal language warranting it. This construction imports that Mason took the hazard, not of Spalding's ability to collect from the government for the claimants he represented, but the hazard of the government adopting and putting in practice Spalding's theory as to the exact status of the claimants under the act of 1866. If the claim of counsel is well founded, then had the House bill referred to in the contract, and which, as has been shown, was practically identical with the subsequent act of 1883, become a law, a construction of that act similar to that adopted by the Postmaster General with reference to the act of 1883 would have defeated all Mason's rights under the contract. But, in consideration of the payment by Mason of twenty-five hundred dollars, Spalding agreed to "prosecute to collection" the "claims" then in hand and others expected to be secured of "postmasters and late postmasters for adjustment of their salaries, in conformity

to section 8 of the act of June 12, 1866." There was no qualification that the collection should be according to a particular theory as to the amount which ought to be recovered, but the plain import was that whatever was due by the general government to the claimants under the provisions of that act was to be collected. Whether we look at the acts of 1866 and 1883, or the later act of 1886, which merely approved the form of readjustment which had been theretofore pursued by the Postmaster General under the act of 1883, and directed that mode of adjustment to be continued in the settlement of further claims under the act of 1866, it is clear that whatever was allowed and paid to claimants was acquired by virtue of the provisions of the act of 1866. We therefore find assignments one and two to be without merit.

The objection covered by assignment three is also made for the first time in this court. No exception of this character was taken to the findings of the auditor. It appears to have been an afterthought. The point that payments subsequent to October 1, 1886, were made solely under the authority of the act of August 4, 1886, is clearly not well taken, for that act did not originate rights against the government, but simply regulated the mode of adjusting rights which had vested under the act of 1866, pursuant to the remedy afforded by the act of 1883. We have looked in vain through the carefully prepared answer of the defendant, himself an attorney, for any suggestion that the act of August 4, 1886, in any way injuriously affected the rights of complainant, though an intimation to that effect is contained in one or more letters from Spalding to Mason written after August 9, 1887. All through the answer it is admitted that the remedy by which Spalding made his collections was provided by the act of 1883. Further, the table showing the dates from which the auditor found the interest should be calculated, does not justify the assumption of counsel that any part of the $9972.88 was allowed complainant, as his share of fees collected by defendant on claims paid at various times between October 1, 1886, and May 1, 1889. The table does not indicate when the "claims" were either "allowed" or "paid," and as the fees were col-

lected from claimants after they had received the full amount of their claims, it may well be that the entire sum had been allowed and paid by the government prior to October 1, 1886.

Some of the observations heretofore made are applicable to the fourth assignment of error. The terms of the contract will not justify the construction that the rights of complainant were dependent upon the successful passage of the bills then pending in Congress. As to the alleged oral contract set up in the answer as having been entered into on the day of the failure of the passage of the House bill, to wit, January 17, 1881, aside from the fact that no consideration appears therefor, the making of the same was flatly denied by complainant, and the auditor found that no such contract was entered into. We not only cannot say that the finding of the auditor, sustained by both the special and general terms of the Supreme Court of the District, is obviously wrong, but we think, on the contrary, that it was clearly warranted by the evidence. A circumstance which would be of great weight in inducing us to reach this conclusion, were it necessary for us to carefully weigh the evidence, is the fact that at the time of the failure of the bill in question five hundred dollars was still due from Mason to defendant under the contract of June 3, 1880, and that sum was subsequently paid to Spalding, and the payment endorsed upon the contract, and there was no indorsement of a modification in any respect of the terms of that contract.

What we have said with reference to the fourth assignment, disposes of the fifth.

The sixth assignment of error needs but little consideration. It was provided in the contract of June 3, 1880, as follows:

"The said Harvey Spalding agrees and binds himself to obtain all the claims of the class named he can and to make contracts for fees equal to twenty-five per cent of the collections and to subject the whole to be shared together with those in hand by said George Mason for the consideration herein specified."

The House bill 3981, referred to in the contract between the parties as having been favorably reported by the proper committee, was, as we have shown, practically identical with

the subsequent act of 1883, the only material difference being that the proviso contained in the act of 1883 was not in the House bill. If we suppose that the House bill in question had been amended by adding a similar proviso, and, as thus amended, became a law, it could not reasonably be contended that Mason would not have had a right to share in any fees collected upon claims embraced in the list of 7500 cases, which Spalding had procured for collection subsequent to the passage of the bill. If such would not have been the effect had the House bill passed with that proviso, no reason is apparent why a contrary effect should be claimed for the act of 1883. The assignment is not tenable.

The seventh assignment reads as follows:

"7th. The court erred in allowing complainant an interest in fees in claims registered in the same book as the 7500 claims, but inserted at a different time, and designated by half numbers."

This is a reiteration of the second exception to the auditor's report.

The list of 7500 cases which the evidence shows Spalding had collected in books and upon slips at the time of the making of the contract was supposed and was intended to embrace all persons entitled to $25 and over, by virtue of section 8 of the act of 1866, as construed by Spalding. His counsel does not argue that the half numbered claims held by the auditor to constitute part of the list of 7500 cases were not embraced in the character of claims designed to be covered by said list.

We adopt the reasoning by which the auditor reached a decision allowing complainant a share in the fees derived from these half numbered claims. He said:

"In the examination of the defendant's books containing a list of the claims which are the subject of this account there appeared to have been entered claims described in the testimony as half numbers, and the fees received in these cases are not included in the statements of the defendant above referred to. These claims are enumerated in another paper marked 'Defendant's Schedule B.'

"The defendant contends (see his brief) that these claims

do not belong on the Mason list; they were subsequently entered there in error, and that they are not covered by the decree.

"The order of reference directs an accounting as to the claims contained 'in a list of about 7500 cases mentioned in the defendant's answer.' No list was filed with the answer, nor has any list been produced in the progress of the cause other than the schedules made by the defendant for the purposes of this reference and the books in which these half numbers appear. It is clear, therefore, that the court in making the decree had no such list before it and could not intend to restrict the accounting to any particular claim by names or numbers. Indeed, the whole case shows the intention of the court to have been to divide the cases as to which the bill sought an accounting into two classes, the dividing line being the change of construction by the government officers of the law relating to these claims.

"So far as appears here, these half numbered cases are of the same class as the others on the Mason list, and are, therefore, included in the contract of sale, and not excluded by the decree.

"The evidence as to the time of their entry on the list and the attempted withdrawal of them from it is not at all clear.

"These fees aggregate the sum of $1678.48."

The eighth and ninth assignments of error read as follows:

"8th. The court erred in holding that the complainant was not chargeable with any part of the expense of procuring claims obtained by the defendant subsequent to January 17, 1871.

"9th. The court erred in holding that the complainant was not chargeable with any part of the expenses of prosecuting claims obtained by the defendant."

It was expressly stipulated in the contract of June 3, 1880, that the one fourth interest of Mason should be "free from all charges of expenses in prosecuting said claims to collection."

These assignments, therefore, depend for their support upon the claim that on the 17th of January, 1881, a new contract

was entered into between complainant and defendant, under the terms of which Mason agreed to share in all future expenses connected with the business. Our concurrence with the holding of the master that no such agreement was entered into leads us to overrule these assignments.

The tenth and eleventh assignments of error read as follows:

"10th. The court erred in holding that the complainant was not chargeable with any part of the expenses of securing and collecting fees which were incurred in consequence of the proviso of the act of March 3, 1883, and of a circular issued by the Postmaster General to make difficult the collection of the fees.

"11th. The court erred in not allowing the defendant twenty per cent or some per cent or gross amount for expenses in collecting fees."

In his original answer, defendant, after averring the amount of fees collected upon the 4208 claims concerning which he submitted to an account, said, "that owing to the change made by the act of 1883 in the previous method of collecting fees, as well as to certain circulars thereunder issued by the Postmaster General, he has been put to an expense of about ten per cent to collect such fees after the allowances had been made and in respect of which they were due." This refers to the requirement by Congress that the claims under the act, when allowed, should be paid to the claimants directly, and not to attorneys.

In his additional answer Spalding admitted that he had received for collection 24,259 claims, and averred that the expenditures incurred and paid for clerk hire, printing, office rent, postage, discounts, interest, etc., in prosecuting said claims from January 17, 1881, to December 31, 1887, aggregated $64,547.75, but that such expenditures did not include the ten per cent expended as in the original answer stated to collect fees that had been earned. It thus appears that before the taking of testimony the expenses of the prosecution of the claims was sworn to by the defendant as being distinct and separate from the expense of collecting fees.

The auditor allowed all actual, direct and necessary expenses

in the collection of fees, such as bank charges, express charges, and attorney's fees, the total amount of such expenses having been deducted from the gross fee charged by Spalding under the contract with claimants, the net sum received by Spalding being returned as the gross amount of fees which he had collected.

Changing, however, the position taken in his sworn answer, the defendant demanded at the auditor's hands an allowance for expenses in collecting fees, for office rent, clerk hire, postage, stationery, printing, etc., from 1883 to 1887, to an amount exceeding more than one half the total expenditures of that character stated in Spalding's answer to have been by him incurred in the prosecution of the entire business of over twenty-four thousand claims. Mason had an interest in but 4208 of these, and 427 of that number were received from two attorneys, and presumably did not require special effort in each of the cases to collect Spalding's proportion of the fees. The claims asserted were not itemized but were made in bulk sums, and the amounts were mere estimates. No receipts or vouchers were produced by defendant, nor was any book produced containing itemized statements whereby the propriety or correctness of the expenditures might have been determined or tested. Though no fees were collected during the year 1883, and the first five months of 1884, one half of the total expenses of that period are charged as expenses for collection of fees.

The defendant testified that the gross amount of fees collected on all claims was $165,241.80. He claimed that in order to effect collections he had expended for —

Clerk hire	$15,608 24
Office rent	22,540 00
Postage	6,375 00
Stationery, printing, etc.	5,959 18
Miscellaneous expenses	2,565 78
Total	$33,048 20

The alleged expenses thus amounted to exactly 20 per cent

of the gross amount of fees collected, whereas the answer claimed but ten per cent.

The unreliable character of the testimony as to these items of expenditure is illustrated by counsel for appellee in his brief. On cross-examination of Mr. Spalding as to an expense account filed May 22, 1889, he testified that he had disbursed the following amounts:

Statement made at session May 22, 1889.

Half of postage from March 3, 1883, to January 1, 1884	$750 00
Half of postage in 1884	1,000 00
" " " 1885	1,000 00
" " " 1886	1,500 00
Whole of " " 1887	750 00
" " " 1888	1,000 00
" " 5 months, 1889	375 00
Add miscellaneous expenses	2,565 78
	$8,940 78

When pressed to give the items of the miscellaneous expenditures stated as $2565.78, defendant promised a full statement at the next session, but instead of making such explanation, he filed a statement showing miscellaneous expenditures reduced to $143.50, but the postage items increased proportionately, as shown in the following statement:

Statement made at session June 5, 1889.

Half of postage from March 3, 1883, to January 1, 1884	$865 00
Half of postage in 1884	730 00
" " " 1885	1,600 00
" " " 1886	2,920 00
Whole " " 1887	1,300 00
" " " 1888	1,240 00
" " 5 months, 1889	518 50
Total	$9,173 50

The contract did not contemplate a necessity for expenditures in connection with the collection of fees, as, on June 3, 1880, it was believed that drafts for the amounts of the difference claimed would be delivered to Spalding as attorney for the claimants, and that he would make his deduction of fees therefrom.

For this reason, the auditor reached the conclusion that Mason's interest should be charged with its just share of expenses necessary and reasonably incurred in securing and realizing the fees of which he was to receive a share with the qualification that perhaps before any considerable amount of such expenses had been incurred, the complainant should have been notified. Complainant does not find fault with the deductions actually allowed. Concerning, however, the claim for an allowance of twenty per cent upon Mason's share of fees, as an expense for collection, the auditor said:

"Some of these expenses were incurred in unsuccessful endeavors to secure fees, and before his interest in fees collected can be charged with expenses connected with fees not collected it should appear that he assented to such expenditures, or at least had knowledge of them. Neither of these conditions are shown to exist here.

"The defendant kept no current account of these expenditures even in gross and is now compelled to estimate some of them upon a basis of unreliable data. He made no attempt to keep any separate account of those incurred in securing the Mason fees as distinguished from his other business, as he should have done if he intended to claim allowance for them in his settlement with the complainant.

"Nor is the evidence before me sufficient to establish the necessity for or reasonable character of these expenses."

We find no obvious error in this conclusion. Where an allowance is asked which is clearly excessive and exorbitant, it is for the party claiming to be entitled to establish just what is the amount he is properly entitled to, and it is not made the duty of the court or its officers to arbitrarily guess at the amount.

The twelfth assignment alleges error in the allowance by

the general term, in its final decree, of interest upon the entire principal sum found due from August 9, 1887.

The contract of June 3, 1880, provided that "all the fees collected by the said Spalding shall be accounted for and settlements shall be made from time to time as collections are made, and the divisions thereof shall be made, three fourths going to said Spalding and one fourth to said Mason."

The auditor made monthly rests in the collection of fees, and allowed interest on all collections during a particular month from the first day of the succeeding month. The special term entered a decree in accordance with that method. The general term, however, sustained the exception to the auditor's allowance of interest, and modified the decree of the special term in that particular by allowing interest on the entire principal sum found due by the auditor from the time when complainant made his demand upon Spalding for an account as to the fees collected.

Spalding's failure, prior to August 9, 1887, to render an account and make settlements for collections of fees, is shown by the evidence of Mason to have been acquiesced in by him. The general term, therefore, correctly held that interest should run only from the date when the demand for an accounting was made, and the right of complainant thereto was denied.

Appellant strenuously insists that no interest whatever should be allowed. The claim is without merit. Defendant had no reasonable ground for refusing to account, at least as to the fees earned upon the claims embraced in the list of 7500 cases. To that extent he was clearly indebted to Mason, less the amount of any payments which he had made. He had in his possession and control the means of determining the amount of such indebtedness, and as to an indebtedness which he ought not to have disputed he should have ascertained the amount due and tendered it without prejudice to a dispute concerning other items. Interest is allowed both at law and equity upon money due. As said by this court in *Curtis* v. *Innerarity*, 6 How. 146, 154, considering and overruling an exception to an allowance of interest from the time certain payments had become due:

"It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. . . . Every one who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the implied contract of the parties."

It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when the payment should have been made. *Crescent Mining Co.* v. *Wasatch Mining Co.*, 151 U. S. 317, 323.

The circumstance that the complainant may have considered himself entitled to an account and to receive a greater sum than was actually found to be due, does not affect complainant's right to the interest upon what was really due. *Sturm* v. *Boker*, 150 U. S. 312, 341. In the case just cited, while the right to an account was sustained, it was held that a portion of the matters claimed by complainant could not be allowed on a final accounting, but it was directed that the account should be stated up to the filing of the bill, and that any balance shown in favor of either side should bear interest from that date.

The general term, however, erred in its direction on the subject of interest. It overlooked the fact that some of the fees for which a recovery was allowed, amounting to $4735.06, were collected after August, 1887. The dates of the collections made after that date are shown by the record, and an allowance of an average of interest will correct the error.

This completes our consideration of the specific assignments of error. The general assignment that the court erred in not dismissing the bill of complaint with costs is shown to be without merit by what we have already stated.

The error in respect to interest necessitates a modification of the decree under review. As it is a matter, however, of mere interest, not affecting the real merits of the controversy, and which we think would have been corrected by the lower court,

had its attention been called to it, the costs of this appeal must be borne by appellants.

It is therefore ordered that the judgment of the Supreme Court of the District of Columbia be and is hereby modified by providing that of the principal sum due $8934.05 *shall bear interest from August* 9, 1887, *and* $4735.06 *shall bear interest from August* 2, 1888, *and as thus modified the judgment is affirmed at the costs of appellants.*

Mr. Justice Gray dissented.

HANSEN *v.* BOYD.

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

No. 113. Argued December 11, 12, 1895. — Decided March 2, 1896.

In the absence of a request to direct a verdict, this court must assume, when only a part of the evidence is before it, that there was sufficient evidence to warrant the trial court to submit the consideration of the facts to the jury.

It being shown that the transactions in dispute were to be conducted under the rules and regulations of the Board of Trade at Chicago, and that those rules and regulations were explained to the defendant below, they became competent evidence.

When the defendant at the close of plaintiff's evidence, requests an instruction to the jury to charge in his favor, which is refused, and he then introduces testimony, an exception to that refusal is waived.

Some statements by the court of the evidence are held not to be substantial error.

This court cannot pass upon a refusal of a motion to instruct generally in defendant's favor when the record contains only a part of the evidence.

Under a contract which, though its validity was disputed, is found to have been valid, the defendant below had sundry transactions in buying and selling grain with the plaintiffs below, between early in August, 1888, and April 26, 1889, through which he had become largely indebted to them. On or about the latter date the plaintiffs asked of the defendant authority to transfer the May wheat to June wheat, to which no answer was given. Nevertheless they sold the May wheat at a loss and

Statement of the Case.

made purchases of June wheat on his account, and informed him of both transactions. On June 8 all open contracts were closed at a loss, and the defendant having refused payment, this action was begun. There was no controversy as to the correctness of any of the items except those relating to the June purchase. *Held*, that the unauthorized voluntary act of the plaintiffs could not be said, as matter of law, to have been ratified by defendant by his mere retention, without complaint, of an account and statement rendered to him "that said change had been made," or, in other words, that plaintiffs had made a new purchase for his account.

As the rest of the judgment below is valid the court decides that if the defendants in error will within a reasonable time during the present term of this court file in the Circuit Court of the United States for the District of Minnesota a remittitur of the invalid excess, and produce and file a certified copy thereof in this court, the judgment, less the amount so remitted, will be affirmed; but, if this is not done, the judgment will be reversed; and in either event the costs must be paid by defendants in error.

THE action below was instituted by defendants in error to recover from plaintiff in error the amount of payments alleged to have been made for account of defendant, between the 24th day of August, 1888, and the 8th day of June, 1889, and resulting from the purchase and sale of certain grain made for account of the defendant, in the city of Chicago, and also the value of services rendered in connection therewith.

Defendant pleaded that the plaintiffs did not purchase or sell any grain for his account, but that the transactions in question were mere wagering contracts, intended by both as gambling upon the price of wheat, and that the moneys expended by the plaintiffs on account of the matters sued for were advanced at the city of Chicago in paying for wheat options and "futures;" that the services alleged to have been rendered were performed in connection with such illegal transactions, which, it was averred, were in violation of the statutes of the State of Illinois.

Plaintiffs filed a reply to the answer of defendant, denying that it was the understanding and agreement of the parties that there were to be no actual sales or delivery of wheat, and that settlements were to be made by one party paying to the other the difference in values between the contract price and the market price of the wheat bought, according to fluct-

uations in the market, and also denied generally all the allegations in the answer to the effect that the transactions were gambling contracts and in violation of law.

The cause was tried by a jury, and the following facts are shown by so much of the evidence as is contained in the bill of exceptions.

On and prior to August 24, 1888, plaintiffs were partners in business at Chicago under the firm name of James E. Boyd & Bro., and were members of, and commission merchants doing business on, the Board of Trade in that city. They had a branch office at Minneapolis, Minnesota, at which Charles E. Handy was their agent from January 1, 1887, to February 1, 1889, Handy being succeeded on the latter date by George M. Brush. Prior and subsequently to 1888, Theodore Hansen resided at Bensen, Minnesota, a town on the Great Northern Railway, about one hundred and twenty miles west of Minneapolis, being engaged there in the business of general merchandise and grain, owning and operating a grain elevator and warehouse. Prior to the transactions between Boyd & Bro., hereinafter mentioned, Hansen had sold wheat through brokers on the Board of Trade at Chicago and the Chamber of Commerce at Minneapolis, and had had some "option deals," as he expressed it, and was generally familiar with the manner in which business was done on those boards.

Early in August, 1888, as a result of a conversation had with Boyd & Bro.'s Minneapolis agent, a few days previously, Hansen called at Handy's office and gave him an order for the purchase of 5000 bushels of December wheat. Defendant claimed that in the prior conversation Handy had alluded to losses which Hansen had sustained in "some trades" about a year prior thereto, and said "he thought it was a good chance to make something back this fall by making some scalps." Hansen further testified that he supposed the transactions were to be conducted for him on the Board of Trade at Chicago by Boyd & Bro., but claimed that at none of the interviews between himself and Handy was any allusion made to the Board of Trade or the rules of the Board of Trade. He also testified that it was not his intention to buy or sell any

grain on any of the orders given to Handy, but that he contemplated mere speculations on margins. Handy, however, testified that when the first order was given he told Hansen that the commission would be one eighth of a cent per bushel; that he would have to abide by the rules of the Chicago Board of Trade, and stated that he informed Mr. Hansen what those rules were as concerned the handling of grain on that board, and also informed him that a delivery was contemplated in every trade, either by buyer or seller, which was understood by Hansen; that in case wheat was delivered he must take care of it, and pay the purchase price and interest on the money, etc.

The first order to purchase was given August 10, 1888, and from that time until about April, 1889, occasional orders to buy and sell wheat were given. In none of the transactions was wheat offered or furnished by Hansen or to him personally, but the purchases and sales were all made on the Chicago Board of Trade according to the rules of that board. Hansen became delinquent in the furnishing of margins on his contract. On April 16, 1889, 40,000 bushels of May wheat were bought on his account at prices ranging from 109½ to 111¼. On April 26 and 29 following, by telegrams, and about those dates, by personal solicitation of Handy, Boyd & Bro. requested authority to "transfer," as they expressed it, the May wheat to June wheat. Hansen did not answer the telegrams, and gave no satisfactory response to the verbal inquiry. On April 29, however, Boyd & Bro. sold the 40,000 bushels of May wheat, on which Hansen was then in default for margins, at 81½, and the loss of $11,500 was charged against Hansen in his account on the books of Boyd & Bro. The firm then bought 40,000 bushels of June wheat at 82¼, and sent a memorandum notice of the sale of the May wheat and the purchase of the June wheat to Hansen, together with an account of the loss sustained on the May wheat. On May 4, 1889, Boyd's agent, Brush, wrote Hansen that Boyd & Bro. demanded an immediate settlement of his account. Personal interviews with Brush and correspondence with Boyd & Bro. followed. On June 8, 1889, the then open contracts on the books of Boyd &

Bro. with Hansen were closed, and the 40,000 bushels of June delivery wheat, above referred to, were sold on the Board of Trade, and the loss, $1300 and $50 commission on the transaction, was charged against Hansen. A day or two following an account exhibiting the total indebtedness of Hansen to Boyd & Bro. ($18,248.36) was delivered to Hansen and payment thereof demanded, which was refused, and the next day this action was brought. There was no controversy at the trial as to the correctness of any of the items of the account, other than as to the legality or illegality of the transactions, with the exception of the loss resulting from the 40,000 bushels of June wheat, asserted by Boyd & Bro. to have been purchased by authority of Hansen, but which Hansen claimed he had never authorized, and hence should not be held liable for the loss thereon, nor for the commission charged.

As to all the items of the account, plaintiffs contended that the transactions were legitimate purchases and sales of wheat under the rules of the Chicago Board of Trade; that deliveries were intended by the parties to the contracts on the Board of Trade; that Boyd & Bro. and Hansen understood that actual purchases and deliveries of wheat were intended. On the other hand, Hansen claimed that no actual purchases or sales of wheat were agreed to be made or were intended, and that the orders given by him were mere wagers upon the prices of wheat — deals in futures upon the rise and fall in prices of wheat, according to the quotations on the Chicago Board of Trade.

The court instructed the jury very fully as to the law of the case upon the differing contentions of the parties, and the defendant took seven exceptions to the charge of the court. But one instruction was asked on behalf of defendant, and that was given to the jury. It was as follows:

"If you should believe that it was the intention of both parties to this contract that no actual wheat was sold or delivered or intended to be delivered at a future time, and if you should find from the evidence that it was not the intention of either party that a contract should be made by plaintiffs to buy and hold wheat for delivery to the defendant, but

that it was the real intention and the understanding of the parties that a contract should be made which should be closed at a future date, not by the delivery of the wheat and the payment of the purchase price, but by the payment of money to one party or the other, the parties to receive the same and the amount to be paid to be determined upon a basis of the difference between the agreed purchase price at the time the purchases were made and the actual market value of the wheat on the day when the contracts were closed, then the jury are instructed that such contracts are illegal in law and void, and you will find for the defendant."

A verdict was returned for the full amount claimed by plaintiffs. Judgment was entered thereon, and the court overruled a motion for a new trial. The case was then brought to this court by writ of error.

Mr. Charles E. Flandrau for plaintiff in error.

Mr. Ralph Whelan for defendants in error.

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

The assignments of error set out in the record are fifteen in number. The first five are not pressed in the argument for plaintiff in error, and we only briefly notice them.

In number 1, it was assigned as error that the evidence conclusively showed that the transactions upon which the plaintiffs below claimed a right to recover were wagering and gambling contracts, and that the court erred in not so holding and the jury in not so finding.

This assignment is of course without merit, since it asks us to determine the weight of proof and thus usurp the province of the jury. There was no motion made at the close of the evidence to direct a verdict, and both parties therefore agreed to the submission of the issues of fact to the consideration of the jury. In the absence of such a request we must assume that there was sufficient evidence to warrant the court in permitting the jury to draw the inferences proper to be deduced

from the evidence in the case. Moreover, the bill of exceptions filed in the record does not purport to contain all the evidence.

The second, third, fourth, and fifth assignments of error cover exceptions to the admission in evidence of the rules of the Board of Trade at Chicago, the rules of the clearing house of that board, and the admission in evidence of certain testimony given by James E. Boyd, one of the plaintiffs, explanatory of the clearing house rules, and of the manner in which the payments of losses and profits accruing under the various transactions involved in this action were made by the clearing house of the Chicago Board of Trade. Evidence had been introduced on behalf of plaintiffs that the agreement with Hansen was that the transactions were to be conducted under the rules of the Board of Trade at Chicago, and that such rules were explained to him. The rules and regulations in question were therefore competent evidence. *Bibb* v. *Allen*, 149 U. S. 481, 489, 490. The oral testimony of Boyd tended to explain the purport of those rules and the transactions thereunder, and was consequently relevant.

The sixth assignment relates to the overruling of a motion, made at the close of the evidence for plaintiffs, that the court instruct a verdict for the defendant; and assignments seven to fifteen inclusive attack portions of the charge to the jury. As to the alleged error in refusing to instruct a verdict at the close of the evidence for plaintiffs, it is sufficient to say that it has been repeatedly held by this court that when, after such a motion, the defendant introduces testimony, as was done in the case at bar, an exception to the action of the court in refusing to direct a verdict is waived. *Runkle* v. *Burnham*, 153 U. S. 216.

Assignment seven asserts that the court erred in giving the following instruction:

"The time during which these transactions occurred commenced in August, 1888, and was concluded and the whole transaction finally closed up in June, 1889. The plaintiffs claim that the defendant applied to the Minneapolis office to employ them to sell and purchase wheat for future delivery;

that he inquired of the manager the commission to be charged, and was informed of the rate, and was also told by the manager in charge that it was a good time to make some scalps, but what that term means has not been developed by the testimony."

The exception taken to this portion of the charge was that the defendant, in his testimony, had "stated and developed the meaning of the word 'scalp,' and that the charge excepted to was a denial of actual, material testimony introduced on the part of the defendant and material to his defence." In his brief, counsel for plaintiff in error asserts that the charge misled the jury, and, in effect, withdrew the evidence on the subject from the jury and wholly annulled its force. Concerning this alleged error, the trial judge, in his opinion denying the motion for a new trial, said:

"It is urged that the jury were misled by a statement in the charge that the word 'scalps,' used by the agent of the defendant before the defendant authorized him to enter into any contracts for the purchase or sale of wheat, misled the jury.

"Hansen, the defendant, testified, in substance, that in the latter part of July, 1888, the manager of the plaintiff at Minneapolis was introduced to him by Mr. George Shepherd, who said: 'I used to have a few deals in options, and when I was trading with him I had never made a loss;' and that the next day after the introduction the manager spoke to him in the Chamber of Commerce building, in Minneapolis, and said that 'he knew I had some trades a year ago and they had roasted me pretty hard then, but he thought it was a good chance to make something back this fall by making some scalps.' On cross-examination, witness, on being asked 'What do you mean by the word "scalps?"' said the word was used on exchange frequently when they mean 'taking a short time, buy and sell as quick as you see a profit, and when you have a loss close it out at any amount.' 'A scalp means a short deal.'

"The meaning of the word is not fully disclosed by this testimony, nor is it revealed by the answer to a question of

the court, when the witness, in substance, said that an example of a 'scalp' was when a dealer, having previously bought wheat to be delivered in May, sold the same quantity to be delivered the same month and settled his deals before May."

In view of the evidence contained in the record and referred to in the opinion of the trial judge, there was no substantial error committed in the portion of charge now under review. The language of the court could not reasonably be understood by the jury as meaning more than that the court was of opinion that the precise meaning of the term in question had not been clearly shown by the evidence. The observations, however, of the court were mere comment upon the evidence and were evidently not intended, and we do not think could have operated, to prevent the jury giving such weight as they saw fit to the explanatory testimony on the subject.

Assignments eight, ten, eleven, and twelve may be considered together. They allege error in the following portions of the charge:

"8. It is claimed on the part of the plaintiffs that defendant was informed of the rate of commission for their services; that the contracts made for him would be subject to the rules, usages and regulations of the Chamber of Commerce of the city of Chicago, and that in all cases actual wheat must be purchased and sold, and the margins kept up to protect them against loss."

"10. The plaintiffs' theory is, and evidence has been introduced tending to sustain it, that they were employed by defendant, through the Minneapolis office, as brokers and commission merchants, to purchase or sell wheat, for future delivery, on his account, and that such sales and purchases were to be made on the Chicago Board of Trade with the members thereof; that such contracts were to be governed by the rules and usages of such Chamber of Commerce, and that in every instance actual delivery of wheat was intended by the parties to the contracts made for the defendant's account, and that these contracts were closed and settled up by the plaintiffs in accordance with these terms, and at the

defendant's request, and advances were made and their own money paid out for his benefit.

"11. All optional contracts, however, are not illegal under the statute which was read to you. If the option is to sell or purchase at a future time, then it is illegal and a wager; but if the option consists merely of a delivery within a specified time, the contract is valid, and what was done by putting up margins amounts to nothing unless the contract itself is illegal. The validity of an option contract depends upon the mutual intention of the parties thereto, and if a sale or purchase of actual wheat for future delivery is intended, it is valid. If the contract is lawful, the putting up of margins to cover losses which might accrue from fluctuations in prices in final settlement of the transactions, according to the rules and usages of the Board of Trade of the City of Chicago, is entirely proper and legitimate. These rules have been read to you by counsel for plaintiffs, and there is nothing in these rules on their face that indicates that they are in violation of the laws of Illinois or contrary to public policy.

"12. Courts, however, must recognize from necessity the methods of carrying on business at the present day, and apply well settled principles of the common law to enforce contracts, unless they are forbidden by statute or violate some rule of public policy. The daily mercantile business of the country, mercantile deals — and by that I mean the sale and purchase of personal property — could not be successfully carried on if merchants and dealers were unable to sell something which they did not have, but which they intended to get in the market and buy before the day of delivery. A trader has a right to sell, to deliver at some future time, that which he then has not, but which he expects to go into the market and buy; and the parties may agree mutually that there need not be a present delivery, but that such delivery may take place at some other time. Such future delivery contracts, however, must be in good faith; there must be an intention to make an actual sale and delivery of the article dealt in."

The sole objection made upon the argument to these several instructions was, in substance, that under the evidence in the

case the court was not warranted in assuming or the jury in finding that the transactions between Boyd & Bro. and Hansen might be valid. Obviously, however, such an objection cannot prevail in the absence of a motion on behalf of defendant at the close of the whole evidence for an instruction in his favor. Nor, if such motion had been made, could we review a ruling upon it in the condition of the record in this case, as the bill of exceptions does not purport to contain all the evidence.

Assignment No. 13 covers instructions, in which the court repeated plaintiffs' theory of the transactions, stated the rules of law governing the question as to when a contract was void as a wagering or gambling contract, and the facts necessary to be proven to the satisfaction of the jury before they could properly return a verdict to that effect. These instructions embraced a half dozen paragraphs of the charge, one paragraph in particular being very lengthy, and covering more than a page and a half of the printed record.

The exception noted to this part of the charge was, "that there is nothing in the pleadings, evidence, or record in this action to support or justify the theory of the plaintiffs stated by the court in this part of its charge here excepted to; that the portion of said charge here excepted to is prejudicial to the defendant and is misleading to the jury, is error in the charge and error in law on all the evidence and facts in the case." The assignment is without merit. As all the evidence is not shown to be contained in the record, we must assume that there was evidence in the case tending to support plaintiffs' theory of the case stated by the court. The exception is moreover too general, uncertain, and indefinite to merit detailed consideration.

Assignment No. 14 asserts that the court erred in giving the following instruction:

"I might say to you here that if you find from the evidence that any of these contracts had been offset under the rules and regulations as prescribed by the Board of Trade of Chicago, offsets between persons and dealers connected with that board through whom these plaintiffs operated, that is

not evidence of their illegality. The mode of settlement of *bona fide* contracts for the sale of actual wheat does not affect the validity of the contract if the original intention was to purchase, receive, take and deliver the actual wheat at the time specified when the contracts were made."

The exception taken to this instruction was "that the offsets and modes of settlement stated and referred to in the part of the charge here excepted to belong to the jury as proper and competent evidence, to be considered by them in determining the entire intentions of the plaintiffs in respect thereto, and as affecting and showing the original intention with which said contracts were made and were to be executed and closed; that said charge here excepted to characterizes said evidence as no evidence and virtually takes the same from the jury; that said charge here excepted to is prejudicial to the defendant, is misleading to the jury, and is otherwise error in law."

We are referred by counsel for plaintiff in error, in his brief, to the language of the exception, as his argument upon this assignment.

The court had informed the jury what was the theory of plaintiffs upon which they claimed a right to recover. (See tenth assignment of error, *supra.*) Pursuant to their theory plaintiffs contended that the purchases and sales of wheat on account of the defendant were to be made on the Chicago Board of Trade with the members thereof, and the contracts of defendant were to be governed by the rules and usages of such board, and that, in every instance, an actual delivery of wheat was intended. The contracts referred to in the criticised instruction were the contracts claimed to have been entered into by plaintiffs on account of defendant with members of the Board of Trade at Chicago. Just before giving the instruction the court had said to the jury:

"These memoranda which have been offered in evidence and the entries on the plaintiffs' books of these contracts are not conclusive evidence of their character. You are to determine what these contracts were; you are to determine them from the evidence in the case; you can look into the

transactions themselves as disclosed by the evidence and determine from the facts and circumstances attending their making and the conduct of the parties thereto with reference to them whether they are illegal within the rule laid down, or whether they are *bona fide* contracts for the purchase and sale of wheat to be delivered at a future time."

In determining the conduct of the parties to the contracts with reference thereto, particularly in view of other instructions of the court, we think it beyond question that the jury must have understood they were authorized to take into consideration the modes of offsets and settlements by which the contracts were cancelled. We do not think the instruction was amenable to the criticism made on behalf of defendant.

The greater part of the brief of counsel for plaintiff in error is devoted to argument in support of the contention that upon the undisputed evidence in the cause a verdict should have been directed for defendant. Aside from the circumstance to which we have before called attention, that the bill of exceptions does not purport to contain all the evidence introduced at the trial, this contention is fully answered by what we have said above in disposing of the first assignment of error.

We are of opinion, however, that the instruction covered by the ninth assignment of error was erroneous. The instruction is as follows :

"9. Now, if you find from the evidence that the plaintiffs, about April 29, 1889, informed the defendant by letter that the forty thousand bushels of May wheat in question could be at that time changed to June wheat, and that the defendant made no answer thereto, and if you further believe from the evidence that said May wheat was changed over into June, for and on account of the defendant, and that the plaintiffs rendered an account, a report, and statement to defendant that said change had been made, and the defendant received such report and statement and retained it, and made no objections to said change of said May wheat to June, then such facts amount to and were a ratification on the part of defendant of the acts of the plaintiffs in making such change."

The exception taken to this instruction was, "that the evidence in the case did not justify the finding by the jury that 'said May wheat was changed over into June wheat for and on behalf of the defendant,' and that the statement and form of the part of said charge excepted to is prejudicial to the defendant and for error in law."

It was not claimed that Boyd & Bro. had a general authority, by virtue of their dealings with Hansen, to make the so-called transfer; and, just preceding the instruction quoted, the court had called the attention of the jury to the fact that there was conflict in the evidence as to whether or not specific authority had been given to make it. Hansen was in default for margins on the purchase of May wheat, the price of the article had fallen very greatly, and on April 29, 1889, Boyd & Bro. had the right to close out the contract.

The instruction assumes that Boyd & Bro. and Hansen were so situated with reference to each other — as was the fact — that power could have been obtained from Hansen to make the purchase of June wheat, if he had wished to give the authority, and that the authority was asked for and was not given. Under such circumstances, we are of opinion that the unauthorized voluntary act of Boyd & Bro. could not be said, as matter of law, to have been ratified by Hansen by his mere retention, without complaint, of an account and statement rendered to him "that said change had been made," or, in other words, that Boyd & Bro. had made a new purchase for his account.

In *Supervisor* v. *Schenck*, 5 Wall. 772, 782, this court said: "Ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name." The mere retention by Hansen of a report that an unauthorized purchase of 40,000 bushels of wheat had been made on his account was entirely consistent with the hypothesis that he did not approve and did not intend to adopt what he had previously declined to authorize. The mere silence of Hansen was certainly not necessarily indicative of an intention to adopt the unauthorized act of Boyd &

Bro., and it was, therefore, insufficient of itself to warrant an instruction that it constituted in law an adoption of such act. The question of whether the evidence established ratification should have been submitted to the jury.

The fifteenth assignment of error covers an instruction to the jury that if facts and circumstances introduced in evidence by the plaintiffs which tended to show that the order for the transfer of May wheat to June wheat was given, in connection with a number of other recited facts were found by the jury to exist, they would constitute a ratification. In view of our holding with reference to assignment number nine, it will be unnecessary to review this last assignment.

We find, therefore, that there is error in the record solely with reference to the instruction contained in the ninth assignment of error, that if certain facts were found by the jury, the defendant should be held to have ratified the purchase on April 29, 1888, of 40,000 bushels of wheat for June delivery. The question arises as to the proper judgment to be entered. The plaintiffs below recovered judgment for the full amount of their claim. The June wheat purchase and sale were distinct and separable from the other transactions upon which a recovery was had. The amount of loss arising from the purchase and sale of this wheat, including the commission charged by Boyd & Bro., is clearly ascertainable from the evidence contained in the record, while the interest thereon embraced in the judgment is matter of simple calculation. The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party, in whose favor a verdict or judgment has been returned or entered, to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same. *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U. S. 41, and cases cited, p. 53; *Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646, 656.

Following the practice pursued in the last cited case, and also in *Washington & Georgetown Railroad Company Co.* v.

Harmon, 147 U. S. 571, 590, we will not reverse the judgment below, if the defendants in error will remit the excess therein in the particulars heretofore indicated, that is, the loss on the purchase and sale of the June wheat ($1300), the commission charged in that transaction ($50), and interest on those items from June 8, 1889, to the date of the verdict.

Ordered, that if the defendants in error will within a reasonable time during the present term of this court file in the Circuit Court of the United States for the District of Minnesota a remittitur of such excess, and produce and file a certified copy thereof in this court, the judgment, less the amount so remitted, will be affirmed; but, if this is not done, the judgment will be reversed. In either event the costs must be paid by defendants in error.

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

UNITED STATES *v.* STANFORD.

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

No. 783. Argued January 28, 29, 1896. — Decided March 2, 1896.

An examination of the statutes of the United States relating to the construction of a railroad from the Missouri River to the Pacific Ocean, especially the acts of July 1, 1862, c. 120, 12 Stat. 489, and July 2, 1864, c. 216, 13 Stat. 356, shows that every subscriber to the Union Pacific Railroad Company must be deemed to have become such upon the condition, implied by law, that he should not be personally liable for the debts of the corporation.

It is equally clear that Congress intended to grant national aid to all the corporations constructing that connecting line of railroad upon terms and conditions applicable alike to all, with no purpose to make discriminations against any one part of the line, and that the imposition of a liability upon the stockholders of the Central Pacific Railroad Company for the debt of that corporation, arising out of the bonds which it received from the United States, when no such liability was imposed upon

the Union Pacific Railroad Company on account of like bonds received by it, is entirely inconsistent with that equality.

The United States has no claim against the stockholders of the Central Pacific Railroad Company on account of the bonds issued to that company by the United States to aid in the construction of its road.

This adjudication is not to be taken as deciding that the stockholders of the Central Pacific Railroad Company either can or cannot be made liable for its debts to the United States in some other way than under the Pacific railroad acts and by the acceptance of the United States bonds to aid in the construction of the road; nor whether the adoption of the California corporation as an instrument of the national government in accomplishing a national object, exempted its stockholders from liability, under the constitution and laws of California, to ordinary creditors.

THE case is stated in the opinion.

Mr. Solicitor General and *Mr. Assistant Attorney General Dickinson* for appellants.

Mr. Joseph H. Choate, (with whom was *Mr. Russell J. Wilson* on the brief,) for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The United States seeks by this suit to establish a claim against the estate of Leland Stanford for fifteen millions two hundred and thirty-seven thousand dollars.

The deceased held and owned a large number of the shares of the capital stock of the Central Pacific Railroad Company of California, and the Western Pacific Railroad Company — corporations that were organized under the laws of California, and which subsequently were consolidated and became the Central Pacific Railroad Company.

Those companies received bonds of the United States that were issued under the acts of Congress known as the Pacific Railroad Acts in aid of the construction of a railroad and telegraph line extending from the Missouri River to the Pacific Ocean. The present demand of the government arises out of the obligation which, it is alleged, rested upon the companies receiving such bonds to pay the principal at maturity and to reimburse the United States for all interest paid thereon.

The bill proceeds upon the ground that by the constitution and laws of California, at the time the above corporations were organized, as well as when they received the bonds of the United States, each stockholder of a railroad corporation was liable, in proportion to the stock owned and held by him, for all of its debts and liabilities, and, consequently, that the estate of Stanford is liable to the United States in proportion to the stock owned and held by him in the corporations named.

The principal contention of the defendant is, that the question of the liability of stockholders for the debts and obligations of companies receiving bonds of the United States under the Pacific Railroad Acts, does not depend upon the laws of California, but is governed by the acts of Congress under which such bonds were issued; that by its legislation in aid of the construction of the Union and Central Pacific railroads Congress intended to define, control, and regulate the entire relations of the government to all of the companies receiving subsidy bonds without reference to the laws of any State; that those companies were respectively created or adopted as agencies for a great national purpose, in the accomplishment of which they were to be subject to the exclusive control of the general government; that the functions, obligations and liabilities of all the companies participating in the bounty of the United States were to be equal and identical; and that as to each company the government looked to it alone for the performance of all that the acts imposed upon it, and did not contemplate, nor intend that there should be any individual liability of stockholders in respect of the subsidy bonds issued by the United States.

If these acts of Congress have the scope and effect attributed to them by the defendant, the decree may be affirmed without any expression of opinion by this court upon other questions discussed at the bar, and which, if considered, would require a construction of the laws of California relating to the personal liability of stockholders for the debts of railroad corporations.

Was it part of the contract between the United States and the corporations receiving its subsidy bonds that the stock-

holders of such corporations, respectively, should be personally liable for the principal and interest of those bonds? Or, did the United States make provision in the acts of Congress for all the security intended to be taken for their payment? These questions cannot be answered by referring to any one section of either act, but only by examining the provisions of all of those acts in the light of the circumstances under which the United States made grants of public lands and provided for the issuing of bonds in aid of the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean.

By the act of July 1, 1862, c. 120, 12 Stat. 489, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," the Union Pacific Railroad Company was incorporated with power to lay out, locate, maintain, and enjoy a continuous railroad and telegraph from a named point in what was then the Territory of Nebraska to the western boundary of what at that time was the Territory of Nevada.

That company was given the right of way through the public lands for the construction of its railroad and telegraph line as well as the power and authority to take from those lands adjacent to the line of the road, earth, stone and timber, and other materials required in the work of construction, and so far as it was necessary to do so, to occupy the public lands, for stations, buildings, workshops and depots, machine shops, switches, side tracks, turntables and water stations; the United States to extinguish the Indian titles to all lands falling under the operation of the act and required for the right of way and grants made. "For the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores," a large grant of lands was made, for which patents were directed to be issued as each forty consecutive miles of railroad and telegraph were completed and equipped in all respects as required. §§ 2, 3, 4.

The fifth section provided that for the purposes mentioned

the Secretary of the Treasury, upon the completion and equipment of forty consecutive miles of railroad and telegraph, should issue to the company bonds of the United States, of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, to the amount of sixteen of said bonds per mile for such section of forty miles; and "*to secure the repayment* to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto constitute a mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued;* and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, *the said road, with all the rights, functions, immunities and appurtenances thereunto belonging, and also all lands granted to the said company, by the United States, which, at the time of said default shall remain in the ownership of said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.*"

The grants referred to were made "upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores upon said railroad for the government whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and *all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid.*" The company was entitled to pay

the United States, wholly or in part, in the same or other bonds, treasury notes or other evidences of debt against the United States, to be allowed at par; and after the road was completed, *until the bonds and interest were paid, at least five per centum of the net earnings of said road were required to be annually applied to the payment thereof.* § 6.

The company was required to file its assent to the act in the Department of the Interior within one year after its passage, and it was allowed until the 1st day of July, 1874, to complete its railroad and telegraph through the Territories of the United States, to the western boundary of the Territory of Nevada, "there *to meet and connect with* the line of the Central Pacific Railroad Company of California." §§ 7, 8.

The ninth section authorized the Leavenworth, Pawnee and Western Railroad Company of Kansas to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, "upon the same terms and conditions in all respects" as were provided in the act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude named; the route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. By the same section it was declared that "the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, *upon the same terms and conditions, in all respects*, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act."

The tenth section provided that the company chartered by the State of Kansas should complete one hundred miles of its road, commencing at the mouth of the Kansas River, within two years after filing its assent to the conditions of the act, and one hundred miles per year thereafter until the whole was completed; and the Central Pacific Railroad Company of California should complete fifty miles of its road within two years after filing its assent to the provision of the act, and fifty miles per year thereafter until the whole was completed; and "after completing their roads, respectively, said companies, or either of them, may unite *upon equal terms* with the first named company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines in this act hereinafter mentioned, *through the Territories from the State of California to the Missouri River*, as shall then remain to be constructed, *on the same terms and conditions* as provided in this act in relation to the said Union Pacific Railroad Company." And the Central Pacific Railroad Company of California, after completing its road across that State, was authorized "to continue the construction of said railroad and telegraph *through the Territories of the United States to the Missouri River*, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and *the whole of said railroad and branches and telegraph is completed.*"

By the twelfth section it was declared that the "track upon the entire line of railroad and branches *shall be of uniform width*, to be determined by the President of the United States, so that, when completed, *cars can be run from the Missouri River to the Pacific coast;* the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; the *whole line* of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation so far as the public and government are concerned, *as one connected, continuous line.* . . ."

The fifteenth section gave to any other railroad company then or thereafter incorporated the right to connect with the road and branches provided for by the act, at such places and upon such just and equitable terms as the President of the United States should prescribe.

All of the railroad companies named in the act, and assenting thereto, or any two or more of them, were authorized to form themselves into one consolidated company; notice of such consolidation to be in writing, to be filed in the Department of the Interior, and the consolidated company to proceed to construct the railroad, branches and telegraph line, *upon the terms and conditions* provided in the act. § 16.

The seventeenth section provided: "That in case said company *or companies* shall fail to comply with the terms and conditions of this act, by not completing said railroad and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted *to the use of the United States*, to repay all such expenditures caused by the default and neglect of said company or companies: *Provided*, That if said roads are not completed, so as to form *a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento River, in California*, by the first day of July, 1876, *the whole of all of said railroads* before mentioned and to be constructed under the provisions of this act, together with all their furnishings, fixtures, rolling stock, machine shops, lands, tenements and hereditaments, and property of every kind and character, *shall be forfeited to and be taken possession of by the United States: Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada Mountains, there

shall be reserved of each part and instalment twenty-five per centum, to be and *remain in the United States Treasury undelivered*, until said roads *and all parts thereof provided for in this act are entirely completed;* and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, *to be and to remain in the Treasury* until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States."

By the eighteenth section it was declared: "Whenever it appears that the net earnings of the *entire road and telegraph*, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its costs, exclusive of the five per centum, to be paid to the United States, *Congress* may reduce the rates of fare thereon if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

The several railroad companies named were authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, "so that the present line of telegraph between *the Missouri River and San Francisco* may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into and the transfer of said telegraph line be made in accordance therewith to the line of said

railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of the railroad companies named herein." § 19.

The act of 1862 was amended in many particulars by the act of July 2, 1864, c. 216, 13 Stat. 356. The time for designating the general route of the Union Pacific Railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, was extended one year from the time designated in the act of 1862; and the Central Pacific Railroad Company of California was required to complete twenty-five miles of its road "in each year thereafter, and the whole to the state line within four years, and that only one half of the compensation for services rendered for the government *by said companies* shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads." § 5.

The proviso to section four of the original act was modified so that the President of the United States was authorized to appoint *for each of the roads* three commissioners, as provided for in the original act; and "the verified statement of the president of the California company, required by said section four, shall be filed in the office of the United States surveyor general for the State of California, instead of being presented to the President of the United States; and the said surveyor general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on, by the said commissioners, *and the requisite amount of bonds*

may be issued and the lands appertaining thereto may be set apart, located, entered and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory." § 6.

So much of section 17 of the act of 1862 as provided for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads was repealed; and it was provided that the failure of any one company to comply fully with the conditions and requirements of that act, and the act of which it was amendatory, should not work a forfeiture of the rights, privileges, or franchise of any other company or companies that should have complied with the same. § 7.

To enable any one of the corporations to make convenient and necessary connections with other roads, it was authorized to establish and maintain all necessary ferries upon and across all rivers which its road might pass in its course; and authority was given each corporation to construct over all rivers for the convenience of such road bridges having suitable and proper draws for the passage of steamboats.

The tenth section provided: "That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to *participate in the construction of said road*, may, on the completion of each section of said road, as provided in this act and the act to which this is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective

roads, property and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the government of the United States. And said section is further amended by striking out the word 'forty,' and inserting in lieu thereof the words 'on each and every section of not less than twenty.'"

By the eleventh section it was declared that "if any of the railroad companies entitled to bonds of the United States, or to issue their first mortgage bonds herein provided for, has, at the time of the approval of this act, issued, or shall thereafter issue, any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority of preference of payment to the said guaranteed bonds or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds shall be granted or permitted, as, added to such outstanding, unsatisfied or uncancelled bonds of the company shall make up the whole amount per mile to which the company would otherwise have been entitled. . . . *Provided, also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road, or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act and the act amended by this act."

The twelfth section provided that the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, should build the railroad from the mouth of Kansas River, by the way of Leavenworth, or, if that be not deemed the best route, then it should, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city

of Lawrence; but to aid in the construction of said branch the company was to receive no bonds. And if the Union Pacific Railroad Company should not be proceeding in good faith to build its railroad through the territories, when the Leavenworth, Pawnee and Western Railroad Company, or the Union Pacific Railroad Company, Eastern Division, shall have completed its road to the hundredth degree of longitude, then the last named company may proceed to make said road westward "until it meets and connects with the Central Pacific Railroad Company on the same line."

The fifteenth section required the several companies, authorized to construct the aforesaid roads, to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and government were concerned, "*as one continuous line;* and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of either or any of said companies, or adverse to the road or business of any or either of the others."

Any two or more of the companies authorized to participate in the benefits of the act were authorized, at any time, to unite and consolidate their organizations "upon such terms and conditions and in such manner as they may agree upon, and as shall not be incompatible with this act or the laws of the States in which the roads of such companies may be," and thereupon such organization, so formed and consolidated, "shall succeed to, possess and be entitled to receive from the government of the United States *all and singular the grants, benefits, immunities, guarantees, acts and things to be done and performed, and be subject to the same terms, conditions, restrictions and requirements* which said companies, respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively." § 16.

All the provisions of this act so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, were to apply to the consolidated

organization. And if, upon the completion by the consolidated organization of the roads, or either of them, of the companies consolidated, any other of the road or roads of either of the other companies authorized and forming, or intended or necessary to form, a portion of "a continuous line" from each of the several designated points on the Missouri River to the Pacific coast shall not have constructed the number of miles of its road within the time required, the consolidated organization was authorized "to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things provided, authorized or granted to be done by the company authorized to construct and equip the same," and shall be entitled to "*similar and like grants, benefits, immunities, guarantees, acts and things* to be done and performed by the government of the United States, by the President of the United States, or the Secretaries of the Treasury and Interior, and by commissioners in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, *and upon the like and similar terms and conditions*, as far as the same are applicable thereto." "And in case any company authorized thereto shall not enter into any consolidated organization, such company, upon the completion of the road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions in this section, *and to have all the benefits thereof, as fully and completely as are herein provided*, touching such consolidated organization. And in case more than one such consolidated organization shall be

made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force and effect to the other: *Provided, however*, That rights and interests at any time acquired by one such consolidated organization shall not be impaired by another thereof." It was further provided that "should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first named company, said first named company may extend their line of road eastward one hundred and fifty miles on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and upon doing so shall enjoy *all the rights, privileges and benefits conferred by this act on said Union Pacific Railroad Company*." § 16.

By a subsequent act, approved March 3, 1865, c. 88, the tenth section of the act of 1864 was so amended as to allow the Central Pacific Railroad Company, and the Western Pacific Railroad Company of California, the Union Pacific Railroad Company, the Union Pacific Railroad Company, Eastern Division, and all other companies provided for in the above act, to issue their six per centum thirty years' bonds, to the extent of one hundred miles in advance of a continuous, completed line of construction; further, that the assignment made by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of said State, of the right to construct all that portion of said railroad and telegraph from the city of San José to Sacramento, was ratified and confirmed to the latter company, "with *all the privileges and benefits* of the several acts of Congress relating thereto and subject to all the conditions thereof." 13 Stat. 504.

From this review of the legislation of Congress it appears that the acts of 1862, 1864, and 1865 all relate to the same general subject; and, when examined for the purpose of ascertaining the object of Congress in passing them, they

should be regarded as one enactment. What that object was is no longer a subject of inquiry in this court. In *United States* v. *Union Pacific Railroad Company*, 91 U. S. 92, this court, speaking by Mr. Justice Davis, held that the construction of a railroad connecting the Missouri River with the Pacific Ocean was a national work, because such a road would be a great national highway, under national control; that the scheme for establishing that highway originated in national necessities, the country being involved at the time in a civil war which threatened the disruption of the Union, and endangered the safety of our possessions on the Pacific; and that the enterprise required national assistance, because private capital was inadequate for an undertaking of such magnitude. It appears upon the face of the act of 1862, as amended by the act of 1864, that Congress had in view the promotion of the public interest and welfare by the construction of a railroad and telegraph line that could be used by the government at all times, but particularly in time of war, for postal, military, and other purposes, and that so far as the government and the public were concerned, such road and telegraph were to be operated as one continuous line. These ends were to be attained through the agency of a corporation created by Congress, and of certain corporations organized under state laws which Congress selected as instruments to be employed in accomplishing the public objects specified in its legislation.

Naturally, the next inquiry is, whether Congress made any and if any what provision to secure the United States against liability on account of its bonds issued in aid of the construction of this national highway? The acts of 1862 and 1864 furnish the answer to this question. By the act of 1862, as we have seen, it is provided that the issuing of bonds and their delivery to the railroad company entitled to receive them should *ipso facto* constitute a mortgage on the whole line of the railroad and telegraph constructed by the company receiving the bonds, together with its rolling stock, fixtures and property of every kind and description, and in consideration of which the bonds were issued; and upon the refusal or failure of the company to redeem the bonds, or any part of

them, when required so to do by the Secretary of the Treasury in accordance with the act, the railroad, with all the rights, functions, immunities and appurtenances appertaining thereto, and all lands granted to the company, could be taken possession of by that officer, for the use and benefit of the United States. The same act also authorized the government to retain all sums due as compensation for services rendered in its behalf by the railroad company.

These provisions were so far altered by the act of 1864 as to authorize the Union Pacific Railroad Company, or any company authorized to participate in the construction of the road from the Missouri River to the Pacific Ocean, to place a first mortgage on their railroad and telegraph lines, respectively, (to an amount not exceeding the bonds of the United States,) to which mortgage the lien of the United States bonds was made subordinate — saving the right of the government, reserved in the act of 1862, to be preferred in the use of the railroad and telegraph for the transportation of the mails, troops and munitions of war, and the transmission of telegraphic dispatches. The act of 1864 also provided that only one half of the compensation due from the government for services rendered should be retained and applied to the payment of the bonds issued by the United States. But the act of May 7, 1878, c. 96, § 2, known as the Thurman Act, 20 Stat. 56, provided that the whole of such compensation might be retained, one half to be applied to the payment of interest on the bonds issued by the United States, and the other half to be turned into the sinking fund established by that act.

These and other provisions indicate the extent to which Congress deemed it necessary to make provision for the protection of the United States against liability on its bonds loaned to railroad companies for the purposes indicated in the act of 1862. The security taken by the government was, of course, impaired by the act of 1864, which subordinated the lien of the United States, as originally declared, to the first mortgages executed by the respective companies under the authority of that act. But if the act of 1862, fairly interpreted, excludes the idea that stockholders of the companies

receiving subsidy bonds were to be personally liable to the United States for the principal and interest accruing on those bonds, the legislation of 1864, however unwise, did not have the effect of imposing such liability.

Now the important fact disclosed by the Pacific Railroad acts is that no one of them contains any clause imposing upon the stockholders of a corporation receiving subsidy bonds personal responsibility for any debt due to the United States from such corporation by reason of its failure to pay those bonds at maturity. It was, of course, competent for Congress, when incorporating the Union Pacific Railroad Company, to impose such liability upon the stockholders of that corporation. But as it did not do so; as the personal liability of stockholders for the debts of the corporation arises only from statute, it cannot be claimed, nor is it claimed, that the stockholders of *that* corporation incurred by their subscriptions of stock any liability to the United States, or to any other creditor for the debts of that company; they were bound, of course, to make good the amount of their subscriptions; but that being done, their personal responsibility to creditors of the corporate body ceased. *Pollard* v. *Bailey*, 20 Wall. 520, 526; *Terry* v. *Little*, 101 U. S. 216; *Trustees of Free Schools in Andover* v. *Flint*, 13 Met. 539, 541; *Slee* v. *Bloom*, 19 Johns. 456, 474; *Carr* v. *Iglehart*, 3 Ohio St. 458; *Seymour* v. *Sturgess*, 26 N. Y. 134, 139; *Bohn* v. *Brown*, 33 Michigan, 257; *Woods* v. *Wicks*, 7 Lea, 40, 45; *Smith* v. *Huckabee*, 53 Alabama, 191, 193; *Salt Lake City National Bank* v. *Hendrickson*, 40 N. J. Law, 52, 54; *Coffin* v. *Rich*, 45 Maine, 507, 510; 3 Thomps. on Corp. § 2925, and authorities there cited. Congress, by its legislation, encouraged and invited the investment of private capital in the construction of a highway which, at that time, was deemed of vital importance to the whole country. As the stockholder of a corporation is not liable, beyond the amount of his unpaid subscription, for its debts, unless such liability is imposed by statute, and as the acts of Congress in question are silent upon that subject, every subscriber to the stock of the Union Pacific Railroad Company must be deemed to have become such upon the con-

dition, implied by law, that he should not be personally liable for the debts of the corporation. It is not too much to say that if the acts of 1862 and 1864 had made the stockholders of the corporations therein named personally liable, in proportion to their stock, for the repayment of the principal and interest of the bonds issued and delivered to such corporation, the accomplishing of the objects Congress had in view would have been seriously retarded, if not wholly defeated.

It is said, however, that these principles have no application to stockholders of California corporations that came into existence under constitutional and statutory provisions making a stockholder of a railroad corporation liable, in proportion to his stock, for its debts and obligations.

This position cannot be sustained except upon the theory that Congress intended to take a larger security in respect of that part of the Pacific road which the California company undertook to construct and maintain, than it took in respect of the Union Pacific railroad. But it cannot be inferred from the legislation of Congress that it intended, for the protection of the interests of the United States, to impose a heavier liability upon the stockholders of the California company than was imposed upon the stockholders of the Union Pacific Railroad Company. Why should it have so intended? Why should it be supposed that Congress would purposely make it more difficult to construct one part of the proposed national highway than another? The supreme end sought to be attained was, by means of private capital and governmental aid, to secure the construction of the whole line for the benefit, primarily, of the United States, and for the use of all the people. If, instead of making use of the Central Pacific Railroad Company of California, Congress had itself created a corporation with authority to construct a road from San Francisco through the Territories of the United States, to meet the Union Pacific Railroad Company, no one would suggest that the stockholders of such a corporation would have been liable for its debts, unless Congress expressly imposed liability upon them. In respect of the liability of stockholders to the United States, on account of its subsidy bonds,

we cannot believe that Congress intended to apply to the stockholders of the state corporation, selected to participate in the great work of establishing railroad and telegraphic communication between the Missouri River and the Pacific Ocean, any rule that it did not prescribe for stockholders of a national corporation created for the purpose of accomplishing the same object.

As Congress contemplated the construction of one connected, continuous line from the Missouri River to the Pacific Ocean to be used for governmental and public purposes; as it recognized "the necessity of uniting, by iron bands, the destiny of the Pacific and Atlantic States;" as its enactments disclose an intention to grant national aid to the corporations named, upon terms and conditions applicable alike to all of them, we cannot impute to it the purpose to make a discrimination against one part of that line that would necessarily have retarded the accomplishment of the important public object which it had in view. Throughout the whole of the acts referred to is manifest the purpose that the California corporation, and other state corporations named, should enjoy the rights, immunities, benefits, and privileges given to them, upon the same terms and conditions as were prescribed for the Union Pacific Railroad Company. But the imposition of liability upon the stockholders of the California corporation for the debt of that corporation arising out of the bonds it received from the United States, when no such liability was imposed upon the stockholders of the Union Pacific Railroad corporation on account of like bonds received by it, would be inconsistent with that equality in terms and conditions which Congress prescribed for the corporations that were invited or permitted to participate in the grants, rights, benefits, privileges and immunities granted by the general government to the corporation created by it.

It should be remembered that the question here is not whether the stockholders of the California company can be made liable for its debts to the United States arising in some other way than under the Pacific Railroad Acts and by the acceptance of United States bonds in aid of the construction

of its road. Nor are we now to decide whether the adoption of the California corporation as an instrument of the national government in accomplishing a national object exempted its stockholders from liability under the constitution and laws of California to ordinary creditors. The question before us relates only to the liability of the stockholders of the California corporation on account of a claim of the United States arising out of particular acts of Congress which authorized the issuing and delivery of bonds to that corporation, and made such provision for the security of the United States as Congress deemed necessary and proper, but which did not reserve any right to look to the stockholders of that corporation if it failed or refused to meet the obligation imposed upon it in respect of those bonds.

Touching the obligation of the several railroad companies to pay at maturity the bonds received from the United States in aid of the construction of a railroad and telegraph line to the Pacific Ocean, there are cogent reasons, apart from the words of the act of Congress, why a rule should not be applied to the stockholders of the Central Pacific Railroad Company which confessedly cannot be applied to stockholders of the Union Pacific Railroad Company. Both corporations participated in the execution of the purposes of Congress. Each received franchises and powers from the Federal government to be exerted for objects of national concern. Although the Central Pacific Railroad Company of California became an artificial being, under the laws of that State, its road owes its existence to the national government; for, all that was accomplished by the corporation that constructed and owns it was accomplished in the exercise of privileges granted by, and because of the aid derived from, the United States. "By the act of 1862," this court has said, "Congress granted this corporation a right to build a road from San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of the State and thence through the Territories of the United States, until it met the road of the Union Pacific Company. For this purpose all the rights, privileges and franchises were given this company that were granted the

Union Pacific Company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company. The land grants and subsidy bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved. Each of the companies was required to file in the Department of the Interior its acceptance of the conditions imposed before it could become entitled to the benefits conferred by the act. This was promptly done by the Central Pacific Company, and in this way that corporation voluntarily submitted itself to such legislative control by Congress as was reserved under the power of amendment." Again, in the same case: "But for the corporate powers and financial aid granted by Congress it is not probable that the road would have been built." *Sinking Fund cases*, 99 U. S. 700, 727. And in *California* v. *Pacific Railroad Company*, 127 U. S. 1, 38, Mr. Justice Bradley, delivering the opinion of the court, referred to the Pacific Railroad Acts, relating to the Central Pacific Railroad, and said: "Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the acts of 1862 and the subsequent acts to construct a railroad from the Pacific Ocean across the State of California and the Federal Territories until it should meet the Union Pacific, which it did meet at Ogden in the Territory of Utah." The relations between the California corporation and the State were of no concern to the national government at the time the purpose was formed to establish a great highway across the continent for governmental and public use. Congress chose this existing artificial being as an instrumentality to accomplish national ends, and the relations between the United States and that corporation ought to be determined by the enactments which established those relations; and if those enactments do not expressly nor by implication subject the stockholders of such corporation to liability for its debts, it is to be presumed that Congress intended to waive its right to impose any such liability.

The views we have expressed render it unnecessary to con-

sider any other question in the case. We are of opinion that the bill filed by the United States was properly dismissed, and that the order of the Circuit Court of Appeals affirming such dismissal was correct.

The judgment is, therefore, affirmed.

EVANSVILLE *v.* DENNETT.

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

No. 509. Submitted May 2, 1895. — Decided March 2, 1896.

The recital in a series of bonds, issued by a municipal corporation in Indiana in payment of its subscription to the stock of a railroad company, that they were issued "in pursuance of an act of the legislature of the State of Indiana and ordinances of the city council of said city, passed in pursuance thereof" do not put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued.

The recital in such series that the bonds were issued to the railroad company, "by virtue of a resolution of said city council passed May 23, 1870," do not put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms.

Such recitals in such bonds as against a *bona fide* purchaser for value of such bonds estop the municipal corporation from asserting that the bonds were not issued, for stock subscribed, upon a petition of two thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed.

Under the recitals in the bonds issued to the railroad company a *bona fide* purchaser for value was not put upon inquiry to ascertain whether a proper petition of two thirds of the residents of Evansville, freeholders of that city, had been presented to the common council, before that body had subscribed for stock in the said railroad company.

A *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi, and Paducah Railroad Company is not charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it; and he had a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds.

THE case is stated in the opinion.

Opinion of the Court.

Mr. George A. Cunningham for plaintiff in error.

Mr. George A. Sanders and *Mr. William A. Bowers* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This case is here upon a certificate by the Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

It appears from the statement of facts accompanying the questions propounded to this court that, on May 1, 1868, the city of Evansville issued its bonds, bearing date on that day, to the amount in the aggregate of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Henderson and Nashville Railroad Company.

Each bond was for the sum of one thousand dollars, was made payable to the bearer thirty years after date, with interest on presentation of the coupons attached, and was of the tenor and effect following:

"$1000.00. No. ——.

"United States of America.

"City of Evansville, State of Indiana.

"On account of stock subscription on the Evansville, Henderson and Nashville Railroad Company.

"The city of Evansville, in the State of Indiana, promises to pay to the bearer thirty (30) years after date the sum of one thousand dollars, at the office of the Farmers' Loan and Trust Company, of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually at the office of the Farmers' Loan and Trust Company, in the city of New York, on the first day of November and the first day of May of each year, on presentation and delivery of the interest coupons hereto attached. This being one of a series of three hundred bonds of like tenor and date issued by the city of Evansville, in payment of a subscription to the Evansville, Henderson and Nashville Railroad Company, made in pursuance of an act of the legislature of the State of Indiana

and ordinances of the city council of said city, passed in pursuance thereof. The city of Evansville hereby waives all benefit from valuation or appraisement laws.

"In testimony whereof, the said city of Evansville has hereunto caused to be set its corporate seal, and these presents to be signed by the mayor of said city, and countersigned by the clerk thereof.

"Dated the 1st of May, 1868.

"WILLIAM H. WALKER, *Mayor.*

"A. M. MCGRIFF, *City Clerk.*"

On December 1, 1870, the city also issued bonds, amounting in the aggregate to three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Carmi and Paducah Railroad Company, each bond being dated December 1, 1870, for the sum of one thousand dollars, payable to the Evansville, Carmi and Paducah Railroad Company, or bearer, December 1, 1895, with interest on presentation of the coupons attached. Each of those bonds was in the following form:

"Total amount authorized, three hundred thousand dollars.

"No. —. $1000.00.

"City of Evansville, State of Indiana.

"Evansville, Carmi and Paducah Railroad Company.

"By virtue of an act of the general assembly of the State of Indiana, entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27, 1847; and by virtue of an act of the general assembly of the State of Indiana, amendatory of said act, approved March 11, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad

Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of 7 per cent per annum, for the purpose of paying the subscription as authorized above. The said city of Evansville hereby acknowledges to owe and promises to pay to the Evansville, Carmi and Paducah Railroad Company, or bearer, one thousand dollars, without relief from valuation or appraisement laws, payable on the 1st day of December, A.D. 1895, at the Farmers' Loan and Trust Company, in the city of New York, with interest from the date thereof, at the rate of 7 per cent per annum, said interest payable semi-annually on the first day of June and the first day of December on presentation of the proper coupons for the same at said bank. The faith and credit and real estate revenues and all other resources of the said city of Evansville are hereby solemnly and irrevocably pledged for the payment of the principal and interest of this bond.

"In testimony whereof, the mayor of the city of Evansville has hereunto set his hand and affixed the corporate seal of the said city, and the city clerk of said city has countersigned these presents this 1st day of December, 1870.

"WM. HELDER, *City Clerk.* WM. BAKER, *Mayor.*"

The charter of Evansville, approved January 27, 1847, in the fortieth clause of section 30 thereof, gave the city power "to take stock in any chartered company for making roads to said city, or for watering said city, and in any company authorized or empowered by the commissioners of Vanderburg County to build a bridge on any road leading to said city; and to establish, maintain and regulate ferries across the Ohio River from the public wharves of said city: *Provided*, That no stock shall be subscribed or taken by the common council in any such company, unless it be on the petition of two thirds of the residents of said city, who are freeholders

of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed: *And provided, also*, That in all cases where such stock is taken the common council shall have power to borrow money and levy and collect taxes on all real estate (either inclusive or exclusive of improvements, at their discretion) for the payment of said stock." Laws of Indiana, Local, 1846–47, p. 14, c. 1.

This clause of the original charter of Evansville was, in form, amended by the act of the legislature of the State of Indiana, approved December 21, 1865, entitled "An act to amend the fortieth clause of section 30 of an act entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27, 1847, and declaratory of the meaning of the second section of the same act." Laws of Indiana, Called Session, 1865, pp. 76, 83.

The certificate before us states that "under the decisions of the Supreme Court of Indiana, this act was repugnant to the constitution and invalid, in that it did not set out the entire section as amended."

In 1867 the legislature of Indiana attempted to amend the act of 1865, above referred to, by an act approved March 11, 1867, entitled "An act to amend the first section of an act entitled 'An act to amend the fortieth clause of section thirty of an act entitled "An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter," approved January 27, 1847, and declaratory of the meaning of the second section of the same act,' approved December 21, 1865, so as to authorize the common council of the city of Evansville to subscribe for and take stock in the Evansville, Henderson and Nashville Railroad Company, or any other company, or corporation, organized under and by virtue of the laws of the Commonwealth of Kentucky, for the purpose of constructing a railroad leading from Nashville, in the State of Tennessee, to a point on the Ohio River at or near Evansville, Indiana." Laws of Indiana, 1867, p. 121, c. 52.

This act authorized subscriptions for stock in the Evansville,

Henderson and Nashville Railroad Company, or other railroad companies, by the city of Evansville, when a majority of the qualified voters of the city, who were also taxpayers, should vote therefor.

It is certified to us that under the decision of the Supreme Court of the State of Indiana this latter act was invalid, because amendatory of a prior invalid act.

The bonds in question, of both series, were in fact issued in attempted compliance with the act of March 11, 1867, referred to in the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company.

The ordinances of the city council of the city of Evansville authorizing the issue of both series of bonds disclose that they were issued pursuant to an election by the legal voters of the city of Evansville, but do not recite that any petition of resident freeholders of the city was presented to the common council, as required by the charter; and no such petition was, in fact, in either case made or presented to the common council of the city of Evansville.

The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity and for value, and is a *bona fide* holder thereof.

This suit is brought upon matured coupons of both series of bonds.

The questions propounded are these:

1. Does the recital in the series of bonds, issued in payment of subscription to the Evansville, Henderson and Nashville Railroad Company, that they were issued "in pursuance of an act of the legislature of the State of Indiana and ordinances of the city council of said city, passed in pursuance thereof" put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

2. Does the recital in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, that they were issued "by virtue of a resolution of said city council passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?

3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed?

4. Under the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two thirds of the residents of Evansville, freeholders of that city, had been presented to the common council, before that body had subscribed for stock in the said railroad company?

5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it, or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?

Such is the case made by the statement of facts. By that statement we are informed that the act of the legislature of Indiana of December 21, 1865, purporting to amend the fortieth clause of section 30 of the charter of Evansville granted in 1847, as well as the act of March 11, 1867, amendatory of the above act of December 21, 1865, were adjudged by the Supreme Court of Indiana to be unconstitutional and invalid. And, upon that basis, this court is asked to answer the questions embodied in the certificate from the judges of the Circuit Court of Appeals.

Under this presentation of the case, we put aside the acts of 1865 and 1867 as giving no support to the rights of the plaintiff, and look alone to the charter of 1847.

It cannot be doubted that the power given by the charter of 1847 "to take stock in any chartered company for making

roads to said city," authorized the city to subscribe to the capital stock of the Evansville, Henderson and Nashville Railroad Company, as well as of the Evansville, Carmi and Paducah Railroad Company. In *City of Aurora* v. *West*, 9 Indiana, 74, 86, one of the questions was whether the authority given to the city council of Aurora, in the State of Indiana, "to take stock in any chartered company for making roads to said city," was authority to subscribe to the stock of a railroad company. The Supreme Court of Indiana said: "Here, the power is expressly granted, and the question is merely whether the road in which the stock was subscribed is one contemplated by the charter. We think, also, that a company chartered to build a railroad is chartered to build a road. We think a railroad is a road as properly as a turnpike road, or a plank road, is a road; and one of these kinds was contemplated by the charter, and not common public highways, as the latter are not constructed by chartered companies, while the former are, and the stock is to be taken by the city in a chartered company. A railroad would accommodate the people of the city more than a plank or a turnpike road, and the stock would be of more value."

It is true that the city charter provided that "no stock shall be subscribed or taken by the common council in such company, unless it be on the petition of two thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed." But these were only conditions which the statute required to be performed or met before the power given was exercised. That there was legislative authority to subscribe to the stock of these companies cannot be questioned, although the statute declared that the power should not be exercised except under the circumstances stated in the statute.

Was a *bona fide* purchaser of bonds issued in payment of a subscription of stock — the power to subscribe being clearly given — bound to know that the conditions precedent to the exercise of the power were not performed? If the bonds had not contained any recitals importing a performance of such

conditions before the power to subscribe was exercised, then it would have been open to the city to show, even as against a *bona fide* purchaser, that the bonds were issued in disregard of the statute, and, therefore, did not impose any legal obligation upon it. *Buchanan* v. *Litchfield*, 102 U. S. 278; *School District* v. *Stone*, 106 U. S. 183, 187.

But the bonds issued on account of subscription to the stock of the Evansville, Henderson and Nashville Railroad Company recite that the subscription was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof." This imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised.

The bonds issued to the Evansville, Carmi and Paducah Railroad Company recite that they were issued "by virtue of" the city's charter of January 27, 1847, and that recital imports compliance with the provisions of the charter. The additional recitals that the bonds were issued by virtue of the act of March 11, 1867, as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription, and of a resolution ordering the issuing of bonds, did not, as between the city and a *bona fide* purchaser for value, prevent the latter from assuming the truth of the recital that the bonds were issued by virtue of, that is, in compliance with, the city's charter.

In *School District* v. *Stone*, above cited, the court said: "Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers — invested with authority to determine whether such conditions have been performed — the responsibility of issuing them when such conditions have been com-

plied with, recitals, by such officers, that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of' the statute, have been held in favor of *bona fide* purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued." *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners* v. *Bolles*, 94 U. S. 104; *Mercer County* v. *Hacket*, 1 Wall. 83; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 238–9 and authorities there cited; *Cairo* v. *Zane*, 149 U. S. 122.

The charter of the city of Evansville gave authority to subscribe to the stock of these railroad corporations, and, as held by the Supreme Court of Indiana, in *Evansville, Indianapolis & Cleveland Straight Line Railroad Co.* v. *Evansville*, 15 Indiana, 395, 412, the express power given to borrow money necessarily implied "the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness."

As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature. The charter of 1847 contemplated a petition of two thirds of the resident freeholders of the city. The act of 1867 provided for an election by the qualified voters, who were also taxpayers. Notwithstanding the provisions of the charter of 1847 the city council before subscribing for the stock might well have ascertained what were the wishes of taxpayers, who were also qualified voters. So far as the recitals in the bonds are concerned, the purchaser of bonds might properly have assumed that both methods were pursued. Although, in strict law, he was chargeable with knowledge that the act

of 1867 was invalid, and, consequently, that an election held under it could not itself authorize a subscription of stock by the city, he was entitled to stand upon the validity of the city charter, and to act upon the assurance, given by the recitals in the bonds, that the provisions of that charter had been respected, and, therefore, that the subscription of stock had been preceded by a petition to the city council of two thirds of the resident freeholders of the city.

The present case comes directly within *Van Hostrup* v. *Madison City*, 1 Wall. 291, 296, 297.

The city of Madison, Indiana, was authorized by its charter "to take stock in any chartered company for making a road or roads to the said city, . . . *provided*, that no stock shall be subscribed . . . unless it be on petition of two thirds of the citizens who are freeholders," etc. Mr. Justice Nelson, delivering the unanimous judgment of this court, said: "It is supposed that the authority to subscribe is tied down to a chartered road, the line of which comes within the limits of the city; and that the words are to be taken in the most literal and restrictive sense. But this, we think, would be not only a very narrow and strained construction of the terms of the clause, but would defeat the manifest object and purpose of it. The power was sought and granted, with the obvious idea of enabling the city to promote its commercial and business interests, by affording a ready and convenient access to it from different parts of the interior of the State, and thus to compete with other cities on the Ohio River and in the interior which were or might be in the enjoyment of railroad facilities." Touching another issue in that case — and a similar issue is presented in the present litigation — the court said: "Another objection taken is, that the proviso requiring a petition of two thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to sub-

scribe the stock and issue the bonds, as has been repeatedly held by this court. Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and are in the hands of *bona fide* purchasers for value, we should have felt bound to acquiesce in it."

The case before us cannot be distinguished from the one just cited.

It may be added that the questions here presented were carefully examined by Judge Woods in the case of *Moulton* v. *City of Evansville*, 25 Fed. Rep. 382, 388, where will be found a full review of the adjudged cases. That was an action to recover the amount of coupons of bonds of the same class as those here involved. The conclusion there reached was that the purchaser of the bonds had a right to rely on the recital as showing that a proper petition of freeholders was presented to the council before the subscription was ordered. The court said: "The purchaser, it is clear, was bound to know that the act of 1867, and the election ordered and held in compliance with it, were void, and that the law of 1847 required a petition of freeholders as a condition precedent to the right of the common council to make such stock subscriptions; but while bound by legal construction to know these things for himself, he, for the same reason, had a right to presume that the common council and officials of the city who ordered and made the bonds had the same knowledge; that they ordered and held the election as matter of precaution merely, and without the omission of any requirement of the act of 1847, as they must have intended to certify, if they acted honestly, as they are presumed to have acted intelligently, in ordering the bonds issued."

It is contended that the defence is sustained by *Barnett* v. *Denison*, 145 U. S. 135, 139. That case has no application to the issues here presented. The only point there decided was that the requirement of its charter, that all bonds issued by

the city of Denison, "shall specify for what purpose they were issued," was not satisfied by a bond that purported on its face to be issued by virtue of an ordinance, the date of which was given, but not its title or contents.

The conclusion we have reached upon legal grounds, and in accordance with our former decisions, is the more satisfactory, because of the long time which elapsed before any question was raised by the city as to the validity of the bonds. The city having authority, under some circumstances, to put these bonds upon the market and having issued them under the corporate seal of the city, and under the attestation of its highest officer, certifying that they were issued in payment of a subscription of stock made in pursuance of the city's charter, the principles of justice demand that the bonds, in the hands of *bona fide* holders for value, should be met according to their terms, unless some clear, well settled rule of law stands in the way. No such obstacle exists.

The court answers the first, second, and fourth questions in the negative, and the third in the affirmative. Its answer is in the negative to the first clause, and in the affirmative to the second clause, of the fifth question.

SWEARINGEN *v.* UNITED STATES.

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

No. 567. Submitted October 21, 1895. — Decided March 9, 1896.

The newspaper article, in the note on the opposite page, while its language is coarse, vulgar, and, as applied to an individual, libellous, was not of such a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the minds and morals of those into whose hands it might fall, as to make it an offence to deposit it in the post office of the United States, to be conveyed by mail and delivered to the person to whom it was addressed.

In the District Court of the United States for the District

of Kansas, November term, 1895, Dan K. Swearingen was indicted, under the provisions of section 3893 of the Revised Statutes, for depositing in the post office of the United States, at Burlington, Kansas, to be conveyed by mail and delivered to certain named persons a certain publication or newspaper, entitled "The Burlington Courier," dated September 21, 1894, and containing a certain article charged to be of an obscene, lewd, and lascivious character, and non-mailable matter.[1]

The indictment contained three counts, differing only in the names of the persons to whom copies of the newspapers

---

[1] That article is added by the reporter to the statement of the case, only omitting the names and substituting dashes. "About the meanest and most universally hated and detested thing in human shape that ever cursed this community is the red headed mental and physical bastard that flings filth under another man's name down on Neosho street. He has slandered and maligned every Populist in the State, from the governor down to the humblest voter. This black hearted coward is known to every decent man, woman, and child in the community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion. He is a contemptible scoundrel and political blackleg of the lowest cut. He is pretending to serve Democracy and is at the same time in the pay of the Republican party. He has been known as the companion of negro strumpets and has revelled in lowest debauches. He has criminally libelled and slandered such men as —— ——, —— ——, —— ——, —— ——, ——, and dozens of others whom we might name, who are recognized by all parties as among the oldest and most respected citizens of the county. His soul, if he has a soul, is blacker than the blackest shades of hell. He is the embodiment of treachery, cowardice, and dishonor, and hasn't the physical nor moral courage to deny it. He stands to-day hated, despised, and detested as all that is low, mean, debased, and despicable. We propose to have done with the knave. We have already devoted too much valuable space to him. Time and again has he been proven a wilful, malicious, and cowardly liar, and instead of subsiding he has redoubled his lies. He lies faster than ten men could refute; and for what? A little Republican slush-money! He is lower, meaner, filthier, rottener than the rottenest strumpet that prowls the streets by night. Again we say, we are done with him. The sooner Populists and Populist newspapers snub him, quit him cold, ignore him entirely, the sooner will he cease to be thought of only as a pimp that any man can buy for $1 or less. He is too little and rotten to merit the notice of men. We have been wrong in noticing the poltroon at all, and henceforth are done."

were addressed. In each count the article was charged to be of an obscene, lewd and lascivious nature. The defendant moved to quash the indictment because the same did not state or charge a public offence, and because there were several offences improperly joined in each count. This motion was overruled. The defendant pleaded not guilty; a trial was had; and a verdict of guilty was rendered. Thereupon the defendant filed a motion in arrest of judgment and for a new trial. These motions were overruled, and the defendant was sentenced to be imprisoned at hard labor in the penitentiary for the period of one year, to pay a fine of $50, and to pay the costs of prosecution. Thereupon a writ of error was sued out to this court.

Mr. J. D. McCleverty for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

The record discloses that the defendant below was, in the month of September, 1894, the editor and publisher of a newspaper called "The Burlington Courier," and was indicted for having mailed several copies of the paper, containing the article referred to in the previous statement, addressed to different persons.

The bill of exceptions shows that, at the trial, the government offered the article in question in evidence, and that the defendant objected for the reasons that no public offence was stated in the indictment, that there was a misjoinder of offences, and that the words of said newspaper article did not constitute unmailable matter. These objections were overruled, and an exception was allowed. The article was then read to the jury, and evidence was offered and received tending to show that on September 21, 1894, copies of the newspaper containing the said article were mailed by employés of the defendant, addressed severally to Riggs, Cowgill and

Lane, who were regular subscribers to the paper, and whose names were on the mail list. The defendant, on the ground of its insufficiency, moved to strike out the evidence as to the mailing of any paper to Lane or Cowgill. This motion was overruled, as was likewise a motion to compel the district attorney to elect upon which count of the indictment he would rely. The defendant offered no evidence, and the court charged the jury that the newspaper article in evidence, which the defendant admitted he published, was obscene and unmailable matter, and that the only thing for the jury to pass upon was whether the evidence satisfied them, beyond a reasonable doubt, that the defendant deposited, or caused to be deposited, in the post office at Burlington, Kansas, newspapers containing said article. To the rulings of the court overruling the motions and to the charge exceptions were taken and allowed.

As we think that the court erred in charging the jury that the newspaper article in question was obscene and unmailable matter, it will not be necessary for us to consider the merits of those assignments which allege error in the admission of evidence.

This prosecution was brought under section 3893 of the Revised Statutes, which declares that "every obscene, lewd or lascivious book, pamphlet, picture, paper, writing or other publication of an indecent character . . . are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office, nor by any letter carrier; and any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall, for each and every offence, be fined not less than one hundred dollars nor more than five thousand dollars, or be imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The indictment contained three counts, in each of which the offence charged was the mailing of a copy of a newspaper containing the article referred to in the previous statement, and which was alleged to be "an obscene, lewd and lascivious article."

As already stated, the court charged the jury that the newspaper article was obscene and unmailable matter, and that the only question for the jury to pass upon was whether the defendant deposited the same in the post office at Burlington, Kansas.

The language of the statute is that "every obscene, lewd *or* lascivious book or paper" is unmailable, from which it might be inferred that each of those epithets pointed out a distinct offence. But the indictment alleges that the newspaper article in question was obscene, lewd *and* lascivious. If each adjective in the statute described a distinct offence, then these counts would be bad for duplicity, and the defendant's motion in arrest of judgment for that reason ought to have been sustained. We, however, prefer to regard the words "obscene, lewd or lascivious," used in the statute, as describing one and the same offence. That was evidently the view of the pleader and of the court below, and we think this is an admissible construction.

Regarding the indictment as charging, in each count, a single distinctive offence, to wit, the mailing of an obscene, lewd and lascivious paper, we think the court below erred in charging the jury that the evidence, so far as the character of the paper was concerned, sustained the charge, and that the only duty of the jury was to find whether the defendant knowingly deposited or caused to be deposited in the post office newspapers containing the article so described.

Assuming that it was within the province of the judge to determine whether the publication in question was obscene, lewd and lascivious, within the meaning of the statute, we do not agree with the court below in thinking that the language and tenor of this newspaper article brought it within such meaning. The offence aimed at, in that portion of the statute we are now considering, was the use of the mails to circu-

late or deliver matter to corrupt the morals of the people. The words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.

Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libellous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.

The judgment of the court below is reversed and the cause remanded with instructions to set aside the verdict and award a new trial.

Justices Harlan, Gray, Brown, and White dissented.

UNION PACIFIC RAILWAY COMPANY *v.* O'BRIEN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 119. Argued and submitted December 13, 1895. — Decided March 2, 1896.

A railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants the company is liable for the injury sustained.

The servant, on his part, undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself.

The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by embankments and excavations.

Statement of the Case.

There are cases in which, if the employé knows of the risk and the danger attendant upon it, he may be held to have taken the hazard by accepting or continuing in the employment; but this case, as left to the jury under the particular facts, is not one of them.

THIS was an action brought by Nora O'Brien against the Union Pacific Railway Company, in the Circuit Court for the District of Colorado, to recover damages for the death of her husband, John O'Brien, who was in the employment of the defendant as a locomotive engineer, running on the South Park division of the company's line, and was killed by the derailment of his engine. The evidence tended to show that at the time of his death O'Brien, who had been an engineer upon the road for seven or eight years, was bringing a freight train of twenty-three cars from Como, Colorado, to Denver, and was running through that part of the mountains known as Platte Cañon; that O'Brien left Como at seven or eight o'clock on the evening of September 3, 1890, and that the accident occurred at one o'clock in the morning of September 4; that the line of railway followed the course of the South Platte River, and that there were numerous cuts thereon caused by the intersection of the line with the spurs projecting from the foot hills along which the line was built; that the locomotive was derailed by reason of sand and gravel which had been deposited on the track to a depth of some seven or eight inches and to the extent of from ten to twenty feet; that this deposit was in a cut, approached by a curve to the left, and then curving to the right as the track entered the cut, a double curve; that the river bank of the cut was about seven or eight feet high, the other bank being much higher and very steep, sloping back up the mountain side; that down the upper bank ran a narrow gully which in rainy weather brought down water, carrying sand and disintegrated rock; that this gully had had an outlet into the river before the track was constructed across it; that there was no opening or culvert under the railroad track through which the water and material brought down could escape; that a small ditch ran alongside the roadbed, but if the water coming down was greater in quantity than this ditch could carry, then the sur-

plus would run over and upon the tracks of the railroad; and that rain had fallen the evening previous to the accident, and the water rushing down the gully had deposited this mass of sand and gravel upon the track. There was some evidence that the gully was narrow, crooked, and concealed by the hills.

One Hall, a locomotive engineer, familiar with the road, testified that there were many cuts on the line; that sand was frequently found thereon in several places; that there were usually rains about the latter part of August or September, and that in rainy weather, on account of the steepness of the mountains, more or less material would be deposited on the track. Defendant then propounded this question on cross-examination, "Are the engineers here aware of that fact?" to which plaintiff's counsel interposed an objection, which was sustained, and defendant excepted. The witness had also testified that a culvert would have added to the safety of this cut, and was asked this question by defendant: "You said you thought the culvert would make it much safer, but is not that cut constructed there, and the water run out of it exactly as the cuts are ordinarily constructed on roads running through such places?" The question was objected to, the objection sustained, and defendant excepted.

George Warnick, the locomotive fireman who was on the engine when the accident happened, gave evidence on defendant's behalf tending to show negligence on the part of deceased, and was asked on cross-examination whether he had in answer to certain specified questions put to him at the hospital on the Sunday following stated that neither he nor the engineer was to blame for the accident. This he denied, and leading questions were permitted to be propounded to a witness called in rebuttal to contradict him, to which exceptions were saved.

Defendant asked the court to give the jury the following instructions:

"1. The court is asked to instruct the jury that the burden of proof is upon the plaintiff to show that the accident occurred by reason of the negligence of the defendants, and

that the plaintiff was in the exercise of due care at the time of the accident, and that due care in such a case required of the deceased that he be vigilant and watchful to avoid such danger as his experience of the road must have made him aware he must expect in such places as the place where the accident occurred, and under the circumstances detailed by the witnesses, to wit: at a time when heavy rains had been met with, and that there has been offered no evidence whatever upon that point by the plaintiff, not even a reputation for care, but there has been evidence offered by defendant that he was not in the exercise of due care; nor has there been any evidence offered as to whether if the sand had been discovered at the time it might have been discovered he could or could not have applied the air in time to prevent the accident.

"2. The court is asked to instruct the jury that a party taking employment as an engineer in running a locomotive assumes the risks that are incident to the employment and to the running of locomotives over the roads operated by his employer, and if the jury believe that the country through which this road ran and its location was such that sand was frequently deposited on the track, then the deposit of sand on the track when heavy rains occurred must be taken as one of the ordinary risks of his employment, and the duty of the engineer was to be vigilant in avoiding it; and if the jury believe that the lack of such vigilance on the part of deceased contributed to the accident, then the plaintiff cannot recover.

"3. The court is asked to instruct the jury that the duty that an employer owes to the employé is to exercise ordinary care in providing the employé a safe place in which to work, and what is ordinary care is such care as men of ordinary prudence use in similar circumstances in the same employment.

"4. The court is asked to instruct the jury that there is no evidence to show that the construction of a culvert at the place where the accident happened would have avoided or would probably have avoided the accident."

Statement of the Case.

The court refused to give each of these instructions, and defendant excepted.

The court then charged the jury at large, leaving to them the issues of negligence on the part of the company in not properly constructing the track in that no outlet was provided for the water which would be liable to come down on the track and deposit sand and other obstructions thereon, and of contributory negligence.

The court advised the jury, among other things, that, as the road at the place where the accident occurred was built across the mouth of a gulch, and from all the circumstances it would seem that it would have been practicable to make a culvert under the track at that place, keeping open the channel towards the river through which the sand might have washed out, and in that manner obstruction might have been avoided, if they believed from the evidence, taking into consideration the size of the requisite opening and the quantity of sand and gravel coming down through the gulch, and all the circumstances, the track might have been built at reasonable expense so as to avoid the possibility of the sand coming upon the track and obstructing it, they were at liberty to find that the company was negligent in respect to the manner of building the track at that place. And also that, independently of the testimony of Hall on that subject, the jury, "having regard to the testimony before you, the situation of the road and the topography of the ground, the gulch coming down in the way described by the witnesses," might on their own judgment and knowledge of such matters determine in their own minds "whether it was practicable to make a culvert there with reasonable cost, which would have the effect of carrying away the sand and gravel so it would not be an obstruction upon the track."

To these parts of the charge defendant excepted.

The jury found in favor of plaintiff, and judgment having been entered on the verdict, the company carried the case to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment. 4 U. S. App. 221.

Thereupon this writ of error was brought.

Mr. John M. Thurston, (with whom was *Mr. John F. Dillon* on the brief,) for plaintiff in error.

Mr. H. E. Luthe and *Mr. C. S. Thomas*, for defendant in error, submitted on their brief.

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

The Circuit Court of Appeals held that as to the first question which the Circuit Court declined to allow to be put to Hall the answer would have been purely an inference based upon facts previously proven, and an inference which it was for the jury to draw from those facts, and therefore that it was properly excluded; that as to the second question addressed to that witness and excluded, namely, whether the cut was not constructed as cuts were ordinarily constructed on roads running through such places, the court did not err in its exclusion, because railway cuts are not made upon any recognized pattern, and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially similar to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead; and that it was within the discretion of the trial court to permit leading questions to be propounded for the purposes of impeachment. It was also held that the Circuit Court did not err in refusing the first instruction asked for defendant, because the burden of proof was not upon plaintiff to show in the first instance that he was in the exercise of due care at the time of the accident; that the second instruction was properly refused because it confused two distinct propositions, that relating to the risks assumed by an employé in entering a given service and that relating to the amount of vigilance that should be exercised under given circumstances, and because furthermore the instruction was not justified under the evidence; that while it was true that persons employed on lines of railway constructed at the foot of mountain ranges are necessarily subjected to greater dangers than those employed upon

railroads passing over prairie country, and that an engineer on a line running at the foot of a mountain range assumes the increased risk due to this fact, yet the employé does not assume the risks and dangers that are caused by negligence on the part of the company, but has a right to expect that the company will construct and maintain its track and roadbed in such a condition as not to subject its employés to unnecessary risks and dangers, and that it is the duty of such company to use due care to construct its roadbed at a place where it crosses a waterway so that it may be reasonably safe for use, and if it has not done that, a jury may be justified in finding negligence on its part.

And also that there was no error in declining to give the third instruction, inasmuch as it was fully covered in the charge; nor in refusing the fourth instruction because it was not proper under the evidence; nor in those parts of the charge complained of.

In our opinion the Circuit Court of Appeals committed no error in its rulings and in affirming the judgment of the court below, and we are not inclined to restate the reasons for the conclusions reached by that court, which are fully set forth in the case as reported.

The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction thereof an injury happen to one of its servants the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations. *Hough* v. *Railway Co.*, 100 U. S. 213; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593; *Gardner* v. *Michigan Central Railroad*,

150 U. S. 349, 359; *Union Pacific Railway* v. *Daniels*, 152 U. S. 684; *Chicago & Northwestern Railroad* v. *Swett*, 45 Illinois, 197; *Toledo & Peoria Railway* v. *Conroy*, 68 Illinois, 560; *Stoher* v. *Iron Mountain Railway Co.*, 91 Missouri, 509; *Paulmier* v. *Erie Railroad*, 34 N. J. Law, 151; *Snow* v. *Housatonic Railroad Co.*, 8 Allen, 441; *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282; *Smith* v. *Harlem Railroad Co.*, 19 N. Y. 127; *Patterson* v. *Connellsville Railroad Co.*, 76 Penn. St. 389.

It is the duty of the company in employing persons to run over its road to exercise reasonable care and diligence to make and maintain it fit and safe for use, and where a defect is the result of faulty construction which the employer knew or must be charged with knowing, it is liable to the employé if the latter use due care on his part, for injuries resulting therefrom.

There are cases in which, if the employé knows of the risk and the danger attendant upon it, he may be held to have taken the hazard by accepting or continuing in the employment; but this case, as left to the jury under the particular facts, is not one of them. This engineer was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect of latent defects, if there were any, in the construction, for such was its duty, and he cannot be held to knowledge of the danger lurking in this narrow seam in the mountain side by whose inequalities its sinuosities were hidden. We agree with the Circuit Court of Appeals that the Circuit Court properly instructed the jury in this regard, and that no error was committed in allowing the jury to consider the evidence in the light of their own judgment and knowledge, taking into consideration all the facts bearing on the defective construction in question.

Judgment affirmed.

Mr. Justice Brewer and Mr. Justice Peckham took no part in the consideration and decision of this case.

THE DELAWARE.

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

Nos. 555, 570. Argued January 10, 1896. — Decided March 2, 1896.

Gedney Channel, being the main entrance to the harbor of New York, is as much a part of the inland waters of the United States within the meaning of the act of March 3, 1885, c. 354, 23 Stat. 438, as the harbor within the entrance.

The real point aimed at by Congress in that act was to allow the original code (Rev. Stat. § 4233) to remain in force so far as it applies to pilotage waters, or waters within which it is necessary, for safe navigation, to have a local pilot.

The Delaware, returning to New York in ballast only, entered Gedney Channel upon a true course of W. by S. About the same time, the Talisman, a tug towing a pilot boat, entered it from the northwest, upon a course about S.SE., and not far from a right angle to the course of the Delaware. Under these circumstances, as they were approaching each other on crossing courses, the Delaware was bound to keep out of the way, and the Talisman to keep her course. The Delaware made no effort to avoid the Talisman, but kept on its course until about a minute before collision, when its engines were stopped too late. The Talisman was struck and sunk, and became a total loss. *Held*, that the Delaware was grossly in fault.

The Supervising Inspector's rules, so far as they require whistles to be used, ought to be construed in harmony with the International Code, and, as applied to vessels upon crossing courses, they mean that when a single blast is given by the preferred steamer she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her.

It is the primary duty of a steamer, having the right of way when approaching another steamer, to keep her course; all authorities agree that this rule applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way; and it is settled law in the United States that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty.

The facts stated and referred to in the opinion leave too much doubt about the fault of the Talisman to justify the court in apportioning the damages.

The Delaware is not exempted from liability by the provisions of the act

Statement of the Case.

of February 13, 1893, c. 105, 27 Stat. 445, entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property."

THIS was a suit in admiralty instituted by Charles H. Winnett, the owner and master, and the crew of the tug Talisman against the steamship Delaware, to recover damages for a collision between these vessels, which occurred on September 16, 1893, about ten o'clock in the morning, in Gedney Channel, off Sandy Hook, at the outer entrance of New York harbor, and within three miles from land.

In the District Court the Delaware was held solely in fault, 61 Fed. Rep. 525, and a decree was entered against her for $21,318.70. Her owner thereupon appealed to the Circuit Court of Appeals, which affirmed the decree of the District Court as to the fault of the steamship, and certified to this court certain questions as to whether she was absolved from liability by the provisions of the act of February 13, 1893, c. 105, 27 Stat. 445, entitled "An act relating to navigation of vessels, bills of lading and to certain obligations, duties and rights in connection with the carriage of property." This certificate was docketed as a separate cause. The owner of the Delaware thereupon applied for and was granted a writ of certiorari to bring up the whole record, upon the ground that the Circuit Court of Appeals erred in failing to find contributory negligence on the part of the Talisman.

The first three sections, containing the material provisions of the act in question, commonly known as the Harter Act, are printed in the margin.[1]

---

[1] An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of

Mr. J. Parker Kirlin for appellant.

Mr. Harrington Putnam for appellees.

Mr. Justice Brown delivered the opinion of the court.

There are two questions involved in this case: *first*, whether the tug Talisman was guilty of a fault contributing to the collision; and, *second*, whether the Delaware is exonerated from liability under the act of February 13, 1893, known as the Harter Act, by the fact that her owners had used due diligence to make her seaworthy, and provide her with competent officers and crew.

1. Gedney Channel, in which the collision took place, is a dredged passage about 1100 feet in width, running from the open ocean in a direction about W. NW. ¼ W., and constituting the main entrance to New York harbor. It is defined by

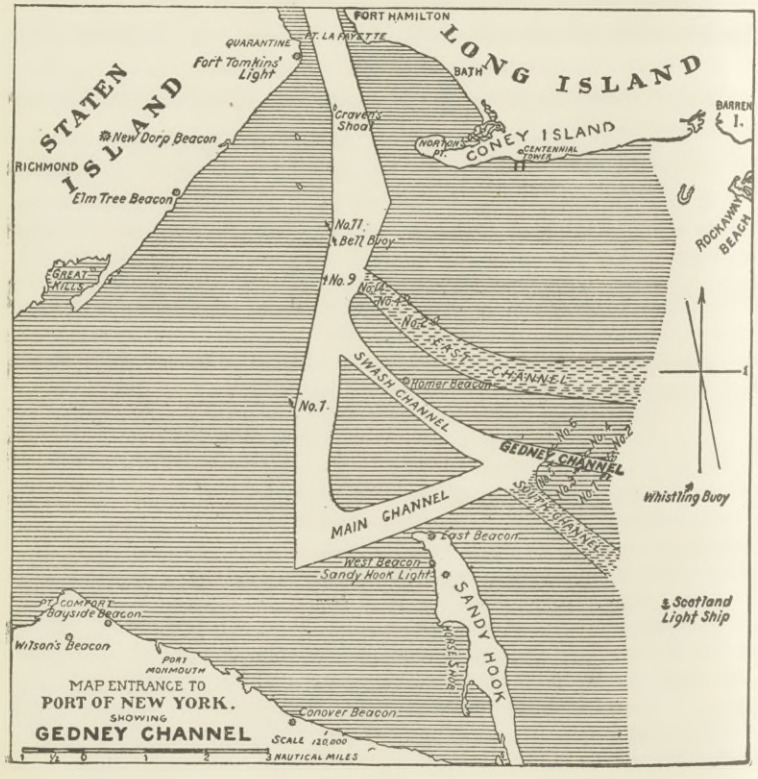
---

such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

red buoys, bearing even numbers, along its northerly side, at intervals of 2000 feet, and corresponding black buoys, bearing odd numbers, on the southerly side, at the same distance apart. Two iron can buoys, sometimes called fairway buoys, the northerly one red and the southerly one black, mark the outer entrance to the channel. About a mile out to sea beyond the channel entrance an automatic whistling buoy marks the prolongation of the central axis of the channel. Directly outside the entrance is located the station pilot boat, which anchors near black buoy No. 1, and sends out small boats to take off pilots who have been taking vessels to sea through the channel. Within the bar at the other end of the channel the water widens and the Swash Channel diverges from the main ship channel, as shown in the following diagram:



Counsel upon one, if not upon both, sides have assumed, upon the authority of *The Aurania* and *The Republic*, 29 Fed. Rep. 98, and *Singlehurst* v. *Compagnie Transatlantique*, 11 U. S. App. 693, that Gedney Channel is within the "coast waters of the United States," and therefore that the vessels involved were subject to the Revised International Regulations of March 3, 1885, c. 354, 23 Stat. 438. We think that they are mistaken in this assumption.

The International Code for preventing collisions was first adopted by act of April 29, 1864, now incorporated into the Revised Statutes as section 4233, and was made applicable generally to the "vessels of the Navy and of the mercantile marine of the United States." This code remained substantially unaffected by Congressional legislation until March 3, 1885, when the Revised International Regulations for preventing collisions at sea were adopted by act of Congress, and made applicable to "the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States." By section 2, all laws inconsistent with these rules were repealed, *except* as to the navigation of such vessels within the *harbors*, lakes, and *inland waters* of the United States. As to such waters, the original code of 1864 still remains in force, explained and supplemented by the rules of the Supervising Inspectors.

The act of 1885 did not attempt to draw the line between the high seas and the coast waters of the United States, on the one hand, and the harbors and inland waters, on the other. Nor was it possible by any general legislation to do so. We are of opinion, however, that the dredged entrance to a harbor is as much a part of the inland waters of the United States within the meaning of this act as the harbor within the entrance, and that the real point aimed at by Congress was to allow the original code to remain in force so far as it applied to pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot. It is important that a pilot, while conducting a vessel in or out of a harbor, should not traverse waters governed by two inconsistent codes of signals, and if there are to be two codes, the

line should be drawn between the high seas, and the inland waters wherein the services of a local pilot are requisite for safe navigation. If, as has been suggested, ocean steamers were authorized or compelled to observe the new Revised Rules until their arrival at their docks, while vessels engaged in local traffic were observing the original rules, great confusion would result, and the probabilities of collision be materially increased. It is evident that all vessels running upon the same waters should be bound by the same rules and regulations in respect to their navigation.

Recent legislation has not only established the proper practice for the future, but has explained what must have been the intention of Congress in passing the original act. By act of February 19, 1895, c. 102, 28 Stat. 672, "to adopt special rules for the navigation of harbors, rivers and inland waters of the United States," these waters are declared to be still subject to the provisions of Rev. Stat. § 4233 (the original code) and to the regulations of the Supervising Inspectors, §§ 4412 and 4413. By section 2 the Secretary of the Treasury was authorized and directed from time to time "to designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects, the line dividing the high seas from rivers, harbors and inland waters." Pursuant to this authority the Secretary of the Treasury, on May 10, 1895, by Department Circular 95, designated and defined the dividing line between the high seas and the rivers, harbors and inland waters of New York as follows: "From Navesink (southerly) Light-House NE. $\frac{5}{8}$ E., easterly, to Scotland Light Vessel, thence N. NE. $\frac{1}{2}$ E. through Gedney Channel Whistling Buoy (proposed position) to Rockaway Point Life-Saving Station." The whole of Gedney Channel is within this line.

This of course must be accepted as the dividing line as to all future cases; but as the Secretary of the Treasury was merely directed to carry out the existing law upon the subject, we think it should be treated as cogent evidence of what the law had been before, and we are therefore of the opinion that Gedney Channel should be treated, for the purposes of this case, as belonging to the inland waters of the United

States. We are the less reluctant to take this course in view of the fact that the pilots of both steamers appear to have acted in contemplation of the Supervising Inspectors' Rules rather than the Revised International Rules and Regulations.

The Delaware was an English tank steamship of 2495 tons registered, 345 feet in length, and was engaged in the business of transferring petroleum in bulk from New York to London and Liverpool. She was returning to New York in ballast only, and had taken a duly licensed Sandy Hook pilot, who was in charge of her navigation at the time of the collision. The Talisman was an ocean tug, 100 feet in length, and at the time of the collision was engaged in towing the station pilot boat Edmund Driggs, with a hawser 15 fathoms in length, from a point some distance to the northward of the northerly line of Gedney Channel, diagonally across the channel towards the pilot station outside of the black fairway buoy, on the southerly side of the channel.

During the morning of the collision the weather was cloudy and overcast, until the Delaware got within three or four miles of the outer end of the channel, when a heavy rain squall came on, which lasted for about ten minutes, during which time the vessels were lost to view of each other. About four or five minutes before the collision, and when the vessels were probably a mile or more apart, the squall passed over, and each vessel sighted the other, and kept her in sight from that time until the collision. As the squall passed over, the pilot of the steamship made the outer red buoy about half a point on his port bow, and thereupon starboarded one point to bring the buoy upon his starboard bow, and was brought into the channel upon a true course of W. by S. At the same time the Talisman was entering the channel from the northwest, upon a course about S. SE., and not far from a right angle to the course of the Delaware.

Without inquiring minutely into the respective manœuvres and courses of the two steamers, it is sufficient to say that they were approaching each other upon crossing courses, and that under the 19th Rule, the steamship, having the Talisman on her starboard side, was bound to keep out of her way. By

Rule 23 there was a corresponding obligation on the part of the Talisman to keep her course. The Delaware made no effort to avoid the tug. Instead of porting as she entered the channel and passing up the starboard side, and astern of the Talisman, the pilot kept her on her course until about a minute before the collision, when the master, who had been below, ran hurriedly on the bridge, and seeing the Talisman about three points on his starboard bow, and close at hand, ordered the helm hard-a-starboard, and the engine stopped; though both orders were given too late to be of any service. The Delaware struck the Talisman upon the port quarter, about 15 feet from the stern, listing her heavily to starboard, and continued to push her sidewise through the water for about 300 feet, when she sank near the southerly side of the channel. A fireman who was trying to cast off the tow line was drowned; Captain Winnett's arm was severely fractured; and the tug became a total loss. It is evident from the bare statement that the Delaware was grossly at fault, and no claim is made to the contrary.

2. It is insisted, however, that the Talisman was also in fault in several particulars. It seems that, when the Delaware was about a mile off, the Talisman blew a single blast of her whistle, which does not appear to have been answered. When the Delaware was from a quarter to an eighth of a mile off, and the Talisman was a little above, or near the northerly edge of the channel, she sounded another single blast, which was not answered, although three of the libellant's witnesses from the Talisman seemed to have understood that it was answered. When the Delaware was about a length off, the Talisman sounded an alarm signal of three blasts, but did not change her helm or reduce her speed before the collision.

In this connection, the Talisman was charged with a violation of the Supervising Inspectors' rules, in not porting her helm and directing her course to starboard after sounding her first signal. These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on or nearly end on, and the signals therein provided for are designed to apprise the approaching vessel of the inten-

tion of the steamer giving the signal, to port or starboard, as the case may be. As applied to vessels upon crossing courses, however, it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her. Such was evidently the view taken by both parties in this case, as there is not the slightest evidence that the pilot of the Delaware was misled by these signals, nor is a failure to port charged in the answer, or suggested in the testimony, as a fault on the part of the Talisman. These rules, so far as they require whistles to be used, ought to be construed in harmony with the International Code. If they were so construed as to require the preferred vessel to port, after having blown a blast of her whistle, it would involve a violation of article 23, which requires her to keep her course. On the other hand, if they be construed as applying chiefly to steamers meeting end on, or nearly end on, under Rule 18, they would frequently aid in solving any doubt with regard to the proposed course of the vessel giving the signal, and thus enable the meeting vessel to govern her own course accordingly. Certainly the rules should not be construed to require the steamer giving the signal to violate a plain statutory rule of navigation.

As bearing upon the proper interpretation of these rules, it is pertinent to observe that to Rule 23 of the act "to regulate navigation upon the Great Lakes and their connecting and contributory waters," approved February 8, 1895, c. 64, 28 Stat. 645, — a rule which corresponds in this particular feature with the Supervising Inspectors' Regulations, and with article 19 of the Revised International Regulations, — there is added the following qualification: "But the giving or answering a signal by a vessel required to keep her course shall not vary the duties or obligations of the respective vessels."

The main fault charged upon the Talisman, however, is that of not stopping and reversing, when the failure of the Delaware to take measures to avoid her became apparent. In *The Britannia*, 153 U. S. 130, which was also a case of a starboard hand collision, the preferred steamer, the Beaconsfield, was

held to have been in fault for stopping and reversing under similar circumstances — in other words, for doing what it is claimed the Talisman should have done in this case. Two members of the court dissented upon the ground that the Beaconsfield, having been brought into a position of peril by the negligence of the Britannia, was not in fault for stopping and reversing; the substance of their opinion being that, under such circumstances, the master might exercise his judgment as to the best method of avoiding a collision, and that an error in judgment should not be imputed to him as a fault. In neither opinion, however, was it intimated that, if the Beaconsfield had kept her speed, she would have been in fault for so doing.

The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th Rule of the original International Code, (Rev. Stat. § 4233,) and of the 16th Rule of the Revised Code of 1885, and doubtless applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way. The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and, perhaps, of American authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a "special circumstance," under Rule 24, "rendering a departure" from the rules "necessary to avoid immediate danger." Some even go so far as to hold it the duty of the preferred vessel to stop and reverse, when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be *in extremis*, he is bound to hold to his course and speed.

The cases of *The Britannia*, 153 U. S. 130, and *The Northfield*, 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. *Belden* v. *Chase*, 150 U. S. 674; *The Highgate*, 62 L. T. R. 841; *S. C.* 6 Asp. Mar. Law Cases, 512.

In the case under consideration there was really nothing to apprise the tug that the Delaware would not port and go under her stern, until the collision became inevitable. The vessels were in plain sight of each other. The Delaware was entering a channel, whose course was marked by buoys, and she could not possibly have continued her then course without soon crossing the line of black buoys, which marked the southerly edge of the channel. There was every reason to suppose that, as soon as she passed the line of red buoys at the northerly edge, she would port and take her proper course up the channel, and if for any reason she was unable to do this, it was her plain duty to apprise the tug of the fact either by blowing the starboard signal of two whistles, or an alarm whistle, to indicate that the circumstances were such as to render it impossible for her to fulfil her obligation to keep out of the way of the tug. If she had done so a different question would have been presented. Until the last moment the tug had a right to assume that she would comply with the rule. Had the tug stopped and reversed, she might not only have brought about a collision with the Delaware, but would

have incurred the danger of a collision with her own tow. It is true the Delaware did not answer the signals of the Talisman as she should have done, but Captain Winnett, who was in charge, testifies that he was under the impression that she answered the first whistle, and made an allegation to that effect in his libel. He appears to have been mistaken in this, but as the morning was somewhat thick he might have thought so, and was not in fault for acting upon that hypothesis. The second whistle was given so late that the vessels were evidently *in extremis* before a reasonable time had elapsed in which to answer it. In any event there is too much doubt about the fault of the Talisman to justify us in apportioning the damages.

3. Is the Delaware exempted from liability by the act of February 13, 1893, entitled "An act relating to navigation of vessels, bills of lading and to certain obligations, duties and rights in connection with the carriage of property"? This is the first case in which this act, which has an important bearing upon the rights of shippers, has been called to our attention.

The *first* section declares it to be unlawful for the manager, etc., of any vessel engaged in foreign trade, to insert in any bill of lading any covenant or agreement whereby the vessel or her owner "shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge," and that any such clause shall be null and void. The *second* section declares it to be unlawful for any such vessel to insert in any bill of lading any covenant whereby the obligation of the owner to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make her seaworthy, and to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in anywise be lessened, weakened, or avoided. The *third* section provides that, if the owner shall exercise due diligence to make her seaworthy, "neither the vessel, her owner or owners, agent, or charterers shall become or be held responsi-

ble for damage or loss resulting from faults or errors in navigation or in the management of said vessel," nor shall they be "liable for losses arising from dangers of the sea, or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." The *fourth* section makes it obligatory to issue to shippers a bill of lading, stating certain particulars, which document shall be *prima facie* evidence of the receipt of the merchandise therein described. The *fifth* section is penal in its character. The *sixth* reserves the application of the limited liability act; and the *seventh* excepts vessels engaged in the transportation of live animals.

Respondent relies, in this connection, upon the first clause of section 3: "That if the owner of any vessel, transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel, in all respects, seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness,

bad stowage and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time, holding the vessel for non-excepted liabilities, new clauses were inserted in the bills of lading to meet these decisions until the common law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand and suggested amendments to the maritime law in line with those embodied in the Harter Act. The exigencies which led to the passage of the act are graphically set forth in a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury and embodied in a report of the Committee on Interstate and Foreign Commerce of the House of Representatives. As a part of the history of the times, this is a proper subject of consideration. *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474.

"That, taking advantage of this practical monopoly, the owners of the steamship lines combined to adopt clauses in their bills of lading, very seriously and unduly limiting their obligations as carriers of the goods, and refuse to accept consignments for carriage on any other terms than those dictated by themselves.

"That this policy has been gradually extended by the steamship owners until at the present time their bills of lading are so unreasonable and unjust in their terms as to exempt them from almost every conceivable risk and responsibility as carriers of goods.

"For example, many of these bills of lading provide, in addition to the usual and reasonable exceptions, that the carriers shall not be liable for loss or damage occasioned by negligence of the master, pilot, stevedores, crew or others in their employment; nor for bad stowage; nor for defect or insufficiency of the hull, machinery or fittings of a vessel, whether occurring before or after receiving the goods on board; nor

for the admission of water into the vessel by any cause, and whether for the purpose of extinguishing fire or for any other purpose, and whether occurring previously or subsequently to the vessel's sailing; nor for the differences between the quality, marks or brands of flour or other goods shipped and those of the goods actually found to be on board of the steamer (the marks, numbers or description in the bill of lading notwithstanding); nor for loss of weight; nor for detention, delay or deviation.

"Such bills of lading also frequently exempt the carrier from any claim not intimated before delivery of the goods, and at the same time provide that the master porterage of the goods on arrival of the steamer shall be done by the steamship owners or their agents at the expense and risk of the receivers, so that the receivers have no opportunity before the delivery of their goods of ascertaining whether they are damaged or not, or how or in what part of the hold they may have been stowed.

"That bills of lading have thus become so lengthened, complex and involved, that in the ordinary course of business it is almost impossible for shippers of goods to read or check their various conditions, even if objections would be listened to, and the hardship is aggravated by the fact that new and more stringent conditions are constantly being added by the shipowners to provide for new questions or claims that have arisen.

"That a striking illustration of this is the fact that recently a clause has been added to certain steamship forms of bill of lading actually giving the shipowners a right of lien over, and the right to sell the goods entrusted to them for carriage, not only for the freight upon the goods themselves, but for all debts due, either by the shippers, or the consignees of such goods, to the carriers or their agents, though these debts may have arisen on contracts unconnected with the carriage of such goods. The effect of this clause is to render the bill of lading, which has been of such essential service on account of its negotiable character in promoting the commercial prosperity of Great Britain, a document unfit for negotiation."

No complaint was made in this connection of the liability of vessels under the ordinary forms of bills of lading, or their liability to other vessels for the consequences of their negligence, the evil to be remedied being one produced by the oppressive clauses forced upon the shippers of goods by the vessel owners. It is true that the general words of the third section, above quoted, if detached from the context and broadly construed as a separate provision, would be susceptible of the meaning claimed, but when read in connection with the other sections, and with the remainder of section 3, they show conclusively that the liability of a vessel to other vessels with which it may come in contact was not intended to be affected.

The first, second, fourth, and seventh sections deal exclusively with bills of lading and their covenants, and the third section, after using the general language relied upon by the respondent here, with regard to non-liability for faults or errors in navigation or in the management of the vessel, contains a further exemption of "loss arising from dangers of the sea, or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." These provisions have no possible application to the relations of one vessel to another, and are mainly a reënactment of certain well-known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes. The fact, too, that by section 6 the various sections of the Revised Statutes, which embody the limited liability act, are preserved unimpaired, would seem to indicate that the later act was not intended to receive the broad construction claimed.

The decree of the court below is, therefore,

Affirmed.

UNITED STATES v. ZUCKER.

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

No. 794. Argued January 14, 1896. — Decided March 2, 1896.

In an action against importers brought to recover from them the value of merchandise, originally belonging to them, and alleged to have been forfeited to the United States under the provisions of the Customs Administrative Act of June 10, 1890, c. 407, § 9, the defendants cannot demand, as of right, that they shall be confronted, at the trial, with witnesses who testify in behalf of the government.

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiffs in error.

Mr. Abram J. Rose, (with whom was *Mr. Peter Zucker* on the brief,) for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

By the act of June 10, 1890, c. 407, § 9, 26 Stat. 131, 135, known as the Customs Administrative Act, it is provided that "if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to

which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offence a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

The present action was brought to recover from the defendants the sum of $346.02 as the value of certain merchandise originally belonging to them and alleged to have been forfeited to the United States under the above statute.

The complaint, which is in the form prescribed by the New York Code of Civil Procedure, alleged that, on or about December 14, 1891, certain described merchandise was imported into the United States, at the port of New York, and when so imported was subject to the payment of duties; that the defendants, the owners, importers, and consignees of such merchandise, entered the same at the office of the collector, to whom was produced a duly certified invoice, purporting to show the actual cost of the merchandise, and also a declaration, which entry and declaration were signed and verified in the manner and form required by law; that said entry, invoice, affidavit, and paper were false and fraudulent, as the defendants well knew, in that the actual cost of such merchandise was greater than the amount stated therein; and that the defendants wilfully and wrongfully concealed the actual cost of such merchandise, whereby the United States had been deprived of the lawful duties, or a portion thereof, accruing upon the same.

The defendants made a general denial of each allegation of the plaintiff. As separate defences they pleaded: 1. That the merchandise mentioned in the complaint was not forfeited. 2. That the action was not brought against the person making the entry of the merchandise in the complaint specified. 3. That the duties on all goods imported by them during the times specified in the complaint had been liquidated and paid by them, and such merchandise delivered to them as the owners thereof, all without fraud, and that more than one year had elapsed since the date of the entry referred to by the United States.

At the trial below the government, to sustain the issues on its part, offered to read in evidence a deposition that had been duly taken in Paris, France, and was properly authenticated and certified under letters rogatory, properly issued and returned.

The defendants objected to the admission of this testimony upon the following grounds: 1. That this action, though civil in form, was in substance a criminal case, and, under the Constitution of the United States, the defendants were entitled on the trial "to be confronted with the witnesses" against them. 2. That "the constitutional right of the defendants to be confronted with the witnesses against them is not secured by giving them notice of the execution of letters rogatory in France, and that their failure to attend on such occasion at a place three thousand miles from the place of trial, out of the district and in a foreign country, does not operate as a waiver of their constitutional right, if it can be waived."

In answer to questions propounded by the court, the defendants admitted that the evidence was material, and placed their objection to it upon the grounds just stated.

The court thereupon sustained the objection and excluded the evidence, to which action the government excepted.

The United States having no other evidence to offer, the jury, by direction of the court, returned a verdict for the defendants, and the action was thereupon dismissed.

The only question presented for our decision is, whether the court below erred in excluding the deposition which the government took in Paris, France, and the materiality of which is conceded by the defendant.

The sole ground of objection to the deposition, as we have seen, was that, in this action to recover the value of merchandise alleged to have been forfeited to the United States under the ninth section of the act of June 10, 1890, c. 407, no deposition, wherever taken, could be read against the defendants, without their consent, but the witness must testify in person, before the court, during the progress of the trial.

This objection is supposed to be sustained by the Sixth

Amendment of the Constitution, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

In support of their contention the defendants cite *Coffey* v. *United States*, 116 U. S. 436, 443; *Boyd* v. *United States*, 116 U. S. 616, 634, and *Lees* v. *United States*, 150 U. S. 476.

Coffey v. *United States* was a civil information, on behalf of the United States, against certain property that had been seized by an internal revenue officer as forfeited to the United States on account of the alleged violations of certain provisions of the Revised Statutes relating to internal revenue. Rev. Stat. §§ 3257, 3450, 3453. Coffey intervened and claimed the property. One of the defences was that a criminal information had been filed against him in respect of the matters set forth in one or more of the counts of the declaration, and that upon a trial he had been acquitted. The principal question presented in the civil case was as to the effect of the trial, verdict, and judgment of acquittal in the criminal case. This court, after observing that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to impose upon the offender the fine and imprisonment prescribed by statute must be a criminal proceeding, said: "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*."

That case is an authority for the proposition that if the

present defendants had been proceeded against criminally on account of the same acts and facts that must be shown in order to sustain this action under the statute of 1890, and had been acquitted, the verdict and judgment of acquittal would have barred a subsequent civil proceeding, based on the same acts and facts, and instituted to enforce a forfeiture or to recover the value of the merchandise forfeited.

Boyd v. *United States* was an information, in a cause of seizure and forfeiture of property, against certain merchandise seized as forfeited to the United States under the twelfth section of the Customs Act of June 22, 1874, c. 391, 18 Stat. 186, 188. Boyd intervened and claimed the goods. On the trial it became important to show the quantity and value of the merchandise contained in certain cases previously imported. The court, on motion of the District Attorney, made an order, under the fifth section of the above act, requiring the claimant to produce the invoice of those cases. The order was obeyed, the claimant, however, objecting to its validity, as well as to the constitutionality of the statute. When the invoice was offered by the government as evidence, Boyd objected to its reception on the ground that, in a suit for forfeiture, the claimant himself could not be compelled to produce evidence, and that the statute, in that particular, was invalid. This court said: "As showing the close relation between civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey* v. *United States*, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of

goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose."

The principles announced in the *Boyd case* have no application whatever to the present case. Neither the constitutional provision which protects the people in their persons, houses, papers, and effects against unreasonable searches and seizures, nor the provision that a person shall not be compelled in any criminal case to be a witness against himself, has any bearing whatever upon the inquiry whether the right of an accused, in *a criminal prosecution*, "to be confronted with the witnesses against him," is infringed by permitting a deposition of a living witness to be read against him in an action brought to recover the value of merchandise forfeited to the United States by reason of his acts in violation of law. This is so manifest that it is impossible, by any argument, to make it clearer.

Equally inapplicable to the present inquiry is the case of *Lees* v. *United States*, 150 U. S. 476. That was a civil action to recover a penalty imposed by the act of February 26, 1885, c. 164, 23 Stat. 332, for importing an alien under a contract to perform labor. Our attention has been called to that part of the opinion in that case, in which it was declared, upon the authority of *Boyd* v. *United States*, above cited, that although the proceeding against Lees was civil in form, it was "unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself." But that principle is not involved in the present case.

No case has been cited which sustains the contention of the defendants. And we are unaware of any such case in England, where the constitutional principle embodied in the Sixth Amendment, and here involved, is recognized as part of the law of the land.

The Sixth Amendment relates to a prosecution of an accused person which is technically criminal in its nature. In such a proceeding, the person accused is entitled to a speedy and public trial by an impartial jury of the State, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed; whereas an action, in which a judgment for money only is sought, even if, in some aspects, it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction. The words, in the Sixth Amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled "to be confronted with the witnesses against him," has no reference to any proceeding (although the evidence therein may disclose, of necessity, the commission of a public offence) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed. A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the Sixth Amendment, a witness against an "accused" in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, 562, it was held that the provision in the Fifth Amendment that no person

"shall be compelled in any criminal case to be a witness against himself," covered, but was not limited to, criminal prosecution; that its object was "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." In the argument of that case reference was made to the Sixth Amendment in support of the proposition that an investigation before a grand jury was not a criminal case, within the meaning of the Fifth Amendment, and was solely for the purpose of finding out whether a crime had been committed. But this court said that a criminal prosecution, within the meaning of the Sixth Amendment, was one against a person who was accused and who was to be tried by a petit jury; that "a criminal prosecution under article six of the Amendments is much narrower than a criminal case under article five of the Amendments."

Of course, if the government had elected to prosecute the present defendants, criminally, for the offence defined in the ninth section of the act of 1890, a verdict and judgment of acquittal could have been pleaded in bar of an action to recover the value of the merchandise. *Coffey* v. *United States*, above cited. But it does not follow that the defendants can demand of right, in this civil action, not directly involving their personal security, that they shall be confronted, at the trial, with the witnesses who testify in behalf of the government.

The judgment is reversed, and the case is remanded with directions to set aside the verdict and judgment, and for further proceedings in conformity with this opinion.

Counsel for Parties.

SPALDING *v.* VILAS.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 81. Argued November 21, 1895. — Decided March 2, 1896.

It was the duty of the Postmaster General to cause all cheques or warrants issued under the authority of the act of March 3, 1883, c. 119, 22 Stat. 487, and of the act of August 4, 1886, c. 903, § 8, 24 Stat. 256, 307, 308, to be sent directly to the claimants, and it was his right to call their attention to the provisions of the act of 1883; and if the legislation to which attention was thus invited worked injury to an attorney employed by such claimants to present their claims, in that it gave his clients an opportunity to evade, for a time, the payment of what they may have agreed to allow him, it was an injury from which no cause of action could arise.

The Postmaster General was directly in the line of duty when, in order that the will of Congress as expressed in the act of 1883 might be carried out, he informed claimants that they were under no legal obligation to respect any transfer, assignment or power of attorney, which section 3477 of the Revised Statutes declared to be null and void. If the plaintiff had not taken any such transfers, assignments, or powers of attorney from his clients, he could not have been injured by the reference made by the Postmaster General to that section. If he had taken such instruments, he cannot complain that the Postmaster General called the attention of claimants to the statute on the subject, and correctly interpreted it.

The act of the head of one of the Departments of the government in calling the attention of any person having business with such Department to a statute relating in any way to such business, cannot be made the foundation of a cause of action against such officer.

The same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.

THE case is stated in the opinion.

Mr. W. Willoughby for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendant in error.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a judgment of the Supreme Court of the District of Columbia in general term, which affirmed a final order in the same court in special term, sustaining a demurrer to the declaration filed by the plaintiff in error Spalding against the defendant Vilas, and dismissing the plaintiff's action.

The question presented for determination is whether the plaintiff's declaration stated a valid cause of action against the defendant.

The plaintiff alleged that he was a citizen of the District of Columbia, and had been for more than twenty years an attorney-at-law, practising his profession in the city of Washington, and that the defendant, from March 4, 1885, until January 16, 1888, was the Postmaster General of the United States;

That "in or about the year 1871, he, the said plaintiff, was employed by a considerable number of persons, who were and had been postmasters at different post offices in the United States, to obtain a review and readjustment of their salaries, in accordance with the provisions of the act of Congress of June 12, 1866, relating thereto, and which enacted that when the quarterly returns of the postmasters of the third, fourth, and fifth classes, mentioned therein, showed that their salary allowed is ten per centum less than it would be on the basis of commissions under the act of June 22, 1854, fixing their compensation, they were entitled to have their compensation reviewed and readjusted under the provisions of said act of 1854, by reason of which a large number of such postmasters had just and valid claims against the United States arising from such readjustment, and a large number of them entered into written contracts with the plaintiff, employing him, and providing a reasonable compensation to him for procuring the same, and gave to him written powers of attorney to act for them in the prosecution of said claims and to receive the drafts which might be issued in payment thereof;" and,

That "upon making and filing applications at the Post

Office Department in behalf of his clients for such readjustment and review, the same was denied, notwithstanding such act of Congress, whereupon the plaintiff took measures to procure mandatory legislation by Congress and appropriations necessary, pressing such legislation by all lawful means in his power in the different Congresses from 1871 to 1886, giving to such efforts a great amount of his time, and in the meantime procuring similar contracts and applications and powers of attorney from several thousands of postmasters of the said classes throughout different parts of the United States, and filing in the Post Office Department such applications and powers of attorney, and expending a good many thousands of dollars in building up a business in the collection of such claims, relying upon the justice thereof, and finally obtaining the passage of the acts of Congress of March 3, 1883, requiring the Postmaster General of the United States, upon proper presentation of such claims, to compute and pay the same; an act of Congress of July 7, 1884, making appropriations for the payment of such claims; a further act of Congress of March 3, 1885, making a like appropriation; and a similar act of Congress of August 4, 1886, making further appropriations therefor, all of which acts were brought about in consequence of the continual and persistent efforts of the plaintiff, under which acts the plaintiff proceeded to make out papers and proofs for the presentation of such claims in behalf of his clients, and filed the same, with powers of attorney to him, as aforesaid, in the said Post Office Department, and commenced the collection of the same, a large number of said claims prior to March, 1885, and which were good and valid, being, however, repudiated by the Post Office Department, and the prosecution of such claims being made more difficult by great hostility of the persons managing such department to the collection of this class of claims;"

The declaration also alleged that "soon after the 3d day of March, 1885, the plaintiff made application to the defendant, in his capacity of Postmaster General of the United States, to adjust and pay the said claims which had been disallowed, and also to review and readjust claims of the same character

which had not before been presented, which applications were refused, and an acrimonious controversy arose between the said defendant and this plaintiff in relation thereto, the said defendant, among other things, endeavoring to obtain legislation by Congress to impair and destroy the rights of the plaintiff under the said contracts, in which, however, he failed; but to further harass the plaintiff, and to injure him in his good name and in his business, without any good reason therefor, and with malicious intent, the said defendant interposed all possible obstacles to the collection of said claims, and undertook to induce the clients of the plaintiff to repudiate the contracts they had made, and for such purpose, and with such malicious intent, caused the drafts for the payment of such claims to be sent directly to the claimants, and for the malicious purpose of causing the claimants to disregard the contracts they had made with the plaintiff for fees, and to cause them to believe that the same were null and void, and that plaintiff had rendered them no service, and that he was attempting falsely to claim for valuable services rendered under said contracts, falsely claimed to be valid, and using his official character for such purpose, thus placing the plaintiff before the country as a common swindler; and to bring him into public scandal, infamy, and disgrace, and to injure his business, with each letter of transmittal of drafts to said claimants caused to be issued and sent to them, between September, 1886, and January 17, 1888, to a great number, to wit, four thousand of the said claimants, clients of the plaintiff, residing in the States of New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and the Territories of Utah, Washington, and Wyoming, the circular, of which the following is a copy, the same being dated and addressed to each claimant, respectively, stating the sum transmitted and the name and post office of such claimant, respectively, and having added thereto, in print, section 8 of the act of August 4, 1886, and section 3477 of the Revised Statutes of the United States, to wit:

Opinion of the Court.

"POST OFFICE DEPARTMENT,
"OFFICE OF THE THIRD ASSISTANT POSTMASTER GENERAL,
"DIVISION OF FINANCE, WASHINGTON, D. C., ——, 188–.

"SIR: Herewith inclosed you will find warrant payable to your order for $——, which is in full liquidation of your claim for the balance unpaid of the readjusted salary of—— ———, postmaster at ——, State of ———.

"In transmitting it I am directed by the Postmaster General to advise you that in the act of 1883, which provided for readjustments of salary, the Congress directed that all checks or warrants should be made payable to the claimants and transmitted direct to them, and that in the appropriation and enactment on this subject by Congress, a copy of which is printed at the foot of this note, the direction was repeated. This was done because no attorney's services were necessary to the presentation of the claim before the department, and the Congress desired all the proceeds to reach the person really entitled thereto. After a claim of this character is filed in the department its examination and the readjustment of the salary, if found proper, are made directly from the books and papers in the department by its officers, and without further evidence.

"You are further advised that by section 3477 of the Revised Statutes, a copy of which is also printed at the foot of this note, any transfer of this claim or power of attorney for receiving payment of this warrant is null and void.

"Yours respectfully, J. H. HARRIS,
"*Third Assistant Postmaster General.*

"—— ———,
"—— ———.

"See statutes referred to on next leaf;"

It was alleged that the said circular was intended to deceive and did deceive the said claimants, who believed what the defendant meant and intended, as hereinbefore stated, of and concerning the plaintiff, and was false in the following respects, to wit: (1) that "in the act of 1883, which provided for readjustments of salary, the Congress directed that all

cheques or warrants should be transmitted direct to the claimants, and that such direction was repeated in the act of 1886;" (2) that "this was done because no attorney's services were necessary to the presentation of the claim before the department;" (3) that "this was done because the Congress desired all the proceeds to reach the person really entitled thereto;" (4) that "the statement that claims of this character, after being filed in the department, were examined and readjusted directly from the books and papers in the department, without further evidence, besides being untrue, in many cases was unnecessary to protect the interests of the government or the claimant, was not required by law, and was maliciously intended to cause the claimants to believe that the plaintiff's claim for valuable services was false and fraudulent, and the same was inserted for no other purpose."

The declaration further alleged that "the reference to section 3477 in said circular, and the printing of the whole of said section, was for the malicious purpose only of causing the claimants to believe that the said contracts for fees, before suggested in said circular, were null and void according to a pretended official ruling of the Post Office Department; while in truth and in fact the said section had no reference to any contracts of the kind, nor to contracts of the character hereinbefore described as made by the plaintiff with such claimants;" that "all of said false statements or irrelevant references and printing of said section 3577 of the Revised Statutes were unnecessary, malicious, and without reasonable or probable cause, and intended to deceive the claimants, and to thereby induce them to repudiate the contracts they had made with the plaintiff, and they understood said circular as meant and intended, as herein stated, of and concerning the plaintiff; and they were deceived, and did repudiate their said contracts by reason thereof, to the great injury of the good name of the plaintiff and to his business, and for no other purpose;" and that "soon after commencing to issue such circulars the attention of the defendant was called by the plaintiff to the fact that the issuing of such circulars produced great injury to his business and was unjust towards him; but the said defendant,

notwithstanding, maliciously continued the said issue, so long as he held the position of Postmaster General of the United States, to all the claimants he could reach, and to the number of four thousand, as aforesaid, for no other purpose than to continue the said injury to this plaintiff."

In consequence of the alleged acts of the defendant the plaintiff claimed to have been put to great trouble and expense in enforcing the said contracts, had lost the benefit of many of them, at an expense and loss of $25,000; and, besides, had suffered injury to his good name and reputation to the amount of $75,000. He prayed judgment for $100,000, besides costs and disbursements.

Section 3477 of the Revised Statutes referred to in the circular made part of the declaration is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

The thought which underlies the entire argument for the plaintiff is that the circular issued from the Post Office Department, by direction of the Postmaster General, was beyond the scope of any authority possessed by that officer; and, therefore, the sending of the circular to the persons who had presented claims against the government was not justi-

fied by law, and would not protect the Postmaster General from responsibility for the injury done to the plaintiff from that act.

The statute of March 3, 1883, c. 119, 22 Stat. 487, relating to the readjustment of the salaries of postmasters of certain classes, provided that every readjustment of salary, under that act, should be upon a written application, signed by the postmaster, or late postmaster, or legal representative entitled to such readjustment, and that "each payment made shall be by warrant or check on the treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the post office within whose delivery he resides, and which address shall be set forth in the application above provided for." And, by the act of August 4, 1886, c. 903, § 8, 24 Stat. 256, 307, 308, it was declared that the payment of all sums thereby appropriated "shall be made by warrants or cheques, as provided by the said act of March 3, 1883, payable to the order of and transmitted to the persons entitled respectively thereto."

Whatever may have been the value of any services rendered by the plaintiff for his clients; even if the readjustment of their salaries was wholly due to his efforts "to procure mandatory legislation by Congress, pressing such legislation by all lawful means in his power," through many years, it was competent for the legislative branch of the government to provide that any sums ascertained to be due to claimants should be paid directly to them. Such a requirement could have had no other object than to make it certain that the full amount due to those whose salaries were readjusted was received by them personally, and should not pass through the hands of agents or attorneys. No one will question the power of Congress to enact legislation that would effect such an object. *Ball* v. *Halsell*, *ante*, 72. If such legislation worked injury to the plaintiff in that it gave his clients an opportunity to evade, for a time, the payment of what they may have agreed to allow him, it was an injury from which no cause of action could arise. This view is so clear that no argument in its support is necessary.

It results that the Postmaster General not only had the right, but it was his duty, to cause all cheques or warrants, issued under the authority of the above acts of Congress, to be sent directly to the claimants. If not strictly his duty, it was his right to call the attention of claimants to the provisions of the act of 1883. Of the legislation of Congress every one is presumed to have knowledge; but all know, as matter of fact, that the larger part of the people are not informed as to the provisions of many acts of Congress. No one could rightfully complain that the Postmaster General called the attention of those having business with his Department to an act of Congress that related to that business, and which would explain why cheques or warrants, in their favor, were sent directly to them, and were not delivered to agents or attorneys.

Nor did the Postmaster General exceed his authority when he informed claimants that Congress required cheques or warrants to be sent to them "because no attorney's services are necessary to the presentation of the claim before the Department, and Congress desired all the proceeds to reach the person really entitled thereto;" nor when he stated in his circular that "after a claim of this character is filed in the Department, its examination and the readjustment of salary, if found proper, are made directly from the books and papers in the Department by its officers, and without further evidence." Was it not true that any claim, under these acts of Congress must be, or could properly be, sustained or rejected according to the evidence furnished by the records of the Department? Besides, the statement that "no attorney's services were necessary to the presentation of the claim," if not strictly accurate, was, at most, only an expression of the opinion of the Postmaster General in the course of his official duties. As he was charged with the execution of the will of Congress in relation to the readjustment of those salaries, he was entitled to express his opinion as to the object for which the act of 1883 was passed, and to indicate what, in his judgment, was necessary to be done in order to bring claims under that act properly before the Department. Indeed, the clear indication in

the act of 1883 of the desire of Congress that the full amount awarded to claimants should be paid directly to them, rendered it entirely appropriate that he should advise them of the fact that the records of the Department furnished all the evidence necessary for the readjustment directed by Congress. He did not by his circular advise claimants that they could disregard any valid contract made by them with attorneys. Claimants could not have understood him as recommending a violation of the legal rights of others. He said, in substance, nothing more than that they, the claimants, were mistaken if they supposed that the services of attorneys were required for the presentation and prosecution of their claims before the Department.

Equally without foundation is the suggestion that the Postmaster General exceeded his authority and duty when he called the attention of claimants to section 3477 of the Revised Statutes. That officer might well have apprehended that the salutary provisions of that section had been overlooked or disregarded by those interested or connected with the prosecution of these claims. If any claimant had transferred or assigned his claim, or any part of it, or any interest therein, or had executed any power of attorney, order or other instrument for receiving payment of such claim, or any part of it, before the claim was allowed, and before its amount was ascertained and a warrant for its payment issued, such transfer, assignment and power of attorney were null and void. The Postmaster General was directly in the line of duty when, in order that the will of Congress as expressed in the act of 1883 might be carried out, he informed claimants that they were under no legal obligation to respect any transfer, assignment, or power of attorney, which section 3477 of the Revised Statutes declared to be null and void. If the plaintiff had not taken any such transfers, assignments, or powers of attorney from his clients, he could not have been injured by the reference made by the Postmaster General to that section. If he had taken such instruments, he cannot complain that the Postmaster General called the attention of claimants to the statute on the subject, and correctly interpreted it.

The act of the head of one of the departments of the government in calling the attention of any person having business with such department to a statute relating in any way to such business, cannot be made the foundation of a cause of action against such officers.

If, as we hold to be the case, the circular issued by the Postmaster General to claimants under the acts of Congress in question was not unauthorized by law, nor beyond the scope of his official duties, can this action be maintained because of the allegation that what the officer did was done maliciously?

This precise question has not, so far as we are aware, been the subject of judicial determination. But there are adjudged cases, in which principles have been announced that have some bearing upon the present inquiry.

In *Randall* v. *Brigham*, 7 Wall. 523, 535 — which was an action against one of the Justices of the Superior Court of Massachusetts for an alleged wrongful removal of the plaintiff from his office of an attorney and counsellor at law — it was said that whatever might be the rule in respect of judges of limited and inferior authority, judges of superior or general authority were not liable to civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, "unless, perhaps, where the acts, in excess of jurisdiction, are done maliciously or corruptly."

But in *Bradley* v. *Fisher*, 13 Wall. 335, 350, 351 — which was an action against a Justice of the Supreme Court of the District of Columbia to recover damages alleged to have been sustained by the plaintiff "by reason of the wilful, malicious, oppressive and tyrannical acts and conduct" of the defendant, whereby the plaintiff was deprived of his right to practise as an attorney in that court — it was said that the qualifying words, above quoted, were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction were not liable to civil suits for their judicial acts, even when such acts were in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction was made between excess of jurisdiction and the clear absence of all jurisdiction over the subject-mat-

ter, the court observing that "where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. In this country," the court said, "the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office." Again: "The exemption of judges of the superior courts of record from liability to civil suit for the judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."

In *Yates* v. *Lansing*, 5 Johns. 282, 291, Kent, C. J., said: "The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisputed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government."

The same principle was announced in England in the case of *Fray* v. *Blackburn*, 3 B. & S. 576, in which Mr. Justice Crompton said: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore, the proposed allegation would not make the declaration good. The public are deeply interested

in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions." The principle was applied in one case for the protection of a county court judge, who was sued for slander, the words complained of having been spoken by him in his capacity as judge, while sitting in court, engaged in the trial of a cause in which the plaintiff was defendant. Chief Baron Kelly observed that a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice, and that the doctrine had been applied to the court of a coroner, and to a court-martial, as well as to the superior courts. He said: "It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?" *Scott* v. *Stansfield*, L. R. 3 Ex. 220, 223.

In *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94, 114, which was an action for libel brought by an officer of the army against his superior officer to recover damages on account of a report made by the latter in relation to certain letters of the former, the defendant claimed that what he did was done in the course of and as an act of military duty. The replication stated that the libel was written by the defendant of actual malice, without any reasonable, probable or justifiable cause, and not *bona fide* or in the *bona fide* discharge of the defendant's duty as such superior officer. The case was heard on

demurrer to the replication, and it was held by all the justices (Cockburn, C. J., only dissenting) that the action would not lie. The case was first considered in the light of the pleadings and the admissions of the demurrer. Mellor, J., said: "I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty and not the motives from or under which it is done. In short, it appears to me, that the proposition resulting from the admitted statements in this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; and, therefore, upon the pleadings as they stand we might give judgment for the defendant." But, according to the report of that case, the Attorney General did not rest the defence on the effect of the admissions in the pleadings, but contended broadly that no action would lie against an officer of the army charged with duties such as those stated on the record, for the discharge of them. He likened the case to that of the judges of courts of law, to grand jurymen, petty jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it, and claimed immunity for the defendant for the acts done in the course of his duty on the highest grounds of policy and convenience. No judge, no jury, nor witness, he said, "could discharge his duty freely if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him and to all officers in the same position." "There is," Mellor, J., said, "little doubt that the reasons which justify the immunity in the one case do in great measure extend to the other."

An instructive case upon the general subject of the immunity of public officers from actions for damages on account of what they may have done in the course of their official duties is *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255, 262, the judg-

ment in which was affirmed by the House of Lords. L. R. 7 H. L. 744, 754. The defendant, a general in the English army, was called before a court of inquiry, legally assembled to inquire into the conduct of the plaintiff, also an officer in the army. He made statements in evidence, and after the close of the evidence, handed in a written paper (not called for by the court, but having reference to the subject of the inquiry) as to the conduct of that officer. An action was brought in respect of those statements, which were alleged to be both untrue and malicious. That case came before the Queen's Bench, in the Exchequer Chamber, upon a bill of exceptions allowed by Mr. Justice Blackburn, who had instructed the jury as matter of law that the action would not lie, if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a military inquiry, in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted *mala fide*, and with actual malice, and without any reasonable or probable cause, and with the knowledge that the statements made and handed in by him were false. The court, all the judges concurring, sustained the correctness of this ruling, and held that the statements were privileged. "The authorities," it was said, "are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law." Lord Chancellor Cairns, in the House of Lords, said: "Adopting the expressions of the learned judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a court of inquiry of this kind for the purpose of testifying there upon a matter of

military discipline connected with the army. It is not denied that the statements which he made, both those which were made *viva voce* and those which were made in writing, were relative to the inquiry."

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a Department, it is clear — and the present case requires nothing more to be determined — that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such

Names of Counsel.

large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law.

The judgment of the Supreme Court of the District of Columbia is

Affirmed.

SPALDING *v.* DICKINSON. Error to the Supreme Court of the District of Columbia. No. 82, argued with No. 81, *ante*, 483.

MR. JUSTICE HARLAN: The defendant in error succeeded Mr. Vilas in the office of Postmaster General. The declaration in the present case is, in all material respects, like that in *Spalding* v. *Vilas*, just decided. For the reasons stated in the opinion in that case the judgment is

Affirmed.

Mr. W. Willoughby for plaintiff in error.

Mr. Attorney General and *Mr. Assistant Attorney General Dickinson* for defendant in error.

MATTHEWS *v.* UNITED STATES.

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

No. 778. Submitted March 3, 1896. — Decided March 16, 1896.

The defendant was indicted for perjury alleged to have been committed on the 7th of June. The minutes of the stenographer of the testimony, alleged to be false, were read upon the trial, and they said that the testimony alleged to be false was given on the 6th of June, instead of the 7th. The defendant, being convicted, moved for a new trial upon the ground that the variance was fatal, which was refused. *Held*, that such a variance was not material in this case.

Stenographers' minutes of evidence are not records.

THE plaintiff in error was indicted in the Circuit Court of the United States, for the Southern District of New York, for the crime of perjury, alleged to have been committed upon the trial of an action between the United States and one John Matthews, impleaded with others. The trial of the action in which the perjury was alleged to have been committed was had in the Circuit Court for the Southern District of New York, and Matthews, plaintiff in error, was sworn upon the trial, and the indictment in this case alleges that he committed the perjury set forth in the indictment upon that trial "before the said judge and jury, to wit, on the 7th day of June, in the year of our Lord one thousand eight hundred and ninety-four, and within the district aforesaid and within the jurisdiction of this court." For the purpose of proving the testimony of plaintiff in error, taken upon the original trial in which the perjury was alleged to have been committed, and by stipulation of counsel for the parties in this case, the minutes of the stenographer were read upon the trial, and from those minutes it appeared that the testimony, alleged to be false, was given by plaintiff in error upon the 6th instead of the 7th of June. The plaintiff in error was convicted. His counsel then made a motion for a new trial and in arrest of judgment, both of which motions were

denied. Upon the trial the objection was raised by counsel for defendant that there was a fatal variance existing between the indictment and the proof as to the time when the perjury was committed, and that question was reserved for the purpose of being heard on the motion for a new trial, in case the plaintiff in error was convicted. The motion for a new trial having been made on that ground and denied, the defendant below obtained a writ of error from this court, and the case is now here for review.

Mr. W. J. Townsend for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

The only point suggested by counsel for plaintiff in error upon which to obtain a reversal of the judgment is the fact of the variance between the indictment and the proof as to the day when the alleged perjury was committed. We think the decision of the court below was clearly right. The cases cited by counsel for plaintiff in error, in regard to the necessity for specific and accurate proof of the very day upon which the perjury was alleged to have been committed, were those in relation to records, depositions or affidavits which were to be identified by the day on which they were made or taken. Under such circumstances a misdescription of the date of the particular record, deposition or affidavit has been sometimes held fatal on the ground, substantially, that it has not been identified as the particular one in which the perjury is alleged to have been committed, because the record or other paper itself bears one date and the indictment describing it bears another. It is not the same record, and therefore there is variance, which has been held fatal to a conviction.

In this case there was no record which was contradicted by the proof given upon this trial. The trial was described accurately, the parties to it, the court in which it took place, the

term and the time at which it was tried, and the only difference between the allegation in the indictment and the proof in the case is that during this trial, which occupied several days, the plaintiff in error swore on the 6th of June instead of on the 7th, as alleged in the indictment, to the matter which was alleged to be false. The date upon which the evidence was given, which was alleged to have been false, appeared by the stenographer's minutes, who took the evidence on the trial, to have been the 6th of June. This is no record, and it is not within the principle upon which the cases relied upon by counsel for plaintiff in error were decided. Such a variance as appears in this case is not material. *Rex* v. *Coppard*, 3 C. & P. 59; *Keator* v. *People*, 32 Michigan, 484; *People* v. *Hoag*, 2 Parker's Cr. Rep. (N. Y.) 10. It will be seen that the time was stated under a *videlicet* in this indictment, although that fact is probably not very material. The opinion written by the learned judge in denying the motion for a new trial and in arrest of judgment says all that is necessary to be said in this case, and we concur entirely in the conclusion reached by him. 68 Fed. Rep. 880.

The judgment must be

Affirmed.

ORNELAS *v.* RUIZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 622. Argued January 13, 1896. — Decided March 16, 1896.

The appellees were brought before a Circuit Court commissioner in the Western District of Texas, charged by the Mexican consul with the commission, in Mexico, of a crime extraditable under the treaty of June 20, 1862. The commissioner found the evidence sufficient to warrant their commitment for extradition. On the application of the prisoners a writ of *habeas corpus* was issued by the United States District Judge, directed to the marshal of the district. The judge, after hearing, decided that the offences charged were political offences, and not extraditable, and ordered the prisoners discharged. From this judgment the consul appealed to this court. *Held*, that as his government was the real party

Statement of the Case.

interested, the appeal was properly prosecuted by him; and as the construction of the treaty was drawn in question, it was properly taken to this court.

The order of the District Court requiring the petitioners to enter into recognizances for their appearance to answer its judgment was rightly made.

A writ of *habeas corpus* cannot perform the office of a writ of error, and in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*.

Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law.

It is enough if it appear that there was legal evidence on which the commissioner might properly conclude that the accused had committed offences within the treaty as charged, and so be justified in exercising his power to commit them to await the action of the Executive Department.

On complaints made by Plutarco Ornelas, consul of the Republic of Mexico, charging Juan Duque, Inez Ruiz, and Jesus Guerra with the commission of murder, arson, robbery, and kidnapping, at the village of San Ygnacio, in the State of Tamaulipas, Republic of Mexico, on December 10, 1892; that they were fugitives from justice of the State of Tamaulipas and the Republic of Mexico, and had fled into the jurisdiction of the United States for the purpose of seeking an asylum; and that the alleged crimes were enumerated and embraced in the treaty of extradition then in force between the United States and the Republic of Mexico, warrants were issued by L. F. Price, commissioner of the Circuit Court of the United States for the Western District of Texas, duly authorized, for their apprehension, on which they were arrested and brought before the commissioner to answer the premises and to be dealt with according to law and the provisions of the treaty. The cases were heard, and the commis-

sioner found that the evidence was sufficient in law to justify their commitment on such charges, and that they should be placed in custody to await the order of the President of the United States in the premises.

Thereupon Ruiz, Guerra and Duque applied to the District Court of the United States for the Western District of Texas for writs of *habeas corpus*, alleging that they were unlawfully restrained of their liberty by the United States marshal for that district, and praying that they be released.

The writs were issued, and the marshal made his return, showing that he held petitioners by virtue of warrants issued by the United States commissioner on the application of the Mexican government for their extradition on the aforesaid charges. With the writs of *habeas corpus* were issued writs of *certiorari* directing the commissioner to send up the original papers and a transcript of the testimony on which the prisoners were committed. This was done, and on consideration of the cases the District Court held on the evidence that the offences with which petitioners were charged were purely political offences, for the commission of which petitioners were not extraditable, and entered a final order discharging petitioners from the custody of the marshal on giving bond for their appearance to answer the judgment on appeal. From this final order, the consul of the Republic of Mexico prayed an appeal to this court.

The following are articles of the extradition treaty between the United States and the Republic of Mexico proclaimed June 20, 1862, 12 Stat. 1199:

"Article I. It is agreed that the contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in article third of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found,

would justify his or her apprehension and commitment for trial if the crime had been there committed.

"Article II. In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory.

"Article III. Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories, or accomplices, to wit: Murder, (including assassination, parricide, infanticide, and poisoning,) assault with intent to commit murder, mutilation, piracy, arson, rape, kidnapping, defining the same to be the taking and carrying away of a free person by force or deception; forgery, including the forging or making, or knowingly passing or putting in circulation counterfeit coin or bank notes, or other paper current as money, with intent to defraud any person or persons; the introduction or making of instruments for the fabrication of counterfeit coin or bank notes, or other paper current as money; embezzlement of public moneys, robbery, defining the same to be the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear; burglary, defining the same to be breaking and entering into the house of another with intent to commit felony; and the crime of larceny, of cattle, or other goods and chattels, of the value of twenty-five dollars or more, when the same is committed within the frontier States or Territories of the contracting parties.

"Article IV. On the part of each country the surrender of fugitives from justice shall be made only by the authority of the executive thereof, except in the case of crimes committed

within the limits of the frontier States or Territories, in which latter case the surrender may be made by the chief civil authority thereof, or such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or, if, from any cause, the civil authority of such State or Territory shall be suspended, then such surrender may be made by the chief military officer in command of such State or Territory.

"Article V. All expenses whatever of detention and delivery effected in virtue of the preceding provisions shall be borne and defrayed by the government or authority of the frontier State or Territory in whose name the requisition shall have been made.

"Article VI. The provisions of the present treaty shall not be applied in any manner to any crime or offence of a purely political character, nor shall it embrace the return of fugitive slaves, nor the delivery of criminals who, when the offence was committed, shall have been held in the place where the offence was committed in the condition of slaves, the same being expressly forbidden by the constitution of Mexico; nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the third article committed anterior to the date of the exchange of the ratifications hereof.

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty."

Mr. J. H. McLeary for appellant. *Mr. John W. Foster*, *Mr. S. F. Phillips*, and *Mr. F. D. McKenney* were on his brief.

Mr. T. J. McMinn for appellee. *Mr. W. H. Brooker* was on his brief.

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

The Republic of Mexico applied for the extradition of these petitioners by complaints made under oath by its consul at

San Antonio, Bexar County, Texas, under section 5270 of the Revised Statutes. The official character of this officer must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf. *Wildenhus's case*, 120 U. S. 1. As the construction of the treaty was drawn in question the appeal was taken directly to this court, and the District Court rightly required petitioners, under Rule 34, to enter into recognizance for their appearance to answer its judgment.

The legislative provisions on the subject of extradition are to be found in sections 5270 to 5280, constituting Title LXVI of the Revised Statutes. Section 5270 provides: "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any Justice of the Supreme Court, Circuit Judge, District Judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

In the extradition case of *In re Stupp*, 12 Blatchford, 501, Mr. Justice Blatchford, then District Judge, carefully consid-

ered the provisions of the Revised Statutes in respect of the issue of writs of *habeas corpus* and *certiorari* by the courts and judges of the United States, Rev. Stat. §§ 751 to 761, and the acts of Congress from which those sections were brought forward, and pointed out that the general language used is as applicable to a case where the party is in custody under process issued on a final judgment of a court of the United States on a conviction on an indictment as it is to a case where a party is in custody under any other process; that it could not be successfully contended that these provisions have the effect to authorize a court of the United States, which has no direct power given to it to review the final judgment of another court of the United States in a given case, to review such judgment on the merits under the indirect authority of a writ of *habeas corpus;* and that, therefore, as the statute in respect of extradition gives no right of review to be exercised by any court or judicial officer, but the magistrate is to certify his findings on the testimony to the Secretary of State, that the case may be reviewed by the Executive Department of the government, the court issuing the writ may "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion."

By repeated decisions of this court it is settled that a writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the

purposes of extradition, such decision cannot be reviewed on *habeas corpus*. *In re Oteiza y Cortez, Petitioner*, 136 U. S. 330; *Benson* v. *McMahon*, 127 U. S. 457; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714.

As the English extradition act of 1870, 33 & 34 Vict. c. 52, extracts from sections 3 and 11 of which are given below,[1] contemplates an independent examination on *habeas corpus* in every case, if applied for, as in effect part of the proceedings, it has been held that the courts have power to go into the whole matter under the writ so provided for. *In re Castioni*, L. R. 1 Q. B. 1891, 149; *In re Arton*, 1896, 1 Q. B. 108. But the legislation of Congress in respect of extradition is widely different, and the scope of inquiry on the writ of *habeas corpus* is necessarily much narrower.

Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law.

---

[1] 3. "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character."

11. "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. Upon the expiration of the said fifteen days, or, if a writ of *habeas corpus* is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State by a warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly."

It must be assumed on this record that the commissioner was duly authorized; that petitioners were not citizens of the United States but were citizens of Mexico; that the acts charged were committed in Mexico, and were considered crimes under both governments; that no objection requiring consideration exists in the mode of procedure; and that the commissioner had jurisdiction of the person, and of the subject-matter, if, on the evidence, the offences charged were within the terms of the treaty.

The release of petitioners was ordered on the sole ground that, as appears from the portion of the opinion of the learned District Judge contained in the record, this raid was part of "a political movement, having for its purpose the overthrow of the existing government in Mexico, and that the offences committed by the petitioners and their associates in their vain and visionary attempt to accomplish their purpose were purely political offences within the meaning of the sixth article of the treaty of extradition." The evidence before the commissioner, from which this conclusion was deduced, tended to show that on December 10, 1892, a band of armed men to the number of one hundred and thirty or forty, under the leadership of one Francisco Benevides, passed over the Rio Grande from Texas into Mexico, and attacked about forty Mexican soldiers stationed at the village of San Ygnacio; killing and wounding some of them, and capturing others, who were afterwards released; burning their barracks and taking away their horses and equipments; that private citizens were also violently assaulted; horses belonging to them taken; houses burned; small sums of money extorted from women; clothes, provisions, and goods appropriated; and three citizens kidnapped and carried over the river to the Texas side, finally escaping; that these men were bandits, without uniforms or flag, but with a red band on their hats; and that Garza was not there and had nothing to do with the expedition. The band remained on the Mexican side of the river about six hours and recrossed at the village ford. Petitioners were members of the band, and citizens of Mexico, as appeared from the complaints and testimony, though one of them at

least had resided a large part of the time, for many years, in Texas. Evidence on behalf of petitioners was adduced indicating that there had been a revolutionary movement on that border under one Garza in 1891; that indictments had been found against the participants for violation of the neutrality laws; and that the aim, object and purpose of Benevides' men was the same as Garza's, "to cross over the river and fight against the government."

In the course of his opinion the District Judge referred to the views of the State Department as to the transaction at San Ygnacio. We presume this reference is to the note of Mr. Secretary Gresham to the Minister of Mexico, May 13, 1893, in respect of the extradition of Benevides. The facts were reviewed therein by the Secretary, and it was held that the acts for which his extradition was asked were "not of such a purely political character as to exclude them from the operation of the treaty." The Secretary concluded his resumé with these words: "The idea that these acts were perpetrated with *bona fide* political or revolutionary designs is negatived by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas." But extradition was not granted because it appeared that Benevides was a citizen of the United States.

The District Judge entertained different views from those of the Secretary, and arrived at a different result from that reached by the commissioner on the evidence on which the latter proceeded, and so was induced to substitute his judgment for that of the commissioner, in whom was reposed the authority of decision, unless jurisdiction were lacking.

Can it be said that the commissioner had no choice on the evidence but to hold, in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed, that this was a movement in aid of a political revolt, an insurrection or a civil war, and that acts which contained all the characteristics of crimes under the ordinary law were exempt from extradition because

of the political intentions of those who committed them? In our opinion this inquiry must be answered in the negative.

The contention that the right of the executive authority to determine when offences charged are or are not purely political is exclusive is not involved in any degree; nor are we concerned with the question of the actual criminality of petitioners if the commissioner had probable cause for his action. It is enough if it appear that there was legal evidence on which the commissioner might properly conclude that the accused had committed offences within the treaty as charged, and so be justified in exercising his power to commit them to await the action of the Executive Department. The rule as to probable cause was thus laid down by Mr. Chief Justice Marshall, sitting as a committing magistrate, in *Burr's case:* "On an application of this kind I certainly should not require that proof which would be necessary to convict the persons to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it." 1 Burr's Trial, 11; *Benson* v. *McMahon*, 127 U. S. 457, 462; *In re Farez*, 7 Blatchford, 345; *In re Ezeta*, 62 Fed. Rep. 972, 981.

We are of opinion that it cannot be held that there was substantially no evidence calling for the judgment of the commissioner as to whether he would, or would not, certify and commit under the statute, and that, therefore, as matter of law, he had no jurisdiction over the subject-matter; and, this being so, his action was not open to review on *habeas corpus.*

The final order of the District Court is therefore reversed and the case remanded for further proceedings in conformity to law.

DUSHANE *v.* BEALL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 134. Submitted March 2, 1896. — Decided March 16, 1896.

The limitation of two years made by Rev. Stat. § 5057 to suits and actions between an assignee in bankruptcy and persons claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment.

Assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefiting the estate, and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course.

From the record in this case the court is constrained to the conclusion that the assignee should not have been held by the court below to have exercised the right of choice between prosecuting the claim and abandoning it, in the absence of any evidence whatever to justify the conclusion that he had knowledge, or sufficient means of knowledge, of its existence prior to August 10, 1888; and that therefore there was error in its judgment.

THIS was a garnishee proceeding in the Court of Common Pleas for Fayette County, Pennsylvania.

The record of that court shows the issue in favor of Alpheus Beall, on a judgment recovered by him against Abraham O. Tinstman, of an attachment execution, dated June 9, 1888, and service thereof accepted by the Pittsburgh and Connellsville Railroad Company, as garnishee, June 15, 1888.

August 10, 1888, McCullough, assignee in bankruptcy, appeared in the garnishment proceeding and participated in the choice of arbitrators, who made an award September 25, 1888, in favor of Beall, from which award an appeal was taken. December 13, 1889, the case was continued "on account of death of assignee of A. O. Tinstman; said case not to be again placed on trial list until after appointment and appearance of another assignee in bankruptcy." April 23, 1890, "Edward

Statement of the Case.

Campbell, Esq., appears for J. M. Dushane, assignee in bankruptcy of A. O. Tinstman." September 11, 1890, "Joshua M. Dushane, assignee of A. O. Tinstman, appears in court and asks leave to be added to the record as defendant." Thereafter the case was submitted to the court for determination on a case stated, which embodied the following facts:

On the 5th of April, 1876, Abraham O. Tinstman was adjudicated a bankrupt in involuntary proceedings in bankruptcy, and during the same month Welty McCullough was appointed assignee, and took upon himself the duties thereof. The deed of the register in bankruptcy to the assignee conveyed the property which Tinstman possessed, was interested in, or entitled to, on the fifth day of April, but the schedule of assets filed by the assignee did not embrace the bankrupt's interest in a certain telegraph line hereinafter mentioned. Tinstman was duly discharged as a bankrupt, January 3, 1877.

In 1882, James L. Shaw instituted an action against the Pittsburgh and Connellsville Railroad Company in the Court of Common Pleas for Fayette County, Pennsylvania, to recover damages for a breach of contract relative to the maintenance and working of a line of telegraph between Uniontown and Connellsville, and on October 2, 1885, Tinstman was made one of the "use plaintiffs" therein.

After his discharge, Tinstman engaged in business, and became indebted to Alpheus Beall in the sum of $730.54, for which a judgment was rendered against him November 24, 1886, in said Court of Common Pleas.

Shaw recovered judgment against the railroad company for a considerable amount, covering damages from January 1, 1874, to September 1, 1887. Of these damages, the sum of $947.73 was Tinstman's share on account of an interest in the line of telegraph, which became his property "by subscription and payment therefor in the year 1865." McCullough died August 31, 1889, Joshua M. Dushane was appointed assignee in his place December 14, 1889, and intervened in this case, as such, September 11, 1890.

The Court of Common Pleas ruled that the assignee had

lost any right to the fund by reason of delaying claim thereto for an unreasonable time; and also that the limitation of two years prescribed by section 5057 of the Revised Statutes of the United States applied; and entered judgment in favor of Beall and against the railroad company as garnishee for $947.43, "the debt due by said garnishee to said Tinstman." The case was taken to the Supreme Court of Pennsylvania, which affirmed the judgment on the ground that the delay of the assignee was fatal to his claim. 149 Penn. St. 439. A writ of error from this court was then sued out.

Mr. Edward Campbell for plaintiff in error.

Mr. Leoni Melick for defendant in error.

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

We concur with the Supreme Court of Pennsylvania that the limitation of § 5057 of the Revised Statutes did not apply. That limitation is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment. *In re Conant*, 5 Blatchford, 54; *Clark* v. *Clark*, 17 How. 315, 321; *Phelps* v. *McDonald*, 99 U. S. 298, 306; *French* v. *Merrill*, 132 Mass. 525.

It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefiting the estate, and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course. *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Glenny* v. *Langdon*, 98 U. S. 20; *American File Co.* v. *Garrett*, 110 U. S. 288; *Smith* v. *Gordon*, 6 Law Rep., 313; *Amory* v. *Lawrence*, 3 Clifford, 523; *Ex parte Houghton*, 1 Lowell, 554; *Nash* v. *Simpson*, 78 Maine, 142; *Streeter* v. *Sumner*, 31 N. H. 542. The same principle is applicable also

to receivers and official liquidators. *Quincy &c. Railroad* v. *Humphreys*, 145 U. S. 82; *St. Joseph &c. Railroad* v. *Humphreys*, 145 U. S. 105; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313; *United States Trust Co.* v. *Wabash &c. Railway*, 150 U. S. 287; *In re Oak Pits Colliery Co.*, 21 Ch. Div. 322, 330. And see *Bourdillon* v. *Dalton*, 1 Esp. 233; *S. C.* Peake's N. P. 312; *Turner* v. *Richardson*, 7 East, 336; Domat, vol. 2, part 2, Book I, Title I, sec. v.

If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in *Smith* v. *Gordon*, he, with such knowledge, "stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property," then he may be held to have waived the assertion of his claim thereto.

In *Sparhawk* v. *Yerkes* we held that as the conduct of the assignees was such as to show that they did not intend to take possession of the assets in controversy; as they avoided assuming any liability in respect thereof; and as they allowed the bankrupt after his discharge by the expenditure of labor and money to save the assets and render them valuable, they could not be permitted to assert title against him. That was a suit directly against the bankrupt, and this is in effect the same, for Beall does not appear to occupy any better position than Tinstman himself. The judgment of the Supreme Court of Pennsylvania proceeded upon the ground that the assignee delayed too long in the assertion of his claim; that the litigation against the railroad company was protracted, uncertain, and expensive; and that as the assignee did not appear to have intervened in the matter until, as is stated, December 11, 1890, although the litigation began in the summer of 1882, he must be held to have elected to abandon the claim, and could not come in at so late a day and share in the fruits of litigation carried on by others; and on that view of the facts this conclusion would seem to be correct if the record showed on

the part of Tinstman's assignee knowledge of the facts or wilful blindness in relation to them.

The Supreme Court manifestly referred to the intervention, in this proceeding, of Dushane, as assignee, which was, according to the case stated, September 11, 1890; but McCullough had intervened as assignee August 10, 1888, and he having died August 31, 1889, the cause was continued for the appointment and appearance of another assignee.

It is said by counsel for the assignee that the original litigation was commenced April 29, 1878, by a bill in equity, filed for the benefit of all the owners of the telegraph line, which it was decided January 9, 1882, would not lie; that thereupon the action at law, which resulted in judgment, was brought July 10, 1882, in the name of Shaw alone, the contract being under seal, but for the benefit of his assigns as well, who were very numerous; that afterwards some, but not all, of the "use plaintiffs" were added to the record; and that Tinstman's assignee just as much participated in the litigation, from April, 1878, to its end in 1888, as any of the others, whether named as plaintiffs or not. The difficulty with this is that very little, if any, of the matter stated can be deduced from the record, which fails to disclose that the assignee was represented in the litigation against the railroad company, or asserted his claim to his share of the fruits thereof, whether as a party of record under Shaw or otherwise prior to his intervention in this action, August 10, 1888.

The case stated does show that Tinstman was made one of the "use plaintiffs" in Shaw's action, October 2, 1885, but there is no explanation of how that entry came to be made, and nothing to indicate notice thereof to the assignee, or to charge him with notice assuming that he was ignorant of the claim.

On the other hand, the bankruptcy proceeding was involuntary, and it appears that the schedule of assets (the term schedule being used in the case stated as the equivalent of the inventory) was made by the assignee, the law providing that the order of adjudication should require the bankrupt to deliver a schedule of creditors and an inventory and valuation

of his estate, and if the bankrupt were absent or could not be found, such schedule and inventory should "be prepared by the messenger and the assignee from the best information they can obtain." Rev. Stat. §§ 5030, 5031. And this inventory, thus prepared by the assignee, the record affirmatively shows, did not embrace the bankrupt's interest in the telegraph line, as we must presume it would, if the assignee had had, or been able to obtain, information in respect thereof. Nor can we find elsewhere in the record any evidence that the assignee knew or was informed of Tinstman's interest prior to August 10, 1888. Counsel for the assignee argues that the fact is that Tinstman's interest was the ownership of certain shares of stock in the telegraph company which were included in the inventory and delivered to the assignee, but the exact contrary appears from the case stated. Nor does the fact appear, which he likewise insists upon, that the assignee not only did not abandon, but actively asserted, his claim.

The question whether the assignee in bankruptcy was entitled to this claim was clearly a Federal question. *Williams* v. *Heard*, 140 U. S. 529. And if all the facts stated in the record before us do not, as matter of law, warrant the conclusion at which the highest court of the State arrived upon this question, it is the duty of this court so to declare, and to render judgment accordingly.

We must take the record as we find it, and are constrained to the conclusion that the assignee should not have been held to have exercised the right of choice between prosecuting the claim and abandoning it, in the absence of any evidence whatever to justify the conclusion that he had knowledge, or sufficient means of knowledge, of its existence prior to August 10, 1888; and that therefore there was error in the judgment.

Judgment reversed, and the cause remanded, that the judgment of the Court of Common Pleas may be reversed, and further proceedings had not inconsistent with this opinion.

GEER *v.* CONNECTICUT.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 87. Argued November 22, 1895. — Decided March 2, 1896.

The provision in the General Statutes of Connecticut, (Revision of 1888, § 2546,) that "no person shall at any time kill any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of this State; or shall transport or have in possession, with intent to procure the transportation beyond said limits, any of such birds killed within this State," is legislation which it is within the constitutional power of the legislature of the State to enact.

THE General Statutes of the State of Connecticut provide (Sec. 2530, Revision of 1888):

"Every person who shall buy, sell, expose for sale, or have in his possession for any purpose, or who shall hunt, pursue, kill, destroy or attempt to kill any woodcock, quail, ruffled grouse, called partridge, or gray squirrel, between the first day of January and the first day of October, the killing or having in possession of each bird or squirrel to be deemed a separate offence, . . . shall be fined not more than twenty-five dollars. . . . "

It is further by the statute of the same State provided (Sec. 2546):

"No person shall at any time kill any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of this State; or shall transport or have in possession, with intent to procure the transportation beyond said limits, any of such birds killed within this State. The reception by any person within this State of any such bird or birds for shipment to a point without the State shall be *prima facie* evidence that said bird or birds were killed within the State for the purpose of carrying the same beyond its limits."

An information was filed against the plaintiff in error in the police court of New London, Connecticut, charging him

with, on the 19th day of October, 1889, unlawfully receiving and having in his possession, with the wrongful and unlawful intent to procure the transportation beyond the limits of the State certain woodcock, ruffled grouse and quail killed within this State after the first day of October, 1889. The trial of the charge resulted in the conviction of the defendant and the imposing of a fine upon him. Thereupon the case was taken by appeal to the criminal court of Common Pleas. In that court the defendant demurred to the information on the ground, among others, that the statute upon which that prosecution was based violated the Constitution of the United States.

The demurrer being overruled, and the defendant declining to answer over, he was adjudged guilty and condemned to pay a fine and costs, and to stand committed until he had complied with the judgment. An appeal was prosecuted to the Supreme Court of Errors of the State. The defendant on the appeal assigned the following errors:

"The court erred —

"1st. In holding that the allegations contained in the complaint constitute an offence in law.

"2d. In holding that said complaint was insufficient in the law without an allegation that the birds therein mentioned were killed in this State for the purpose of conveying the same beyond the limits of this State.

"3d. In refusing to hold that so much of section 2546 of the General Statutes, under which this complaint is brought, as may be construed to forbid the transportation from this State of the birds therein described, lawfully killed and permitted by the laws of the State to become the subject of traffic and commerce, is unconstitutional and void.

"4th. In refusing to hold that so much of said section as may be construed to forbid the receiving and having in possession, with intent to procure the transportation thereof to another State, birds therein described, lawfully killed and permitted by the laws of this State to become the subject of traffic and commerce, is unconstitutional and void.

"5th. In holding that the defendant is guilty of an offence

under said section if such birds were lawfully killed in this State and were bought by the defendant in the markets of this State as articles of property, merchandise and commerce, and had begun to move as an article of interstate commerce.

"6th. In not rendering judgment for defendant."

In the Supreme Court the conviction was affirmed. The case is reported in 61 Connecticut, 144. To this judgment of affirmance this writ of error is prosecuted.

Mr. Hadlai A. Hull for plaintiff in error.

Mr. Solomon Lucas for defendant in error.

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

By the statutes of the State of Connecticut, referred to in the statement of facts, the open season for the game birds mentioned therein was from the first day of October to the first day of January. The birds which the defendant was charged with unlawfully having in his possession on the 19th of October, for the purpose of unlawful transportation beyond the State, were alleged to have been killed within the State after the first day of October. They were, therefore, killed during the open season. There was no charge that they had been unlawfully killed for the purpose of being transported outside of the State. The offence, therefore, charged was the possession of game birds, for the purpose of transporting them beyond the State, which birds had been lawfully killed within the State. The court of last resort of the State held, in interpreting the statute already cited, by the light afforded by previous enactments, that one of its objects was to forbid the killing of birds within the State during the open season for the purpose of transporting them beyond the State, and also additionally as a distinct offence to punish the having in possession, for the purpose of transportation beyond the State, birds lawfully killed within the State. The court found that the information did not charge the first of these offences, and therefore that the sole offence which it covered was the lat-

ter. It then decided that the State had power to make it an offence to have in possession, for the purpose of transportation beyond the State, birds which had been lawfully killed within the State during the open season, and that the statute in creating this offence did not violate the interstate commerce clause of the Constitution of the United States. The correctness of this latter ruling is the question for review. In other words, the sole issue which the case presents is, was it lawful under the Constitution of the United States (section 8, Article I) for the State of Connecticut to allow the killing of birds within the State during a designated open season, to allow such birds, when so killed, to be used, to be sold and to be bought for use within the State, and yet to forbid their transportation beyond the State? Or, to state it otherwise, had the State of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the State and forbid its transmission outside of the State?

In considering this inquiry we of course accept the interpretation affixed to the state statute by the court of last resort of the State. The solution of the question involves a consideration of the nature of the property in game and the authority which the State had a right lawfully to exercise in relation thereto.

From the earliest traditions the right to reduce animals *ferœ naturæ* to possession has been subject to the control of the law-giving power.

The writer of a learned article in the Répertoire of the Journal du Palais mentions the fact that the law of Athens forbade the killing of game, (Rep. Gen. J. P. vol. 5, p. 307,) and Merlin says (Répertoire de Jurisprudence, vol. 4, p. 128) that "Solon, seeing that the Athenians gave themselves up to the chase, to the neglect of the mechanical arts, forbade the killing of game.

Among other subdivisions, things were classified by the Roman law into public and common. The latter embraced animals *ferœ naturæ*, which, having no owner, were considered as belonging in common to all the citizens of the State. After pointing out the foregoing subdivision, the Digest says:

"There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law, that is to say, by methods which belong to the government. As the law of nature is more ancient, because it took birth with the human race, it is proper to speak first of the latter. 1. Thus, all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. . . . Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property or on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so." Digest, Book 41, Tit. 1, De Adquir. Rer. Dom.

No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession, although the Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property, as indeed this right was impliedly admitted by the Digest in the passage just cited. Institutes, Book 2, Tit. 1, s. 12.

This inhibition was, however, rather a recognition of the right of ownership in land than an exercise by the State of its undoubted authority to control the taking and use of that which belonged to no one in particular, but was common to all. In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals *ferœ naturœ* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control. Merlin, *ubi. sup.* mentions the fact that, although tradition indicates that from the earliest day in France, every citizen had a right to reduce a part of the common property in game to ownership by possession, yet it was also true that as early as the Salic law that right was regu-

lated in certain particulars. Pothier in his treatise on Property speaks as follows:

"In France, as well as in all other civilized countries of Europe, the civil law has restrained the liberty which the pure law of nature gave to every one to capture animals who, being *in naturali laxitate*, belong to no person in particular. The sovereigns have reserved to themselves, and to those to whom they judge proper to transmit it, the right to hunt all game, and have forbidden hunting to other persons. Some ancient doctors have doubted if sovereigns had the right to reserve hunting to themselves and to forbid it to their subjects. They contend that as God has given to man dominion over the beasts, the prince had no authority to deprive all his subjects of a right which God had given them. The natural law, say they, permitted hunting to each individual. The civil law which forbids it is contrary to the natural law and exceeds, consequently, the power of the legislator, who, being himself submitted to the natural law, can ordain nothing contrary to that law. It is easy to reply to these objections. From the fact that God has given to human kind dominion over wild beasts, it does not follow that each individual of the human race should be permitted to exercise this dominion. The civil law it is said cannot be contrary to the natural law. This is true as regards those things which the natural law commands or which it forbids; but the civil law can restrict that which the natural law only permits. The greater part of all civil laws are nothing but restrictions on those things which the natural law would otherwise permit. It is for this reason, although by the pure law of nature, hunting was permitted to each individual, the prince had the right to reserve it in favor of certain persons and forbid it to others. Pothier, Traité du Droit de Propriété, Nos. 27–28.

"The right belongs to the king to hunt in his dominion; his quality of sovereign gives him the authority to take possession above all others of the things which belong to no one, such as wild animals; the lords and those who have a right to hunt hold such right but from his permission, and he can affix to this permission such restrictions and modifications as may seem to him good." No. 32.

In tracing the origin of the classification of animals *feræ naturæ*, as things common, Pothier moreover says:

"The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community, which those who have written on this subject have called a negative community, which resulted from the fact that those things which were common to all belonged no more to one than to the others, and hence no one could prevent another from taking of these common things that portion which he judged necessary in order to subserve his wants. Whilst he was using them others could not disturb him, but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately reëntered into the negative community, and another could use them. The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community." No. 21.

Referring to those things which remain common, or in what he qualified as the negative community, this great writer says:

"These things are those which the jurisconsults called *res communes*. Marcien refers to several kinds — the air, the water which runs in the rivers, the sea and its shores. . . . As regards wild animals, *feræ naturæ*, they have remained in the ancient state of negative community."

In both the works of Merlin and Pothier, *ubi sup.*, will be found a full reference to the history of the varying control exercised by the law-giving power over the right of a citizen to acquire a qualified ownership in animals, *feræ naturæ*, evidenced by the regulation thereof by the Salic law, already

referred to, exemplified by the legislation of Charlemagne, and continuing through all vicissitudes of governmental authority. This unbroken line of law and precedent is summed up by the provisions of the Napoleon Code, which declare (arts. 714, 715): "There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws." Like recognition of the fundamental principle upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and, indeed, it may be safely said in the law of all the countries of Europe. Saint Joseph Concordance, vol. 1, p. 68.

The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.

Blackstone, whilst pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such right. 2 Bl. Com. 1 and 12.

Referring especially to the common ownership of game, he says:

"But after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them and no longer. Such (among others) are the elements of light, air and water, which a man may occupy by means of his windows, his gardens, his mills and other conveniences; such also are the generality of those animals which are said to be *feræ naturæ* or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure." 2 Bl. Com. 14.

"A man may lastly have a qualified property in animals

ferœ naturœ, propter privilegium, that is, he may have the privilege of hunting, taking and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases. . . . A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer." 2 Bl. Com. 394.

In stating the existence and scope of the royal prerogative, Blackstone further says:

"There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals, *ferœ naturœ*, as are known by the denomination of *game*, with the right of pursuing, taking and destroying them; which is vested in the king alone and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren or free fishery. . . . In the first place then, we have already shown, and indeed it cannot be denied, that by the law of nature every man from the prince to the peasant has an equal right of pursuing and taking to his own use all such creatures as are *ferœ naturœ*, and, therefore, the property of nobody, but liable to be seized by the first occupant, and so it was held by the imperial law even so late as Justinian's time. . . . But it follows from the very end and constitution of society that this natural right as well as many others belonging to a man as an individual may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community." 2 Bl. Com. 410.

The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.

Undoubtedly this attribute of government to control the taking of animals *ferœ naturœ*, which was thus recognized and

enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution. Kent, in his Commentaries, states the ownership of animals *feræ naturæ* to be only that of a qualified property. 2 Kent Com. 347. In most of the States laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. *Commonwealth* v. *Hall*, 128 Mass. 410; *Commonwealth* v. *Wilkinson*, 139 Penn. St. 304; *People* v. *O'Neil*, 71 Michigan, 325. There are also cases where the validity of some particular method of enforcement provided in some of the statutes has been drawn in question. *Kansas* v. *Saunders*, 19 Kansas, 127; *Territory* v. *Evans*, 2 Idaho, 634.

The adjudicated cases recognizing the right of the States to control and regulate the common property in game are numerous. In *McCrady* v. *Virginia*, 94 U. S. 395, the power of the State of Virginia to prohibit citizens of other States from planting oysters within the tide waters of that State was upheld by this court. In *Manchester* v. *Massachusetts*, 139 U. S. 24, the authority of the State of Massachusetts to control and regulate the catching of fish within the bays of that State was also maintained. See also *Phelps* v. *Racey*, 60 N. Y. 10; *Magner* v. *People*, 97 Illinois, 320; *American Express Co.*, v. *People*, 133 Illinois, 649; *State* v. *Northern Pacific Express Co.*, 58 Minnesota, 403; *State* v. *Rodman*, 58 Minnesota, 393; *Ex parte Maier*, 103 California, 476; *Organ* v. *State*, 56 Arkansas, 267, 270; *Allen* v. *Wyckoff*, 48 N. J. Law, 90, 93; *Roth* v. *State*, 51 Ohio St. 209; *Gentile* v. *State*, 29 Indiana, 409, 415; *State* v. *Farrell*, 23 Mo. App. 176, and cases there cited; *State* v. *Saunders*, *ubi sup.*; *Territory* v. *Evans*, *ubi sup.*

Opinion of the Court.

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this court in *Martin* v. *Waddell*, 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the State, is thus stated in a well considered opinion of the Supreme Court of California:

"The wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good." *Ex parte Maier*, *ubi sup.*

The same view has been expressed by the Supreme Court of Minnesota, as follows:

"We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common." *State* v. *Rodman*, *ubi sup.*

The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. The proposition

that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the State has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of State commerce, as a resulting necessity such property has become the subject of interstate commerce, and is hence controlled by the provisions of article 1, section 8, of the Constitution of the United States. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the State is allowed, that it thereby becomes commerce in the legal meaning of that word. In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the State, it may well be doubted whether commerce is created by an authority given by a State to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the State. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State, under the provision in question, created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the

control of the Constitution of the United States. The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court. In *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, Mr. Chief Justice Marshall said:

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of the State. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

So, again, in *The Daniel Ball*, 10 Wall. 557, 564, this court, speaking through Mr. Justice Field, said:

"There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations and with the Indian tribes. This limita-

tion necessarily excludes from the Federal control, commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State and does not extend to or affect other States."

The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the State to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it. All ownership in game killed within the State came under this condition, which the State had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the State consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce.

The case in this respect is identical with *Kidd* v. *Pearson*, 128 U. S. 1. The facts there considered were briefly as follows: The State of Iowa permitted the distillation of intoxicating liquors for "mechanical, medicinal, culinary and sacramental purposes." The right was asserted to send out of the State intoxicating liquors made therein on the ground that, when manufactured in the State, such liquors became the subject of interstate commerce, and were thus protected by the Constitution of the United States; but this court, through Mr. Justice Lamar, pointed out the vice in the reasoning, which consisted in presupposing that the State had authorized the manufacture of intoxicants, thereby overlooking the exceptional purpose for which alone such manufacture was permitted. So here the argument of the plaintiff in error substantially asserts that the state statute gives an unqualified right to kill game, when in fact it is only given upon the condition that the game killed be not transported beyond the state limits. It was upon this power of the State to qualify and restrict the ownership in game killed within its limits that the court below rested its conclusion, and similar views

have been expressed by the courts of last resort of several of the States. In *State* v. *Rodman*, 58 Minnesota, 393, 400, the Supreme Court of Minnesota said:

"The preservation of such animals as are adapted to consumption as food or to any other useful purpose, is a matter of public interest; and it is within the police power of the State, as the representative of the people in their united sovereignty, to make such laws as will best preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right of property in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the legislature has seen fit to impose." See, also, *State* v. *Northern Pacific Express Co.*, 58 Minnesota, 403.

So, also, in *Magner* v. *The People*, 97 Illinois, 320, 333, the Supreme Court of Illinois said:

"So far as we are aware, it has never been judicially denied that the government under its police powers may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year, although laws to this effect, it is believed, have been in force in many of the older States since the organization of the Federal Government. . . . The ownership being in the people of the State, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict, as in the opinions of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority — not a right inherent in each individual, and consequently nothing is taken away from the individual when

he is denied the privilege at stated seasons of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the State, and hence by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the State. But in any view, the question of individual enjoyment is one of public policy and not of private right."

See also *Ex parte Maier*, 103 California, 476; *Organ* v. *The State*, 56 Arkansas, 270. It is, indeed, true that in *State* v. *Saunders*, 19 Kansas, 127, and *Territory* v. *Evans*, 2 Idaho, 634, it was held that a state law prohibiting the shipment outside of the State of game killed therein violated the interstate commerce clause of the Constitution of the United States, but the reasoning which controlled the decision of these cases is, we think, inconclusive, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the State over property in game killed within its confines, and the consequent power of the State to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest.

Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson*, 128 U. S. 1; *Hall* v. *De Cuir*, 95 U. S. 485; *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Gibbons* v. *Ogden*, 9 Wheat. 1. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. *Phelps* v. *Racey*, 60 N. Y. 10; *Ex parte*

Maier, *ubi sup.*; *Magner* v. *The People*, *ubi sup.*, and cases there cited. The exercise by the State of such power therefore comes directly within the principle of *Plumley* v. *Massachusetts*, 155 U. S. 461, 473. The power of a State to protect by adequate police regulation its people against the adulteration of articles of food, (which was in that case maintained,) although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good.

Judgment affirmed.

Mr. Justice Field dissenting.

I am unable to agree with the majority of my associates in the affirmance of the judgment of the Supreme Court of Errors of Connecticut in this case, and I will state, briefly, the grounds of my disagreement.

Section 2546 of the statutes of Connecticut, contained in the revision of 1838, enacts that "no person shall, at any time, kill any woodcock, ruffled grouse, or quail, for the purpose of conveying the same beyond the limits of the State; or shall transport, or have in his possession with intent to procure the transportation beyond its limits, of any of such birds killed within the State." And it adds in substance that the reception by any person within the State of any such bird or birds for shipment to a point without the State shall be *prima facie* evidence that the bird or birds were killed within the State for the purpose of carrying the same beyond its limits.

Section 2530 of the statutes provides that every person who shall kill, destroy, or attempt to kill, any woodcock, quail, ruffled grouse, called partridge, or gray squirrel, between the first day of January and the first day of October, shall be fined in a sum not exceeding twenty-five dollars.

The present proceeding was commenced by an information

presented by the assistant district attorney of the city of New London, Connecticut, against the defendant, Edgar M. Geer, in the police court of that city, charging that he did, on the 19th of October, 1889, unlawfully receive and have in his possession certain woodcock, ruffled grouse, and quail killed within the State after the first day of October, 1889, with the wrongful and unlawful intention to procure their transportation without the limits of the State.

Upon the information the judge of the police court issued to the sheriff of the county, and to his deputies, a warrant for the arrest of the defendant and to have him brought before that court to answer the complaint. The defendant being brought before the court pleaded to the complaint that he was not guilty, but, as it is alleged, the court, having inquired into the matter, adjudged him to be guilty, and that he pay a fine of a specified amount, together with the costs of the prosecution, and stand committed until the judgment be complied with. From that decision the accused appealed to the next session of the Criminal Court of Common Pleas to be held for New London County, on the second Tuesday of December, 1889. At that court and term he appeared and demurred to the complaint on the ground, first, that the matters contained therein did not constitute an offence; second, on the ground that it did not allege that the birds were killed for the purpose of being conveyed beyond the limits of the State; third, on the ground that section 2546 of the General Statutes of Connecticut, under which the complaint was brought, was void and unconstitutional, so far as it could be construed to forbid the transportation of the birds killed from the State, or having possession of them with intent to procure their transportation to another State, averring that the birds had been sold to parties in such other State, and had begun to move as an article of interstate commerce; fourth, on the ground that it appeared in the complaint that the defendant was not guilty under the section if the birds were bought by him in the markets of the State as merchandise, and had begun to move to another State as an article of interstate commerce, such facts being averred in the complaint to exist.

The Criminal Court of Common Pleas overruled the demurrer, and found that the complaint was sufficient, and the accused having declined to answer over, it was held that he was guilty of the offence charged, and he was accordingly sentenced to pay a fine of twenty-five dollars and the costs of the prosecution, and to stand committed until the judgment was complied with. The defendant thereupon appealed from the judgment rendered by the Criminal Court of Common Pleas to the Supreme Court of Errors of the State for the Second Judicial District, to be held at Norwich on the last Tuesday of May, 1891. On that day the Supreme Court of Errors found that there was no error apparent in the judgment of the Criminal Court of Common Pleas, and accordingly affirmed it. An appeal was then taken from the decision of the Supreme Court of Errors to the Supreme Court of the United States, in which latter court the plaintiff in error assigns the following as grounds of error in the lower court:

1st. In refusing to hold that so much of section 2546 of the General Statutes, under which the complaint was brought, as might be construed to forbid the transportation from the State of the birds described, lawfully killed and permitted by the laws of the State to become the subject of traffic and commerce, was unconstitutional and void.

2d. In refusing to hold that so much of the section as might be construed to forbid the receiving and having in possession, with intent to procure the transportation thereof to another State, the birds described, lawfully killed, and permitted by the laws of the State to become the subject of traffic and commerce, was unconstitutional and void.

3d. In holding that the defendant was guilty of an offence under the section if the birds were lawfully killed in the State, and were bought by the defendant in the market of the State as merchandise, and had begun to move as an article of interstate commerce.

And this court, notwithstanding the errors assigned, affirms the judgment of the Supreme Court of Errors of Connecticut.

The record sent to it from the Supreme Court of Errors of the State presents the questions, supposed to be involved, in

a very confused and indistinct manner. Disentangling them from the mass of words used, it appears that the Supreme Court of Errors held that it was an offence against the statute, upon which the information was filed in the police court of New London, for the accused to have in his possession any of the birds mentioned killed in the State within the period designated, for the purpose of transporting them without the State, and that it was to be inferred, under the law, that the birds were killed within the State for that purpose. But if that constitutes the offence at which the statute aimed, the information is defective in not alleging that the birds were killed for the purpose stated, that is, of conveying them beyond the limits of the State, and thus that they were unlawfully killed.

The transportation of birds described to another State, which were lawfully killed, does not constitute an offence under the statute. The transportation against which the statute was levied was that of birds *unlawfully* killed; the evident object of the law being to prevent birds *unlawfully* killed from being transported to the markets of another State. The law was directed against the killing of the birds within certain designated months of the year; and, in furtherance of that law, the transportation of them to another State was declared to be unlawful. The Supreme Court of Errors held that it was not unconstitutional for the State to enact that birds might be killed and sold or held for domestic consumption only; and that although the birds became a lawful subject of property when killed within the State for the purpose of food, that it was competent for the State to limit their sale for that purpose to the needs of domestic consumption. And this court, in affirming the judgment of the Supreme Court of Errors, appears to sanction that doctrine; but to its soundness I cannot yield assent.

When any animal, whether living in the waters of the State or in the air above, is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State. Although

there are declarations of some courts that the State possesses a property in its wild game, and when it authorizes the game to be killed and sold as an article of food it may limit the sale only for domestic consumption, and the Supreme Court of Errors of Connecticut in deciding the present case appears to have held that doctrine, I am unable to assent to its soundness, *where the State has never had the game in its possession or under its control or use.* I do not admit that in such case there is any specific property held by the State by which, in the exercise of its rightful authority, it can lawfully limit the control and use of the animals killed to particular classes of persons, or citizens, or to citizens of particular places or States. But on the contrary, I hold that where animals within a State, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the State in any respect, they are not the property of the State or of any one in a proper sense. I hold that until they are brought into subjection or use by the labor or skill of man, they are not the property of any one, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit. When man by his labor or skill brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them, and the ownership of others in the animals is limited by the extent and right thus acquired. This is a generally recognized doctrine, acknowledged by all States of Christendom. It is the doctrine of law, both natural and positive. The Roman law, as stated in the Digest, cited in the opinion of the majority, expresses it as follows: "That which belongs to nobody is acquired by the natural law by the person who first possesses it." A bird may fly at such height as to be beyond the reach of man or his skill, and no one can then assert any right of property in such bird; it cannot then be said to belong to any one. But when from any cause the bird is brought within the reach and control or use of man, it becomes at that instant his property, and may be an article of commerce between him and citizens of the same or of other States.

In an opinion written by me some years since I had occasion to speak of this rule of law. I there said that it was a general principle of law, both natural and positive, that where a subject, animate or inanimate, which otherwise could not be brought under the control or use of man, is reduced to such control or use by his individual labor or skill, a right of property in it is acquired. The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property in the gem. He has by his own labor reduced it to possession, and in all communities and by all law his right to it is recognized. So the trapper on the plains and the hunter in the north have a property in the furs they have gathered, though the animals from which they were taken roamed at large and belonged to no one. They have added by their labor to the uses of man an article promoting his comfort which, without that labor, would have been lost to him. They have a right, therefore, to the furs, and every court in Christendom would maintain it. So when the fisherman drags by his net fish from the sea, he has a property in them, of which no one is permitted to despoil him. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 374.

In *State of Kansas* v. *Saunders*, 19 Kansas, 127, the defendant was charged, as the agent of the Adams Express Company, with receiving at Columbus, Kansas, "certain prairie chickens, which had been recently killed as game" and shipping them to the city of Chicago, in the State of Illinois. The statute under which he was prosecuted made it unlawful for any person to transport or to ship any animals or birds mentioned, among which were prairie chickens, out of the State of Kansas, and subjected him on conviction thereof to a fine of not less than ten nor more than fifty dollars. The defendant admitted the facts as alleged, but contended that such acts constituted no offence, claiming that the statute of the State

under which the proceedings against him were commenced was unconstitutional and void. The District Court held the statute valid, and found the defendant guilty, and sentenced him to pay a fine of ten dollars and costs of prosecution. From the conviction and sentence he appealed to the Supreme Court of Kansas, which reversed the judgment of the District Court, holding "that no State can pass a law (whether Congress has already acted upon the subject or not) which will directly interfere with the free transportation from one State to another, or through a State, of anything which is or may be a subject of interstate commerce;" and referred to the case of *Welton* v. *Missouri*, 91 U. S. 275, 282, where it was held by this court that "the fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

I do not doubt the right of the State, by its legislation, to provide for the protection of wild game, so far as such protection is necessary for their preservation or for the comfort, health or security of its citizens, and does not contravene the power of Congress in the regulation of interstate commerce. But I do deny the authority of the State, in its legislation for the protection and preservation of game, to interfere in any respect with the paramount control of Congress in prescribing the terms by which its transportation to another State, when killed, shall be restricted to such conditions as the State may impose. The absolute control of Congress in the regulation of interstate commerce, unimpeded by any state authority, is of much greater consequence than any regulation the State may prescribe with reference to the place where its wild game, when killed, may be consumed.

When property, like the game birds in this case, is reduced to possession it becomes an article of commerce and may be the subject of sale to the citizens of one State or community, or to the citizens of several. The decision of the court, however, would limit the right of sale of such property, however

valuable it may become, and whether living or killed, to the directions of the State or community in which the property is found, and would convert it from the freedom of use which belongs to property in general to the limited use of the persons or communities where found, or to a particular class to which only property possessed of special ingredients or qualities is limited. I do not think that it lies within the province of any State to confine the excellencies of any articles of food within its borders to its own fortunate inhabitants to the exclusion of others, and that it may lawfully require that game killed within its borders shall only be eaten in such parts of the country as it may prescribe.

By the Constitution of the United States it has been adjudged that commerce between the States is under the absolute regulation of Congress, and that whenever an article of property begins to move from one State to another, commerce between the States has commenced, and that with its control or regulation no State can interfere. *Welton* v. *Missouri*, 91 U. S. 275; *Henderson* v. *New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Ward* v. *Maryland*, 12 Wall. 418; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Sherlock* v. *Alling*, 93 U. S. 99.

I therefore dissent from the conclusion of the majority of my associates in affirming the judgment of the Supreme Court of Errors of Connecticut.

Mr. Justice Harlan dissenting.

The statutes of Connecticut declare that "every person who shall buy, sell, expose for sale, or have in his possession for the purpose, or who shall hunt, pursue, kill, destroy or attempt to kill any woodcock, quail, ruffled grouse, called partridge, or gray squirrel between the first day of January and the first day of October, the killing or having in possession of each bird or squirrel to be deemed a separate offence, . . . shall be fined not more than $30." They also provide that "no person shall at any time kill any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of the State; or shall transport or have in his posses-

sion, with intention to procure the transportation beyond said limits, any such birds killed within this State. The reception by any person within this State of any such bird or birds for shipment to a point without the State shall be *prima facie* evidence that said bird or birds were killed within the State for the purpose of carrying the same beyond its limits."

The plaintiff in error was not charged with having in his possession game that had been killed "for the purpose of conveying the same beyond the limits of the State." It is admitted that the game in question was lawfully killed, that is, was killed during what is called the "open season." But the charge was that the defendant unlawfully received and had in his possession, with the wrongful and unlawful intent to procure the transportation of the same beyond the limits of the State, certain woodcock, ruffled grouse and quail killed within the State after the first day of October.

I do not question the power of the State to prescribe a period during which wild game within its limits may not be lawfully killed. The State, as we have seen, does not prohibit the killing of game altogether, but permits hunting and killing of woodcock, quail, ruffled grouse and gray squirrels between the first day of October and the first day of January. The game in question having been lawfully killed, the person who killed it and took it into his possession became the rightful owner thereof. This, I take it, will not be questioned. As such owner he could dispose of it, by gift or sale, at his discretion. So long as it was fit for use as food, the State could not interfere with his disposition of it, any more than it could interfere with the disposition by the owner of other personal property that was not noxious in its character. To hold that the person receiving personal property from the owner may not receive it with the intent to send it out of the State is to recognize an arbitrary power in the government which is inconsistent with the liberty belonging to every man, as well as with the rights which inhere in the ownership of property. Such a holding would also be inconsistent with the freedom of interstate commerce which has been established by the Constitution of the United States. If the

majority had not held differently in the present case, I should have said that discussion was unnecessary to show the soundness of the propositions just stated. But it seems that if the citizen, whether residing in Connecticut or elsewhere, finds in the markets of one of the cities or towns of that State game, fit for food, that has been lawfully killed, and is lawfully in the possession of the keeper of such market, he may, without becoming a criminal, buy such game and take it into his possession, provided his intention be to eat it, or to have it eaten, in Connecticut. But he will subject himself to a fine, as well as to imprisonment upon his failing to pay such fine, if he buys and take possession of such lawfully killed game, with intent to send it to a friend in an adjoining State.

The court cites *McCready* v. *Virginia*, 94 U. S. 391, 395, in which it was held that Virginia could restrict to its own citizens the privilege of *planting* oysters in the streams of that State, the soil under which was owned by it. But I cannot believe that it would hold that oysters, which had been lawfully taken out of such streams, and which had been lawfully planted, could not be purchased in Virginia, with the intent to ship them to another State. This court, in *Plumley* v. *Massachusetts*, 155 U. S. 461, another of the cases cited by the majority, sustained as valid a statute of Massachusetts, enacted to prevent deception in the manufacture and sale in that State of imitation butter, and which prohibited the sale of oleomargarine, artificially colored so as to cause it to look like genuine yellow butter. But I cannot suppose that this court will ever hold that a State could make it a crime to purchase with the intent to send it to another State oleomargarine or genuine yellow butter that had been lawfully manufactured within its limits.

Believing that the statute of Connecticut, in its application to the present case, is not consistent with the liberty of the citizen or with the freedom of interstate commerce, I dissent from the opinion and judgment of the court.

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

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* JAMES.

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

No. 242. Submitted October 15, 1895. — Decided March 2, 1896.

There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in "controversies between citizens of different States."

It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State; and such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.

Such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations.

The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation.

That presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary.

The provision in the Arkansas statute of March 13, 1889, that a railroad corporation of another State which had leased or purchased a railroad in Arkansas and filed with the Secretary of State of that State, as provided by the act, a certified copy of its articles of incorporation, should become a corporation of Arkansas, does not avail to create an Arkansas corporation out of a foreign corporation complying with those provisions, in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution, and subject it to a suit in the Federal courts sitting in the State of Arkansas, brought by a citizen of the State of its origin.

On December 24, 1892, Etta James, defendant in error, brought this action in the Circuit Court for the Western Dis-

trict of Arkansas against the St. Louis and San Francisco Railway Company, plaintiff in error, for negligence in maintaining a switch target at Monett, in Barry County, in the State of Missouri, so near its tracks that her husband was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. Her husband resided at Monett and died intestate. The defendant in error was the widow and sole heir at law of her husband, and no administrator of his estate was appointed in Arkansas. She recovered a judgment of $5000.

Etta James, the defendant in error, resided at Monett, and was a citizen of the State of Missouri. Monett is a station in Missouri, on the railroad of the plaintiff in error, about fifty miles from the southern border of that State.

The St. Louis and San Francisco Railway Company was organized and incorporated under the laws of the State of Missouri in 1876, and soon thereafter became the owner of and has ever since owned and operated a railroad in that State extending from Monett southerly to the southern border of the State of Missouri.

Section 11 of Article XII of the constitution of the State of Arkansas, which was adopted in 1874, provides that —

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law: *Provided*, That no such corporation shall do any business in this State, except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations, and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges, or franchises than may be exercised by like corporations of this State; nor shall they have power to condemn or appropriate private property."

Section 1 of Article XVII of that constitution provides that —

"All railroads, canals, and turnpikes shall be public highways, and all railroads and canal companies shall be common

carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the state line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other road, and shall receive and transport each other's passengers, tonnage, and cars loaded or empty, without delay or discrimination."

Section 3 of an act passed by the general assembly of the State of Arkansas, entitled "An act in relation to certain railroads," approved March 16, 1881, (Laws of Arkansas, 1881, No. 43, at p. 83,) provides —

"That every railroad corporation incorporated under the laws of this State, whose road is wholly, or in part, constructed and operated, is hereby authorized to sell, lease, or otherwise dispose of the whole or any part of its road, ways, and rights of way, with the franchises thereto belonging, and its other property, to any connecting railroad company, or to any railroad corporation now or hereafter organized under the laws of this or any other State, upon such terms and conditions as may be agreed upon by the board of directors of said corporations, and ratified by a two thirds vote of the issued capital stock thereof, and to receive the bonds or stock of the purchasing corporation in whole or in part payment of such purchase, and corporations may be formed for the purpose of purchasing or leasing the whole or any part of any railroad, and such purpose or object shall be stated in articles of association, which shall be executed and filed in the office of the Secretary of State, the same to be as near as may be in accordance with section 4918 of Gantt's Digest. All shares of stock issued in payment of such purchase shall be deemed to be full paid shares, and the number and amount of shares so to be issued shall be stated in the aforesaid articles of association, and said articles shall be otherwise altered, if necessary, so as to conform to the facts."

Section 5 of the same act provides that —

"Any railroad company incorporated by or under the laws of any other State, and having a line of railroad built, or

partly built, to or near any boundary of this State, and desiring to continue its line of railroad into or through this State, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease, or purchase, the property rights, privileges, lands, tenements, immunities, and franchises of any railroad company organized under the laws of this State, which said lease or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own, and operate the said railroad so leased or purchased as fully and to the same extent as the company organized under the laws of this State might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad company as will best subserve its purpose, and the building of said line of railroad; but before any such lease or sale shall be made, by any company organized under the laws of this State, two thirds in amount of the capital stock issued shall, at a meeting of the stockholders thereof — of which sixty days' notice shall be given in some newspaper published at the city of Little Rock, and in such other papers published elsewhere as the president and directors of such company may direct — assent thereto; and any railroad company organized under the laws of any State, and having a line of railroad built, or partly built, to any boundary of this State, and desiring to continue its line of road, or any branch thereof, into or through this State, is hereby authorized and empowered so to do, when it shall have acquired by lease or purchase the corporate rights, privileges, and franchises of any railroad corporation in the manner herein provided, formed under the laws of this State, and such railroad company, upon filing a certified copy of its articles of incorporation, or the special act incorporating the same, shall have, possess, and enjoy all the rights, powers, privileges, franchises, and immunities belonging to railroad corporations formed under the general laws of this State, which are not in conflict with the constitution or laws of this State; but nothing herein contained shall interfere with, or abridge the right of any railroad corporation acquired under

section 4942 of Gantt's Digest. . . . In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads, the liabilities and forfeitures thereby imposed, and may sue and be sued in the same manner as other railroad corporations, and subject to the same service of process, and shall keep an office or offices in said State as is required by section 11 of article 12 of the constitution of this State, and an agent or agents upon whom process may be served, with the like force and effect as is provided for the service of process in section two of this act."

At the time of the accident complained of the plaintiff in error owned and operated the railroad from the southern border of the State of Missouri to Fort Smith, in the State of Arkansas, in connection with its original line from Monett to the Missouri border, and these roads formed and were operated as a continuous line of railroad from Monett to Fort Smith. That portion of this continuous line of railroad which was situated in Arkansas had been built by corporations organized and incorporated under the laws of that State. In the year 1882 the St. Louis and San Francisco Railway Company purchased from these Arkansas corporations, under the act of March 16, 1881, the railroad extending from the southern border of Missouri to Fort Smith, Arkansas, and all the railways, constructed and unconstructed, and all the roads, franchises, and property which these Arkansas corporations had. These Arkansas corporations have since maintained their separate organizations as corporations of that State, but have operated no railroads. From the time of this purchase to the present time the plaintiff in error has operated this continuous line of railroad from Monett, Missouri, to Fort Smith, Arkansas, and has owned all the rolling stock and other appurtenances used upon this railroad.

An act passed by the general assembly of the State of Arkansas, entitled "An act relating to the consolidation of railroad companies and the purchasing, leasing, and operation of railroads, and to repeal sections one, two, three, four, and five of an act entitled 'An act to prohibit foreign corporations from operating railroads in this State,' approved March 22, 1887,"

approved March 13, 1889, Laws of Arkansas, 1889, act 34, at p. 43, provided as follows:

"SEC. 1. That sections one, two, three, four, and five of an act entitled 'An act to prohibit foreign corporations from operating railroads in this State,' approved March 22, 1887, be and the same are hereby repealed.

"SEC. 2. Any railroad company in this State, existing under general or special laws, may sell or lease its road, property, and franchises to any other railroad company duly organized and existing under the laws of any other State or Territory, whose line of railroad shall so connect with the leased or purchased road by bridge, ferry, or otherwise as to practically form a continuous line of railroad, and any railroad company in this State existing under general or special laws may buy or lease, or otherwise acquire, any railroad or railroads, with all the property, rights, privileges, and franchises thereto pertaining, or buy the stocks and bonds, or guarantee the bonds of any railroad company or companies incorporated or organized within or without this State whenever the roads of such companies shall form in the operation thereof a continuous line or lines: *Provided*, That before any such lease or sale is valid, it must be approved and ratified by persons holding or representing two thirds of the capital stock of each of such companies respectively, at a stockholders' meeting called for that purpose; and any railroad company existing under the general or special laws of any other State or Territory may buy or lease or otherwise acquire any railroad or railroads, the whole or part of which is in this State, with all the rights, privileges, and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company incorporated or organized under the laws of this State, whenever the roads of such companies shall form in the operation thereof a continuous line or lines: *Provided*, That the road so purchased shall not be parallel or competing with the purchasing road; and any railroad company existing under the laws of any other State or Territory may extend and construct its railroad into or through this State: *Provided further*, That any agreement of any company existing under

the general or special laws of this State, or of any other State or Territory, to lease or buy a railroad and appurtenances, or to buy the stock or bonds, or guarantee the bonds of any railroad company incorporated and organized within this State, heretofore executed by the proper officers of such companies and ratified by the companies parties thereto, by the assent of persons holding two thirds of the capital stock in each of such companies, expressed at a meeting of such stockholders called for that purpose, shall be taken and held to be binding from the date of its execution: *Provided further*, That nothing in the foregoing provisions shall be held or construed as curtailing the right of State or counties through which said consolidated, leased, or purchased road or roads may be located to levy and collect taxes upon the same and the rolling stock thereof, *pro rata*, in conformity with the provisions of the laws of this State upon that subject: *Provided further*, That before any railroad corporation of any other State or Territory shall be permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the secretary of State of this State a certified copy of its articles of incorporation, if incorporated under a general law of such State or Territory, or a certified copy of the statute laws of such State or Territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such State; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line, and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this State, subject to all of the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation: *And provided further*, That every railroad corporation of any other State, which has heretofore leased or purchased any railroad in this State, shall, within sixty days from the passage of this act,

file a duly certified copy of its articles of incorporation or charter with the secretary of State of this State, and shall, thereupon, become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits or proceedings instituted against any such corporation process may be served upon the agent or agents of such corporation or corporations in this State, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this State organized and existing under the laws of this State.

"SEC. 3. Any foreign corporation which has heretofore constructed, purchased, leased, or acquired or now operates any railroad in this State, shall within sixty days after the passage of this act comply with the provisions thereof, by filing a copy of its articles of incorporation or of the special act of the legislature incorporating such company in the office of the secretary of State of this State, and for every day which any such company shall fail to comply with the provisions of this act it shall pay a penalty of one thousand dollars, which penalty may be recovered by the district attorney in a civil action instituted in the proper court in any county through which such railroad or any part thereof so owned, purchased, leased, acquired, or operated by such foreign company may be located.

"SEC. 4. This act shall take effect and be in force from and after its passage."

On May 6, 1889, the St. Louis and San Francisco Railway Company filed with the secretary of State of the State of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri, as required by said act of March 13, 1889, and has never been otherwise incorporated or organized under the laws of the State of Arkansas.

The plaintiff in error properly and seasonably raised the objection in the Circuit Court that that court had no jurisdiction of this action on the ground that the plaintiff in error was not a citizen of the State of Arkansas, but was a citizen of the State of Missouri, of which State the defendant in error was also a resident and citizen; but the plaintiff in

error waived its personal privilege of being sued in the district of which it was an inhabitant. The question raised by that objection was, by proper exception to the ruling below and assignment of error, presented to the Circuit Court of Appeals for determination.

And the said United States Circuit Court of Appeals, to the end that it might properly decide this and other questions arising in this case which are duly presented by exceptions and assignments of error properly taken and filed, the said court, desired the instruction of the Supreme Court of the United States upon the following questions:

1st. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of State of Arkansas, and continuing to operate its railroad through that State, become a corporation and citizen of the State of Arkansas?

2d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the State of Missouri?

3d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which defendant in error was and is a resident and citizen of the State of Missouri, and the

cause of action accrued in the State of Missouri, and arose from an accident that resulted from the operation of the railroad of the company in that State?

4th. In view of the facts hereinbefore set forth, did the Circuit Court of the United States for the Western District of Arkansas have jurisdiction of this action?

Mr. George R. Peck, *Mr. A. T. Britton*, *Mr. E. D. Kenna*, and *Mr. A. B. Browne*, for plaintiff in error.

Mr. Frank W. Hackett, *Mr. J. H. Clendening*, *Mr. H. C. Mechem*, and *Mr. F. A. Youmans* for defendant in error.

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

Etta James, as a citizen of the State of Missouri, and having a cause of action against the St. Louis and San Francisco Railway Company, a corporation of the State of Missouri, could, of course, sue the latter in the courts of that State, but equally, of course, could not sue such state corporation in the Circuit Court of the United States for the District of Missouri. Can she, as such citizen of the State of Missouri, lawfully assert her cause of action in the Circuit Court of the United States for the District of Arkansas against the St. Louis and San Francisco Railway Company by showing that the latter had availed itself of the rights and privileges conferred by the State of Arkansas on railroad corporations of other States coming within her borders and complying with the terms and conditions of her statutes?

Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature, and that the St. Louis and San Francisco Railway Company, though denying the plaintiff's right to sue it in the Circuit Court of Arkansas, waives its statutory privilege of being sued only in the district in which it has its habitat.

It must be regarded, to begin with, as finally settled, by repeated decisions of this court, that, for the purpose of juris-

diction in the Federal courts, a state corporation is deemed to be indisputably composed of citizens of such State. It is equally true that, without objection so far from the Federal authority, whether legislative or judicial, it has become customary for a State, adjacent to the State creating a railroad corporation, to legislatively grant authority to such foreign corporation to enter its territory with its road — to make running arrangements with its own railroads — to buy or lease them or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent State, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such State.

We have already said that the rule that state corporations are undisputably composed of citizens of the States creating them is finally settled. But, in view of the question now before us, it may be well to briefly review some of the cases.

In the case of *Bank of the United States* v. *Deveaux*, 5 Cranch, 61, 87, 88, where an action had been brought against citizens of the State of Georgia in the Circuit Court of the United States for the District of Georgia, by a petition of "the president, directors, and company of the Bank of the United States," wherein it was alleged that the petitioners were citizens of the State of Pennsylvania, it was held that a corporation aggregate, composed of citizens of one State, may sue a citizen of another State in the Circuit Court of the United States, and Chief Justice Marshall, in giving the opinion of the court, said: "Substantially and essentially, the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals."

Before leaving this case it should be noted that the United States Bank was not a corporation of the State of Pennsylvania, but of the United States. The decision, therefore, was to the effect that where it appeared that a corporation plaintiff, regardless of its origin, was composed of aliens or of

citizens of a different State from the defendant, the plaintiff, through suing in its corporate name, could make the averment that the individuals who composed the corporation were such aliens or citizens of a different State, and such averment, if not traversed, would sustain the jurisdiction. The principle of the case makes the individual corporators the real parties to the suit.

In *Louisville, Cincinnati &c. Railroad* v. *Letson*, 2 How. 497, 555, an action was brought, in the Circuit Court of the United States for the District of South Carolina, by a citizen of the State of New York against a corporation whose members were alleged to be citizens of South Carolina. A plea to the jurisdiction was set up that there were members of the defendant company who were not citizens of the State of South Carolina, but of another State than New York or South Carolina. In the opinion in this case, *Bank of the United States* v. *Deveaux* was said to have gone too far, and that consequences and inferences had been argumentatively drawn from it which ought not to be followed, and it was said that "a corporation created by a State to perform its functions under the authority of that State and only suable there, though it may have members out of the State, seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and, therefore, entitled, for the purpose of suing and being sued, to be deemed a citizen of that State," and accordingly the judgment of the Circuit Court, overruling the plea to its jurisdiction, was sustained.

Marshall v. *Baltimore & Ohio Railroad*, 16 How. 314, 329, was a case tried in the Circuit Court of the United States for the District of Maryland, wherein the plaintiff alleged that he was a citizen of the State of Virginia, and that the Baltimore and Ohio Railroad Company, the defendant, was a body corporate by an act of the general assembly of Maryland, and it was suggested, when the case came into this court, that such an averment was insufficient to show jurisdiction in the courts of the United States over the suits, and it was denied that the decision in *Louisville Railroad Company* v. *Letson*, 2 How. 497, sanctioned it, or, if some of the doctrines there

advanced seemed to do so, it was said that they were extra-judicial, and, therefore, not authoritative. Several judges dissented, but the court, speaking through Mr. Justice Grier, held that "if the declaration set forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that 'the defendants are a body corporate by the act of the general assembly of Maryland,' is a sufficient averment that the real defendants are citizens of that State."

In *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, 233, Chief Justice Taney, speaking for the court, said: "The question as to the jurisdiction of the courts of the United States in cases where a corporation is a party, was argued and considered in this court, for the first time, in the cases of the *Hope Insurance Company* v. *Boardman*, and of the *Bank of the United States* v. *Deveaux*, 5 Cranch, 57 and 61. These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And in the last-mentioned case the court held that in a suit by or against a corporation, in its corporate name, this court might look beyond the mere legal being which the charter created, and regard it as a suit brought by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular State (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators were not named in the suit or the averment.

"But in the case of the *Louisville Railroad Company* v. *Letson* the court overruled as much of this opinion as authorized a corporation to plead in abatement that one or more of the corporators, plaintiff or defendants, were citizens of a different State from the one described, and held that the members of the corporate body must be presumed to be citizens of the State in which the corporation was domiciled, and that both parties were estopped from denying it. And that inasmuch

as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the State from which this legal being derived its existence and its faculties and powers."

The previous cases were reviewed in *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286, 297. That was the case of an action brought in the Circuit Court of the United States for the District of Indiana against Wheeler, a citizen of that State, to recover the amount due on his subscription to stock of the Ohio and Mississippi Railroad Company. The declaration described the plaintiffs as "the president and directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the States of Indiana and Ohio, and having its principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio." The defendant pleaded to the jurisdiction by alleging that the plaintiff company, although a corporation of the State of Ohio in the first instance, had been incorporated by an act of assembly of the State of Indiana, and thus had become a body corporate of the same State whereof he was a citizen.

The question thus raised was on a certificate of a division of opinion between the judges of the Circuit Court, brought to this court, and was answered as follows: "This suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned State. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and

style by which they are described. The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the coöperating legislation of the two States, and to be one and the same legal being in both States. If this were the case it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law or under the decision of this court in the case of the *Bank of Augusta* v. *Earle*. It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of those States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company are, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States. . . . And we shall certify to the Circuit Court that it has no jurisdiction of the case on the facts presented by the pleadings."

Memphis & Charleston Railroad v. *Alabama*, 107 U. S. 581, 585, was where an action had been brought by the State of Alabama, for the use of a county of that State, in a court of that State, against a railroad corporation whose road passed through that State and county, to recover the amount of a county tax

assessed upon its property; and the cause was removed into the Circuit Court of the United States for the Northern District of Alabama; and upon motion the cause was remanded to the state court upon the ground that the defendant, although incorporated in Tennessee also, was a corporation of the State of Alabama. On error the judgment of the court below was affirmed, and this court, per Mr. Justice Gray, said: "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of the State of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

In this case, *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286, and *Railway Company* v. *Whitton*, 13 Wall. 270, were cited. The former has already been noticed, and of the latter it may be said, by way of distinguishing it from the present case, that while it was held that a citizen of Illinois might sue the railroad company in the Circuit Court of Wisconsin, although the company had been likewise incorporated in Illinois, yet the cause of action arose in Wisconsin — nor does it appear in the report of that case what was the character of the legislation by which the Wisconsin company was created, nor was the question now before us there considered. It is also observable that in the latter case *Ohio & Mississippi Railroad* v. *Wheeler* was cited with approval.

One phase of the subject was before the court in the case of the *Pennsylvania Co.* v. *St. Louis &c. Railroad*, 118 U. S. 290, 295. A suit had been brought in the Circuit Court of the United States for the District of Indiana, by the St. Louis, Alton, and Terre Haute Railroad Company, alleging that it was a corporation organized under the laws of the State of Illinois, and a citizen of that State, against the Indianapolis and St. Louis company, a corporation organized under the laws of the State of Indiana, and a citizen of that State, and against other corporations mentioned in the bill as citizens of Indiana,

or of other States than Illinois. An objection to the jurisdiction was made on the ground that the St. Louis, Alton, and Terre Haute Railroad Company was organized under laws of both Illinois and Indiana, and was therefore a citizen of the latter State. In treating this question this court said, by Mr. Justice Miller: "It does not seem to admit of question that a corporation of one State, owning property and doing business in another State by permission of the latter, does not become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary, may by permission of the State of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire State, . . . without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana as have been conferred on it by the State which created it, constitutes it a corporation of the State of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another State to exercise its functions in the State where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies and others to do business in other States than those which have chartered them. To make such a company a corporation of another State, the language must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers."

So in *Nashua Railroad* v. *Lowell Railroad*, 136 U. S. 356, it was held that railroad corporations, created by two or more

States, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; but each has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it was created, and the union of name, of officers, of business and property does not change their distinctive character as separate corporations.

To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in "controversies between citizens of different States."

It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.

Such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations.

The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation.

We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably

taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of its original creation.

We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it.

It should be observed that, in the present case, the corporation defendant was not incorporated as such by the State of Arkansas. The legislation of that State was professedly dealing with the railroad corporation of other States. The constitution of Arkansas provides that "foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law," but "they shall not have power to condemn or appropriate private property."

Section 5 of the act of March 16, 1881, as shown in the preliminary statement, provides that "any railroad company incorporated by or under the laws of any other State, and having a line of railroad built, or partly built, to or near any boundary of this State, and desiring to continue its line of railroad into or through this State, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease or purchase the property, rights, privileges, lands, tenements, immunities and franchises of any railroad company organized under the laws of this State, which said lease

or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own and operate the said railroad so leased or purchased as fully and to the same extent as the company organized under the laws of this State might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad company as will best subserve its purpose and the building of said line of railroad. . . . In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads, the liabilities and forfeitures thereby imposed, and may sue and be sued in the same manner as other railroad corporations, and subject to the same service of process, and shall keep an office or offices in said State as required by the constitution of this State."

It was under the provisions of this section that the St. Louis and San Francisco Railway Company, in 1882, purchased from corporations of Arkansas, the railroad already built by them extending from the southern boundary of Missouri to Fort Smith in Arkansas. These Arkansas corporations have since maintained their separate organizations as corporations of that State, but do not operate railroads. It is, therefore, obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation. The terms of the statute show that it merely granted rights and powers to an existing foreign corporation, which was to continue to exist as such, subject only to certain conditions — among others that of keeping an office in the State, so as to be subject to process of the Arkansas courts.

It is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other State, which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a corporation of Arkansas, anything

in its articles of incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of the state. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution so as to subject it as such to a suit by a citizen of the State of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation.

It is further contended, on behalf of the defendant in error, the plaintiff below, that, as the plaintiff described herself as a citizen of Missouri, and the defendant company as a citizen of Arkansas, and as the cause of action, though arising in Missouri, was transitory in its nature, jurisdiction was thus formally conferred upon the Circuit Court of the United States for the District of Arkansas, and that the only question left for inquiry was whether the defendant company, alleged to be a citizen of Arkansas, was legally responsible for the conduct of the Missouri company of the same name, and such responsibility is supposed to be found in the fact that the railroad running through both States was under the common management of both companies.

But even if it be admitted that a common management of a railroad running through two States, and participation in its earnings and losses, by two companies, might make both responsible, jointly and severally, for a tortious cause of action, and that such cause of action might be maintained

in the courts of either State, the question of the jurisdiction of the Federal court still remains. The defendant was not content to leave that question to be decided by the plaintiff's allegations, but pleaded that it was in law a corporation of the State of Missouri, and that, therefore, an action could not be maintained against it, in the Federal court, by a citizen of that State. In other words, the defendant company claimed that, while it had voluntarily subjected itself to the laws of Arkansas, as interpreted and enforced by the courts of that State, it still remained a corporation of the State of Missouri, disabled from suing or being sued by a citizen of that State in a Federal court, and that such disability was not and could not be removed by state legislation.

The result of these views is that we answer the second question put to us by the Circuit Court of Appeals in the negative, and this renders it unnecessary to answer the other questions.

Mr. Justice Harlan dissenting.

I am of opinion that this action is one of which the Circuit Court of the United States for the Western District of Arkansas could properly take cognizance, and that the fourth question propounded by the Circuit Court of Appeals should be answered in the affirmative; in which case it will become unnecessary to answer the other questions.

The statement of the case, to which the certified questions are appended, does not distinctly show whether the railway company is described, in the complaint or declaration, as a corporation of Missouri or as a corporation of Arkansas. But I take it that the able judges who joined in the certificate did not intend to ask this court whether the court below had jurisdiction of an action brought by a citizen of Missouri against a corporation of *that* State. It must be assumed that the defendant company, the St. Louis and San Francisco Railway Company, is sued as a corporation of Arkansas.

Is there an Arkansas corporation by the name of the St. Louis and San Francisco Railway Company? The Missouri

corporation of the same name complied with the Arkansas statute of March 13, 1889, by filing in the office of the secretary of State of Arkansas a certified copy of its articles of incorporation, and, therefore, if effect be given to the statute as a valid enactment it became, also, a corporation of Arkansas. This is made clear by the last proviso of section two of the Arkansas statute declaring: "And provided further, that every railroad corporation of any other State which has heretofore leased or purchased any railroad in this State shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the secretary of State of this State, and shall thereupon become *a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding*, and in all suits or proceedings instituted against any such corporation, process may be served upon the agent or agents of such corporation or corporations in this State in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this State, organized and existing under the laws of this State."

We have, then, two distinct corporations, one being the St. Louis and San Francisco Railway Company, a Missouri corporation, the other, the St. Louis and San Francisco Railway Company, an Arkansas corporation. If a citizen of Tennessee, being a passenger on the St. Louis and San Francisco Railway, as operated in Arkansas, be injured by the negligent conduct of those who operated the road in Arkansas, it is clear, if the amount in dispute be sufficient, that he could sue the St. Louis and San Francisco Railway Company, *as a corporation organized under the laws of Arkansas*, in the Federal Circuit Court sitting in that State. The right to maintain such suit shows that there is an Arkansas corporation distinct as to its corporate existence from the Missouri corporation of the same name, and having, for purposes of suit, a citizenship in Arkansas.

In the particular just mentioned, the present case is not substantially different from that of *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286, 297, 298. The report of that case

shows that a corporation, by the name of the Ohio and Mississippi Railroad Company, was chartered by the States of Indiana and Ohio. Chief Justice Taney said: "The president and directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be *joined* in a suit as one and the same plaintiff, nor maintain a suit *in that character* against a citizen of Ohio or Indiana in a Circuit court of the United States." If the present suit had been brought against the St. Louis and San Francisco Railway Company, as incorporated both in Missouri and Arkansas, the complaint, under the decision in the *Wheeler case*, would have disclosed, upon its face, a want of jurisdiction; for, one of the defendant corporations, and the plaintiff, in such a case, would be citizens of the same State. In *Railroad Co.* v. *Harris*, 12 Wall. 65, 82, the court said: "Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad hoc* any property within its territorial jurisdiction. That this may be done was distinctly held in *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 297."

The same point arose and was decided in *Railway Company* v. *Whitton*, 13 Wall. 270. It appears from the report of that case, but more distinctly from the original record, which I have examined, that the Chicago and Northwestern Railway Company was a corporation of Wisconsin, and also of Illinois and Michigan, respectively. The plaintiff sued, in a court of Wisconsin, as a citizen of Illinois. The defendant was the Chicago and Northwestern Railway Company, incorporated in Wisconsin. The question was, whether that case was removable to the Federal court, sitting in Wisconsin, upon the ground of diverse citizenship. That question was decided in the affirmative. It was objected that the Chicago and Northwestern Railway Company, although a corporation of Wisconsin, was also a corporation under the laws of Illinois, of which State the plaintiff was a citizen. This court, speaking by Mr. Justice Field, said: "The answer to this position is obvious. In Wisconsin, the laws of Illinois have no opera-

tion. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not *there* a corporation or a citizen of any other State. Being there sued it can only be brought into court as a citizen of that State, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of the *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286." Referring to the decision of the *Wheeler case*, the court held that the Chicago and Northwestern Railway Company must be regarded, for all purposes of jurisdiction in the Federal courts, as a distinct corporation *in each of the States* of Wisconsin, Illinois, and Michigan.

So, in *Nashua Railroad* v. *Lowell Railroad*, 136 U. S. 356, 373, it was held that a corporation created by the laws of Massachusetts, bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes as a New Hampshire corporation, was not the same corporation with the one in New Hampshire. The court said: "Identity of name, powers and purposes does not create an identity of origin or existence, any more than other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity."

To the same effect are *Muller* v. *Dows*, 94 U. S. 444, 447; *Railroad Co.* v. *Vance*, 96 U. S. 450, 453, 457; *Clark* v. *Barnard*, 108 U. S. 436, 448, 452; *Farnum* v. *Blackstone Canal Co.*, 1 Sumner, 46; *St. Louis, Alton & Terre Haute Railroad* v. *Indianapolis & St. Louis Railroad*, 9 Bissell, 144.

I submit, with confidence, that if the defendant company is a corporation of Arkansas, and wholly distinct, as a corporate body, from the corporation in Missouri of the same name, the jurisdiction of the court below to determine the controversy between the present parties is not defeated by the fact that the Missouri corporation and the plaintiff are both citizens of Missouri. If this view be sound, it results that the plaintiff, a citizen of Missouri, can invoke the jurisdiction of the United States Circuit Court, sitting in Arkansas, to determine a con-

troversy between her and the St. Louis and San Francisco Railway Company, a corporation of Arkansas.

We are here met with the suggestion that the cause of action arose in Missouri, and that the injuries, of which the plaintiff complains, were committed in Missouri by the Missouri corporation bearing the same name as that of the present defendant. But the question still remains whether, in view of the relations of the Arkansas corporation to the St. Louis and San Francisco Railway in Missouri, the Arkansas corporation could be separately sued in the Federal court, sitting in Arkansas. The *jurisdiction* of the court below existed by reason of the diverse citizenship of the parties. If, upon the facts disclosed at the trial, the court was of opinion that the Arkansas corporation was not liable to the plaintiff upon a cause of action arising in Missouri, it would not dismiss the action for want of jurisdiction, but would direct the jury to return a verdict for the defendant.

Was not the Arkansas corporation liable to the plaintiff, albeit the cause of action arose in Missouri? It appears from the record that the road from Monett, Missouri, to Fort Smith, Arkansas, is and for many years has been operated as one continuous line. The entire line is under the joint management of the Missouri and Arkansas corporations. In other words, the St. Louis and San Francisco Railway Company, as a Missouri corporation, manages the property situated in Missouri, and, as an Arkansas corporation, manages the property situated in Arkansas.

Are not both corporations liable to the plaintiff under the authority of *Pennsylvania Railroad* v. *Jones* and *Pennsylvania Railroad* v. *Stewart*, 155 U. S. 333, 345? The facts in that case were these: The plaintiffs were personally injured by a railroad collision between a train of the Virginia Midland Railway Company and a train of the Alexandria and Fredericksburg Railway Company. The injury occurred near Washington but in Virginia, on the tracks of the Alexandria and Washington Railroad Company. The suit was brought against the latter company, which was then in the hands of a receiver, as well as against several other companies. One

of the questions in the case was whether any company was liable except the one whose negligence was the immediate cause of the injury. This court, speaking by Mr. Justice Shiras, said: "Our views respecting the exceptions urged on behalf of the other plaintiffs in error are briefly expressed as follows: There was evidence from which the jury might properly infer that the railroad between the cities of Alexandria and Washington was managed and controlled for the common use of the Baltimore and Potomac Railroad Company, (owning that portion of the route that lies between Washington and the south end of the Long Bridge,) the Alexandria and Washington Railroad Company, (owning that portion between the south end of the Long Bridge and St. Asaph's Junction,) and the Alexandria and Fredericksburg Railway Company (owning the line between St. Asaph's Junction and Alexandria); *that the gross earnings of these companies, derived from this line between Alexandria and Washington*, including what the Virginia Midland Railway Company paid for the privilege of running its trains over these tracks and what was received for transportation of mails, *went into the hands of a common treasurer*, and were, by him, after paying operating expenses, *divided among the three companies*, according to some rule not very definitely shown, but apparently in proportion to the miles of track of each road; that the operating and accounting officers of the three companies were the same; that the freight train in question was, at the time of the collision, on that portion of the road which belonged to the Alexandria and Washington Company; that the engineer and fireman were employés of the Baltimore and Potomac Railroad Company; that the engine was that of the Alexandria and Fredericksburg Railway Company; that the conductor and brakemen were employés of that company; and that the passenger train was in charge of a pilot employed and paid by the three companies, in pursuance of an arrangement to that effect." These facts, the court said, if proved, would warrant a finding of joint liability of the three companies to the plaintiff. Consequently, either company can be sued. I am unable to perceive why, under the principles of

that case, the Arkansas corporation is not liable to the plaintiff for personal injuries received through the negligence of the Missouri corporation. The two corporations have a common management and a common treasury, and they unite in operating the lines of road, situated in Missouri and Arkansas, as one continuous road.

At first blush, it may seem strange that the plaintiff did not sue the Missouri corporation in one of the courts of Missouri. But that cannot affect the jurisdiction of the court below, if the defendant is an Arkansas corporation. And her right to a judgment cannot be denied, if the Arkansas corporation is liable for injuries caused, in Missouri, by the negligence of the Missouri corporation. It may be that the line in Missouri is covered by mortgages for very large amounts, so that a judgment against the Missouri corporation would be of no real value. That perhaps is the reason why the plaintiff brought suit against the Arkansas corporation. But, as already said, this view is not at all material on the present hearing.

To sum up: There is an Arkansas corporation by the name of the St. Louis and San Francisco Railway Company; that corporation, being a citizen of Arkansas, can be sued in the court below by a citizen of Missouri; the court below has, consequently, jurisdiction to determine any controversy between those parties, citizens of different States (the amount in dispute being sufficient) which has been raised by the plaintiff's complaint; the Arkansas corporation, by reason of its relation to the Missouri corporation in the operation, as one continuous road, of the lines connecting Monett, Missouri, with Fort Smith, Arkansas, is liable for the acts and defaults of the Missouri corporation in the management of that part of the continuous road which lies in Missouri; and, even if the Arkansas corporation is held, under the evidence, not to be liable, the case should not be dismissed for want of jurisdiction in the court below, but the jury should be instructed to find for the defendant.

For these reasons I am unable to concur in the opinion of the majority.

GILDERSLEEVE *v.* NEW MEXICO MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 89. Argued December 2, 3, 1895. — Decided March 16, 1896.

In an appeal from a judgment of a territorial court, with no exceptions to rulings of the court on the admission or rejection of testimony this court is limited in its review to a determination of the question whether the facts found are sufficient to sustain the judgment rendered.

The court bases its conclusion in this case upon the fact that the record exhibits such gross laches on the part of complainant, or those with whom he is in privity, and upon whose rights his own must depend, as to effectually debar him from a right to the relief which he seeks.

THE relief sought by appellant in the lower court was to have the New Mexico Mining Company, to whom certain letters patent were issued by the United States for a Mexican mining grant, declared a trustee for his benefit to the extent of a one fourth interest in the land covered by said letters patent.

The Territorial District Court held that the statute of limitations barred the suit, and therefore dismissed the bill. The Supreme Court of the Territory affirmed the decree of dismissal, 27 Pac. Rep. 318, holding the plea of the statute of limitations good, and also sustained the mining company's contention that Mrs. Ortiz, under whom they claimed, acquired title through a valid mutual will executed by herself and her husband in 1841. The cause was then brought to this court by appeal. From the findings in the record the following facts are extracted:

The property in controversy covered by the United States patent embraced a mining grant made by the government of Mexico in 1833, to José Francisco Ortiz and Ignacio Cano. This grant consisted of a gold mine or vein, and a small ex-

tent of surface ground, as also commons of pasture and water to the extent of four leagues from each of the four cardinal points of the mine. Some time prior to the cession of New Mexico to the United States, under the treaty of February 2, 1848, Cano sold and transferred all his interest in the grant in question to Ortiz his coöwner. On August 15, 1841, Ortiz and his wife executed before a Mexican alcalde and two attending witnesses a mutual will, in which it was provided that the survivor should be the universal legatee or heir of the other to all the property, both real and personal, of every kind whatsoever. Ortiz died before his wife, July 22, 1848, at Santa Fé, New Mexico, and thereupon Mrs. Ortiz entered into the possession of the mine and the enjoyment of the privileges connected therewith, and retained this possession up to December 20, 1853, when she sold and delivered the possession thereof to John Greiner, the deed to whom was recorded in the office of the probate clerk of Santa Fé County on December 29, 1853. Greiner remained in possession until August 19, 1854, when he transferred the property to Elisha Whittlesley and six others. Contemporaneous with the execution of the deed to Whittlesley *et als.*, they and one other person executed articles of association under the name of the New Mexico Mining Company, and on February 1, 1858, the members of the association were incorporated by the legislature of the Territory of New Mexico, under a similar designation.

On November 8, 1860, Whittlesley *et als.*, as representing the New Mexico Mining Company, petitioned the then surveyor general of the Territory to examine their title to said grant. That official complied with the request and made a favorable report to Congress, which, by an act approved March 1, 1861, 12 Stat. 887, c. 66, confirmed the grant, the claim being designated as private land claim No. 43. A survey of the grant was thereafter made and was completed on August 14, 1861, but such survey was not approved by the Secretary of the Interior until April 22, 1876. On May 20, 1876, a patent issued in the name of the New Mexico Mining Company, the lands embraced therein being stated to

contain 69,458.33 acres, less 259 acres in conflict with another grant.

In addition to the possession by Mrs. Ortiz, before stated, her grantee, Greiner, and his assigns held actual, open, and notorious possession of the property in question from the conveyance to Greiner in December, 1853, until the commencement of this litigation in 1883. Such possession was held by employing an agent or agents to live on the property at the village of Dolores, near the said mine, and by making large and extensive improvements on the property, in building a large stamp mill at Dolores, near said mine, and many other acts, open and notorious, indicative of ownership of the property. No attempt was ever made by those through whom Gildersleeve claimed to interfere with such possession or enjoyment of the property, or to actively assert any right or interest in said property, except through a suit brought in 1880 by Brevoort, as hereinafter stated. None of said parties ever intervened in the proceedings instituted before the surveyor general looking to the confirmation of the grant to the New Mexico Mining Company, nor after the surveyor general's report to Congress was an objection raised to the passage of the act confirming the grant, nor, indeed, at any time did the complainant or those under whom he claims object to the mining company's assertion of title to the property, or to the issuance of letters patent to the company.

The complainant bases his right to the equitable relief prayed for in his bill upon the assertion that the authentic mutual will of Ortiz and his wife heretofore referred to was void, because not executed with the formalities required by law as to the number of witnesses, etc., and that, subsequently, Ortiz died intestate, leaving no direct but certain collateral heirs, who conveyed in 1873 the interest inherited, by them, from Ortiz to one Brevoort, who, in 1880, conveyed an undivided one half interest in the property thus acquired by him jointly to appellant and Knaebel. The consideration of the last conveyance from Brevoort to Gildersleeve and Knaebel, they being attorneys at law, was money advanced and services rendered and to be rendered to Brevoort for the maintenance

of a suit then or about to be instituted to enforce Brevoort's alleged title to the mine.

At the July, 1880, term of a District Court of the Territory, Brevoort, through the attorneys in question, filed a bill against the New Mexico Mining Company, asserting his equitable title to an undivided interest in the land covered by the patent, but after the taking of testimony, and the hearing of exceptions, upon the report of a master, the court on July 16, 1884, dismissed the cause.

At the February term, 1883, of the same court certain alleged heirs and legal representatives of Ignacio Cano instituted suit against the New Mexico Mining Company and others, based upon the claim that Cano had never conveyed his interest in the mine to Ortiz, and that in consequence he was seized at the time of his death of an undivided interest in the property. The court, however, sustained the plea of a former adjudication based on an action which had been instituted in 1865 by the same persons or others with whom they were in privity, and dismissed the bill. Brevoort was a party defendant to this second suit of the Cano claimants. He filed a cross-bill denying the rights of the heirs of Cano and setting up title in himself to an undivided part of the mine and land covered by the patents by virtue of the conveyances aforesaid from the collateral heirs of Ortiz, and asked the same relief as that prayed for in his former suit. Subsequently, the mining company compromised their controversy with Brevoort and Knaebel, and Brevoort was dismissed from the cause. Thereupon Gildersleeve intervened and was permitted by the court to set up his rights, under the conveyance from Brevoort to himself, with the same effect as though he had originally been made a defendant. The court, treating the compromise between Brevoort and the mining company as inoperative against Gildersleeve, by its order allowed Gildersleeve to assert his rights, *nunc pro tunc*, as if they had been advanced at the time Brevoort filed his cross-bill.

The issue thus formed between Gildersleeve and the New Mexico Mining Company thereupon proceeded as a new action, with Gildersleeve as complainant.

Opinion of the Court.

In 1880 the mining company transferred the property embraced in the letters patent to Stephen B. Elkins and Jerome B. Chaffee, but the greater portion of the property was reconveyed to the company in 1884.

It is not material, however, to notice the disposition made by Chaffee and Elkins of the land not reconveyed by them to the mining company.

The issue between Gildersleeve and the mining company, as heretofore stated, resulted adversely to complainant in the territorial courts.

Mr. Thomas Smith, (with whom was *Mr. H. L. Warren* on the brief,) for appellant.

Mr. Joseph Larocque for appellee.

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

The appeal being from a judgment of a territorial court, and no exceptions to rulings of the court on the admission or rejection of testimony being presented for our consideration, we are limited in our review to a determination of the question whether the facts found are sufficient to sustain the judgment rendered. *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303, 312.

In the trial court, the controversy between Gildersleeve and the mining company was disposed of upon the ground that the statute of limitations barred complainant's right to recover. The Supreme Court of the Territory, however, rested its judgment of affirmance not only upon the bar of the statute, but upon the further fact found by it that Ortiz and his wife had executed a valid mutual will, by which, upon the death of Ortiz, title to the mine in question vested in his widow, through whom the mining company claimed.

We shall, however, consider the case in another aspect, and shall base our conclusion that the complainant is not entitled to relief at the hands of a court of equity upon the fact that

the record exhibits such gross laches on the part of complainant, or those with whom he is in privity, and upon whose rights his own must depend, as to effectually debar him from a right to the relief which he seeks.

In *Hammond* v. *Hopkins*, 143 U. S. 224, 250, speaking through Mr. Chief Justice Fuller, this court said: "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

In *Galliher* v. *Cadwell*, 145 U. S. 368, 371, speaking through Mr. Justice Brewer, it was said of the case then being considered: "The question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defence has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all."

In *Speidel* v. *Henrici*, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Gray: "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.'"

In *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193, and *Mackall* v. *Casilear*, 137 U. S. 556, it was declared to be correct doctrine that the mere assertion of a claim unaccompanied by any act to give effect to it, could not avail to keep alive a right which would otherwise be precluded.

With the principles enunciated in these decisions to guide us, we proceed to review the pertinent facts showing the conduct of the persons in whom complainant contends the title to the mine vested upon the death of Ortiz in 1848, by reason of the alleged intestacy of the latter.

It is undisputed, if the claim of the collateral heirs of Ortiz as to the nullity of the will executed by Ortiz was well founded, whatever title Ortiz had to what is now known as the Ortiz mine vested in them upon the decease of Ortiz in 1848, subject to such confirmation by the United States as the law required. By article VIII of the treaty of Guadalupe Hidalgo of 1846, 9 Stat. 922, 929, this government agreed to respect rights of private property in the ceded territory in existence at the date of the cession. To carry into effect this agreement, Congress passed an act entitled "An act to establish the office of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes," which act was approved July 22, 1854. 10 Stat. 308, c. 103. By section eight of this act it was made the duty of the surveyor general, under rules and regulations to be established by the Secretary of the Interior, to inquire into and report to Congress upon the validity or invalidity of all claims to lands within the territory ceded by Mexico which had originated before such cession, which report was to be laid before Congress for such action thereon as might be deemed to be just and proper, with a view to the confirmation of *bona fide* grants. This act has been considered by this court. *Stoneroad* v. *Stoneroad*, 158 U. S. 240; *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80, and cases cited in the latter case.

The finding of facts does not recapitulate the various steps in the proceedings initiated, by the mining company through Whittlesley, before the surveyor general under the act of 1854

to acquire a patent to the mining grant. Knowledge, in the collateral heirs of Ortiz, of the passage of the act in question and of their right to file a claim with the surveyor general is, of course, to be presumed. It has not been asserted, however, that these collateral heirs ever submitted their alleged title to the surveyor general for examination, or entered objection to the validity of the claim to ownership of the entire grant filed with that official by the New Mexico Mining Company. It is also not pretended after the surveyor general had reported the entire grant to Congress for confirmation, as belonging to the New Mexico Mining Company, that the alleged collateral heirs of Ortiz ever in any way presented their pretensions to that body, or raised any objection to the confirmation by Congress of the grant in the manner and form recommended by the surveyor general, and after the grant was confirmed by Congress, in the long interval which elapsed before the issue of the patent, (from 1861 to 1876,) there is also no pretence that the collateral heirs of Ortiz ever before any administrative officer of the government asserted the existence in themselves of the rights now advanced by them as the basis for the equitable relief which they seek. Indeed, the record shows that during twenty-two years, between the passage of the act of 1854 and the issue of the patent in 1876, the collateral heirs remained supinely indifferent to the assertion of their supposed title, while during the greater portion of this time the New Mexico Mining Company was expending labor and incurring the expense connected with the obtaining of the letters patent. So, also, these alleged heirs from the date of the death of Ortiz permitted Mrs. Ortiz, Greiner, and those holding under him, including the mining company, to remain in undisturbed possession of the property and to engage in large outlay for its development without, so far as appears, even claiming rights in themselves, until more than four years had elapsed from the final granting of the patent. It is proper also to observe that when the first suit was brought in 1880 it was commenced, not on behalf of the collateral heirs of Ortiz, but was initiated for the benefit of one, who, with full knowledge of all the circumstances, acquired the supposed title of such

collateral heirs, for the purpose of speculating upon the chance of wresting from the mining company the title acquired by it under the patent, although at that time the laches of the collateral heirs, whose rights the suit championed, had effectually debarred them from invoking the aid of a court of equity to relieve them from the results of their own acquiescence and neglect.

It is true, as held in *Johnson* v. *Towsley*, 13 Wall. 72, that where the title to land had passed from the government, and the question becomes one of private right, courts may inquire whether the party holding the patent should be treated as owning it absolutely in his own right or as a trustee for another, and, therefore, that courts of equity have the power to inquire into and correct mistakes, injustice and wrong. But when the aid of a court of equity is invoked in effect to annul the confirmation by Congress or to overrule the final conclusion of the administrative department as to the person entitled to a patent from the United States, the fact that the complainant who asks such equitable relief, theretofore possessed not only ample opportunity to assert his own claim, but also abundant occasion to contest the right of the person to whom a patent was granted, has completely failed to do either, and has been guilty of the grossest and most inexcusable laches, is necessarily a conclusive reason against the allowance of the relief asked.

When Brevoort acquired his alleged rights, in 1873, the New Mexico Mining Company was in possession of the property, and Brevoort knew this fact. When on June 30, 1880, Brevoort executed the conveyance of an undivided interest to Gildersleeve and Knaebel for the consideration of their assistance by advance of money or otherwise in contemplated litigation with the mining company, Brevoort's grantees knew the fact to be that he was not in possession, and that the New Mexico Mining Company was in actual possession.

To recapitulate, there was an uninterrupted use and enjoyment by the widow of Ortiz, and those claiming by conveyance from her of the property in question, from the death of Ortiz in 1848; no attempt was ever made to assert rights, if

any, of the collateral heirs of Ortiz in this property until the year 1880. They stood by and witnessed the expenditure of large sums of money upon the property and did nothing exhibiting an intention to assert their supposed rights. No attempt was made in the pleading of Gildersleeve to offer any explanation of this long continued acquiescence in the rights of those in possession of the mine and of the privilege connected therewith. Under such circumstances, we think the heirs and those claiming under them are not entitled to equitable relief. Finding at the very threshold of the case the existence of such laches on the part of complainant as debars him from obtaining the equitable relief which he invokes, we have not deemed it necessary to express any opinion on the other questions presented by the record. The court below in the concluding sentences of its opinion aptly conveyed the reasons which, apart from a consideration of the other questions by it considered, demonstrates the entire want of equity in the complainant's case. The expressions to which we refer, by O'Brien, C. J., are as follows:

"Ortiz dies in 1848. The widow claims and asserts her rights under the will as the absolute owner of all the property of which he died possessed; she disposes of such rights to *bona fide* purchasers; for nearly forty years before this suit was commenced they occupy, improve and pay taxes on this property. Plaintiff's grantor and those through whom such grantor claims title, relatives of the deceased Ortiz, and residing in the vicinity of the grant, remain silent; acquiesce by such silence in the disposition so made of the property for so long a period, while the same is being enhanced in value by the capital and labor of honest purchasers or occupants. In fact, not a word is heard from any of the kindred in relation to the matter until they relinquish for a trifling consideration all their interest therein to plaintiff's grantor."

The judgment of the Supreme Court of the Territory is

Affirmed.

POST *v.* UNITED STATES.

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

No. 694. Argued March 6, 9, 1896. — Decided March 23, 1896.

Under the act of July 12, 1894, c. 132, enacting that "all criminal proceedings instituted for the trial of offences against the laws of the United States arising in the District of Minnesota shall be brought, had and prosecuted in the division of said district in which such offences were committed," the court has no jurisdiction of an indictment afterwards presented by the grand jury for the district in one division, for an offence committed in another division before the passage of the act, and for which no complaint has been made against the defendant; although the witnesses whose names are endorsed upon the indictment were summoned before the grand jury and were in actual attendance upon the court before the passage of the act.

At June term, 1894, of the District Court for the District of Minnesota, held at Saint Paul in the third division of the district, the grand jury for the district presented, on July 20, 1894, two indictments against George W. Post on section 5493 of the Revised Statutes for subornation of perjury on February 3, 1894, at Duluth in the fifth division.

To each indictment the defendant pleaded not guilty, with leave to withdraw his plea at October term, 1894, held at Saint Paul, to which the cases were continued. At that term, he withdrew his plea; and demurred to each indictment, for want of jurisdiction in the court to take cognizance of the matters and things therein set forth, because the offences were alleged to have been committed in the fifth division of the district, and the indictment was found and presented at a term held at Saint Paul, in the district, and outside of that division. The demurrer was overruled; the defendant pleaded not guilty to each indictment; the two cases were consolidated by order of the court for trial; the jury returned verdicts of guilty; the defendant moved in arrest of judgment, for want of jurisdiction in the court to

try him upon the indictments; the motion was overruled; and the defendant was sentenced to be imprisoned three years in the penitentiary, and to pay a fine of $2000; and sued out this writ of error.

By stipulation in writing of counsel, it was agreed that there should be added to the record, as if in obedience to a writ of certiorari for diminution thereof, an order of the District Court, directing the record to be amended by setting forth the following facts: The grand jury for the District of Minnesota at June term, 1894, was duly empanelled July 5, 1894, and then entered upon the discharge of its duties for the entire District of Minnesota, and was continuously in session from that day to and including July 20, 1894, and on this last day returned these two indictments, and made its final report, and was discharged by the court. All the persons whose names were endorsed upon the indictments were duly summoned in these cases before the grand jury prior to July 5, 1894, and in obedience to such summons were in actual attendance upon the court prior to July 12, 1894.

Mr. James K. Redington for plaintiff in error. *Mr. S. F. White* filed a brief for same.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

By the Revised Statutes, as by the previous act admitting the State of Minnesota into the Union, the whole State was constituted one judicial district. Act of May 11, 1858, c. 31, § 3; 11 Stat. 285; Rev. Stat. § 531. By the act of April 26, 1890, c. 167, which took effect August 1, 1890, the District of Minnesota was divided into six divisions for the purpose of holding terms of court; the courts for the third division, which included Saint Paul, were to be held at Saint Paul on the fourth Tuesday in June and the second Tuesday in January, and the courts for the fifth division, which included

Duluth, were to be held at Duluth on the second Tuesday in May and the second Tuesday in October; a grand jury and petit jury might be summoned at each term; and the criminal jurisdiction of the court was in no wise restricted to a particular division. 26 Stat. 72.

But by the act of July 12, 1894, c. 132, entitled "An act regulating the procedure in criminal causes in the District of Minnesota," it was enacted, in section 1, that "all criminal proceedings instituted for the trial of offences against the laws of the United States arising in the District of Minnesota shall be brought, had and prosecuted in the division of said district in which such offences were committed;" and, in section 2, that "this act shall take effect upon its passage." 28 Stat. 102.

As was said by this court in a recent case, "in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits, in any essential requirement, in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms." "It is plain that such court has jurisdiction to render a particular judgment, only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void." *In re Bonner*, 151 U. S. 242, 256, 257.

The act of 1894, now in question, is doubtless to be construed as operating prospectively, and not retrospectively, upon the subject legislated upon. That subject, however, is not a matter of substantive criminal law, but is one of jurisdiction and procedure only. The act does not create any new offence, or make any change in the proof or the punishment

of an offence already existing. It is but a regulation of procedure, and of procedure so far only as affects the jurisdiction of the court with regard to the different divisions into which the district is divided, and in which the court may be held. It distributes the jurisdiction among the several divisions by requiring the prosecution of offences "arising in the District of Minnesota" to take place in that division "in which such offences were committed." It is not limited to offences which shall arise after it takes effect, nor does it in terms mention offences which have already arisen; but it uses the general words "offences arising," which naturally include both past and future offences, as do the words "offences committed;" and it is indisputably within the discretion of the legislature, when granting, limiting or redistributing jurisdiction, to include offences committed before the passage of the act. *Cook* v. *United States*, 138 U. S. 157, 180. The point of time at which the act is to apply to a particular case is not the time of committing the offence, but the time of instituting the proceedings. Treating the direction as operating prospectively only, that "all criminal proceedings instituted" "shall be brought, had and prosecuted" in a particular division, it obviously includes all proceedings which shall be, and none which have been, instituted. Without regard, therefore, to the time of the commission of an offence, all the proceedings for its prosecution, if instituted after the act of 1894 took effect, must be in the division in which the offence was committed; but if instituted before this act took effect, they might go on, as under the earlier acts, in any division.

The two cases, principally relied on by the United States, of *Logan* v. *United States*, 144 U. S. 263, 297, and *Caha* v. *United States*, 152 U. S. 211, 214, by implication, at least, support this conclusion. In *Caha's case*, the act of Congress expressly reserved the former jurisdiction, not only over prosecutions already commenced, but also over crimes already committed. In *Logan's case*, the act of Congress, as this court observed, "does not affect the authority of the grand jury for the district, sitting at any place at which the court is appointed to be held, to present indictments for offences com-

mitted anywhere within the district. It only requires the trial to be had, and writs and recognizances to be returned, in the division in which the offence is committed. The finding of the indictment is no part of the trial."

Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex* v. *Phillips*, Russ. & Ry. 369; *Regina* v. *Parker*, Leigh & Cave, 459; *S. C.* 9 Cox Crim. Cas. 475. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.

In the present case, each indictment, for an offence committed in the fifth division of the district, having been first presented, after the act of 1894 took effect, to the court held in the third division, and no complaint having been previously made against the defendant, the court had no jurisdiction of the case; and for this reason, without considering the other questions argued at the bar, the

Judgment is reversed, and the case remanded with directions to set aside the verdicts and to sustain the demurrers to the indictments.

ROUSE *v.* HORNSBY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 706. Submitted March 2, 1896. — Decided March 23, 1896.

The decrees and judgments of Circuit Courts of Appeal are made final by section 6 of the Judiciary Act of March 3, 1891, where the jurisdiction of the Circuit Court over the intervenor's petition, the decree on which is appealed from, was referable to its jurisdiction of an equity suit which depended wholly upon diverse citizenship.

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

Mr. Nelson Case for the motion.

Mr. James Hagerman and *Mr. T. N. Sedgwick* opposing.

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

The Mercantile Trust Company, a corporation of New York, filed its bill against the Missouri, Kansas and Texas Railway Company, a corporation of Kansas, in the Circuit Court of the United States for the District of Kansas, for the foreclosure of certain mortgages, and Eddy and Cross were appointed receivers, upon whose decease Rouse was substituted.

Under a general order, to which he refers but which is not given in the record, Hornsby filed a petition of intervention in that suit seeking damages for injuries inflicted through the negligence of the receivers in the operation of the road. To this petition the defendants interposed a demurrer upon the ground that the petition did not state facts sufficient to constitute a cause of action, which was sustained and the petition dismissed, whereupon the case was carried to the Circuit Court of Appeals for the Eighth Circuit, the judgment reversed and the case remanded. *Hornsby* v. *Eddy*, 12 U. S.

App. 404. Thereupon defendants answered on the merits and the intervenor replied. Defendants moved the court for a reference to a master, "which motion," the record states, "to refer the claim of John E. Hornsby against them as set forth in the intervening petition of said Hornsby and the issues joined thereon to a master," was overruled. A jury was then empanelled on motion of the intervenor, a trial had, and verdict returned, whereupon the court entered an order in these words, after setting out the verdict:

"And thereupon the court doth now approve said verdict and order and adjudge that the said intervenor, John E. Hornsby, have and recover of and from the said defendants, George A. Eddy and Harrison C. Cross, as receivers of the property of the Missouri, Kansas and Texas Railway Company, the sum of fifteen thousand dollars ($15,000.00), together with interest thereon at the rate of 6 per cent per annum from this date, and also all costs herein expended by him, amounting to $——; and the property of said Missouri, Kansas and Texas Railway Company which was heretofore in the hands of said receivers and over which this court now holds jurisdiction shall remain liable for said sum and sums, and said receivers are hereby ordered to allow, audit and pay said sum and sums into the registry of this court for said intervenor, John E. Hornsby; and if said receivers as such have not sufficient funds in their possession and under their control for that purpose, the property of said railway company remain liable therefor; to which orders and judgment of the court the said defendants, George A. Eddy and Harrison C. Cross, as such receivers, at the time excepted. It is further ordered that the said defendants, George A. Eddy and Harrison C. Cross, as such receivers, have sixty days from this date in which to prepare and present a bill of exceptions herein for allowance, and that execution in this case be stayed ten days from this date."

The petition of intervention, the answer, and the various orders were all entitled in the case of *The Mercantile Trust Company of New York* v. *The Missouri, Kansas and Texas Railway Company et al.* From the final order of the court

defendants took the case to the Circuit Court of Appeals for the Eighth Circuit by writ of error and also by appeal. The cause was heard in that court and the order of the court below affirmed. 67 Fed. Rep. 219. The Circuit Court of Appeals was of opinion that the appeal should be dismissed, and that the order below should be affirmed on the writ of error, because "the intervening petition set up a cause of action exclusively cognizable at law, and was tried by a jury as such."

If, as is said, the intervenor, the railroad company and the receivers were all citizens of Kansas, and this had been an action at law and not a petition of intervention in the equity suit, the jurisdiction of the Circuit Court would nevertheless have been maintainable on the ground that it was one arising under the Constitution and laws of the United States in that the receivers were appointed by the Circuit Court and derived their powers from and discharged their duties subject to those orders, and the right to sue them as such, without leave of the court which appointed them, was conferred by section three of the act of March 3, 1887, c. 373, 24 Stat. 552. *Texas and Pacific Railway Co.* v. *Cox*, 145 U. S. 593; *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454.

In *Railway Co.* v. *Cox*, the objection was raised that neither of the defendants was an inhabitant of the district in which the suit was brought, and it was remarked that if the suit was regarded as merely ancillary to the receivership the objection was without force, but that, irrespective of that, the immunity was a personal privilege which might be waived, and which in that case had been waived. In the case before us the question in respect of an independent action at law is not presented, since this intervention was nothing more than an application for the allowance of a claim under the foreclosure proceedings and as against the property or fund being administered by the court. *Rouse* v. *Letcher*, 156 U. S. 47. Defendants raised no objection to the determination of the entire matter on the intervention, and did not ask that an action at law be directed to be brought, and the reference of the questions of fact to a jury was within the discretion of the court and did not change the character of the proceeding.

Statement of the Case.

The jurisdiction of the Circuit Court over the petition was clearly referable to its jurisdiction of the equity suit, which depended wholly upon diverse citizenship, and the case comes directly within recent decisions of this court holding that under such circumstances the decrees and judgments of the Circuit Courts of Appeals are made final by section six of the Judiciary Act of March 3, 1891. *Rouse* v. *Letcher*, *supra*; *Gregory* v. *Van Ee*, 160 U. S. 643; *Carey* v. *Houston and Texas Railway Co.*, 161 U. S. 115. As the final order below was affirmed by the Circuit Court of Appeals, we are not called upon to entertain jurisdiction simply because that affirmance was entered on the writ of error rather than the appeal.

Writ of error dismissed.

BROWN *v.* WALKER.

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

No. 765. Argued January 23, 1896. — Decided March 23, 1896.

The provision in the act of February 11, 1893, c. 83, 27 Stat. 443, "that no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture: but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding," affords absolute immunity against prosecution, Federal or state, for the offence to which the question relates, and deprives the witness of his constitutional right to refuse to answer.

This was an appeal from an order of the Circuit Court, made upon the return of a writ of *habeas corpus*, remanding the petitioner Brown to the custody of the marshal, the respondent in this case.

Statement of the Case.

It appeared that the petitioner had been subpœnaed as a witness before the grand jury, at a term of the District Court for the Western District of Pennsylvania, to testify in relation to a charge then under investigation by that body against certain officers and agents of the Allegheny Valley Railway Company, for an alleged violation of the Interstate Commerce Act. Brown, the appellant, appeared for examination, in response to the subpœna, and was sworn. After testifying that he was auditor of the railway company, and that it was his duty to audit the accounts of the various officers of the company, as well as the accounts of the freight department of such company during the years 1894 and 1895, he was asked the question:

"Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August and September, 1894, coal from any point on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?"

To this question he answered:

"That question, with all respect to the grand jury and yourself, I must decline to answer for the reason that my answer would tend to accuse and incriminate myself."

He was then asked:

"Do you know whether the Allegheny Valley Railway Company during the year 1894, paid to the Union Coal Company any rebate, refund or commission on coal transported by said railroad company from points on its Low Grade division to Buffalo, whereby the Union Coal Company obtained a transportation of such coal between the said terminal points at a less rate than the open tariff rate or the rate established by said company? If you have such knowledge, state the amount of such rebates or drawbacks or commissions paid, to whom paid, the date of the same, and on what shipments; and state fully all the particulars within your knowledge relating to such transaction or transactions."

Answer. "That question I must also decline to answer for the reason already given."

Opinion of the Court.

The grand jury reported these questions and answers to the court, and prayed for such order as to the court might seem meet and proper. Upon the presentation of this report, Brown was ordered to appear and show cause why he should not answer the said questions or be adjudged in contempt; and upon the hearing of the rule to show cause, it was found that his excuses were insufficient, and he was directed to appear and answer the questions, which he declined to do. Whereupon he was adjudged to be in contempt and ordered to pay a fine of five dollars, and to be taken into custody until he should have answered the questions.

He thereupon petitioned the Circuit Court for a writ of *habeas corpus*, stating in his petition the substance of the above facts. The writ was issued, petitioner was produced in court, the hearing was had, and on the eleventh day of September, 1895, it was ordered that the petition be dismissed, the writ of *habeas corpus* discharged, and the petitioner remanded to the custody of the marshal. 70 Fed. Rep. 46.

From that judgment Brown appealed to this court.

Mr. James C. Carter for appellant.

Mr. George F. Edmunds for appellee.

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

This case involves an alleged incompatibility between that clause of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the act of Congress of February 11, 1893, c. 83, 27 Stat. 443, which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture.

But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding."

The act is supposed to have been passed in view of the opinion of this court in *Counselman* v. *Hitchcock*, 142 U. S. 547, to the effect that section 860 of the Revised Statutes, providing that no evidence given by a witness shall be used against him, his property or estate, in any manner, in any court of the United States, in any criminal proceeding, did not afford that complete protection to the witness which the amendment was intended to guarantee. The gist of that decision is contained in the following extracts from the opinion of Mr. Justice Blatchford, (pp. 564, 585,) referring to section 860: "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." And again: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offence to which the question relates."

The inference from this language is that, if the statute does afford such immunity against future prosecution, the witness will be compellable to testify. So also in *Emery's*

case, 107 Mass. 172, 185, and in *Cullen* v. *Commonwealth*, 24 Gratt. 624, upon which much reliance was placed in *Counselman* v. *Hitchcock*, it was intimated that the witness might be required to forego an appeal to the protection of the fundamental law, if he were first secured from future liability and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution. To meet this construction of the constitutional provision, the act in question was passed, exempting the witness from any prosecution on account of any transaction to which he may testify. The case before us is whether this sufficiently satisfies the constitutional guaranty of protection.

The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace or expose him to unfavorable comments, then as he must necessarily to a large extent determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency, 1 Burr's Trial, 244; *Fisher* v. *Ronalds*, 12 C. B. 762; *Reynell* v. *Sprye*, 1 De Gex, McN. & G. 656; *Adams* v. *Lloyd*, 3 H. & N. 351; *Merluzzi* v. *Gleeson*, 59 Maryland, 214; *Bunn* v. *Bunn*, 4 De Gex, J. & S. 316; *Ex parte Reynolds*, 20 Ch. Div. 294; *Ex parte Schofield*, 6 Ch. Div. 230, the practical result would be, that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible — in other words, if his testimony operate as a complete pardon for the offence to which it relates — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.

Our attention has been called to but few cases wherein this provision, which is found with slight variation in the constitu-

tion of every State, has been construed in connection with a statute similar to the one before us, as the decisions have usually turned upon the validity of statutes providing, as did section 860, that the testimony given by such witness should never be used against him in any criminal prosecution. It can only be said in general that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose — not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not to hold the law invalid unless, as was observed by Mr. Chief Justice Marshall, in *Fletcher* v. *Peck*, 6 Cranch, 87, 128, "the opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier

state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else — much less that it shall be made use of as a pretext for securing immunity to others.

1. Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev. § 451; *Dixon* v. *Vale*, 1 C. & P. 278; *East* v. *Chapman*, 2 C. & P. 570; *S. C.* M. & M. 46; *State* v. *K*———, 4 N. H. 562; *Low* v. *Mitchell*, 18 Maine, 372; *Coburn* v. *Odell*, 10 Fost. (N. H.) 540; *Norfolk* v. *Gaylord*, 28 Connecticut, 309; *Austin* v. *Poiner*, 1 Sim. 348; *Commonwealth* v. *Pratt*, 126 Mass. 462; *Chamberlain* v. *Willson*, 12 Vermont, 491; *Lockett* v. *State*, 63 Alabama, 5; *People* v. *Freshour*, 55 California, 375.

So, under modern statutes permitting accused persons to

take the stand in their own behalf, they may be subjected to cross-examination upon their statements. *State* v. *Wentworth*, 65 Maine, 234; *State* v. *Witham*, 72 Maine, 531; *State* v. *Ober*, 52 N. H. 492; *Commonwealth* v. *Bonner*, 97 Mass. 587; *Commonwealth* v. *Morgan*, 107 Mass. 199; *Commonwealth* v. *Mullen*, 97 Mass. 545; *Connors* v. *People*, 50 N. Y. 240; *People* v. *Casey*, 72 N. Y. 393.

2. For the same reason if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer. *Parkhurst* v. *Lowten*, 1 Merivale, 391, 400; *Calhoun* v. *Thompson*, 56 Alabama, 166; *Mahanke* v. *Cleland*, 76 Iowa, 401; *Weldon* v. *Burch*, 12 Illinois, 374; *United States* v. *Smith*, 4 Day, 121; *Close* v. *Olney*, 1 Denio, 319; *People* v. *Mather*, 4 Wend. 229, 252–255; *Williams* v. *Farrington*, 11 Cox Ch. R. 202; *Davis* v. *Reid*, 5 Sim. 443; *Floyd* v. *State*, 7 Tex. 215; *Maloney* v. *Dows*, 2 Hilt. 247; *Wolfe* v. *Goulard*, 15 Abb. Pr. 336.

3. If the answer of the witness may have a tendency to disgrace him or bring him into disrepute, and the proposed evidence be material to the issue on trial, the great weight of authority is that he may be compelled to answer, although, if the answer can have no effect upon the case, except so far as to impair the credibility of the witness, he may fall back upon his privilege. 1 Greenl. on Ev. §§ 454 and 455; *People* v. *Mather*, 4 Wend. 229; *Lohman* v. *People*, 1 N. Y. 379; *Commonwealth* v. *Roberts*, Brightly, 109; *Weldon* v. *Burch*, 12 Illinois, 374; *Cundell* v. *Pratt*, Moody & Malkin, 108; *Ex parte Rowe*, 7 California, 184. But even in the latter case, if the answer of the witness will not directly show his infamy, but only *tend* to disgrace him, he is bound to answer. 1 Greenl. on Ev. § 456. The cases of *Respublica* v. *Gibbs*, 3 Yeates, 429, and *Lessee of Galbreath* v. *Eichelberger*, 3 Yeates, 515, to the contrary, are opposed to the weight of authority.

The extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability is within the control of the legislature. *State* v. *Nowell*, 58 N. H. 314, 316.

4. It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed. *Roberts* v. *Allatt*, Moody & Malkin, 192, overruling *Rex* v. *Reading*, 7 How. St. Tr. 259, 296, and *Rex* v. *Earl of Shaftsbury*, 8 How. St. Tr. 817; *Queen* v. *Boyes*, 1 B. & S. 311, 321. In the latter case it was suggested, in answer to the production by the Solicitor General of a pardon of the witness under the Great Seal, that by statute, no such pardon under the Great Seal was pleadable to an impeachment by the Commons in Parliament, and it was insisted that this was a sufficient reason for holding that the privilege of the witness still existed, upon the ground that, though protected by the pardon against every other form of prosecution, the witness might possibly be subjected to parliamentary impeachment. It was also contended in that case, as it is in the one under consideration, "that a bare possibility of legal peril was sufficient to entitle a witness to protection. Nay, further, that the witness was the sole judge as to whether his evidence would bring him into the danger of the law; and that the statement of his belief to that effect, if not manifestly made *mala fide*, would be received as conclusive." It was held, however, by Lord Chief Justice Cockburn that "to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer," although "if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question."

"Further than this," said the Chief Justice, "we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, — not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his con-

duct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

All of the cases above cited proceed upon the idea that the prohibition against his being compelled to testify against himself presupposes a legal detriment to the witness arising from the exposure. As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them. This is but another application of the familiar rule that where one State adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the State from which they are taken. *Cathcart* v. *Robinson*, 5 Pet. 264, 280; *McDonald* v. *Hovey*, 110 U. S. 619.

The danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.

The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England, (2 Taylor on Evidence, § 1455, where a large number of similar acts are collated,) or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this court in *Ex parte Garland*, 4 Wall. 333, 380, "it extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."

In the case of *The Laura*, 114 U. S. 411, objection was made that a remission by the Secretary of the Treasury, under Rev. Stat. § 4294, of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, was ineffectual to destroy liability by reason of the fact that it involved an exercise of the pardoning power. It was held that, in view of the practice in reference to remissions by the Secretary of the Treasury and other officers, which had been sanctioned by statute and acquiesced in for nearly a century, the power vested in the President was not exclusive in the sense that no other officer could remit forfeitures or penalties incurred for the violation of the laws of the United States — citing *United States* v. *Morris*, 10 Wheat. 246.

The distinction between amnesty and pardon is of no practical importance. It is said in *Knote* v. *United States*, 95 U. S. 149, 152, "the Constitution does not use the word 'amnesty,' and, except that the term is generally applied where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance." Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a

past offence, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted.

While the decisions of the English courts construing such acts are of little value here, in view of the omnipotence of Parliament, such decisions as have been made under similar acts in this country are, with one or two exceptions, we believe, unanimous in favor of their constitutionality.

Thus in *State* v. *Nowell*, 58 N. H. 314, a statute which provided that a clerk, servant or agent should not be excused from testifying against his principal, and that he should not thereafter be prosecuted for any offence disclosed by him, was held to have deprived him of his privilege of silence. In delivering the opinion, the court observed "that the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; otherwise, the statute would be ineffectual. He is to be secured against all liability to future prosecution as effectually as if he were wholly innocent. This would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which he may be required to testify. . . . The conditional exemption becomes absolute when the witness testifies, and, being no longer liable to prosecution, he is not compelled, by testifying, to accuse or furnish evidence against himself. . . . The constitutional privilege of the witness protects, not another person against whom the witness testifies, but the witness himself. The legal protection of the witness against prosecution for crime disclosed by him is, in law, equivalent to his legal innocence of the crime disclosed. . . . The witness, regarded in law as innocent if prosecuted for a crime which he has been compelled by the statute to disclose, will stand as well as other innocent persons, and it was not the design of the common law maxim, affirmed by the bill of rights, that he should stand any better."

In *Kendrick* v. *The Commonwealth*, 78 Virginia, 490, a

statute secured to a witness called to testify concerning unlawful gaming, immunity against prosecution for any offence committed by him at the time and place indicated, and it was held that, as it gave to the witness full indemnity and assurance against any liability to prosecution, it was his duty to testify, notwithstanding that his answer might have a tendency to disgrace him.

The same construction was given to a similar statute of Texas in *Floyd* v. *State*, 7 Texas, 215, though the opinion is brief and does little more than state the conclusions of the court.

In the recent case of *Ex parte Cohen*, 104 California, 524, one Steinberger was charged, under a statute of California, with allowing Cohen to be registered as a voter, knowing that he was not entitled to registration. Cohen, being called as a witness, was asked certain questions with regard to the charge, and set up his privilege. The election law of California provided not only that the testimony given should not be used in any prosecution against the witness, but that he should not thereafter be liable to indictment, information or prosecution for the offence with reference to which his testimony was given. The court held that it was only when his evidence might tend to establish an offence, for which he might be punished under the laws of the State, that a person is a witness "against himself" in a criminal case, and the fact that, in a proceeding in which he is not the defendant, his testimony might tend to show that he had violated the laws of the State, was not sufficient to entitle him to claim this protection of the Constitution, unless he is at the same time liable to prosecution and punishment for such crime.

"If," said the court, "at the time of the transactions, respecting which his testimony is sought, the acts themselves did not constitute an offence; or if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offence has been repealed; if the witness has been tried for the offence and acquitted, or, if convicted, has satisfied the sentence of the law; if the offence is barred by the statute of limitations, and there is no pending prosecution

against the witness — he cannot claim any privilege under this provision of the Constitution, since his testimony could not be used against him in any criminal case against himself, and consequently he is not compelled to be a witness 'against himself.' Equally is he deprived of claiming this exemption from giving evidence, if the legislature has declared that he shall not be prosecuted or punished for any offence of which he gives evidence. Any evidence that he may give under such a statutory direction will not be 'against himself,' for the reason that, by the very act of giving the evidence, he becomes exempted from any prosecution or punishment for the offence respecting which his evidence is given. In such a case he is not compelled to give evidence which may be used against himself in any criminal case, for the reason that the legislature has declared that there can be no criminal case against him which the evidence which he gives may tend to establish."

In *Hirsch* v. *State*, 67 Tennessee, 89, the same construction was given to a similar statute in Tennessee, which exempted witnesses from prosecution for offences as to which they had given testimony before the grand jury, the court holding that this was "an abrogation of the offence;" that the witness could neither be accused by another, nor could he accuse himself, and therefore he could not criminate himself by such testimony. It is but just to say, however, that in *Warner* v. *State*, 81 Tennessee, 52, the same statute was construed as merely offering a reward to a witness for waiving his constitutional privilege, and not as compelling him to answer. But, for the reasons already given, we think that the witness cannot properly be said to give evidence against himself, unless such evidence may in some proceeding be used against him, or unless he may be subjected to a prosecution for the transaction concerning which he testifies. In each of the last two cases there were dissenting opinions.

In *Frazee* v. *State*, 58 Indiana, 8, a section of the criminal code of Indiana compelling a witness to testify against another for gaming, and providing that he should not be liable to indictment or punishment in such case, was enforced, though its constitutionality was not considered at length.

Finally, in *People* v. *Sharp*, 107 N. Y. 427, a section of the penal code declared that any person offending against certain provisions of the code relating to bribery might be compelled to testify, but that the person testifying to the giving of a bribe, which has been accepted, shall not thereafter be liable to indictment, prosecution or punishment for that bribery. This statute was held not to be violative of the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself. Counsel in that case seem to have pursued much the same line of argument that was made in the case under consideration, claiming that the statutory protection did not go far enough; that the indemnity that it offered to the witness was partial and not complete; that while it might save him from the penitentiary by excluding his evidence, it did not prevent the infamy and disgrace of its exposure. But that, said the court, quoting from *People* v. *Kelly*, 24 N. Y. 74, 83, "is the misfortune of his condition, and not any want of humanity in the law."

It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but, as we have already observed, the authorities are numerous and very nearly uniform to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a crimi-

nal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offence, the fact that the disgrace remains no more entitles him to immunity in this case than in the other.

It is argued in this connection that, while the witness is granted immunity from prosecution by the Federal government, he does not obtain such immunity against prosecution in the state courts. We are unable to appreciate the force of this suggestion. It is true that the Constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several States, except so far as the Fourteenth Amendment may have made them applicable. *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410; *Withers* v. *Buckley*, 20 How. 84; *Twitchell* v. *Commonwealth*, 7 Wall. 321; *Presser* v. *Illinois*, 116 U. S. 252.

There is no such restriction, however, upon the applicability of Federal statutes. The Sixth Article of the Constitution declares that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

The language of this article is so direct and explicit, that but few cases have arisen where this court has been called upon to interpret it, or to determine its applicability to state courts. But, in the case of *Stewart* v. *Kahn*, 11 Wall. 493, 505, the question arose whether a debt contracted by a citizen of New Orleans, prior to the breaking out of the rebellion,

was subject in a state court to the statute of limitations passed by Congress June 11, 1864, declaring that as to actions which should accrue during the existence of the rebellion, against persons who could not be served with process by reason of the war, the time when such persons were beyond the reach of judicial process should not be taken or deemed to be any part of the time limited by law for the commencement of such actions. The court held unanimously that the debt was subject to this act, and in delivering the opinion of the court Mr. Justice Swayne said: "But it has been insisted that the act of 1864 was intended to be administered only in the Federal courts, and that it has no application to cases pending in the courts of the State. The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject, and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. . . . The judicial anomaly would be presented of one rule of property in the Federal courts and another, and a different one, in the courts of the States, and debts could be recovered in the former which would be barred in the latter." This case was affirmed in *United States* v. *Wiley*, 11 Wall. 508; and in *Mayfield* v. *Richards*, 115 U. S. 137. See also *Mitchell* v. *Clark*, 110 U. S. 633. The same principle has also been applied in a number of cases turning upon the effect to be given to treaties in actions arising in the state courts. *Foster* v. *Neilson*, 2 Pet. 253; *The Cherokee Tobacco*, 11 Wall. 616; *The Head Money cases*, 112 U. S. 580. Of similar character are the cases in which we have held that the laws of the several States upon the subjects of pilotage, quarantines, inspections and other similar regulations were operative only so long as Congress failed to legislate upon the subject.

The act in question contains no suggestion that it is to be applied only to the Federal courts. It declares broadly that "no person shall be excused from attending and testifying . . . before the Interstate Commerce Commission . . . on the ground . . . that the testimony . . . required

of him may tend to criminate him," etc. "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify," etc. It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under state laws; but the immunity extends to any *transaction, matter or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.

But even granting that there were still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in *Queen* v. *Boyes*, 1 B. & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." Such dangers it was never the object of the provision to obviate.

The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to

indemnity against the State, or even against the prosecutor if the action of the latter was taken in good faith and in a reasonable belief that he was justified in so doing.

In the case under consideration, the grand jury was engaged in investigating certain alleged violations of the Interstate Commerce Act, among which was a charge against the Allegheny Valley Railway Company of transporting coal of the Union Coal Company from intermediate points to Buffalo, at less than the established rates between the terminal points, and a further charge of discriminating in favor of such coal company by rebates, drawbacks or commissions on its coal, by which it obtained transportation at less than the tariff rates. Brown, the witness, was the auditor of the road, whose duty it was to audit the accounts of the officers, and the money paid out by them. Having audited the accounts of the freight department during the time in question, he was asked whether he knew of any such discrimination in favor of the Union Coal Company, and declined to answer upon the ground that he would thereby incriminate himself.

As he had no apparent authority to make the forbidden contracts, to receive the money earned upon such contracts, or to allow or pay any rebates, drawbacks or commissions thereon, and was concerned only in auditing accounts, and passing vouchers for money paid by others, it is difficult to see how, under any construction of section 10 of the Interstate Commerce Act, he could be said to have wilfully done anything, or aided or abetted others in doing anything, or in omitting to do anything, in violation of the act — his duty being merely to see that others had done what they purported to have done, and that the vouchers rendered by them were genuine. But, however this may be, it is entirely clear that he was not the chief or even a substantial offender against the law, and that his privilege was claimed for the purpose of shielding the railway or its officers from answering a charge of having violated its provisions. To say that, notwithstanding his immunity from punishment, he would incur personal odium and disgrace from answering these questions, seems too much like an abuse of language to be worthy of serious

consideration. But, even if this were true, under the authorities above cited, he would still be compelled to answer, if the facts sought to be elucidated were material to the issue.

If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer, and that the judgment of the court below must be

Affirmed.

Mr. Justice Shiras, with whom concurred Mr. Justice Gray and Mr. Justice White, dissenting.

It is too obvious to require argument that, when the people of the United States, in the Fifth Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his right thereto should not be divested or impaired by any act of Congress.

Did Congress, by the act of February 11, 1893, which enacted that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the commission, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture," seek to *compel* any person to be a witness against himself? And, if so, was such provision of that act void because incompatible with the constitutional guaranty?

That it was the intention of the act to exact compulsory disclosure by every witness of all "testimony or evidence, documentary or otherwise, required of him," regardless of the fact that such disclosure might tend to criminate him or subject him to a penalty or forfeiture, was held by the court below, and such seems to be the plain meaning of the language of the act.

That the questions put to the witness, in the present case, tended to accuse and incriminate him, was sworn to by the witness himself, and was conceded or assumed by the court below. The refusal by the witness, in the exercise of his constitutional immunity, to answer the questions put, was held by the court to be an act of contempt, and the witness was ordered to pay a fine, and to be imprisoned until he should have answered the questions.

The validity of the reasons urged in defence of the action of the court below is the matter which this court has to consider.

Those reasons are found in that other provision of the act, which enacts that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or either of them, or in any such case or proceeding;" and it is claimed that it was competent for Congress to avoid the plea by a witness of his constitutional immunity, in proceedings under the act in question, by that provision.

As the apparent purpose of the Constitution was to remove the immunity from self-accusation from the reach of legislative power, the first and natural impulse is to regard any act of Congress which authorizes courts to fine and imprison men for refusing to criminate themselves as obviously void. But it is the duty of this court, as the final expositor as well of the Constitution as of the acts of Congress, to dispassionately consider and determine this question.

It is sometimes said that, if the validity of a statute is merely doubtful, if its unconstitutionality is not plainly ob-

vious, the courts should not be ready to defeat the action of the legislative branch of the government; and it must be conceded that when such questions arise, under the ordinary exercise of legislative power, it is plainly the duty of the courts not to dispense with the operation of laws formally enacted, unless the constitutional objections are clear and indisputable.

On the other hand, when the courts are confronted with an explicit and unambiguous provision of the Constitution, and when it is proposed to avoid, or modify, or alter the same by a legislative act, it is their plain duty to enforce the constitutional provision, unless it is clear that such legislative act does not infringe it in letter or spirit.

Before addressing ourselves immediately to the case in hand, it may be well to examine the authorities respectively cited.

The first case in which there was any consideration of this constitutional provision was the proceeding in the Circuit Court of the United States for the District of Virginia, in the year 1807, wherein Aaron Burr was indicted and tried for treason, and for a misdemeanor in preparing the means of a military expedition against Mexico, a territory of the King of Spain, with whom the United States were at peace.

It appears from the report of that case, as made by David Robertson, and published in two volumes by Hopkins & Earle, in Philadelphia, in 1808, that, in the first place, an application was made to Chief Justice Marshall, sitting as a committing magistrate, by the District Attorney of the United States, to commit the accused on two charges: 1st, for setting on foot and providing the means for an expedition against the territories of a nation at peace with the United States; and, 2d, for committing high treason against the United States. Burr was committed to answer the first charge only; but, at the subsequent term of the court, the application to commit him on a charge of high treason was renewed, testimony to sustain the charge was adduced, Burr was bound over to answer the charge, and a grand jury was empanelled and charged by the Chief Justice.

While the grand jury was considering the case, the District Attorney called to be sworn Dr. Erick Bollman, with a view that he should testify before the grand jury; and as it appeared that the facts to which he was expected to testify might involve him as an accessory, the District Attorney produced and tendered the witness a pardon by the President of the United States. This pardon the witness declined to accept, and thereupon argument was had as to the operation of a pardon which the witness declined to accept, and as to whether the witness or the court was to be the judge as to the propriety of answering the questions put. Upon those points the Chief Justice reserved his decision. Nor does it appear that he made any decision — probably because Dr. Bollman went voluntarily before the grand jury and testified. Burr's Trial, vol. 1, pp. 190, 193. Subsequently, while the grand jury was still considering the case, one Willie was called and asked whether he had, under instructions from Aaron Burr, copied a certain paper, which was then exhibited to him. This question the witness refused to answer, lest he might thereby incriminate himself. The Chief Justice observing that, if the witness was to decide upon this, it must be on oath, interrogated the witness whether his answering the question would criminate himself, to which he replied that it might in a certain case. Thereupon the Chief Justice withheld the point for argument. A full and able argument was had, and, after consideration, the Chief Justice expressed himself as follows: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment; because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privileges which the law allows, and which he claims. It follows, necessarily, then, from this state of

things, that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say, upon his oath, that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received. The counsel for the United States have also laid down this rule, according to their understanding of it, but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement, a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it might be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compelled to accuse himself, would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that might form a necessary and essential part of a crime, which is pun-

ishable by the laws. . . . In such a case, the witness must himself judge what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer." 1 Burr's Trial, 244, 245.

In *Boyd* v. *United States*, 116 U. S. 616, there came into question the validity of the fifth section of the act of June 22, 1874, c. 391, 18 Stat. 186, wherein it was provided that "in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suits in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper, in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal shall be explained to the satisfaction of the court."

This section was held to be unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the Fourth and Fifth Amendments of the Constitution.

It was contended on behalf of the government that the act of February 25, 1868, c. 13, 15 Stat. 37, whereby it was enacted that "no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence or in any manner used against such party or witness, or his property or estate, in any

court of the United States, or in any proceeding by or before any officer of the United States in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness," relieved the act of June 22, 1874, of the objections made. But this court said, by Mr. Justice Bradley, (p. 632,) "No doubt it was supposed that in this new form, couched as it was in almost the language of the fifteenth section of the old Judiciary Act, except leaving out the restriction to cases in which the court of chancery would decree a discovery, it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained, and that the law, though speciously worded, is still obnoxious to the prohibition of the Fourth Amendment of the Constitution as well as of the Fifth."

Other observations made by Mr. Justice Bradley in that case are worthy to be quoted:

"As therefore suits for penalties and forfeitures incurred by the commission of offences against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of proced-

ure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. 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.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law." 116 U. S. 634, 635.

In the recent case of *Counselman* v. *Hitchcock*, 142 U. S. 547, there was a proceeding before a grand jury to investigate certain alleged violations of the act to regulate commerce, and one Charles Counselman, having appeared before the grand jury and been sworn, declined to answer certain questions put to him, on the ground that the answers might tend to criminate him. The District Court of the United States for the Northern District of Illinois, after a hearing, adjudged Counselman to be in contempt of court, and made an order fining him, and directing that he be kept in custody by the marshal until he should have answered said questions. Thereupon Counselman filed a petition in the Circuit Court of the United States, setting forth the facts, and praying for a writ of *habeas corpus.* That court held that the District Court was in the exercise of its lawful authority in doing what it had done, dismissed Counselman's petition, and remanded him to the custody of the marshal. 44 Fed. Rep. 268. An appeal was taken to this court, by which the judgment of the Circuit Court was reversed, and the cause was remanded to that court with a direction to discharge the appellant from custody. Mr. Justice Blatchford, in delivering the opinion of the court, made a careful review of the adjudged cases, including several decisions in States where there is a like constitutional provision to that contained in

the Federal Constitution, and where attempts had been made by legislation to avoid the constitutional provision by substituting provisions relieving the witness from future criminal prosecution. It is needless to here examine those cases.

The contention there made on behalf of the government was that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but this court said:

"Such is not the language of the Constitution. Its provision is that no person shall be compelled in *any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully, (as he was bound to do if he should answer them at all,) the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

"It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he had himself committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." 142 U. S. 562.

Dissenting Opinion: Shiras, Gray, White, JJ.

To the argument that section 860 of the Revised Statutes, which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture," removed the constitutional privilege of Counselman, the court said: "That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . . This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

"The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of section 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso." 142 U. S. 564, 565.

It is, however, now contended, and that is the novel feature of the present case, that the following provision in the act of February 11, 1893, removes the constitutional difficulty: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission." And it is surmised that this proviso was enacted in view of a suggestion to that effect in the opinion in the *Counselman case.*

It is, indeed, true that Mr. Justice Blatchford did say that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates;" and it may be inferred from this language that there might be framed a legislative substitute for the constitutional privilege which would legally empower a court to compel an unwilling witness to criminate himself. But the case did not call for such expression of opinion, nor did Mr. Justice Blatchford undertake to suggest the form of such an enactment. Indeed, such a suggestion would not have comported with his previous remarks, above cited, that "legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled, in any criminal case, to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso."

Is, then, the undeniable repugnancy that exists between the constitutional guaranty and the compulsory provisions of the

act of February 11, 1893, overcome by the proviso relieving the witness from prosecution and from any penalty or forfeiture "for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence?"

As already said, the very fact that the founders of our institutions, by making the immunity an express provision of the Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against *any* act professing to dispense with the constitutional privilege. It may not be said that, by no form of enactment, can Congress supply an adequate substitute, but doubtfulness of its entire sufficiency, uncertainty of its meaning and effect, will be fatal defects.

What, then, is meant by the clause in this act that "*no person shall be prosecuted* . . . for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise?" How possibly can effect be given to this provision, if taken literally? If a given person is charged with a wilful violation of the Interstate Commerce Act, how can the prosecuting officers or the grand juries know whether he has been examined as a witness concerning the same matter before the commission or some court? Nor can the accused himself necessarily know what particular charge has been brought against him, until an indictment has been found. But when an indictment has been found, and the accused has been called upon to plead to it, he assuredly has been *prosecuted.* So that all that can be said is, that the witness is *not* protected, by the provision in question, from being *prosecuted*, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea. It is no reply to this to say that his condition, in those respects, is no worse than that of any other innocent man, who may be wrongfully charged. The latter has not been compelled, on penalty of

fine and imprisonment, to disclose under oath facts which have furnished a clue to the offence with which he is charged.

Nor is it a matter of perfect assurance that a person who has compulsorily testified, before the commission, grand jury, or court, will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of the evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design.

Again, what is the meaning of the clause of the act that "no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying?" The implication would seem to be that, except for such a clause, perjury could not be imputed to a witness who had been compelled to so testify. However that may be, and whether or not the clause is surplusage, it compels attention to the unfortunate situation in which the witness is placed by the provisions of this act. If he declines to testify on the ground that his answer may incriminate himself, he is fined and imprisoned. If he submits to answer, he is liable to be indicted for perjury by either or both of the parties to the controversy. His position in this respect is not that of ordinary witnesses testifying under the compulsion of a subpœna. His case is that of a person who is exempted by the Constitution from testifying at all in the matter. He is told, by the act of Congress, that he must nevertheless testify, but that he shall be protected from any prosecution, penalty or forfeiture by reason of so testifying. But he is subjected to the hazard of a charge of perjury, whether such charge be rightfully or wrongfully made. It does not do to say that other witnesses may be so charged, because if the privilege of silence, under the constitutional immunity, had not been taken away, this witness would not have testified, and could not have been subjected to a charge of perjury.

Another danger to which the witness is subjected by the withdrawal of the constitutional safeguard is that of a prosecution in the state courts. The same act or transaction

which may be a violation of the Interstate Commerce Act may also be an offence against a state law. Thus, in the present case, the inquiry was as to supposed rebates on freight charges. Such payments would have been in disregard of the Federal statute, but a full disclosure of all the attendant facts (and if he testify at all he must answer fully) might disclose that the witness had been guilty of embezzling the moneys entrusted to him for that purpose; or it might have been disclosed that he had made false entries in the books of the state corporation, in whose employ he was acting. These acts would be crimes against the State, for which he might be indicted and punished, and he may have furnished, by his testimony in the Federal court or before the commission, the very facts or, at least, clues thereto which led to his prosecution.

It is, indeed, claimed that the provisions under consideration would extend to the state courts and might be relied on therein as an answer to such an indictment. We are unable to accede to such a suggestion. As Congress cannot create state courts, nor establish the ordinary rules of property and of contracts, nor denounce penalties for crimes and offences against the States, so it cannot prescribe rules of proceeding for the state courts. The cases of *Stewart* v. *Kahn*, 11 Wall. 493; *United States* v. *Wiley*, 11 Wall. 508, and *Mayfield* v. *Richards*, 115 U. S. 137, are referred to as sustaining the proposition. Those were cases defining the scope and effect of the act of Congress of June 11, 1864, providing that as to actions which should accrue, during the existence of the rebellion, against persons who could not be served with process by reason of the war, the time when such persons were beyond the reach of process should not be taken or deemed to be any part of the time limited by law for the commencement of such actions. And it was held that it was the evident intention of Congress that the act was to apply to cases in state as well as in Federal courts, and as to the objection that Congress had no power to lay down rules of action for the state courts, it was held that the act in question was within the war power as an act to remedy an evil which was one of the

consequences of the war, Mr. Justice Swayne saying: The war "power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority. It only applies coercively the principle of the law of nations, which ought to work the same results in the courts of all the rebellious States without the intervention of this enactment." 11 Wall. 507.

Whatever may be thought of these cases, and of the reasoning on which they proceed, it is plain that they are not applicable to the present statute. The latter does not in express terms, nor by necessary implication, extend to the state courts; and, if it did, it could not be sustained as an exercise of the war power. On this part of the subject it will be sufficient to cite the language of Chief Justice Marshall in giving the opinion of the court in the case of *Barron* v. *Baltimore*, 7 Pet. 243, 247:

"The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the Judiciary Act.

"The plaintiff in error contends that it comes within that clause in the Fifth Amendment to the Constitution, which inhibits the taking of private property for public use without just compensation. He insists that this Amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause. The question thus presented is, we think, of great importance, but not of much difficulty.

"The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States.

Each State established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes.

"If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restriction on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest. . . . We are of opinion that the provision in the Fifth Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States."

This result has never since been questioned. As, then, the provision of the Constitution of the United States which protects witnesses from self-incrimination cannot be invoked in a state court, so neither can the congressional substitute therefor.

It is urged that, even if the state courts would not be compelled to respect the saving clause of the Federal statute, in respect to crimes against the State, yet that such a jeopardy is too remote to be considered. The force of this contention is not perceived. On the contrary, such is the nature of the commerce which is controlled by the Interstate Commerce law,

so intimately involved are the movements of trade and transportation, as well within as between the States, that just such questions as those which are now considered may be naturally expected to frequently arise.

It is said that the constitutional protection is solely against prosecutions of the government that grants it, and that, in this case, the questions asked the witness related exclusively to matters of interstate commerce, in respect of which there can be but one sovereign; that his refusal to answer related to his fear of punishment by *that* sovereign, and to nothing else; and that no answer the witness could make could possibly tend to criminate him under the laws of any other government, be it foreign or state.

But, as we have seen, it is entirely within the range of probable events that the very same act or transaction may constitute a crime or offence against both governments, state and Federal. This was manifested in the case of *Ex parte Fonda*, 117 U. S. 516. This was an original application to this court for a writ of *habeas corpus* by one who was a clerk in a national bank, and who alleged in his petition that he had been convicted in one of the courts of Michigan under a statute of that State, and sentenced to imprisonment for having embezzled the funds of that banking institution. The principal ground upon which he asked for a writ of *habeas corpus* and for his discharge from custody was that the offence for which he was tried was covered by the statutes of the United States, and was therefore exclusively cognizable by the Federal courts. But this court refused the application, without, however, deciding whether the same act was or was not an offence against both governments. A similar question was presented in *New York* v. *Eno*, 155 U. S. 89, 98, and these observations were made by Mr. Justice Harlan, who delivered the opinion of the court: "Whether the offences described in the indictment against Eno are offences against the State of New York and punishable under its laws, or are made by existing statutes offences also against the United States and are exclusively cognizable by courts of the United States; and whether the same acts on the part of the accused may

be offences against both the national and state governments and punishable in the judicial tribunals of each government, without infringing upon the constitutional guaranty against being put twice in jeopardy for the same offence; these are questions which the state court of original jurisdiction is competent to decide in the first instance;" and accordingly the writ of *habeas corpus* was dismissed, and the accused was remanded to the custody of the state authorities. But, as already observed, not only may the same act be a common offence to both governments, but the disclosures compulsively made in one proceeding may give clues and hints which may be subsequently used against the witness in another, to the loss of his liberty and property.

Much stress was laid in the argument on the supposed importance of this provision in enabling the commission and the courts to enforce the salutary provisions of the Interstate Commerce Act. This, at the best, is a dangerous argument, and should not be listened to by a court, to the detriment of the constitutional rights of the citizen. If, indeed, experience has shown, or shall show, that one or more of the provisions of the Constitution has become unsuited to affairs as they now exist, and unduly fetters the courts in the enforcement of useful laws, the remedy must be found in the right of the nation to amend the fundamental law, and not in appeals to the courts to substitute for a constitutional guaranty the doubtful and uncertain provisions of an experimental statute.

It is certainly speaking within bounds to say that the effect of the provision in question, as a protection to the witness, is purely conjectural. No court can forsee all the results and consequences that may follow from enforcing this law in any given case. It is quite *certain* that the witness is *compelled* to testify against himself. Can any court be *certain* that a sure and sufficient substitute for the constitutional immunity has been supplied by this act; and if there be room for reasonable doubt, is not the conclusion an obvious and necessary one?

It is worthy of observation that opposite views of the validity of this provision have been expressed in the only two cases

in which the question has arisen in the Circuit Court — one, in the case of the *United States* v. *James*, 60 Fed. Rep. 257, where the act was held void; the other, the present case. In most of the cases cited, wherein state courts have passed upon analogous questions, and have upheld the sufficiency of a statute dispensing with the constitutional immunity, there have been dissenting judges.

A final observation, which ought not to be necessary, but which seems to be called for by the tenor of some of the arguments that have been pressed on the court, is that the constitutional privilege was intended as a shield for the innocent as well as for the guilty. A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.

But surely no apology for the Constitution, as it exists, is called for. The task of the courts is performed if the Constitution is sustained in its entirety, in its letter and spirit.

The judgment of the Circuit Court should be reversed and the cause remanded with directions to discharge the accused from custody.

Mr. Justice Field dissenting.

I am unable to concur with my associates in the affirmance of the judgment of the Circuit Court of the United States for the Western District of Pennsylvania.

The appellant and petitioner had been subpœnaed as a witness before the grand jury, called at a term of the District Court of the same district, to testify with reference to a charge, under investigation by that body, against certain officers and agents of the Allegheny Valley Railroad Company, of having violated certain provisions of the Interstate Commerce Act. Several interrogatories were addressed by the grand jury to the witness, which he refused to answer on the ground that his answers might tend to criminate him. On a

rule to show cause why he should not be punished for a contempt, and be compelled to answer, he invoked his constitutional privilege of silence.

It is stated in the brief of counsel that no question was raised as to the good faith of the appellant, the petitioner, in invoking this privilege, but the ground was taken and held to be sufficient, that under the statute of Congress of February 11, 1893, he was bound to answer the questions. On his still persisting in his refusal, he was adjudged guilty of contempt and committed. He then sued out a writ of *habeas corpus* from the Circuit Court, and on the production of his body before that court and the return of the marshal, the same position was taken and the statute was held valid and sufficient to require him to answer, and he was accordingly remanded. From the order remanding him and thus adjudging the statute to be valid and constitutional in requiring the witness to answer the inquiries propounded to him, notwithstanding his invoking the privilege of exemption from answering when, upon his statement, his answer would tend to criminate himself, the petitioner appealed to this court.

The Fifth Amendment of the Constitution of the United States declares that no person shall be compelled, in any criminal case, to be a witness against himself. The act of Congress of February 11, 1893, entitled "An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled 'An act to regulate commerce,' approved February 4, 1887, and amendments thereto," provides as follows: "That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'An act to regulate commerce,' approved February 4, 1887, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary

or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents required if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of an offence, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

The Fifth Amendment of the Constitution of the United States gives absolute protection to a person called as a witness in a criminal case against the compulsory enforcement of any criminating testimony against himself. He is not only protected from any criminating testimony against himself relating to the offence under investigation, but also relating to any act which may lead to a criminal prosecution therefor.

No substitute for the protection contemplated by the amendment would be sufficient were its operation less extensive and efficient.

The constitutional amendment contemplates that the witness shall be shielded from prosecution by reason of any expressions forced from him whilst he was a witness in a criminal case. It was intended that against such attempted enforcement he might invoke, if desired, and obtain, the shield of absolute silence. No different protection from that afforded by the amendment can be substituted in place of it. The force and extent of the constitutional guarantee are in no respect to be weakened or modified, and the like consider-

ation may be urged with reference to all the clauses and provisions of the Constitution designed for the peace and security of the citizen in the enjoyment of rights or privileges which the Constitution intended to grant and protect. No phrases or words of any provision, securing such rights or privileges to the citizen, in the Constitution are to be qualified, limited or frittered away. All are to be construed liberally that they may have the widest and most ample effect.

No compromise of phrases can be made by which one of less sweeping character and less protective force in its influences can be substituted for any of them. The citizen cannot be denied the protection of absolute silence which he may invoke, not only with reference to the offence charged, but with respect to any act of criminality which may be suggested.

The constitutional guarantee is not fully secured by simply exempting the witness from prosecution for the designated offence involved in his answer as a witness. It extends to exemption from not only prosecution for the offence under consideration but from prosecution for any offence to which the testimony produced may lead.

The witness is entitled to the shield of absolute silence respecting either. It thus exempts him from prosecution beyond the protection conferred by the act of Congress. It exempts him where the statute might subject him to self-incrimination.

The amendment also protects him from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution. It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offence under prosecution. But I do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, "it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that in bestowing upon witnesses in criminal cases

the privilege of silence when in danger of self-incrimination, they would at the same time save him *in all such cases* from the shame and infamy of confessing disgraceful crimes and thus preserve to him some measure of self-respect. . . ." It is true, as counsel observes, that "both the safeguard of the Constitution and the common law rule spring alike from that sentiment of *personal self-respect, liberty, independence and dignity* which has inhabited the breasts of English speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others. What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was ignorant?"

This court has declared, as stated, that "no attempted *substitute* for the constitutional safeguard is sufficient unless it is a *complete* substitute. Such is not the nature and effect of this statute of Congress under consideration. A witness, as observed by counsel, called upon to testify to something which will incriminate him, claims the benefit of the safeguard; he is told that the statute fully protects him against prosecution for his crime; 'but,' he says, 'it leaves me covered with infamy and unable to associate with my fellows;' he is then told that *under the rule of the common law* he would not have been protected against mere infamy, and that the constitutional provision does not assume to protect against infamy *alone*, and that it should not be supposed that its object was to protect against infamy even when associated with crime. But he answers: 'I am not claiming any common law privilege, but this particular constitutional safeguard. What its purpose was does not matter. It saves me from infamy, and you furnish me with no *equivalent*, unless by such equivalent I am equally saved from infamy.'" And it is very justly

urged that "a statute is not a full equivalent under which a witness may be compelled to cover himself with the infamy of a crime, even though he may be armed with a protection against its merely penal consequences."

In *Respublica* v. *Gibbs*, 3 Yeates, 429, in the Supreme Court of Pennsylvania, an indictment was found against the defendant for violation of the law passed in 1799 to regulate the general elections within the Commonwealth. One Benjamin Gibbs, the father of the defendant, a blind and aged man, entitled as an elector, being both a native and an elector above thirty years, who had paid taxes for many years, was led to the election ground by his son and offered his vote. He was told that previous to his vote being received he must answer upon oath or affirmation the following questions, to wit: "Did you at all times during the late revolution continue in allegiance to this State or some one of the United States, or did you join the British forces, or take the oath of allegiance to the King of Great Britain, and if so, at what period? Have you ever been attainted of high treason against this Commonwealth, and if you have, has the attainder been reversed, or have you received a pardon?"

In the litigation which followed these proceedings counsel stated that the constitution of Pennsylvania, formed on the 28th of September, 1776, directs that "no man can be compelled to give evidence against himself," and that the same words were repeated in the constitution of 1790. And it was contended that the true meaning of the constitution and law was that no question should be asked a person, the answer to which may tend to charge him either with a crime or bring him into disgrace or infamy.

The Chief Justice, Shippen, in his charge of the court, among other things, said: "It has been objected that the questions propounded to the electors contravene an established principle of law. The maxim is *nemo tenetur seipsum accusare* (*seu prodere*). It (the maxim) is founded on the best policy, and runs throughout our whole system of jurisprudence. It is the uniform practice of courts of justice as to witnesses and jurors. It is considered cruel and unjust to

propose questions which may tend to criminate the party. And so jealous have the legislature of this Commonwealth been of this mode of discovery of facts that they have refused their assent to a bill brought in to compel persons to disclose on oath papers as well as facts relating to questions of mere property. And may we not justly suppose, that they would not be less jealous of securing our citizens against this mode of self-accusation? The words *accusare* or *prodere* are general terms, and their sense is not confined to cases where the answers to the questions proposed would induce to the punishment of the party; if they would involve him in shame or reproach, he is under no obligation to answer them. The avowed object of putting them is to show that the party is under a legal disability to elect or be elected; and they might create an incapacity to take either by purchase or descent, to be a witness or juror, etc. We are all clear on this point, that the inspectors were not justified in proposing the question objected to, though it is probable they did not wrong intentionally. Nevertheless, if by exacting an illegal oath the election was obstructed or interrupted, it seems most reasonable to attribute it to them."

And in *Galbreath and others* v. *Eichelberger*, reported in that volume, 3 Yeates, 515, it was held by the same court that "no one will be compelled to be sworn as a witness whose testimony tends to accuse himself of an immoral act."

It is conceded as an established doctrine, universally assented to, that a witness claiming his constitutional privilege cannot be questioned concerning the way in which he fears he may incriminate himself, or, at least, only so far as may be needed to satisfy the court that he is making his claim in good faith, and not as a pretext. *Fisher* v. *Ronalds*, 12 C. B. 762; *Adams* v. *Lloyd*, 3 H. & N. 351; *Regina* v. *Boyes*, 7 Jur. N. S. Part 1, 1158; 22 Am. Law Rev. 21, note, p. 28; 2 Crim. Law Mag. 645, note, 654.

To establish such good faith on the part of the witness in claiming his constitutional privilege of exemption — from self-incrimination, where he is examined as a witness in a criminal

case, he may be questioned as to his apprehension of criminating himself by his answer, but no further.

The position that if witnesses are allowed to assert an exemption from answering questions when in their opinion such answers may tend to incriminate them, the proof of offence like those prescribed by the Interstate Commerce act will be difficult and probably impossible — ought not to have a feather's weight against the abuses which would follow necessarily the enforcement of criminating testimony. The abuses and perversions of sound principles which would creep into the law by yielding to arguments like these — to what is supposed to be necessary for the public good — cannot be better stated than it was by the late Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635. Said the learned justice:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. *A close and literal construction deprives them of half their efficacy*, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

And the same great and learned justice adds:

"The freedom of thought, of speech and of the press; the right to bear arms; exemption from military dictation; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment, are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features had been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the Constitution, and the contests were fresh in the memories and traditions of the people at that time." *Boyd* v. *The United States*, 116 U. S. 626.

The act of Congress of February 11, 1893, very materially qualifies the constitutional privilege of exemption of a witness in a criminal case from testifying, and removes the security against unreasonable searches and seizures which is also provided by the Constitution against the exposure of one's private books and papers.

The Fourth Amendment of the Constitution, which declares that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated," is equally encroached upon by the law in question.

The position of the respondent, that the witness can lawfully be compelled to answer on the ground that the act of Congress in effect abrogates the constitutional privilege, in providing that the punishment of the alleged offence, in relation to which the witness was sought to be examined, shall not be imposed in case he answers the interrogatories propounded, is not sound on two grounds: First, because the statute could not abrogate or in any respect diminish the protection conferred by the constitutional amendment; and, secondly, because the statute does not purport to abrogate the offence, but only provides protection against any proceeding to punish it. The constitutional safeguards for security and liberty cannot be thus dealt with. They must stand as the Constitution has devised them. They cannot be set aside and replaced by something else on the ground that the substitute will probably answer the same purpose. The citizen, as observed by counsel, is entitled to the very thing which the language of the Constitution assures to him.

Every one is protected by the common law from compulsory incrimination of himself. This protection is a part of that general security which the common law affords against defamation, that is, against malicious and false imputations upon one's character, as it defends against injurious assaults upon one's person, even though the defamation is created by publication made by himself under compulsion. The defamation arising from self-incrimination may be equally injurious as if originating purely from the maliciousness of others.

The reprobation of compulsory self-incrimination is an established doctrine of our civilized society. As stated by appellant's counsel, it is the "result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other." As such, it should be condemned with great earnestness.

The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought.

A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement.

The counsel of the appellant justly observes on this subject, as on many of the proceedings taken to escape from the enforcement of the constitutional and legal protection, established to guard a citizen from any unnecessary restraints upon his person, action or speech, that "the proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom. The limit which the law carefully assigns to the power to make searches and seizures proceeds from the same source."

The doctrine condemning attempts at self-incrimination is declared in numerous cases. Starkie, in his treatise on Evidence, observes that the rule forbidding such incrimination is based upon two grounds, one of policy and one of humanity, "of policy because it would force a witness under a strong temptation to commit perjury, and of humanity because it would be to extort a confession by duress, every species and description of which the law abhors." (Am. ed. pp. 40, 41.)

In *United States* v. *Collins*, 1 Woods, 511, Mr. Justice Bradley said "the immunity was founded upon principles of public policy and a just regard to the liberties of every citizen." And we have no sympathy for the efforts of any individual or tribunal to weaken or fritter away any of the provisions of the Constitution, even the least, intended for

the protection of the private rights of the citizen. Those provisions should receive the construction which would give them the widest and most beneficent effect intended.

But there is another and conclusive reason against the statute of Congress. It undertakes, in effect, to grant a pardon in certain cases to offenders against the law, that is, on condition that they will give full answers to certain interrogatories propounded. It declares that the alleged offender shall not be punished for his offence upon his compliance with a certain condition. The legal exemption of an individual from the punishment which the law prescribes for the crime he has committed is a pardon, by whatever name the act may be termed. And a pardon is an act of grace which is, so far as relates to offenders against the United States, the sole prerogative of the President to grant.

In *Ex parte Garland*, 4 Wall. 333, 380, this court, after stating that the Constitution provides that the President shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment, says: "The power thus conferred is unlimited with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be affected by any legislative restrictions."

Congress cannot grant a pardon. That is an act of grace which can only be performed by the President. The constitutional privilege invoked by the appellant should have had full effect, and its influence should not have been weakened in any respect by the statute which attempted to exercise a prerogative solely possessed by the President.

The order remanding the appellant should, therefor, in my judgment, be reversed, and an order entered that he be discharged from custody and be set at liberty.

SOUTHWORTH *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 652. Argued and submitted March 3, 1896. — Decided March 23, 1896.

In an action brought by a Circuit Court commissioner for the District of Louisiana to recover fees for alleged services rendered the United States in prosecutions under Rev. Stat. § 1986, the Court of Claims found that the prosecutions were the result of a purpose on the part of party managers to purge, as they alleged, the register of illegal voters; that the commissioner made no inquiry or examination of witnesses to satisfy himself of probable cause, but simply issued warrants on the affidavits filed; that the warrants issued were not signed by himself but by a number of clerks who used a stamp, which was a fac-simile of his signature, until the stamp was broken, and then simply wrote his name; that in the issuance of warrants the commissioner exercised no discretion, and made no personal examination of the complaints or witnesses, but issued a warrant in all cases in which a complaint was made; that the warrants were issued generally for the purpose of affecting the register of votes to be used in the election, and not to arrest and punish offenders; that in a large majority of the 1303 cases in which the defendants were discharged it did not appear that the commissioner performed any service in investigating the offences charged, nor in judicially determining the guilt or innocence of the parties. *Held*, that these findings justified the further finding of that court that "from said facts the court finds the ultimate fact to be that the claimaint's testator did not perform the services for the United States in good faith for the purpose of enforcing the criminal law," and the judgment entered thereon in favor of the United States.

THE case is stated in the opinion.

Mr. Lewis Abraham and *Mr. George A. King* for appellant.

Mr. Assistant Attorney General Dodge and *Mr. Charles W. Russell*, for appellees, submitted on their brief.

MR. JUSTICE BREWER delivered the opinion of the court.

On December 16, 1878, the testator of plaintiff filed his petition in the Court of Claims, praying judgment against the United States for the sum of $82,830, for services as United

States commissioner for the District of Louisiana. The petition alleged that proceedings were commenced before him as such commissioner in 8283 cases, and that under § 1986, Rev. Stat., he was entitled to ten dollars for each case. A demurrer thereto having been sustained, and a judgment of dismissal rendered, his executrix, the present appellant — he having died pending the suit — appealed to this court, and here the judgment of the Court of Claims was reversed, and the case remanded for further proceedings. 151 U. S. 179.

In the opinion then filed this court, while disapproving of the contention that the mere multitude of cases was proof of a lack of good faith, at the same time distinctly recognized that no cause of action arose against the government unless the proceedings, judicial in form, were instituted and carried on in good faith and with a view to the arrest and punishment of offenders; and the case was remanded in order that that question of fact might be considered and determined. Thereafter a trial was had in the Court of Claims, and upon the testimony presented that court found, in its sixth finding, as follows: "From said facts the court finds the ultimate fact to be that the claimant's testator did not perform the services for the United States in good faith for the purpose of enforcing the criminal law." And upon this finding judgment was entered in favor of the defendant. From which judgment the plaintiff has again appealed to this court.

If nothing else were before us than the conclusion of the Court of Claims, expressed in the sixth finding, there would be little for consideration; because, as was held when the case was here before, a lack of good faith on the part of a commissioner may rightfully be pleaded in bar of any claim against the United States for compensation.

But the contention is that this sixth finding is dependent on facts stated in the prior findings, and that they do not warrant the conclusion. Those findings show that "the prosecutions were the result of a purpose on the part of party managers to purge, as they alleged, the register of illegal voters;" that the commissioner made no "inquiry or examination of witnesses to satisfy himself of probable cause," but

simply "issued warrants on the affidavits" filed, and that the warrants were not signed by himself but by a number of clerks who used, until broken, a stamp, which made a fac-simile of his signature, and thereafter simply wrote his name; that of the 8283 persons against whom warrants were issued, about 2000 were persons of respectability and character, residents of the city of New Orleans, and these facts being disclosed the prosecutions were summarily dismissed. It appears further that "in the issuance of warrants the commissioner exercised no discretion, and made no personal examination of the complaints or witnesses, but issued a warrant in all cases in which a complaint was made;" "that the warrants were issued generally for the purpose of affecting the register of votes to be used in the election, and not to arrest and punish offenders;" that in a large majority of the 1303 cases in which the defendants were discharged it does not appear that the commissioner "performed any service in investigating the offences charged, nor in judicially determining the guilt or innocence of the parties." Further findings show that there were 120 persons swearing to the affidavits, each affidavit being sworn to by two persons, there being sixty groups of two persons, and that these affidavits were filed against persons who had registered for the purpose of voting at elections prior to that of 1876, and who, in the meantime, had removed from the ward or voting precinct in which they had theretofore been registered, but had not caused their names to be changed by the supervisors of registration.

Do these facts justify the conclusion stated in the sixth finding? What is a judicial proceeding, and what function does a commissioner perform in instituting a criminal prosecution? Is it partisan in any sense of the term? May a judicial officer exercise the powers conferred upon him to aid any party or faction in respect to a coming election? It seems that the mere statement of the inquiry carries an answer in condemnation. The very thought of a judicial office is that its functions are not partisan or political, and that he who occupies such office stands indifferent to all questions of mere party success.

It carries, also, the further thought that in the discharge of his judicial functions the magistrate exercises a personal and judicial consideration of every charge made, and subjects no one to the annoyance and disgrace of arrest until after personal and careful investigation he, as a magistrate, believes him to be guilty of a violation of law. The idea of a perfunctory discharge of these duties, of a transfer of responsibility to mere clerks, of a wholesale proceeding against a multitude of citizens without personal inquiry as to the probability of the charge against each, is something abhorrent to the true and reasonable understanding of the conditions of judicial action. The testimony is not preserved, and we must rest upon the findings of fact made by the Court of Claims, and upon them, irrespective of what may be considered in the sixth finding as partially a conclusion of law, it is evident that the action of the commissioner was in no just sense the action of a judicial officer, instituted for the sake of upholding the laws of the United States and the punishment of crime. The facts, as stated in the prior findings, we unhesitatingly affirm, justify the conclusions stated in the sixth finding, and we therefore hold that the services rendered by the commissioner were partisan rather than judicial, and as such entitled to no compensation from the government.

The judgment is

Affirmed.

MR. JUSTICE WHITE took no part in the consideration and decision of this case.

OWENS *v.* HENRY.

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

No. 143. Argued and submitted March 13, 1896. — Decided March 30, 1896.

In June, 1861, O. recovered judgment in a Pennsylvania court for the recovery of a sum of money against H. and F., both residents of that State. In 1865 H. removed to Louisiana, and became a citizen of that State and

Statement of the Case.

continued so until his death. In 1866 the judgment was revived by *scire facias*, process being served on F. only. In 1871 it was in like manner revived. In 1880 O. proceeded on the judgment against H. in the courts of Louisiana, where a judgment is barred by prescription in ten years from its rendition. Being compelled to elect upon which judgment he relied, he elected to stand upon the *scire facias* judgment of 1871. *Held*, that, viewed as a new judgment rendered as in an action of debt, the judgment had no binding force in Louisiana, as H. had not been served with process or voluntarily appeared; and considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, it operated merely to keep in force the local lien, and, for the same reason, it could not be availed of as removing the statutory bar of the *lex fori*.

JUNE 17, 1861, judgment was entered on a bond and warrant of attorney, dated March 1, 1861, for ten thousand dollars, conditioned for the payment of five thousand dollars on the second day of March, 1861, with interest, in favor of Bernard Owens against John Henry and James Feeny in the District Court for the county and city of Philadelphia, now the Court of Common Pleas No. 3, for the county of Philadelphia, State of Pennsylvania, and execution was issued thereon that day. February 3, 1866, a *scire facias* to revive this judgment was issued returnable the first Monday of March, and served upon Feeny, but returned *nihil habet* as to John Henry. And a second writ was issued March 19, 1866, and returned *nihil*. The docket entries show: "Ap'l 21, 1866. Judg't for want of an affidavit of defence," but damages were not assessed until March 17, 1871, when they were entered at $6525. On that day a *sci. fa.* to revive this latter judgment was issued returnable the first Monday of April, 1871, and returned *nihil*, and April 11 an *alias* was issued returnable the first Monday of May, 1871, with a like return.

May 10, 1871, judgment was rendered "for want of an appearance on two returns of *nihil*," and damages assessed at $8482.50. The record shows the assessment was made up of the amount of the prior judgment, (assessed March 17, 1871, but treated as of the date of the interlocutory judgment,) $6525, interest from April 21, 1866, $1957.50, "real debt, $8482.50."

At the time the original judgment was rendered, John

Counsel for Parties.

Henry was a citizen of the State of Pennsylvania, but he removed to the State of Louisiana in 1865, and became a citizen of that State, residing there from September 5, 1865, until his death, January 3, 1892.

November 1, 1880, Bernard Owens, who was a citizen of Pennsylvania, filed his petition in the Circuit Court of the United States for the Eastern District of Louisiana against John Henry, as a citizen of Louisiana, setting forth the recovery of judgment against Henry and Feeny June 17, 1861, and the issue of the writs of *scire facias*, upon which he recovered judgment May 10, 1871, in the sum of $8482.50, with interest from that date, together with costs, and prayed judgment, with interest and costs. Henry appeared and filed peremptory exceptions to the petition, which exceptions were sustained, and the plaintiff allowed to amend by declaring on which judgment he relied. Thereupon, Owens filed his supplemental petition, in which he elected to stand upon the *scire facias* judgment of May 10, 1871. Defendant again excepted, and also answered that since September 5, 1865, he had been a citizen and resident of Louisiana, and for and during that time had not been a citizen of Pennsylvania, nor domiciled in said State, nor in any manner represented therein, nor been in any manner, by himself or his property, subject to the laws of the State of Pennsylvania; also pleading *nul tiel record*, and denying that the courts of Pennsylvania ever acquired jurisdiction over him by service or by voluntary appearance.

The case was submitted to the court for trial, a jury being waived, the issues found for defendant, and judgment entered dismissing the suit. While the case was under consideration, Henry died, and it was revived as against his testamentary executor, McCloskey. Thereupon a writ of error was sued out from this court.

Mr. George A. King for plaintiff in error.

Mr. W. S. Benedict filed a brief for same.

No appearance for defendant in error.

Opinion of the Court.

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

Judgments for money, whether rendered within or without the State, are barred by prescription in the State of Louisiana in ten years from the date of the rendition thereof. La. Civ. Code, Art. 3547. The original judgment was recovered June 17, 1861, and this action was commenced November 1, 1880. Considered as brought upon that judgment the action was barred, but inasmuch as the original petition set up the judgment on *scire facias*, rendered May 10, 1871, in respect of which ten years had not run, defendant compelled plaintiff to make his election as to which judgment he relied on, and he elected to stand on the judgment of May 10, 1871. The plea of prescription as to the original judgment therefore became unnecessary.

Ordinarily the writ of *scire facias* to revive a judgment is a judicial writ to continue the effect of, and have execution of, the former judgment, although in all cases it is in the nature of an action, as defendant may plead any matter in bar of execution, as for instance, a denial of the existence of the record or a subsequent satisfaction or discharge. Foster on Scire Facias, 13, and cases cited; Tidd's Practice, 1090; 2 Sellon's Practice, 275.

Conformably to the exigency of the writ, the judgment on *sci. fa.*, the proceeding being regarded as a continuation of the original action, usually is that plaintiff have execution of the judgment mentioned in the writ with costs. Lilly's Entries, 398, 638; Chitty's Forms, 9th ed., 635; Black, Judgments, § 498. But in Pennsylvania it is held that a *scire facias* is in such wise a substitute in that State for an action of debt elsewhere, that the judgment should be *quod recuperet* instead of a bare award of execution; and hence, that a judgment on *scire facias* cannot be avoided because the original judgment might have been. *Duff* v. *Wynkoop*, 74 Penn. St. 300; *Buehler* v. *Buffington*, 43 Penn. St. 278; *Conyngham* v. *Walter*, 95 Penn. St. 85. Accordingly the judgment of May 10, 1871, was a judgment for the recovery of the amount of

the judgment of 1866, with interest added thereon to date, and the judgment of 1866 was a similar judgment on the original judgment of June 17, 1861.

Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of *nihil*, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori*, for the same reason. *Thompson* v. *Whitman*, 18 Wall. 457; *Pennoyer* v. *Neff*, 95 U. S. 714; *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287; *Steel* v. *Smith*, 7 Watts & Searg. 447; *Evans* v. *Reed*, 2 Mich. N. P. 212; *Hepler* v. *Davis*, 32 Nebraska, 556.

The Circuit Court was right, and its judgment is

Affirmed.

PEARSALL *v.* GREAT NORTHERN RAILWAY COMPANY.

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

No. 768. Submitted December 16, 1895. — Decided March 30, 1896.

In 1856, the Minneapolis and St. Cloud Railroad Company was incorporated by the legislature of the Territory of Minnesota, with authority to construct a railroad on an indicated route, and to connect its road by branches with any other road in the Territory, or to become part owner or lessee of any railroad in said Territory; and also "to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company." By a subsequent act it was, in 1865, authorized "to connect with or adopt as its own, any other railroad running in the same general direction with either of its main lines or any branch roads, and which said corporation is authorized to construct;" "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of any other road having the same general direction or location, or to become

merged therein by way of substitution;" to consolidate any portion of its road and property with the franchise of any other railroad company or any portion thereof; and to consolidate the whole or any portion of its main line or branches with the rights, powers, franchises, grants and effects of any other railroad. These several rights, privileges and franchises were duly accepted by the railway company, and its road was constructed and put in operation. In 1874 the State of Minnesota enacted that "no railroad corporation or the lessees, purchasers or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as the officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and in 1881 its legislature enacted that "no railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchise, rights of property thereof, which owns or controls a parallel or competing line." In 1889 the company changed its name to Great Northern Railway Company and extended its road towards the Pacific. The Northern Pacific Railroad being about to be reorganized, it was proposed that the Great Northern company should guarantee, for the benefit of the holders of the bonds to be issued by the reorganized company, the payment of the principal of, and interest upon such bonds, and as a consideration for such guaranty, and as a compensation for the risk to the stockholders, the reorganized company should transfer to the shareholders of the Northern company, or to a trustee for their use, one half the capital stock of the reorganized company; and that the Northern Pacific should join with the Great Northern in providing facilities for an interchange of cars and traffic between their respective lines, and should interchange traffic with the Northern company, and operate its trains to that end upon reasonable, fair and lawful terms under joint tariffs or otherwise, the Northern company having the right to bill its traffic, passengers and freight from points on its own line to points on the Northern Pacific not reached by the Great Northern, with the further right to make use of the terminal facilities of the Northern Pacific at points where such facilities would be found to be convenient and economical, jointly with that company. A stockholder of the Great Northern company filed this bill against it, to restrain it from carrying out such agreement. *Held*, that the Great Northern company was subject to the provisions of the acts of 1874 and 1881, and that the proposed arrangement was in violation of the provisions in those acts prohibiting railroad corporations from consolidating with, leasing or purchasing, or in any other way becoming the owner of, or controlling any other railroad corporation, or the stock, franchises or rights of property thereof, having a parallel or

competing line, and was therefore beyond the corporate power of the company to make.

Where, by a railway charter, a general power is given to consolidate with, purchase, lease or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease or consolidation with parallel or competing lines.

Where a charter authorizes a company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public.

The court epitomizes, in its opinion, several previous cases for the purpose of showing the general trend of opinion in this court upon the subject of corporate charters and vested rights.

THIS was a bill in equity filed by Pearsall, a stockholder in the Great Northern Railway, against the company, which is a corporation created and existing under the laws of the Territory and State of Minnesota, and a citizen of that State, to enjoin it from entering into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgage of the Northern Pacific Railroad Company, under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase or cause to be purchased the property and franchises of the Northern Pacific Railroad Company.

Plaintiff set up that he was the holder of five hundred shares of $100 each of the preferred paid up stock of the defendant corporation; that such stock is of the value of more than $125 per share, but that the proposed arrangement, if consummated, would decrease the value of his stock and damage him to an amount exceeding $5000. The suit was brought for the benefit of the plaintiff and all stockholders similarly situated. The facts as they appear in the bill and answer, upon which the case was heard, are substantially as follows:

The defendant, the Great Northern Railway, is a corpora-

tion organized and existing under the act of the legislature of the Territory of Minnesota of March 1, 1856, c. 160, Gen. Laws 1856, 294, to incorporate the Minneapolis and St. Cloud Railroad Company, and a number of amendatory acts not necessary to be noticed in detail. By the original act, the Territory granted to the railroad company (§ 1) the right to be a corporation, the right to acquire by purchase, gift, grant, devise or otherwise, and to hold and to convey all such property, real and personal, which should be necessary or convenient to carry into effect the objects and purposes of the corporation; the right (§ 2) to construct and operate a railroad from Minneapolis to St. Cloud, (about 75 miles,) and also to a point at or near the mouth of the St. Louis River, (about 180 miles,) with the further power (§ 6) to connect its road by branches with any other road in the Territory, or to become part owner or lessee of any railroad in said Territory, and also (§ 12) "to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company."

By § 17 "this act is hereby declared to be a public act, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporation."

By the amendatory act passed by the legislature of the State of February 28, 1865, c. 4, Special Laws of 1865, page 27, such corporation (§ 3, amendatory of original § 12) was authorized "to connect with or adopt as its own . . . any other railroad running in the same general direction with either of its main lines or any branch roads, and which said corporation is authorized to construct;" (§ 8) "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of any other road . . . having the same general direction or location, or to become merged therein by way of substitution;" the further right (§ 9) to consolidate any portion of its road and property with the franchise of any other railroad company or any portion thereof, and (§ 12) to consolidate the whole or any

portion of its main line or branches with the rights, powers, franchises, grants and effects of any other railroad.

It is alleged in the bill and admitted by the answer that these several acts, with their rights, privileges and franchises, were duly accepted, and that the same have ever since remained in full force and effect; that prior to 1880, the company constructed and put into operation that portion of its line which extended from St. Cloud eastwardly to the town of Hinckley, in the State of Minnesota, and that in 1889 it changed its name to the Great Northern Railway Company, which name it has ever since borne and now bears; that by various purchases, consolidations and leases, it now operates and controls all the lines of the Great Northern Railway Company extending from St. Paul and Duluth in the State of Minnesota, and from Superior in the State of Wisconsin, across the States of Minnesota, North Dakota, Montana and Idaho, to the towns of Everett and Seattle in the State of Washington, with many branch and connecting lines, none of which, however, reach Tacoma in the State of Washington, Portland in the State of Oregon, or Winnipeg in the Dominion of Canada. All of these different lines comprise an aggregate mileage of nearly forty-five hundred miles, and are operated as a combined railway system, under the name of the Great Northern Railway.

The Northern Pacific Railroad Company is a corporation organized and existing under certain acts and resolutions of Congress, and owns some, and through its receivers, controls and operates all the lines of the Northern Pacific Railroad system, extending from St. Paul in Minnesota, and from Ashland in Wisconsin to Tacoma in the State of Washington, and Portland in the State of Oregon, with many branches and connecting lines, one of which extends to Winnipeg in Canada; that the aggregate mileage of the Northern Pacific system is nearly forty-five hundred miles, and some of the lines of each of these systems are parallel to and some competing with the lines of the other system; that the Northern Pacific Railroad Company is insolvent, its road in the hands of receivers appointed by the court at the instance of the

bondholders under the second, third and consolidated mortgages. The trustee for these bondholders has commenced suits to foreclose these mortgages, and the receivers are in possession under appointment in these foreclosure suits.

The defendant and the holders of a majority of the outstanding bonds of these mortgages of the Northern Pacific Railroad Company have entered into an arrangement or agreement by which the property shall be sold to a committee of the bondholders, who are to organize a new corporation, subject to the prior mortgages, which shall issue its bonds to the aggregate amount of $100,000,000, or more, payment of which is to be guaranteed by the Great Northern, and capital stock to the further amount of one hundred millions, one half of which is to be transferred to the shareholders of the Great Northern, and shall enter into a traffic contract with it, whereby in substance the two companies shall thereafter exchange traffic at all intersecting and connecting points, and divide the common earnings from such exchanged traffic on the basis of miles hauled on the systems respectively. This arrangement is fully set forth in the answer, a copy of which in that particular is printed in the margin.[1]

---

[1] (1.) The holders of the said several classes of bonds shall obtain a decree of foreclosure in said actions and for the sale of the railroad properties and franchises of the Northern Pacific Railroad Company, including its franchises to be a corporation, subject to the said divisional and general first mortgages mentioned in paragraph ten of the bill, and shall cause the same to bid in and be purchased by a committee of bondholders or their agents for the benefit of all the holders of said outstanding bonds secured by the mortgages so foreclosed, and shall cause a reorganization of the said railway franchises and property as a new corporation, either under the said acts and joint resolutions of Congress relating to the Northern Pacific Railroad Company or under some other proper and sufficient legislation of the United States, or of some one or more States.

(2.) Upon such foreclosure sale and reorganization the reorganized company may issue its bonds to an amount in the aggregate of $100,000,000 or over and its full paid capital stock of $100,000,000, this defendant to guarantee, for the benefit of the holders of such bonds, the payment of the principal thereof, together with interest thereon to an amount in the aggregate of such interest, guarantee not to exceed $6,200,000 per year, which guar-

Statement of the Case.

Plaintiff claims that this agreement is unlawful and in violation of the act of March 9, 1874, General Laws of Minnesota for 1874, c. 29, which provides that "no railroad corporation or the lessees, purchasers or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad corporations owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as the officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and also because it is a violation of § 3,

---

antee shall, if required by said reorganization company, be written and executed upon the back of each of said bonds.

(3.) Among other good and valuable considerations for such guarantee, and as a compensation for the risk to the stockholders of the defendant company, which may result by reason of said guarantee in the way of a possible diversion of a portion of the earnings of the defendant to make good its guarantee, the said reorganized company shall transfer, or cause or procure to be transferred by its stockholders, to the shareholders of the defendant company, or to some person or corporation as trustee for their use, one half part of the capital stock of said reorganized company.

(4.) The Northern Pacific Company shall join with the defendant in providing reasonable and adequate facilities for an interchange of cars and traffic between their respective lines, and shall interchange traffic with defendant and operate its trains to that end upon reasonable, fair and lawful terms under joint tariffs or otherwise.

(5.) The defendant shall have the right to bill and route its traffic, passengers and freight from points on its line by way of such connections as now exist or may hereafter be constructed between said line and the Northern Pacific Company to Winnipeg, Tacoma, Portland and all points in the different States through which the line of the Northern Pacific Railroad extends and not reached by the line of this defendant.

(6.) The defendant shall have the right to make use of the depot and terminal facilities of the Northern Pacific company at Spokane Falls and other points, where such use shall be found to be convenient and economical, jointly with that company, and upon reasonable, fair and lawful terms, which shall insure to the defendant a large saving on the cost and expense which it must otherwise necessarily incur in constructing and operating depots and terminals of its own.

of the act of March 3, 1881, c. 94, of the laws of Minnesota for 1881, Gen. Laws, 109, which enacts that "no railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchise, or rights of property thereof, which owns or controls a parallel or competing line."

Defendant answered that it had ample power to make and perform its agreement under its charter; that the true construction of the provisions of the acts of 1874 and 1881, just cited, is that they do not amend or affect its charter, and that if the opposite construction be adopted, they are void in so far as they prohibit or affect its rights to make and perform this agreement, because they are in violation of the contract clause of the Constitution.

Upon the other hand, plaintiff insisted that the right to so amend the charter of the defendant, as to prohibit the performance of this contract, was reserved to the State by section 17 of the act of 1856, providing that the act might be amended by any subsequent legislation, in any manner not destroying or impairing the vested rights of said corporation.

The case was first submitted to the court upon motion for injunction, which was denied, and again upon a final hearing upon bill and answer; and the court, for the reasons stated in the opinion upon the motion for injunction, entered a decree dismissing the bill. Whereupon the plaintiff appealed to this court.

Mr. Henry J. Horn for appellant.

Mr. H. W. Childs, Attorney General of the State of Minnesota, for that State.

Mr. M. D. Grover, *Mr. Cushman K. Davis*, *Mr. F. B. Kellogg*, and *Mr. C. A. Severance* for appellee.

I. The agreement, so far as it relates to an interchange of traffic, to a joint use of tracks and terminals and to through billing and routeing of traffic from points on the line of appellee to points on the line of the Northern Pacific Railroad Com-

pany, not reached by its line, is valid. It is authorized by express provisions of the acts constituting appellee's charter and is in accord with public policy.

Section 3 of the Interstate Commerce Act provides: "Every common carrier, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and adequate facilities for an interchange of traffic between their respective lines."

Chap. 108, Laws of 1893, State of Minnesota, provides: "All railway companies doing business in this State shall, upon the demand of any person or persons, establish reasonable joint through rates for the transportation of freight between points on their respective lines within the State. Car load lots shall be transferred without unloading in the cars in which such shipments are made, unless such loading shall be done without charge therefor to the shipper or receiver." See *Stewart* v. *Erie & Western Transportation Co.*, 17 Minnesota, 372; *Oregon Short Line* v. *Northern Pacific Railroad*, 61 Fed. Rep. 158; *Oregon Short Line* v. *Northern Pacific Railroad*, 51 Fed. Rep. 465.

The proposed guaranty is not an accommodation promise, or a loan of credit, but is an agreement to meet a legal obligation upon conditions, or to pay a debt, or to satisfy a liability. The rule is well established that such a guaranty is valid if based upon a valuable consideration, and the guarantor has the right to invest in it. *Zabriskie* v. *Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381; *Green Bay & Minnesota Railroad* v. *Union Steamboat Co.*, 107 U. S. 98; *Pittsburg, Cincinnati &c. Railway* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Fort Worth City Co.* v. *Smith Bridge Co.*, 151 U. S. 294; *Harrison* v. *Union Pacific Railroad*, 13 Fed. Rep. 522; *Tod* v. *Kentucky Union Land Co.*, 57 Fed. Rep. 47; *Leavenworth* v. *Chicago &c. Railway*, 134 U. S. 688; *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159; *Rodgers Works* v. *Southern Railroad Association*, 34 Fed. Rep. 278; *Railroad Co.* v. *Howard*, 7 Wall. 392; *Low* v. *Central Pacific Railroad*, 52 California, 58.

II. The agreement, so far as it relates to a transfer of one

half the full paid stock of the new or reorganized company, by the stockholders of such company, to the stockholders of appellee, is not forbidden by any law of the State. Appellee does not acquire the legal title to the stock, and by such transfer of stock it does not acquire the ownership or control, of the new or reorganized company. See *Pullman's Palace Car Co.* v. *Missouri Pacific Railway*, 115 U. S. 587, where a construction was given to the word "control" such as we contend for.

III. If the legal effect of the agreement, taken as an entirety, is to give to appellee the control of the new or reorganized company, it is authorized by the acts constituting its charter to execute the agreement and acquire such control.

(1) It has such authority under the provisions of the act of March 1, 1856, giving it power to become part owner of a railroad, or to adopt a railroad as its own, and to acquire the right to the sole or joint use of a railroad.

(2) It has such authority under the provisions of the act of February 28, 1865, giving it the right to consolidate its stock and property with the stock and property of another railroad company, either within or without the State.

IV. The appellee having power under its charter and under the facts disclosed in the record, to execute the agreement, such right was not taken away by the state laws of 1874 and of 1881.

V. An accepted act of incorporation of a private corporation is a contract between the State and the corporation. Where the charter consists of a series of acts, each act which confers new and valuable powers and franchises is a contract between the State and the corporation. Any law of the State, which impairs or destroys any valuable franchise granted by such act, violates section ten, article one, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligations of a contract, and is, therefore, inoperative, unless a right to modify, impair, or destroy such franchise is expressly reserved. A right to become owner of the railroad of another company, or to adopt it, or to become the owner of the stock of another company; or to

consolidate with, or acquire the control of such company, is a valuable franchise and property right, which becomes vested immediately upon the acceptance of the acts by which the right is granted. See *Dartmouth College case*, 4 Wheat. 518; *Branch* v. *Jesup*, 106 U. S. 468; *Piqua Bank* v. *Knoop*, 16 How. 369; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *The Binghamton Bridge*, 3 Wall. 51; *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1.

VI. A charter contract not containing a reservation on the part of the State of a right to alter or amend cannot be impaired by subsequent legislation. A right may be reserved by the State to alter, amend or repeal a charter contract. In such case vested rights may be impaired or annulled. Not vested rights in property, or contract acquired by user of corporate powers and franchises, but rights vested in the corporation by the terms of the charter contract, being part of the contract of incorporation. The distinction between the rights of property, acquired under an exercise of corporate powers and franchises, and which are protected under the Fourteenth Amendment of the Constitution of the United States, and rights given by contract, and which are protected under article one of section ten of the Constitution, is apparent. See *Tomlinson* v. *Jessup*, 15 Wall. 454; *Hamilton Gas Light Co.* v. *Hamilton*, 146 U. S. 258; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Bridge Co.* v. *United States*, 105 U. S. 470.

A charter contract may contain a limited reservation of a right to alter or impair powers, rights, and franchises granted by it. In such case it is the contract that may be altered or amended, and vested rights growing out of an acceptance of the contract may be impaired. In this case we have a reservation of a right to amend, "in any manner not destroying the vested rights of the corporation." The vested rights of the corporation were the rights, privileges and franchises which it acquired on its acceptance of the acts constituting its charter. By such acceptance the corporation acquired a right to hold and convey property, real or personal, necessary to carry

into effect the object and purpose of the corporation; . . . the right to construct railroads, main and branch lines; . . . the right to become part owner of, or to adopt as its own, the railroad of another company; . . . the right to acquire the sole or joint use of the railroad of another company; . . . the right to consolidate its stock, its railroad, property, effects and franchises with the stock, property, effects and franchises of any other railroad company, either within or without the State.

If the proposed arrangement had been made prior to the passage of the act of 1874, it is not contended that under the right reserved to amend, the State could have lawfully annulled such contract of consolidation, or have deprived appellee of any right acquired under it. In such case it is conceded the right would have become vested, and thus could not have been impaired. It is claimed that only rights of property and other derivative rights, which have been acquired by user, under the acts constituting the charter, are vested rights within the meaning of the words as used in section 17 of the act of 1856; but this is not so. It is not the user that gives the right or franchise. It is the franchise which authorizes the user. The distinction between rights of property, which are protected as vested rights, because they are property rights, and a contract right, and obligation, in the form of powers, privileges and franchises granted by an act of incorporation, seems very apparent.

A reservation of a right to amend without words of limitation, gives a right to amend the charter, in any manner the State may deem expedient. It is the contract that in such case is subject to amendment. Here we have words of limitation, "may amend in any manner not impairing or destroying the vested rights of the corporation." Are not the negative words to stand as the controlling language?

In construing these words we should look at the condition of the country when the acts were passed. There was no railroad within 300 miles of the legislature that passed the act of 1856, and there was no hope of settlement until a railroad should reach there. Under such circumstances, the leg-

islature was willing to grant large and valuable franchises and privileges, to induce the investment of capital for the construction of railroads. It offered to appellee all the rights, franchises and privileges contained in the act of March 1, 1856. It intended that all such rights should be secure against amendment in such a way as to impair or destroy them by subsequent legislation.

Many questions that have since been solved were, at that time, not thought of; limitations that have since been imposed upon corporations were not considered. Nine years passed, but no railroad had been built. Then the State amended the original charter contract, and offered the amendment to the corporation, thus giving to it new and very valuable privileges and franchises. The court had, prior to that time, decided that every valuable privilege given by a charter, and which induced to its acceptance, was a contract which could not be changed by the legislature unless there was a reserved power to do so. The conclusion, as the court below held, "is irresistible that they meant that they would never so amend that charter as to impair or destroy any franchise or rights of the corporation which the courts had declared vested as soon as the corporate act was accepted."

The words of limitation are controlling. If necessary to preserve the limitation, the word "amend" must be disregarded. If not controlling they are without meaning.

But the word "amend" may be preserved and given force, although the right to amend is limited, as expressed in the section under consideration. The legislature might have made the grant without reserving any right. It could have reserved the full right of amendment or repeal. It adopted a third course. It reserved a right to amend, but not so as to take away or impair any right given by contract to be amended. What is it that the legislature may amend? It is the contract between the State and the corporation. How may it amend this contract? The answer is, in any and all respects not in any way destroying or impairing any right given by the terms of the contract to the corporation. In a charter where there is no reservation of right to amend, no

amendment can be made in any matter affecting the nature of the enterprise or making an increase of liability or duty without the consent of all the stockholders. The word "amend" then has force as a part of the contract under which the State may offer additional privileges, in its interests, that can be accepted by the corporation through the vote of a mere majority of its stockholders, and that cannot be rejected by the dissent of a single share. It has been held that where there is no reserved right, such changes cannot be made without the consent of every stockholder.

VII. The right of consolidation of stock and property is clearly granted to appellee by the act of February 28, 1865. This right is not limited to the line from Minneapolis via St. Cloud to Lake Superior, but extends to all branch lines which appellee is authorized to construct. This act and the act of March 1, 1856, are not to be treated as one act. It grants new franchises and powers; and, upon its acceptance, became a new and independent contract as respects all such new franchises and powers.

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

This case turns upon the question whether the right given by its charter to the Minneapolis and St. Cloud Railroad Company to connect with any railroad running in the same general direction, and, by a subsequent amendatory act, to consolidate its capital stock, or its property, road or franchise with those of any other railroad, could be taken away by a subsequent act inhibiting the consolidation, lease or purchase by any railroad of the stock, property or franchise of any parallel or competing line. A different question would have been presented if any such contract had been made and carried into effect, before the act of 1874 was passed, since it might be claimed that the rights of the parties had become vested, within the meaning of section 17 of the original charter of the Minnesota and St. Cloud Railroad, and as such could not be destroyed or impaired by subsequent legislation, without infringing upon

that provision of the Constitution inhibiting state legislation impairing the obligation of contracts. The case then involves indirectly the meaning of the words "vested rights," when used in the charter of railroads and other similar corporations.

1. The whole doctrine of vested rights as applied to the charters of corporations is based upon the *Dartmouth College case*, 4 Wheat. 518, in which the broad proposition was laid down that such charters were contracts within the meaning of the Constitution, and hence that an act of the state legislature altering a charter in any material respect was unconstitutional and void. The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence. The precise point decided was this: By the original charter from the Crown, granted in the year 1769, twelve persons, therein named, were incorporated by the name of "The Trustees of Dartmouth College," and there was granted to them and their successors the usual corporate privileges and powers, among which was authority to govern the college, and fill all vacancies which might be created in their own body. By an act of the legislature of New Hampshire passed in 1816, the charter was amended, the number of trustees increased to twenty-one, the appointment of the additional members vested in the executive of the State, and a board of overseers, consisting of twenty-five persons, created, with power to inspect and control the most important acts of the trustees. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and the lieutenant governor of Vermont, for the time being, were to be members *ex officio;* and the board was to be completed by the governor and council of New Hampshire, who were also empowered to fill all vacancies which might occur. A majority of the trustees of the college refused to accept this amended charter, and brought suit for the corporate property, which was in possession of a person holding by authority of the acts of the legislature.

The opinion contained an exhaustive discussion of the whole

subject of corporate rights and their impairment by state legislation, and probably contributed as much as any he ever delivered to the great reputation of Chief Justice Marshall. The proposed legislation of the State was fundamental in its character. On the part of the Crown it was expressly stipulated that the corporation thus constituted should continue forever; and that the number of trustees should consist of twelve and no more. By the act of the legislature the trustees were increased to twenty-one, the appointment of the additional number given to the executive of the State, and a board of overseers, twenty-one out of twenty-five of whom were also appointed by the executive of the State, was created and invested with power to inspect and control the most important acts of the trustees. Thus, said Mr. Chief Justice Marshall, "the whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire." If this legislation was valid, Dartmouth College, as it was originally incorporated, ceased to exist, and a new institution of learning was created, which was put completely at the mercy of the state legislature. It was not the case of an amendment in an unimportant particular — the taking away of a non-essential feature of the charter, but a radical and destructive change of the governing body — a transfer of its power to the executive of the State, and virtually a reincorporation upon a wholly different basis.

Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation. Even before the Dartmouth College case was decided, it was held by this court that grants of land made by the Crown to colonial churches were irrevocable, and that property purchased by, or devised to them, prior to the adoption of the Constitution, could not be diverted to other purposes by the States which succeeded to the sovereign power of the colonies. *Terrett* v. *Taylor*, 9 Cranch, 43; *Town of Pawlet* v. *Clark*, 9 Cranch,

292; *Society for Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464.

Indeed, the sanctity of charters vesting in grantees the title to lands or other property has been vindicated in a large number of cases. *Davis* v. *Gray*, 16 Wall. 203; *Fletcher* v. *Peck*, 6 Cranch, 87, 137; *Moore* v. *Robbins*, 96 U. S. 530; *United States* v. *Schurz*, 102 U. S. 378; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165.

This court has had, perhaps, more frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation than in any other, and in a long series of decisions has held that a clause imposing certain taxes in lieu of all other taxes, or of all taxes to which the company or stockholders therein would be subject, is impaired by legislation raising the rate of taxation, or imposing taxes other than those specified in the charter. Thus in *State Bank of Ohio* v. *Knoop*, 16 How. 369, it was held that, where, by a general banking law, it was provided that a certain percentage of dividends should be set off for the use of the State, and should be in lieu of all taxes to which the company or stockholders therein would otherwise be subjected, this was a contract fixing permanently the amount of taxation, and that legislation could not thereafter increase it. In this connection it was said by Mr. Justice McLean: "Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action." To the same effect are *New Jersey* v. *Wilson*, 7 Cranch, 164; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Dodge* v. *Woolsey*, 18 How. 331; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *McGee* v. *Mathis*, 4 Wall. 143; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Humphrey* v. *Pegues*, 16 Wall. 244; *Farrington* v. *Tennessee*, 95 U. S. 679;

New Jersey v. *Yard*, 95 U. S. 104; *Asylum* v. *New Orleans*, 105 U. S. 362. If, however, the charter contain a reservation of an unlimited power to alter, amend or repeal, the legislature may take away an immunity from taxation. *Tomlinson* v. *Jessup*, 15 Wall. 454.

Within the same principle are grants of an exclusive right to supply gas or water to a municipality, or to occupy its streets for railway purposes. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works* v. *Rivers*, 115 U. S. 674; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64; *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1.

So, if a company be chartered with power to construct and maintain a turnpike, erect toll-gates and collect tolls, such franchise is protected by the Constitution. *Turnpike Co.* v. *Illinois*, 96 U. S. 63; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

If it be provided in the charter of a bank that the bills and notes of the institution shall be received in payment of taxes or of debts due to the State, such undertaking on the part of the State constitutes a contract between the State and holders of the notes, which the State is not at liberty to break, although notes issued after the repeal of the act are not within the contract, and may be refused. *Woodruff* v. *Trapnall*, 10 How. 190; *Paup* v. *Drew*, 10 How. 218; *Furman* v. *Nichol*, 8 Wall. 44; *Keith* v. *Clark*, 97 U. S. 454; *Antoni* v. *Greenhow*, 107 U. S. 769; *Poindexter* v. *Greenhow*, 114 U. S. 270. And in *Planters' Bank* v. *Sharp*, 6 How. 301, where a bank was chartered with the usual powers to receive money on deposit, discount bills of exchange and notes, and to make loans, and in the course of its business the bank discounted and held promissory notes, and the legislature then passed a law declaring that it should not be lawful for any bank to transfer, by indorsement or otherwise, any note, bill receivable or other evidence of debt, it was held that the statute conflicted with the Constitution and was void. It was said in this case that "a power to dispose of its notes, as well as other property,

may well be regarded as an incident to its business as a bank to discount notes, which are required to be in their terms assignable, as well as an incident to its right of holding them and other property, when no express limitation is imposed upon the power to transfer them."

In each of the above cases, however, the title to property had either become vested in the grantee by operation of law, or the exercise of the power granted was so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscriptions, by the fact that the corporation was endowed with those privileges during the continuance of the charter.

2. Such limitations, however, upon the power of the legislature must be construed in subservience to the general rule that grants by the State are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language. As was said by Mr. Justice Swayne in *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Hence, an exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, and has been steadily adhered to ever since. *Turnpike Company* v. *The State*, 3 Wall. 210; *Providence Bank* v. *Billings*, 4 Pet. 514; *Pennsylvania Railroad* v. *Miller*, 132 U. S. 75. If however there be an exclusive provision, as, for instance, in the charter of

a bridge company that it shall not be lawful for any person to erect another bridge within a certain distance of the bridge authorized, this constitutes an inviolable contract. *The Binghampton Bridge*, 3 Wall. 51. But even in such cases, if the second charter be for a similar franchise, but to be exercised in a substantially different manner, the exclusive right conferred by the first charter is held not to be violated; as, for instance, if the first charter be for an ordinary bridge, and the second for a railway viaduct, impossible for man or beast to cross, except in railway cars. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. So, if the first franchise be for the sole privilege of supplying a city with water from a designated source, it is not impaired by a grant to another party of the privilege to supply it with water from a different source. *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67.

Upon a similar principle it was held in *Tucker* v. *Ferguson*, 22 Wall. 527, that a tax upon lands owned by a railway company and not used, nor necessary, in working the road and in the exercise of its franchise, was not unlawful, though the charter had provided for a certain tax upon the railroad company, and had enacted that such tax should be in lieu of all other taxes to be imposed within the State. See also *West Wisconsin Railway* v. *Supervisors*, 93 U. S. 595.

Nor does it follow, from the fact that the contract evidenced by the charter cannot be impaired, that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant, are not open to the objection of impairing the contract.

A familiar instance of this class of legislation is that enacted under what is known as the police power. In virtue of this the State may prescribe regulations contributing to the comfort, safety and health of passengers, the protection of the public at highway crossings or elsewhere, the security of owners of adjacent property, by requiring the track to be fenced, and such appliances to be annexed to the engines as shall prevent the communication of fire to neigh-

boring buildings. Cooley Prin. Const. Law, 321. This power, as was said by Mr. Justice Miller in the *Slaughter-house cases*, 16 Wall. 36, 62, is and must be, from its very nature, incapable of any very exact definition or limitation. "Upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." The following cases show to what extent and for what purposes this power may be exercised: *Slaughter-house cases*, 16 Wall. 36; *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Patterson* v. *Kentucky*, 97 U. S. 501; *Barbier* v. *Connolly*, 113 U. S. 27; *Charlotte, Columbia &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Lawton* v. *Steele*, 152 U. S. 133; *Eagle Insurance Co.* v. *Ohio*, 153 U. S. 446. And so important is this power and so necessary to the public safety and health, that it cannot be bargained away by the legislature, and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion. *Stone* v. *Mississippi*, 101 U. S. 814; *Phalen* v. *Virginia*, 8 How. 163, 168.

In obedience to the same principle it has always been held that the legislature may repeal laws authorizing municipal subscriptions to railways, though such laws were in existence at the time the railway was chartered, and may be supposed to have influenced the promoters and stockholders of the road in undertaking its construction. And even if there has been a public vote in favor of such subscription, such vote does not itself form a contract with the railway company protected by the Constitution, the court holding that until the subscription is actually made the contract is unexecuted. *Aspinwall* v. *Daviess County*, 22 How. 364; *Wadsworth* v. *Supervisors*, 102 U. S. 534; *Norton* v. *Brownsville*, 129 U. S. 479; *Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625; *Falconer* v. *Buffalo & Jamestown Railroad*, 69 N. Y. 491; *Covington & Lexington Railroad* v. *Kenton County Court*, 12 B. Mon. 144; *Wilson* v. *Polk County*, 112 Missouri, 126.

The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license. Thus, in *Christ Church* v. *Philadelphia County*, 24 How. 300, the legislature of Pennsylvania enacted that the property of Christ Church Hospital, so long as the same should continue to belong to the same hospital, should be and remain free from taxation. In 1851 they enacted that all property then exempted from taxation, other than that which was in the actual use and occupation of such association, should thereafter be subject to taxation. It was held that the original concession of the legislature exempting the property from taxation was spontaneous, and no service or duty or other remunerative consideration was imposed upon the corporation, and hence that it was in the nature of a privilege or license, which might be revoked at the pleasure of the sovereign.

In *Turnpike Company* v. *Illinois*, 96 U. S. 63, the original charter of the company gave it the right, in consideration of building a turnpike, to erect toll-gates and exact toll for twenty-five years from the date of the charter. In 1861, when the term of charter had more than half expired, the State gave the company a new and additional privilege of using a certain bridge and dyke and of erecting a toll-gate thereon. The only consideration required was that the company should keep them in repair. No term was expressed for the enjoyment of the privileges, and no conditions were imposed for resuming or revoking it on the part of the State. It was held that it could not be presumed to have been intended as a perpetual grant, since the company itself had but a limited period of existence, and that a law resuming possession of the bridge and dyke by subjecting them to the control and management of the city of East St. Louis was not a law impairing the obligation of the contract.

In *Philadelphia & Grays Ferry Co.'s Appeal*, 102 Penn. St. 123, it was also held that a supplement to a charter which merely conferred upon the corporation a new right (as an exclusive right to use and occupy certain streets) or enlarged an

old one, without imposing any additional burden upon it, was a mere license or promise by the State, and might be revoked at pleasure. "It is without consideration to support it and cannot bind a subsequent legislature."

We have epitomized these cases, not because they have any decisive bearing upon the question at issue, but for the purpose of showing the general trend of opinion in this court upon the subject of corporate charters and vested rights.

3. Conceding that there are no authorities directly in point, (and the diligence of counsel has failed to cite us to any,) let us see how far these principles are applicable to the case under consideration.

The Great Northern Railway was originally chartered in 1856, under the name of the Minneapolis and St. Cloud Railroad Company, with authority to build a road from Minneapolis, in a northerly direction, to St. Cloud on the Mississippi River, a distance of about seventy-five miles, with an additional line to a point at or near the mouth of the St. Louis River (now Duluth) on Lake Superior, about one hundred and eighty miles, and with a right to connect its road by branches with the road of any railroad company in the Territory, to become the part owner or lessee of any such railroad and to connect its road with the road of such company, and also to connect with any railroad running in the same direction. This power evidently refers to traffic connections at the termini of the road with other roads running in the same direction, in such manner as to make a continuous line, of which the road in question was to become a part. At this time railway construction west of the Mississippi River was in its infancy; no road existed within two hundred miles of St. Paul; the State was largely a wilderness, and the object of the charter was evidently to connect two cities upon the Mississippi River, one of which was situated some distance above the head of navigation, and also to connect the Mississippi with a port upon Lake Superior, with the possibility that other roads might be constructed further up the river, or in an easterly or westerly direction into the interior. The road was a local one, and while power was given to make traffic connections with other roads, none

such was given to consolidate with them — much less with roads having a parallel line. Nor is the act claimed as authorizing the proposed contract.

To save any possible doubt as to the scope of the charter the act was declared by section 17 "to be a public act, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporation."

Nothing appears to have been done under this charter prior to 1865, when it was amended by reënacting its first section, thereby legalizing and confirming the original organization of the road, and amending section 12 so far as to authorize the corporation "to connect with, or adopt as its own . . . any other railroad running in the same general direction with either of its main lines or any branch roads, which said corporation is authorized to construct." Another section (8) was added, authorizing the company "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of the road or branch road of any other railroad corporation or company having the same general direction or location, or to become merged therein by way of substitution," etc. And further, by section 9, "to consolidate any portion of its road and property, and each branch being organized as aforesaid, may consolidate any portion of its branch road or property with the franchise of any other railroad company or any portion thereof," as might be agreed. And still further, section 12, "to consolidate the whole or any portion of its main line or branch railroads, and all the property, rights, powers, franchises, grants and effects pertaining to such roads, with the rights, powers, franchises, grants and effects of any other railroad company, either within or without the State," etc., as might be agreed. It will be observed that the words in original section 12 as amended and in section 8, limiting the power to connect with or consolidate with other roads, to those having "the same general direction or location" are omitted in sections 9 and 12.

Under these very broad and practically unlimited powers, the company, which, in 1889, took the name of the Great

Northern, proceeded, by a series of consolidations, purchases and leases, to extend its line to the Pacific Ocean, and absorb to itself and operate as a combined system an aggregate length of 4500 miles. It is now proposed, by an arrangement with the bondholders and contemplated purchasers of the Northern Pacific Railway Company, that the Great Northern Railway, the defendant, shall guarantee, for the benefit of the holders of the bonds to be issued by the reorganized company, the payment of the principal and interest upon such bonds, and as a consideration for such guaranty, and as a compensation for the risk to the stockholders, the reorganized company shall transfer to the shareholders of the defendant company, or to a trustee for their use, one half of the capital stock of the reorganized company. By a further provision, the Northern Pacific is to join with the defendant in providing facilities for an interchange of cars and traffic between their respective lines, and shall interchange traffic with the defendant, and operate its trains to that end upon reasonable, fair and lawful terms under joint tariffs or otherwise, the defendant having the right to bill its traffic, passengers and freight from points on its own line to points on the Northern Pacific not reached by the Great Northern, with the further right to make use of the terminal facilities of the Northern Pacific at points where such facilities would be found to be convenient and economical, jointly with that company.

As the Northern Pacific road also controls, by its own construction and by the purchase of stock, other roads extending from the Mississippi River to the Pacific Ocean, and operates as a single system an aggregate mileage of 4500 miles, most of which is parallel to the Great Northern system, the effect of this arrangement would be to practically consolidate the two systems, to operate 9000 miles of railway under a single management, and to destroy any possible advantages the public might have through a competition between the two lines.

It is true that upon its face the agreement contemplates principally an interchange of traffic between the lines under joint tariffs, (by which is probably meant similar rates to be agreed upon between the parties,) in order that the defendant

may enjoy the right to ticket its passengers and consign its freight to points upon the line of the Northern Pacific, not reached by the Great Northern, and to that end is also to have the right to make use of the terminal facilities of the Northern Pacific at such points on the line as should be convenient to the defendant. If the sole object of this agreement were to facilitate an interchange of traffic, so that each road might enjoy the benefit of billing its passengers and freight to points on the other road, not reached by it, it would be difficult to foresee any objection to it. But the fact that one half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured.

That the transfer of stock is to be made, not directly to the company, but to the shareholders, is immaterial, since it may be assumed that they would cast their votes in the interests of the company. Either the stock so transferred becomes virtually the property of the Great Northern, or there is no consideration for its guaranty of the principal and interest of the consolidated bonds. But as, by the agreement, the guaranty by the defendant of the Northern Pacific bonds is assumed to be in consideration of a transfer to its stockholders of one half the capital stock of the reorganized company, it would inevitably follow that this stock would be held for the benefit of the company. There is, however, in addition to that, an alternative provision that the transfer may be made to a trustee for the use of the stockholders, who would of course act as their agent and represent them as a body, and in fact stand as the company under another name. Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized

company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might by sales of the stock, so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic. Under the proposed arrangement, however, the Northern Pacific as a company, in return for a guaranty, which the individual stockholders could not give, turns over to a trustee for the entire body of stockholders of the Great Northern one half of its stock, with the almost certainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies. If such amalgamation were once effected, it would in all probability be final. We think the proposed arrangement is a plain violation of the acts of the state legislature passed in 1874 and 1881, prohibiting railroad corporations from consolidating with, leasing or purchasing, or in any other way becoming the owner of, or controlling any other railroad corporation, or the stock, franchises or rights of property thereof, having a parallel or competing line.

Under the broad powers conferred by the amended act of 1865, it is probable that this arrangement might be lawfully made; and the question is whether an unexecuted power to make such arrangement is a "vested right" within the meaning of section 17 of the original act. It is possible that, if this arrangement had been actually made and carried into effect, before the acts forbidding the consolidation of parallel or competing lines had been passed, the rights of the parties thereto would have become vested, and could not be impaired by any subsequent act of the legislature. But the real question before us is whether a bare unexecuted power to consolidate with other corporations, a power which, if it exists as claimed by the defendant, would authorize it to absorb by successive and gradual accretions the entire railway system of the country, is not, so long as it remains unexecuted, within the control of and subject to revocation by the

legislature, at least, so far as it applies to parallel or competing lines.

A vested right is defined by Fearne, in his work upon Contingent Remainders, as "an immediate fixed right of present or future enjoyment;" and by Chancellor Kent as "an immediate right of present enjoyment, or a present fixed right of future enjoyment." 4 Kent Com. 202. It is said by Mr. Justice Cooley that "rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." Principles of Const. Law, 332.

As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant. If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. *Sala* v. *New Orleans*, 2 Woods, 188.

But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be re-

voked, if a possible exercise of such power is found to conflict with the interests of the public. As applicable to the case under consideration, we think it was competent for the legislature to declare that the power it had conferred upon the Minneapolis and St. Cloud Railway Company to consolidate its interest with those of other similar corporations should not be exercised, so far as applicable to parallel and competing lines, inasmuch as it is for the interest of the public that there should be competition between parallel roads. The legislature has the right to assume in this connection that neither road would reduce its tariff to a destructive or unprofitable figure, or to a point where either road would become valueless to its stockholders, and that the object of the act in question is to prevent such a combination between the two as would constitute a monopoly.

When the act of 1865 was passed it was doubtless contemplated that the Minneapolis and St. Cloud Railway Company would desire to extend its road, (though it is hardly possible to suppose that an extension to the Pacific coast was thought of at that time,) and to build, purchase or lease branch roads, which would serve as feeders to its main line, and open up railway communication with territory naturally tributary to St. Paul and other towns on the Mississippi River. Such anticipations were perfectly legitimate, and these broad powers were undoubtedly intended as an encouragement to the construction of railways, to the development of the vast, unoccupied, but fertile, territory stretching in both directions from the course of the Mississippi River, and also to a connection with the fertile wheat-growing section of Manitoba, by a branch road to the Canadian line. Had it occurred to the legislature at that time that these almost unlimited powers would be used to obtain the control of parallel and competing lines, and to stifle legitimate competition, doubtless a proviso would have been inserted to meet this possibility. That the charter of 1865 might be made available to accomplish this purpose became apparent so soon, that, within nine years thereafter, and before the construction of the road had been fairly entered upon, the legislature declared, in its act

of March 9, 1874, that no railroad corporation should consolidate with, lease, purchase or control any parallel or competing line; and to indicate still more clearly that its object was only to prevent the abuse of these powers by the creation of a monopoly, it passed another act, in 1881, repeating this prohibition, and further declaring that any railroad corporation, whether organized under general law or special charter, might consolidate with, lease, purchase or in any way become the owner of, or control, or hold the stock of any other railroad corporation, when the respective roads could be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches.

We do not deem it necessary to express an opinion in this case whether the legislature could wholly revoke the power it had given to this company to extend its system by the construction or purchase of branch lines or feeders; since the possibility of an extension of the road, even to the Pacific coast, may have had an influence upon persons contemplating the purchase of its stock or securities, so that a right to do this might be said to have become vested. But we think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong.

Nor do we undertake to say that the legislature may not, in the exercise of a wise foresight, and for the purpose of attracting capital to enterprises of doubtful profit, authorize the granting of monopolies for a limited time, irrevocable by a subsequent legislature. To do so would practically ignore or overrule a series of cases to which we have already adverted, wherein corporations have been induced to furnish municipalities with bridges, gas, water and other requirements of modern civilization, by the promise of exclusive privileges for a term of years. Perhaps, too, it might not be beyond the competency of the legislature to authorize a railroad, by a clear and explicit act, to consolidate with a parallel or competing line, since cases may be imagined

where it might be for the public welfare to permit such consolidation. But the act of 1865, upon which the defendant relies, contains no such provision. There is only a general authority to consolidate, which we think the legislature may, by another act, declare shall not apply to cases manifestly not within its original intent. We think the general doctrine, requiring grants to corporations to be construed favorably to the public, where there is a reasonable doubt as to the extent of the privilege conferred, may properly be invoked to declare that such privileges shall not be used to the detriment of the public.

Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect — in short, puts the public at the mercy of the corporation. There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We cannot say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language. While, in particular cases, two railways by consolidating their interests under a single management, may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines; but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels

against the attempt of one road to control all traffic between terminal points, also connected by a competing line. There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts.

The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition.

In conclusion, we hold that where, by a railway charter, a general power is given to consolidate with, purchase, lease or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease or consolidation with parallel or competing lines.

The decree of the court below must therefore be

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

Mr. Justice Field and Mr. Justice Brewer dissented.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* KENTUCKY.

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

No. 722. Argued January 14, 15, 1896. — Decided March 30, 1896.

A power given in a charter of a railroad to connect or unite with other roads refers merely to a physical connection of the tracks, and does not authorize the purchase, or even the lease of such roads or road, or any union of franchises.

Syllabus.

The several statutes of Kentucky and of Tennessee relating to the Louisville and Nashville Railroad Company, which are quoted from or referred to in the opinion of the court, confer upon that company no general right to purchase other roads, or to consolidate with them.

The union referred to in those statutes is limited to a union with a road already connected with the Louisville and Nashville by running into the same town, and has and could have no possible relation to the acquirement of a parallel or competing line.

The third section of the Kentucky act of 1856 reënacting the Tennessee act of 1855, and providing that the Louisville and Nashville Company may "from time to time extend any branch road and may purchase and hold any road constructed by another company" did not confer a general power to purchase roads constructed by other companies regardless of their relations or connections with the Louisville and Nashville road.

A contemporaneous construction of its charter which ratified the purchase of a few short local lines does not justify the company in consolidating with a parallel and competing line between its two termini with a view of destroying the competition which had previously existed between the two lines.

The Chesapeake, Ohio and Southwestern Railroad Company was never vested with the power to consolidate its capital stock, franchises or property with that of any other company owning a parallel or competing line.

If, from reasons of public policy, a legislature declares that a railway company shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful, because the parties choose to let it take the form of a judicial sale.

Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and is within legislative control; and, in the exertion of such power, the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.

Section 201 of the constitution of the State of Kentucky of 1891, providing that "no railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge or common carrier company, owning a parallel or competing line or structure; or acquire, by purchase, lease or otherwise, any parallel or competing line or structure, or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this State, or with any common carrier, by which combination or contract the earnings of the one doing the carrying are to be shared by the other not doing the carrying," is a legitimate exercise of the police power of the State, and forbids the consolidation between the Louisville and Nashville Company and the Chesapeake, Ohio and Southwestern Company, which is the subject of controversy in this suit, at least so far as the power to make it remains unexecuted.

Statement of the Case.

THIS was a bill in equity, styled a petition, originally filed by the Commonwealth of Kentucky against the Louisville and Nashville Railroad Company, (hereinafter called the L. & N. Co.,) the Chesapeake, Ohio and Southwestern Railroad Company (hereinafter called the Chesapeake Co.) and several subordinate corporations tributary to the latter, to enjoin the L. & N. Co. (1) from acquiring the control of, or operating, the parallel and competing lines of railroad known as the Chesapeake, Ohio and Southwestern system; (2) from acquiring or operating the Short Route Railway Transfer Co., a belt line in Louisville, and the Union Depot in Louisville, connected therewith; and also (3) to enjoin the Chesapeake, Ohio and Southwestern system from selling out to or permitting its roads to be operated by its competitor, the L. & N. Co.

It was stated substantially in the Commonwealth's petition, as its cause of action, that the L. & N. Co. owned and controlled many railroads in Kentucky, as respects which, railroads owned or controlled by the other companies named are parallel and competing; that defendants have made a contract and arrangement, whereby the L. & N. Co. is to become the owner, and acquire a control of, the capital stock, franchises and property of the other defendant companies, to the great injury of the Commonwealth, and in violation of section 201 of the state constitution of 1891, which reads as follows:

"SEC. 201. No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge or common carrier company, owning a parallel or competing line or structure; or acquire, by purchase, lease or otherwise, any parallel or competing line or structure, or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this State, or with any common carrier, by which combination or contract the earnings of the one doing the carrying are to be shared by the other not doing the carrying."

In an amended petition it was stated in substance that the

L. & N. Co. was endeavoring to acquire the capital stock, interest in real property and mortgage securities of the other defendant companies, in order to obtain control and ultimately purchase at judicial sale and become the owner of, their franchises and property.

The answer denied the allegation in the form as made, but contained an affirmative statement that the purchase of the stock and securities referred to had already been consummated, and in effect admitted that the L. & N. Co. intended to purchase the franchises and properties at judicial sale.

The L. & N. Co. was incorporated by an act of the Kentucky legislature approved March 5, 1850, the fourteenth section of which act provided "that the president and directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville, the route, to be by them selected and determined, not exceeding sixty-six feet wide, with as many sets of tracks as they may deem necessary; and that they may cause to be made contracts with others for making said railroad, or any part of it."

This act was frequently amended in details unnecessary to be noticed here, one of which, adopted March 7, 1854, declared (section 4) "that it shall be lawful for said Louisville and Nashville Railroad Company to unite their road with any other road connecting therewith upon such terms and conditions as may be agreed upon between the said Louisville and Nashville Railroad Company and such other company as they may desire to unite their said road with."

On December 15, 1855, the legislature of Tennessee passed an act to amend an act entitled "An act to charter the Louisville and Nashville Railroad Company, and the several acts amending said act passed by the legislatures of Kentucky and Tennessee," (Laws of Kentucky, 1855–6, c. 227,) under which it had been authorized to construct its road in Tennessee from the Kentucky line to Nashville, the thirteenth section of which act provided as follows:

"Sec. 13. *Be it further enacted*, That this act shall take effect from and after its passage: *Provided*, Nothing herein

contained shall be construed to prevent the Louisville and Nashville Railroad Company from admitting branch roads to connect with it at any point or points to be agreed upon between said company and those who have or may subscribe stock for the construction of any branch road. The stock subscribed, and the means created to construct such separate branch, shall be faithfully applied to that purpose; and said company is hereby vested with the power and the right to issue its bonds under the provisions of this act to obtain means to construct and equip any branch road; the bonds to express on their face the purpose for which they were executed; and to secure their payment may execute a deed of trust, or mortgage, for payment of which the rights, credits, profits, property and franchise, procured for said branch by the use of its means, shall alone be made liable. The credit, rights or profits of the main stem shall not be used to create means to construct, or be made liable for any debt or liability created to construct, branch roads; nor shall the rights, credit, property and profits of any branch road be used to create means to construct, or made liable for any debt or liability created to build the main stem; and with a view to such liabilities and profits, said company shall keep separate accounts, exhibiting the stock, property and debts of the main road, and each separate branch."

On January 17, 1856, the legislature of Kentucky passed an act, the *first* section of which reënacted the act passed by the legislature of Tennessee in 1855 "in the following sections and words:" (Here follows a literal copy of the Tennessee act.) The *second* section of this act vested the Louisville and Nashville Company with power to make agreements with any Tennessee corporation to construct a railroad in part or in whole of the distance between Louisville and Memphis, and running in the direction of Louisville, whereby to secure mutual and reciprocal rights to the contracting parties, etc. The *third* section was as follows: "That the said company may, under the provisions of the thirteenth section of this act," (referring evidently to the thirteenth section of the Tennessee act,) "from time to time extend any branch road,

and may purchase and hold any road constructed by another company, or may agree on terms to receive the cars of other roads on their said road, but shall charge for the same the usual freight."

At the same session, and on February 14, 1856, (Laws of Kentucky, 1855–6, c. 148,) the legislature of Kentucky passed what is known as the General Reservation Act, the language of which, so far as it is material here, is as follows:

"SEC. 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested. . . ."

"SEC. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

At this time and up to September, 1856, the L. & N. Co. owned only a short piece of road — thirty-one miles in length — extending from Louisville, southwardly, to Lebanon Junction. Up to September, 1857, it owned only forty-five miles; to September, 1858, seventy-two miles; in 1859, only one hundred and ten miles; and not till 1860 did it carry its road to Nashville, one hundred and eighty miles. About the same time was constructed a branch road from a point about seven miles south of Bowling Green to the state line, which has since been extended and is now owned and operated by it, to Memphis, Tennessee. Subsequently it purchased and now owns a road known as the Evansville, Henderson and Nashville Railroad, which extends from Edgefield, Tennessee, on its main line ten miles north of Nashville, by way of Hopkinsville, Kentucky, to Henderson, and thence across the Ohio River to Evansville, Indiana. It also owns and operates various branches in the State of Kentucky that diverge from the main line eastwardly, as well as the Kentucky Central Railroad, extending from Cincinnati southward, and certain branches thereof.

Opinion of the Court.

Of the roads constituting the Chesapeake, Ohio and Southwestern system, the first one extended from Paducah to Elizabethtown, and was subsequently extended from Cecilia Junction, six miles from Elizabethtown, to Louisville, whereby a continuous line was formed from Louisville to Paducah, independent of the L. & N. road. But by a subsequent lease, amounting practically to a purchase of a road from Paducah to Memphis, the Chesapeake Company became, about 1881, the owner of a connected, continuous and independent railroad from Louisville by way of Cecilia Junction and Paducah to Memphis. It also has an interest in, and control of, several other railroads bearing the name of, and nominally held by, the companies that built them, one of which is termed the Short Route Railway, extending from Preston street in Louisville through the depot at Seventh and Water streets to Twelfth street, where it connects with the main line.

Upon a hearing of the case upon pleadings and proofs, a decree was entered by the Jefferson circuit court in favor of the Commonwealth, enjoining the proposed agreement for consolidation, which decree was subsequently affirmed by the Court of Appeals of Kentucky. 31 S. W. Rep. 476.

Whereupon the L. & N. Co. sued out a writ of error from this court.

Mr. Helm Bruce, *Mr. Edward Baxter*, and *Mr. James P. Helm* for plaintiff in error.

Mr. George M. Davie and *Mr. Alexander P. Humphrey* for defendant in error.

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

This case turns to a certain extent upon the principles just announced in *Pearsall* v. *Great Northern Railway Company*, *ante*, 646, although it differs from that case in the fact that the charter of the L. & N. Co. contains no reserved power to alter or amend, as well as in several other minor particulars.

1. The original charter of the L. & N. Co., granted in 1850,

was limited in its character, and authorized the company only to construct a railroad from Louisville to the Tennessee line, in the direction of Nashville, with as many tracks as might be deemed necessary, but with no power to extend its lines or to purchase, lease or consolidate with other roads.

By the act of March 7, 1854, the company was given power to *unite* their road with any other road connecting therewith upon such conditions as the two companies might agree upon. As we have frequently held that a power to connect or unite with another road refers merely to a physical connection of the tracks and does not authorize the purchase or even the lease of such road, or any union of their franchises, it is evident that this act is no authority for the proposed consolidation. *Atchison, Topeka &c. Railroad* v. *Denver & New Orleans Railroad*, 110 U. S. 667; *Pennsylvania Co.* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290; *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393; *Commissioners* v. *Railroad Co.*, 50 Indiana, 85, 110. The important power to purchase or consolidate with another line cannot be inferred from any such indefinite language as "to unite or connect with such road." The union referred to in this act is also limited to a union with a road already connected with the L. & N. Co. by running into the same town, and could have no possible relation to the acquirement of a parallel or competing line. We ordinarily speak of two roads as connecting when they have stations in the same city, in which case authority is given by this act to make a mechanical union between the tracks of the two companies.

Appellant relies principally, however, upon the act of January 17, 1856, the first section of which reënacted an act of the legislature of Tennessee, passed the year before, chartering the L. & N. Co., which last mentioned act contained sixteen sections authorizing, among other things, the issue of bonds of the State to aid the company in building a bridge across the Cumberland River, and in purchasing iron, etc. The Kentucky act contained but five sections in all, the third of which provided "that said company may, under the provisions of the thirteenth section of this act, from time to time extend any branch road,

and *may purchase and hold any road constructed by another company*, or may agree on terms to receive the cars of other roads on their said road, but shall charge for the same the usual freight."

The thirteenth section of the Tennessee act, incorporated into the first section of the Kentucky act, also authorized the company to permit branch roads to connect with it at any points to be agreed upon between the company and the stockholders of the branch road. It also authorized the issue of bonds to obtain the means to construct and equip any branch road, and provided that the credits and profits of the main stem should not be used for such purpose, nor the property and profits of any branch road be used to build the main stem. As this section, however, was merely limited to *branch* roads, the L. & N. Co. is forced to rely for its authority to acquire the control of the Chesapeake Co. upon its power "to purchase and hold any road constructed by another company."

The Court of Appeals of Kentucky held that the whole section, taken together, indicated that the power to purchase and hold any road constructed by another company referred to *branch* roads, which, by a previous clause of the same section, the L. & N. Co. was authorized to construct, and that this was also further manifested by the power given to "agree on terms to receive the cars of other roads on their said road."

Upon the other hand, the company insists that the power to purchase and hold other roads is not only unlimited and extends to all other roads built or to be built, although parallel and competing lines, but that it constitutes an irrevocable contract, which a subsequent legislature is powerless to impair.

In construing this section we are bound to bear in mind the general rule, so often affirmed by this court, that all doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation, and that a surrender of the power of the legislature in any matter of public concern must never be presumed from uncertain or equivocal expressions. *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66, 88; *Delaware Railroad Tax*, 18 Wall. 206, 225;

Bailey v. *Magwire*, 22 Wall. 215; *Slidell* v. *Grandjean*, 111 U. S. 412; *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S. 287.

At this time (January, 1856) the only railroads in the State of Kentucky in operation were from Louisville, eastwardly to Lexington, and one from Lexington, northwardly by way of Paris, to Covington. There was no road running into southern or western Kentucky, or southwardly from Louisville, except the L. & N. Co.'s road as far as it had gone. While the General Assembly was not only willing but anxious that this company should have liberal and broad powers to aid it, the question of parallel or competing lines had probably not entered into the minds of the legislators as a contingency to be provided against.

There are two reasons why, in our opinion, the third section of the act of 1856 was never intended to confer a general power to purchase roads constructed by other companies, regardless of their relations or connections with the L. & N. road.

(1.) The language of the section is that the "company may, *under the provisions of the thirteenth section of this act*," (referring to the thirteenth section of the Tennessee act, reënacted,) "from time to time extend" by its own construction "any branch road." Now, as before observed, the thirteenth section of the Tennessee act refers only to *branch* roads, the cost of which was to be a charge or mortgage upon the branch line, and not upon the main stem; and it seems reasonable to infer that the cost of whatever roads were built or purchased under it were intended to be a charge upon the branch only, and not upon the main line. If the limitation "under the thirteenth section" were held to be applicable only to that part of the third section which allows extensions of branch lines, it would result that, if the company constructed a branch road, its cost would be a charge on the branch line, and not upon the main line; but if it should purchase an independent line, the cost could be made a charge upon the main line.

(2.) It is hardly possible to suppose that the legislature intended to allow the company to "extend," that is, to construct any extension of a branch road, and at the same time to confer an unlimited power to purchase and hold any road con-

structed by another company. The rule, *noscitur a sociis*, applied to this case would undoubtedly limit the power to *purchase*, under the general clause, to such roads as the company was authorized to *build* under the preceding and more special clause. There is no reason why a power to build should be limited to *branch* roads, while the power to purchase should be so unlimited as to authorize the company to absorb parallel or competing lines, either within or without the State. Additional support for this construction is also found in the concluding words of the section empowering the company "to agree on terms to receive the cars of other roads on their said road." This would indicate an intention to permit the company to receive upon its main line the cars of other roads constructed or purchased as feeders to that line, but would scarcely be applicable to the cars of competing or parallel roads, which would seldom be required to be taken upon their line.

That the General Assembly could have intended to grant the broad powers claimed is also highly improbable in view of an act passed a little more than two years thereafter, (January 22, 1858,) by which all railroad companies were declared to have power and authority to make with each other contracts of the following character: *First*, for the consolidation of either the management, profits or stock of any two or more companies, the roads of which are or shall be so connected as to form a continuous road. *Second*, for the leasing of the road of one company to another, provided the roads so leased shall be so connected as to form a continuous line. This act is a general one, and the possibility of consolidating parallel or competing lines was evidently considered and reprobated.

As bearing upon the proper construction of this charter, as well as upon the question of actual parallelism, the case of the *State* v. *Vanderbilt*, 37 Ohio St. 590, is an instructive one. This was an action in *quo warranto* to test the legality of a consolidation of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Cincinnati, Hamilton and Dayton Railroad Company, the former of which owned and controlled a road running from Cleveland upon

Lake Erie, by the way of Columbus, to Cincinnati, and the latter a road running from Toledo, at the western end of Lake Erie, by the way of Hamilton and Dayton, to Cincinnati. The statute provided that companies might consolidate, where their lines were so constructed as to admit of the passage of burden or passenger cars over any two or more of such roads *continuously* without break or interruption. The court held that, in view of the existence of a large commerce from the Southern States, by way of Cincinnati, to ports upon Lake Erie, as well as from such points southerly, by railroad lines converging at Cincinnati, these were substantially parallel and competing roads; that it might be inferred from the record that a leading object in making the consolidation was to destroy that competition; and that upon this state of facts, these roads were not so constructed as to admit the passage of burden or passenger cars over two or more of such roads *continuously*. In delivering the opinion it was observed that "where companies, situated as these are, being parallel and competing, claim that authority to consolidate has been granted to them, they must be able to point to words in the statute which admit of no other reasonable construction, for it will not be assumed that the law-making power has authorized the creation of a monopoly so detrimental to the public interest."

So in *Elkins* v. *Camden & Atlantic Railroad*, 36 N. J. Eq. 5, a statute authorized railroad companies to lease their roads or any part of them to any other corporation or corporations of that or any other State, or to unite and consolidate, as well as merge their stock, property, franchises and roads with those of any other company or companies; and that after such lease or consolidation, the company acquiring the other's road might use and operate such road. The court held that this did not authorize a railroad, running from Philadelphia to Atlantic City, to assume the debts and buy a majority of the stock and bonds and the equipment of a rival railroad running between the same termini, or to become the purchaser of its property at a foreclosure sale, or to control it after such sale in a reorganization of the company. The court

enjoined the purchase, saying that "the purchase of a rival railroad is (not to speak of public policy) foreign to the objects for which the defendant was incorporated. Nor can the purchase be regarded as within the authority given by the defendant's charter to build lateral or branch roads. . . . As a purchase with a view to extinguishing competition, the transaction is clearly *ultra vires*."

Defendant, however, further urges in support of its assumed rights under the third section of the charter of 1856, a contemporaneous construction by the parties in interest, under which several lines were purchased which ran parallel to some of its own branches, and one of which, known as the Cecilia branch, about fifty miles in length, running substantially parallel to its main line, which it purchased and held for a short time, and then sold to the Chesapeake Co. These, however, were local lines, which either ran parallel to the branches of the L. & N., such as the Owensboro and Nashville, and the Bardstown branch, or an extension of its main line, such as the Louisville, Cincinnati and Lexington, running from Louisville to Cincinnati, or a short line like the Cecilia branch, running parallel to the main line; yet, as the terminus at one end or the other was in most cases different, it can hardly be said that any of these were competing lines, or that their purchase showed such an acquiescence on the part of the State as to estop it from opposing the purchase of a through line from Louisville to Memphis, by the way of Paducah — a line which connects the principal termini of the L. & N. Co. by a road substantially parallel, and no part of which is more than 50 miles from the corresponding part of the L. & N. Putting the broadest construction upon what was actually done, it amounts to no more than that the company made several purchases of local lines, in which the State acquiesced. That the State may have seen fit in particular cases to ratify the acquisition of local lines parallel to certain branch lines of the main road, does not argue that it intended to approve the purchase of parallel and competing through lines, especially in view of the act of June 22, 1858, which limited the power to consolidate or lease to roads so connected as to form a continuous line.

Indeed, these acquisitions appear to have been deemed so little in contravention of the public policy of the State, that the General Assembly did not hesitate to confirm them by special acts, and to receive taxes upon them as part of the L. & N. system.

While the doctrine of contemporaneous construction is doubtless of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet to justify its application to a particular case, such contemporaneous construction must be shown to have been as broad as the exigencies of the case require. In this view we cannot say that a contemporaneous construction of this charter, which ratified the purchase of a few short local lines, was sufficient to justify the company in consolidating with a parallel and competing line between its two principal termini, with a view of controlling the through traffic from the lower Mississippi to Cincinnati, and destroying the competition which had previously existed between the two lines. It is possible that the Commonwealth might, if it had seen fit to do so, have enjoined the acquisition of some of these parallel lines, and the fact that it did not deem such purchases to be in contravention of public policy ought not to estop it from setting up an opposition to another purchase, which, in its view, is detrimental to the public interests. As is said by Mr. Justice Cooley, in his Constitutional Limitations, (6th ed.) page 85: "A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution." We are, therefore, of opinion that the Court of Appeals was substantially correct in saying that "though thirty-eight years since the passage of the act of 1856 and thirty-six since the act of 1858 had elapsed, when this action was commenced, the L. & N. Co. never before claimed or attempted to exercise the right to purchase and hold parallel and competing lines, except about 1878, when

it purchased the road from Louisville to Cecilia Junction, which was held only a short time and then sold to the Chesapeake, Ohio and Southwestern Company."

That the lines proposed to be consolidated are parallel and competing is evident from an inspection of the map, since both connect the two important cities, Louisville and Memphis, which constitute their termini, and are natural competitors for the traffic from the Southwestern to the Northeastern States by way of Cincinnati, as well as that in the opposite direction. The object of the consolidation is obviously to enable the L. & N. to obtain a complete monopoly of all the traffic through the western half of the State. Conceding that that part of the Chesapeake line which ran from Elizabethtown to Paducah was originally a branch line of the L. & N., and might have been acquired as such under section 3 of the act of 1856, it ceased to be such after the Cecilia branch was acquired, and the line was extended from Paducah to Memphis. It then became a parallel and competing line within the meaning of the constitution.

In reply to the argument that millions of dollars have been invested in the securities of the company upon the faith of what was supposed to be its admitted powers, and that its capital stock of $1,500,000 in 1856 has expanded to $51,000,000, it is sufficient to say that, in making such investments, capitalists were bound to know the authority of the company under its charter, and to put the proper interpretation upon it; and that we are not at liberty to presume that investments were made upon the faith of powers that do not exist; and, if they were, the Commonwealth is not bound to respect investments made under a misapprehension of the law. Indeed, the argument proves too much, and would justify the inference that capitalists put their money into the road upon the assumption that it had been given irrevocable right to absorb to itself every road which might thereafter be constructed within the limits of the Commonwealth.

2. Besides this, however, in order to support the proposed consolidation of these two systems, the parties are bound to show, not only that the L. & N. Co. was competent to buy, but

that the Chesapeake Co. was also vested with power to sell. To make a valid contract it is necessary to show that both parties are competent to enter into the proposed stipulations. It is a fundamental principle in the law of contracts that, to make a valid agreement, there must be a meeting of minds, and, obviously, if there be a disability on the part of either party to enter into the proposed contract there can be no valid agreement. As was said by this court in *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393, 404: "It is unnecessary, however, to express a definitive opinion upon the question whether a contract between these parties was beyond the corporate powers of the plaintiff, because, as held by the decisions of this court already cited, a contract beyond the corporate power of either party is as invalid as if beyond the corporate powers of both, and the contract in question was clearly beyond the corporate powers of the defendant." See also *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Oregon Railway* v. *Oregonian Railway Co.*, 130 U. S. 1; *Pennsylvania Railroad* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24.

The Chesapeake Co. was incorporated under an act of the General Assembly of Kentucky, passed in 1881, (Acts of 1881, p. 258,) the ninth section of which declares that the corporation should be "governed by any general law enacted by the legislature of this State in regard to consolidation with parallel or competing lines." So that, although organized prior to the adoption of the constitution of 1891, it became subject at once, and as soon as said constitution was adopted, to its provision declaring that no railroad should consolidate its capital stock, franchise or property with that of any other owning a parallel or competing line or structure.

The only answer attempted to this proposition is that the cases above cited in support of the doctrine that to make a valid sale there must be power both in the seller to sell and in the buyer to buy, refers only to private, voluntary sales, arranged between the companies, and dependent upon their respective corporate powers; and that the doctrine has no

application to judicial or involuntary sales, where the property is seized upon to satisfy a debt of the corporation.

We do not understand, however, that the fact that a purchase is made at a judicial sale confers upon the purchaser any right he is forbidden to acquire, if the purchase had been made at private sale. If, from reasons of public policy, the legislature declares that a railway shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful, because the parties choose to let it take the form of a judicial sale. A person who, by reason of any statutory disability, such as infancy, lunacy, marriage or otherwise, is incompetent to buy at private sale is not less incompetent from becoming the purchaser at a judicial sale. The prohibition is not upon the power of the court foreclosing the mortgage to order a judicial sale of the property, but upon its power to confirm a sale made to a parallel or competing road. The allegation of the bill in this connection is that suits have been filed upon claims against the several companies interested, with the object of having a judicial sale of their property, so that the L. & N. Co. may purchase the property in its own name, or in the name of some new company or companies organized by it or in which it shall have a controlling interest. It is true, as was observed in *Pearsall* v. *The Great Northern*, that the stockholders of the L. & N. Co. may individually become the purchasers of the Chesapeake Co. at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the L. & N. Co. The inhibition of the Constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line, but against the acquisition by a railway, in any form, of a parallel or competing line. If this could be evaded by going through the form of a judicial sale, the constitutional provision would be of no value.

3. But, conceding that the L. & N. Co. was vested by the act of January 17, 1856, with the right to purchase all railroads constructed by other companies, whether parallel or competing or not, and that by virtue of such power it might become the purchaser of the Chesapeake system, it is still

insisted on behalf of the Commonwealth that this act was subject to an act approved February 14, 1856, the first section of which enacted that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." The third section of this act provided that the act should apply only to "charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage." The argument is that, as this act was given immediate effect, while the former act, under a general law of the State, did not take effect until two months from the time it was approved by the governor, the act of February 14 was, in reality, the prior act, and the charter of January 17 was, in fact, granted thereafter, within the meaning of the third section of the act of February 14.

The answer of the defendant to this was that the thirteenth section of the Tennessee act of 1855, which was reënacted in the first section of the Kentucky act of January 17, provided "that this act shall take effect from and after its passage." If the adoption verbatim of this Tennessee act by the Kentucky legislature was sufficient to give the Kentucky act immediate effect, then, undoubtedly, the act of February 14 was a subsequent act and did not apply to the charter of January 17. Upon the other hand, if the reënactment of the thirteenth section of the Tennessee act was not intended to give the Kentucky charter immediate effect, then this charter did not become operative until March 17, and thereby became subject to the reservation statute of February 14, which did take immediate effect. This question was elaborately argued at the bar, but, for the reasons hereafter stated, we do not consider it necessary to express a decided opinion upon the point.

4. Whatever be the disposition of this question, and however broad the powers of the L. & N. Co., under its charter of 1856, we are still confronted with the proposition that the proposed consolidation of these two railway systems is a clear violation of section 201 of the constitution, which forbids the

consolidation of the stock, franchises or property, as well as the purchase and lease of parallel and competing lines. Unless this section impairs the obligation of the contract contained in the charter, it operates as a repeal of any power that may possibly be deduced from such charter to purchase, lease or consolidate with any parallel or competing line. In this particular the case differs from that of *Pearsall* v. *Great Northern Railway*, just decided, only in the fact that the charter of the Great Northern, while conferring a power to consolidate with other roads in much clearer and more explicit language than was used in the L. & N. charter, also contained in section 17 the reservation of a power to amend in any manner not destroying or impairing the vested rights of the corporation. The opinion in that case dealt largely with the question whether a subsequent act of the legislature taking away this power so long as it was unexecuted, and so far as it applied to parallel or competing lines, impaired a vested right. Our conclusion was that it did not.

We regard the issue presented in this case as involving practically the same question. While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the *Pearsall case*, that under its police power the people, in their sovereign capacity, or the legislature, as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests. In the case of *Munn* v.

Illinois, 94 U. S. 113, Mr. Chief Justice Waite said: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

There was a difference of opinion in the court as to whether this language applied to elevators in such manner as to empower the legislature to fix their charges; but it has been too often held that railways were public highways, and their functions were those of the State, though their ownership was private, and that they were subject to control for the common good, to be now open to question. It was so expressly stated in *Olcott* v. *Supervisors*, 16 Wall. 678, 694. This power was held to extend, in *New York* v. *Miln*, 11 Pet. 102, to a law requiring the masters of emigrant vessels to report an account of their passengers; in the *Railroad Commission cases*, 116 U. S. 307, to the right of a State to reasonably limit the amount of charges by a railway company for the transportation of persons and property within its jurisdiction, notwithstanding a statute which granted to it the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation;" in *Mugler* v. *Kansas*, 123 U. S. 623, to legislation which prohibited the manufacture of intoxicating liquors within the limits of the State, even as to persons who, at the time, happened to own property, whose chief value consisted in its fitness for such manufacturing purposes; in *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, to the prevention of extortion by railways, by unreasonable charges, and favoritism by discriminations; in *Charlotte &c. Railroad* v. *Gibbes*, 142 U. S. 386, to a requirement that the salaries and expenses of a state railroad commission be borne by the railroad corporations within the State; in *New York & New England Railroad* v. *Bristol*, 151 U. S. 556, to a statute com-

pelling the removal of grade crossings; in *Commonwealth* v. *Alger*, 7 Cushing, 53, to the establishment of harbor lines, beyond which land owners shall not extend their wharves; and in *Eagle Insurance Co.* v. *Ohio*, 153 U. S. 446, to a requirement that insurance companies make returns to the proper state officers of their business conditions, etc., notwithstanding the company be organized under a special charter, which did not in terms require it to make such return.

Indeed, it was broadly held in *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574, that the grant of a corporate franchise is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred; and that, when abused or misemployed, they may be withdrawn by proceedings consistent with law. It was said in this case that an insurance corporation was subject to such reasonable regulations as the legislature might from time to time prescribe, for the general conduct of its affairs, serving only to secure the ends for which it was created, and not materially interfering with the privileges granted to it. "It would be extraordinary," said the court, (page 580,) "if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all." It was further held that the establishment against such a corporation before a judicial tribunal that it was insolvent, or that its condition was such as to render its continuance in business hazardous to the public; or that it had exceeded its corporate powers; or that it had violated the rules, restrictions or conditions prescribed by law, constituted a sufficient reason for the State, which created it, to reclaim the franchises and privileges granted to it.

We think that the principle of these cases applies to the power of the legislature to forbid the consolidation of parallel

or competing lines, whenever, in its opinion, such consolidation is calculated to affect injuriously the public interests. Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void. Cook on Stockholders, § 315; *Central Railroad Co.* v. *Collins*, 40 Georgia, 582; *Hazlehurst* v. *Savannah &c. Railroad Co.*, 43 Georgia, 13; *Elkins* v. *Camden & Atlantic Railroad Co.*, 36 N. J. Eq. 5. The doctrine is peculiarly applicable to this case, in which it is shown that the Chesapeake Co. was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining competition with the L. & N. Co. — a purpose which would, of course, be defeated by a combination with it. This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States — a policy which has not only found a place in the statute law of such States as apprehended evil effects from such consolidations, but has been declared by the courts to be necessary to protect the public from the establishment of monopolies. Indeed, the unanimity with which the States have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible. The fact that, in certain cases, the legislature has seen fit to sanction the consolidation of parallel roads does not militate against the general principle that the consolidation of competing lines is contrary to public policy. Parallel lines are not necessarily competing lines, as they not infrequently connect entirely different termini and command the traffic of distinct territories. For instance, a line from Toledo to Cincinnati is substantially parallel with another from Chicago to Cairo, but they could scarcely be called competing, since one is dependent upon the traffic of

the Northwest, while Cincinnati is the southern outlet of the traffic of the Northeastern States and the lower lakes. Another familiar instance is that of the three north and south railways through the State of Connecticut, one from Bridgeport to Pittsfield, in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester. These are strictly parallel lines, but in only a limited sense competing, since they are between different termini, and each is required for the trade of its own section of the State. Even in the present case the competition is mostly confined to the through traffic. Considerations of this kind may induce legislatures, in particular instances, to permit the consolidation of parallel roads without intending thereby to relinquish their right to forbid the consolidation of such parallel lines as are in fact competing.

Permission to consolidate such roads is no more to be taken as an approval of a general policy of consolidation than are the laws which have been repeatedly upheld by this court, granting corporations exclusive privileges to supply municipalities with the comforts of life for a certain number of years, of which class of monopolies the one upheld in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, is a distinguished example. Such cases are, however, exceptional, and rest upon the theory of an authority expressly vested in the corporation for a limited time, in consideration of benefits likely to accrue to the public from the establishment of a particular industry. Even in such cases, however, we have held that the monopoly may be modified or abrogated, if it proved to be prejudicial to the public health or public morals. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746. In this case Mr. Justice Miller, in delivering the opinion of the court, observed, p. 750: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of such powers to the prejudice of the general welfare. These are the *public health* and *public morals.* The preservation of these is so necessary to the best interests of social organi-

zation that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." To the same effect are *Boyd* v. *Alabama*, 94 U. S. 645; *Beer Co.* v. *Massachusetts*, 97 U. S. 25.

There are doubtless cases where the police power has been invoked to justify acts of the legislature which were dictated to a certain extent by local interests, or with the effect of unduly burdening or interfering with foreign or interstate commerce. Within this category are laws levying taxes upon alien passengers arriving from foreign ports, for the use of hospitals, *The Passenger cases*, 7 How. 283; requiring a bond to be given for every such passenger to indemnify the State against expense for the relief or support of the person named in the bond, *Henderson* v. *New York*, 92 U. S. 259; even though such bonds be limited to lewd and debauched women, *Chy Lung* v. *Freeman*, 92 U. S. 275; prohibiting the driving or conveying of foreign cattle into the State between certain dates, *Railroad Co.* v. *Husen*, 95 U. S. 465; taxing persons from other States engaged in selling or soliciting the sale of liquors, to be shipped into the State from places without it, without imposing a tax upon similar agents for manufacturers within the State, *Walling* v. *Michigan*, 116 U. S. 446; *Welton* v. *Missouri*, 91 U. S. 275; statutes requiring inspection, before slaughtering, of cattle, sheep and swine designed for slaughter for human food, so far as they apply to foreign meats, *Minnesota* v. *Barber*, 136 U. S. 313; a similar statute prohibiting the sale of meat from animals slaughtered one hundred miles or more from the place at which it was offered for sale, unless previously inspected by local inspectors, *Brimmer* v. *Rebman*, 138 U. S. 78; and finally, to statutes requiring a license, under onerous conditions, from the agents of foreign express companies, *Crutcher* v. *Kentucky*, 141 U. S. 47.

These cases, however, do not infringe upon the general principle, so frequently declared, that where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained, wherever it can be done without the impairment of vested rights. Notwithstanding these

cases, the general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.

5. But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less, according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden. There are certain intimations in some of our opinions, which might perhaps lead to an inference that the police power cannot be exercised over a subject confined exclusively to Congress by the Federal Constitution. But while this is true with respect to the commerce itself, it is not true with respect to the instruments of such commerce.

It was said in *Sherlock* v. *Alling*, 93 U. S. 99, 103, 104, and quoted with approbation in *Plumley* v. *Massachusetts*, 155 U. S. 461, that "in conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it with-

out constituting a regulation of it, within the meaning of the Constitution, . . . and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce foreign or interstate, or in any other pursuit."

It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

If it be assumed that the States have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation — a proposition which only needs to be stated to demonstrate its unsoundness. As we have already said, the power of one railway corporation to purchase the stock and franchises of another must be conferred by express language to that effect in the charter, and hence, if the charter of the L. & N. Co. had been silent upon that point, it will be conceded that it would have no power to make the proposed purchase in this case. As the power

to purchase, then, is derivable from the State, the State may accompany it with such limitations as it may choose to impose. Its results, then, from the argument of the appellant that, if there be any interference with interstate commerce it is in imposing limitations upon the exercise of a right which did not previously exist, and hence, if the State permits such purchase or consolidation, it is bound to extend the authority to every possible case, or expose itself to the charge of interfering with commerce. This proposition is obviously untenable.

While the constitutional power of the State in this particular has never been formally passed upon by this court, the power of state legislatures to impose this restriction upon the general authority to consolidate has been recognized in a number of cases. *Railroad Co.* v. *Maryland*, 21 Wall. 456, 470; *Shields* v. *Ohio*, 95 U. S. 319; *Wallace* v. *Loomis*, 97 U. S. 146, 154; *New Buffalo* v. *Iron Co.*, 105 U. S. 73; *Leavenworth* v. *Chicago &c. Railway*, 134 U. S. 688, 699; *Livingston County* v. *Portsmouth Bank*, 128 U. S. 102; *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301; *Ashley* v. *Ryan*, 153 U. S. 436. In the last case it was broadly held that a State, in permitting railway companies to consolidate, might impose such conditions as it deemed proper, and that the acceptance of the franchise implied a submission to the conditions, without which it could not have been obtained.

The power to forbid such purchase or consolidation with competing lines has been directly upheld in a large number of cases in the state courts, in some of which cases a violation of the commerce clause was suggested, and in others it was not. *Hafer* v. *Cincinnati, Hamilton & Dayton Railroad*, 29 Wkly Law Bull. 68; *State* v. *Atchison & Red River Railroad*, 24 Nebraska, 143; *Gulf, Col. & Santa Fé Railway* v. *State*, 72 Texas, 404; *East Line &c. Railway* v. *Rushing*, 69 Texas, 306; *Pennsylvania Railroad* v. *Commonwealth*, 7 Atl. Rep. 368; *Montgomery's Appeal*, 136 Penn. St. 96; *Currier* v. *Concord Railroad*, 48 N. H. 321; *Texas & Pacific Railway Co.* v. *Southern Pacific Railway Co.*, 41 La. Ann. 970. See also *Langdon* v. *Branch*, 37 Fed. Rep. 449; *Hamilton* v. *Savannah*

&c. Railroad, 49 Fed. Rep. 412; *Clark* v. *Central Railroad*, 50 Fed. Rep. 338; *Kimball* v. *Atchison, Topeka &c. Railroad Co.*, 46 Fed. Rep. 888.

In conclusion we are of opinion —

1. That a general right to purchase or consolidate with other roads was never conferred upon the L. & N. Co.

2. That the Chesapeake Co. was never vested with the power to consolidate its capital stock, franchises or property with that of any other road owning a parallel or competing line.

3. That, conceding that the requisite power existed in both the above companies, section 201 of the constitution of 1891 was a legitimate exercise of the police power of the State, and forbade such consolidation, at least so far as such power remained unexecuted.

The decree of the Court of Appeals of Kentucky is, therefore, *Affirmed.*

Mr. Justice Brewer and Mr. Justice White concurred in the result.

INDEX.

ADMIRALTY.

7. The Delaware is not exempted from liability by the provisions of the act of February 13, 1893, c. 105, 27 Stat. 445, entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property." *Ib.*

ANCILLARY SUIT.

See JURISDICTION, A, 1.

APPEAL.

See JURISDICTION, A, 8;
PRACTICE, 8.

BANKRUPTCY.

1. The limitation of two years made by Rev. Stat. § 5057 to suits and actions between an assignee in bankruptcy and persons claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, in which adverse claims existed while in the hands of the bankrupt and before assignment. *Dushane* v. *Beall*, 513.
2. Assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefiting the estate, and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course. *Ib.*
3. From the record in this case the court is constrained to the conclusion that the assignee should not have been held by the court below to have exercised the right of choice between prosecuting the claim and abandoning it, in the absence of any evidence whatever to justify the conclusion that he had knowledge, or sufficient means of knowledge, of its existence prior to August 10, 1888; and that therefore there was error in its judgment. *Ib.*

CASES AFFIRMED.

1. *Baltzer* v. *North Carolina*, 161 U. S. 240, followed. *Baltzer and Taaks* v. *North Carolina*, 246.
2. *Home Insurance & Trust Co.* v. *Tennessee*, 161 U. S. 198, followed. *Home Ins. & Trust Co.* v. *Tennessee*, 200.
3. *Spalding* v. *Vilas*, 161 U. S. 483, followed. *Spalding* v. *Dickinson*, 499.

See CONSTITUTIONAL LAW, A, 2;
JURISDICTION, E, 2;
LOCAL LAW, 4.

CASES EXAMINED.

See TAX AND TAXATION, 4.

CENTRAL PACIFIC RAILROAD.

1. An examination of the statutes of the United States relating to the construction of a railroad from the Missouri River to the Pacific Ocean, especially the acts of July 1, 1862, c. 120, 12 Stat. 489, and July 2, 1864, c. 216, 13 Stat. 356, shows that every subscriber to the Union Pacific Railroad Company must be deemed to have become such upon the condition, implied by law, that he should not be personally liable for the debts of the corporation. *United States* v. *Stanford*, 412.
2. It is equally clear that Congress intended to grant national aid to all the corporations constructing that connecting line of railroad upon terms and conditions applicable alike to all, with no purpose to make discriminations against any one part of the line, and that the imposition of a liability upon the stockholders of the Central Pacific Railroad Company for the debts of that corporation, arising out of the bonds which it received from the United States, when no such liability was imposed upon the Union Pacific Railroad Company on account of like bonds received by it, is entirely inconsistent with that equality. *Ib.*
3. The United States has no claim against the stockholders of the Central Pacific Railroad Company on account of the bonds issued to that company by the United States to aid in the construction of its road. *Ib.*
4. This adjudication is not to be taken as deciding that the stockholders of the Central Pacific Railroad Company either can or cannot be made liable for its debts to the United States in some other way than under the Pacific railroad acts and by the acceptance of the United States bonds to aid in the construction of the road; nor whether the adoption of the California corporation as an instrument of the national government in accomplishing a national object, exempted its stockholders from liability, under the constitution and laws of California, to ordinary creditors. *Ib.*

CLAIMS AGAINST THE UNITED STATES.

1. By the act of February 26, 1853, c. 81, § 1, (Rev. Stat. § 3477,) every specific assignment, in whatever form, of any claim against the United States, under a statute or treaty, whether to be presented to one of the executive departments, or to be prosecuted in the Court of Claims, is void, unless assented to by the United States. *Ball* v. *Halsell*, 72.
2. A contract, by which the owner of a claim against the United States for Indian depredations appointed an attorney to receive and give acquittances for one half of the money which the attorney might recover of the United States upon that claim, will not, although the attorney has obtained from the Secretary of the Interior a recom-

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

B. OF THE STATES.

CONTRACT.

CORPORATION.

COURT AND JURY.

CRIMINAL LAW.

DEPUTY MARSHAL.

See MARSHAL.

DISTRICT OF COLUMBIA.

DOWER.

EQUITY.

See DEED;
EVIDENCE, 1.

ERROR.

ESCHEAT.

See LOCAL LAW, 5, 6, 7.

ESTOPPEL.

See DISTRICT OF COLUMBIA, 4.

EVIDENCE.

1. When the plaintiff in a bill in equity alleges facts material to his recovery, and the defendant in his answer denies them under oath, the burden of proof is thrown upon the plaintiff. *Cochran* v. *Blout*, 350.
2. It being shown that the transactions in dispute were to be conducted under the rules and regulations of the Board of Trade at Chicago, and that those rules and regulations were explained to the defendant below, they became competent evidence. *Hansen* v. *Boyd*, 397.
3. Stenographers' minutes of evidence are not records. *Matthews* v. *United States*, 500.

See CRIMINAL LAW, 3, 4, 12;
DISTRICT OF COLUMBIA, 3.

EXCEPTION.

When the defendant at the close of plaintiff's evidence, requests an instruction to the jury to charge in his favor, which is refused, and he then introduces testimony, an exception to that refusal is waived. *Hansen* v. *Boyd*, 397.

EXECUTIVE DEPARTMENTS, HEADS OF.

1. The act of the head of one of the Departments of the government in calling the attention of any person having business with such Department to a statute relating in any way to such business, cannot be made the foundation of a cause of action against such officer. *Spalding* v. *Vilas*, 483.
2. The same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. *Ib.*

See POSTMASTER GENERAL.

EXECUTION.

See LOCAL LAW, 2, 3.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

B. JURISDICTION OF CIRCUIT COURTS OF APPEAL.

E. JURISDICTION OF THE COURT OF CLAIMS.

1. When a petition filed in the Court of Claims alleges that a depredation was committed by an Indian or Indians belonging to a tribe in amity with the United States, it becomes the duty of that court to inquire as to the truth of that allegation, and its truth is not determined by the mere existence of a treaty between the United States and the tribe, or by the fact that such treaty has never been formally abrogated by a declaration of war on the part of either, but the inquiry is whether, as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States: and if it appears that the depredation was committed by a single individual, or a few individuals without the consent and against the knowledge of the tribe, the court may proceed to investigate the amount of the loss, and render judgment therefor; but if, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the petition is not sustained, and that the claim is not one within its province to adjudicate. *Marks* v. *United States*, 297.
2. *Johnson* v. *United States*, 160 U. S. 546, affirmed to the point that, by clause 2 of section 1 of the act of March 3, 1891, c. 538, 26 Stat. 851, the jurisdiction of the Court of Claims was limited to claims which, on March 3, 1885, had either been examined and allowed by the Department of the Interior, or were then pending therein for examination. *Ib.*

See CLAIMS AGAINST THE UNITED STATES.

LEASE.

See NATIONAL BANK, 1.

LACHES.

The court bases its conclusion in this case upon the fact that the record exhibits such gross laches on the part of complainant, or those with whom he is in privity, and upon whose rights his own must depend, as to effectually debar him from a right to the relief which he seeks. *Gildersleeve* v. *New Mexico Mining Co.*, 573.

LIMITATION, STATUTES OF.

See BANKRUPTCY, 1.

LOCAL LAW.

1. In Alabama a judgment in itself imposes no lien upon the property of the judgment debtor, but the issue of an execution and its delivery to the officer are necessary to create a lien. *Beebe* v. *United States*, 104.
2. According to the settled rule in Alabama, when an execution comes to

PUBLIC LAND.

RAILROAD.

road by branches with any other road in the Territory, or to become part owner or lessee of any railroad in said Territory; and also "to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company." By a subsequent act it was, in 1865, authorized "to connect with or adopt as its own, any other railroad running in the same general direction with either of its main lines or any branch roads, and which said corporation is authorized to construct;" "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of any other road having the same general direction or location, or to become merged therein by way of substitution;" to consolidate any portion of its road and property with the franchise of any other railroad company or any portion thereof; and to consolidate the whole or any portion of its main line or branches with the rights, powers, franchises, grants and effects of any other railroad. These several rights, privileges and franchises were duly accepted by the railway company, and its road was constructed and put in operation. In 1874 the State of Minnesota enacted that "no railroad corporation or the lessees, purchasers or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as the officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and in 1881 its legislature enacted that "no railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchise, rights of property thereof, which owns or controls a parallel or competing line." In 1889 the company changed its name to Great Northern Railway Company and extended its road towards the Pacific. The Northern Pacific Railroad being about to be reorganized, it was proposed that the Great Northern company should guarantee, for the benefit of the holders of the bonds to be issued by the reorganized company, the payment of the principal of, and interest upon such bonds, and as a consideration for such guaranty, and as a compensation for the risk to the stockholders, the reorganized company should transfer to the shareholders of the Northern company, or to a trustee for their use, one half the capital stock of the reorganized company; and that the Northern Pacific should join with the Great Northern in providing facilities for an interchange of cars and traffic between their respective lines, and should interchange traffic with the Northern company, and operate its trains to that end upon reasonable, fair and lawful terms under joint

RECORD.

STATUTE.

A. STATUTES OF THE UNITED STATES.

TAX AND TAXATION.

1. When not otherwise exempted, the capital stock of a corporation, and its shares in the hands of shareholders, may both be taxed; and if so taxed it is not double taxation. *Bank of Commerce* v. *Tennessee*, 134.
2. The surplus accumulated by the plaintiff in error is not exempted from taxation by the provision of exemption in its charter. *Ib.*
3. A clause in the charter by a State of a banking corporation requiring it to "pay to the State an annual tax of one half of one per cent on each share of capital stock, which shall be in lieu of all other taxes," while it limits the amount of tax on each share of stock in the hands of the shareholders, does not apply to or cover the case of the capital stock of the corporation or its surplus and accumulated profits, but such capital stock, surplus and accumulated profits are liable to be taxed as the State may determine. *Shelby County* v. *Union & Planters' Bank*, 149.
4. The previous cases examined and shown (especially *Farrington* v. *Tennessee*, 95 U. S. 679, and *Gordon* v. *Appeal Tax Court*, 3 How. 133) not to be inconsistent with the above decision. *Ib.*
5. A state statute granting to a company incorporated by it "all the rights and privileges" which had been granted by a previous statute of the State to another corporation, does not confer upon the new company an exemption from taxation beyond a defined limit which was conferred upon the other company by the act incorporating it. *Phœnix Fire & Marine Ins. Co.* v. *Tennessee*, 174.
6. The ruling of the highest court of a State, in a suit to recover taxes alleged to be due, concerning the effect to be given to a former judgment of the same court as to the liability of the same parties to pay similar taxes previously assessed, is not subject to review by this court. *Ib.*
7. In 1860 the legislature of Tennessee incorporated the Energetic Insurance Company of Nashville, with a proviso in the charter limiting its taxation to one quarter of one per cent on its capital stock. In 1870 a new constitution was adopted by the State, forbidding such limitation. In 1884 the surviving corporators of the Energetic Insurance Company,