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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1895

J. C. BANCROFT DAVIS
REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

CORRECTION.

In volume 161, on page 635, the following corrections should be made:

Line 13 from bottom, change "And the same great and learned justice adds:" to "As said by counsel for the appellant:"

Last two lines, take out "*Boyd* v. *The United States*, 116 U. S. 626."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1895.

UNITED STATES *v.* TEXAS.

ORIGINAL.

No. 8. Original. Argued October 23, 24, 25, 1895. — Decided March 16, 1896.

The treaty between the United States and Spain, made in 1819, and ratified in 1821, provided that "the boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of the river to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818." *Held*,

(1) That the intention of the two governments, as gathered from the words of the treaty, must control, and that the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty;

(2) But, looking at the entire instrument, it is clear that, while the parties took the Melish map, improved to 1818, as a basis for the final settlement of the question of boundary, they contemplated, as shown by the fourth article of the treaty, that the line was subse-

quently to be fixed with more precision by commissioners and surveyors representing the respective countries;

(3) That the reference in the treaty to the 100th meridian was to that meridian astronomically located, and not necessarily to the 100th meridian as located on the Melish map;

(4) That the Melish map located the 100th meridian far east of where the true 100th meridian is, when properly delineated;

(5) That the Compromise Act of September 9, 1850, and the acceptance of its provisions by Texas, together with the action of the two governments, require that, in the determination of the present question of boundary between the United States and Texas, the direction in the treaty, "following the course of the Rio Roxo westward to the degree of longitude 100 west from London," must be interpreted as referring to the true 100th meridian, and, consequently, the line "westward" must go to that meridian, and not stop at the Melish 100th meridian;

(6) That Prairie Dog Town Fork of Red River is the continuation, going from east to west, of the Red River of the treaty, and the line, going from east to west, extends up Red River and along the Prairie Dog Town Fork of Red River to the 100th meridian, and not up the North Fork of Red River;

(7) That the act of Congress of February 24, 1879, c. 97, creating the Northern Judicial District of Texas, is to be construed as placing Greer County in that district for judicial purposes only, and not as ceding to Texas the territory embraced by that county.

The territory east of the 100th meridian of longitude, west and south of the river now known as the North Fork of Red River, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red River and the river now known as the Prairie Dog Town Fork or South Fork of Red River until such line meets the 100th meridian of longitude — which territory is sometimes called Greer County — constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America.

Each party will pay its own costs.

By the act of May 2, 1890, c. 182, § 25, 26 Stat. 81, 92, the Attorney General of the United States was "directed to commence in the name and on behalf of the United States, and prosecute to a final determination, a proper suit in equity in the Supreme Court of the United States against the State of Texas, setting forth the title and claim of the United States

to the tract of land lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary and a part of its land, and designated on its map as Greer County."

This suit was commenced in compliance with that direction. A demurrer to the bill was heard and overruled at October Term 1891, (143 U. S. 621,) and the case was at this term heard upon its merits.

Mr. Attorney General, *Mr. Solicitor General* and *Mr. Edgar Allan* for the United States.

Mr. George Clark, *Mr. M. M. Crane* and *Mr. A. H. Garland* for the State of Texas. *Mr. Charles A. Culberson*, *Mr. George R. Freeman* and *Mr. H. J. May* were on the briefs for the State.

I. The map of Melish, improved to the first of January, 1818, made part of the treaty, conclusively establishes the claim of Texas to the territory in controversy, and known as Greer County.

The boundary line from the mouth of the Sabine River to the point where the line strikes the Rio Roxo of Natchitoches or Red River is not disputed, and that on the north and west of the State was settled by the act of September 9, 1850. This act of 1850 has no reference to the boundary line from the point where it intersects Red River, thence up that river to the 100th meridian and northward, or to the disputed territory. This is plain from the act itself, and it is expressly alleged in the bill. The case therefore turns upon that portion of the treaty providing, "then following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River and running thence by a line due north to the river Arkansas," and "the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818."

Accepting the admission and argument of complainants' counsel, that unless the act of 1850 operates to settle the eastern boundary line of the State against her claim, the territory rightfully belongs to Texas, other facts make it indisputable that the act can be given no such effect. In the first place, when this act was passed, the actual intersection of the 100th meridian with Red River had not been determined, and the meridian referred to in the act necessarily and logically was that shown on the map of Melish made part of the treaty. The title of the act shows that it is confined to the northern and western boundaries. By the first section of the act Texas agreed that "her boundary *on the north*" should commence at the point of intersection of the 100th meridian with the parallel 36° 30′, and by the second section ceded to the United States "all her claim to territory *exterior*" to this line, thus clearly and undoubtedly ceding only territory *north* of this line. This is also shown by the controversy which led to the passage of this act; for it is well known that it had no reference to the eastern boundary line of the State. At that time the United States had not asserted any claim to Greer County, and did not do so till years afterwards. The eastern boundary line of the State is regarded by the United States as that laid down by Melish on his map of 1818; the act of 1850 has been so construed by Congress. By the act of the legislature of Texas of May 2, 1882, the United States were invited to appoint commissioners to mark the line thus defined, and the Congress accepted said invitation by the act of January 31, 1885, reciting the terms of the treaty of 1819, and directing the commissioners to "mark the point where the 100th meridian of longitude crosses Red River *in accordance with the terms of the treaty aforesaid.*" In view of these solemn declarations by Congress, together with the pleadings and other considerations mentioned, it is manifest that the 100th meridian of longitude named in the act of 1850 is that laid down by Melish.

But if the intersection of the 100th meridian of longitude with the parallel 36° 30′ north latitude, constituting the beginning of the north boundary line of Texas under the act of 1850,

shall be held to mean the actual, and not the Melish intersection, it does not follow that the actual, and not the Melish 100th meridian constitutes the eastern boundary line of the State. Before this court can reach the conclusion contended for by complainants, it must set at naught the pleadings in the cause, the repeated declarations of the sovereign power of the United States, and the obvious meaning of the act of purchase. Nor is the situation altered by the fact that this construction will leave for future determination the ownership of a portion of the northeastern territory. That has occurred before. *Cook* v. *United States*, 138 U. S. 157. It should not be used as a pretext to disturb the integrity of our territory. The small consideration of ten millions of dollars, paid under the act of 1850, in itself refutes such a contention; and the United States, now grown imperial in every national aspect, should limit rather than enlarge the terms of contracts with members of the Union.

Counsel for the United States does not appear to contest the proposition that the map of Melish constitutes part of the treaty, and that its representation of degrees of latitude and longitude is controlling unless affected by the act of 1850. The rule is thoroughly settled. *McIver* v. *Walker*, 9 Cranch, 173; *McIver* v. *Walker*, 4 Wheat. 444; *Noonan* v. *Lee*, 2 Black, 499; *Davis* v. *Rainesford*, 17 Mass. 207; *Jenkins* v. *Trager*, 40 Fed. Rep. 726; *Koenigham* v. *Miles*, 67 Texas, 113; *Cragin* v. *Powell*, 128 U. S. 691; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178.

If there were otherwise doubt of the matter, the fact that the treaty expressly provides for determining the *actual* source of the Arkansas River, regardless of the map, establishes beyond question that the purpose was to leave all else to the delineation of the map. While this rule is practically admitted, it seems to be insisted by counsel that the Melish delineation of upper Red River is inaccurate, that the North and South Forks of that river, as now known, are not represented upon that map, and that the United States had no other knowledge of the country other than that afforded by the Melish map. Recalling the admission heretofore referred

to, that according to that map Greer County is in Texas, it is not material, if true, that the forks are not represented, or that the map is not accurate, or that the United States were without other information, and a decree should be entered for the defendant regardless of these matters. For reasons to be stated, it is certain, however, that both of the forks of the river are laid down on the Melish map of 1818, that their existence was fully known to the United States and Spain at the date of the treaty, and that the map is surprisingly accurate.

Before discussing these propositions, however, we call attention to the strong testimony to the effect that the South Fork, or Prairie Dog Town River, is not laid down on the Melish map, that the treaty was entered into without reference to it, and consequently the North Fork is the river of the treaty. Especially we invite attention to the testimony in the record of Mr. Charles W. Pressler, at present and for 38 years engaged as chief and assistant draughtsman in the General Land Office of Texas, and the most experienced and competent map maker in the State.

The testimony demonstrates that the North and South Forks of Red River are laid down on the Melish map of 1818 and made part of the treaty, the confluence being just west of the 101st meridian of longitude, between the 33d and 34th parallels of latitude. By the scale of this map the confluence is about 70 miles west of the intersection of the 100th meridian with Red River, and therefore the territory in controversy belongs to Texas. The propositions which we now purpose establishing are that the parties to the treaty were well informed of the geographical features of the country in the vicinity of the forks of Red River; in reference to these features they agreed upon the 100th meridian of west longitude, as laid down on the map of Melish, as the boundary line from Red River to the Arkansas, whether astronomically correct or not; that said boundary line was thus fixed by the map and with reference to the great natural landmarks shown on the face of the map; that its position so fixed is far east of the forks of Red River and of Greer County, and of the line now claimed by

complainants to be the true 100th meridian; and that the map of Melish delineates the North and South Forks of Red River and is substantially accurate. The position assumed by complainants, that the section of country in dispute was unknown to them and to the Spaniards, is thoroughly disproved by the record. It will be shown that it was known to the Spanish government and the United States in this order. The negotiations between the parties leading up to the treaty show that the territory which had been under discussion at the time of the treaty, was bounded on the south by a line along Red River, from the vicinity of Natchitoches to its head, and thence west to the Pacific Ocean, and on the north by a line from the mouth of the Missouri River westward to the Pacific Ocean, along the courses of the Missouri and Columbia rivers; but that towards the close of the discussion, it was narrowed principally to the region between the Red River, west of Natchitoches and the Arkansas.

The question of boundary had existed from the acquisition of Louisiana by the United States in 1803, and both parties to the treaty had, for many years, been informing themselves of this extensive region and its geographical outline.

The record shows that it was known to the Spaniards as early as 1541, when Coronado made a military expedition from the mouth of the Puerco or Pecos River, reaching the region of the Arkansas, Kansas and Platte Rivers, occupied by the Quivera Indians, subsequently, in 1778, called the Pawnees or Pananas by the Spaniards.

It was visited and occupied by them continually from that time until the date of the treaty, from Santa Fé as a base of operations, as shown by the record.

[Counsel then referred in detail to Spanish expeditions in 1601, 1611, 1629, 1632, 1650, 1654, 1698; and to French expeditions in 1698, 1719, 1722, 1724, 1727, 1729 and 1759.]

But there still remains to be mentioned perhaps the most conclusive evidence of the familiar knowledge the Spanish government had of the region under discussion.

On the face of the country, from the northeastern borders of Texas along the Red River to the head of the North Fork

of Red River, there are still to be seen traces of Spanish civilization and enterprise, which show the occupancy of all that river, including the North Fork to its source, by the Spaniards, from ancient times to dates within the memory of men now living, while no similar or other signs of such occupancy by them have been discovered on the South Fork of that river.

About the year 1791 the Spanish government laid out two roads eastward from Santa Fé; one to a point in the Province of Louisiana known as the Establishment of San Louis of the Illinois, which was an eastern tributary of the Arkansas River, debouching into it nearly opposite the mouth of the Canadian, a western tributary of the same river; and the other to Natchitoches on Red River, in the Province of Louisiana.

These roads were by way of the North Fork of Red River, and the Kiowa and Panis villages on that stream; the former about 75 miles and the latter about 35 miles above its junction with the Prairie Dog Town River, or South Fork of Red River, and passing down the North Fork, in places for some miles having two tracks, by reason of cut-offs, reached the junction of the North and South Forks of Red River on the east side of the North Fork, and there separated, one going toward the Illinois River, which lies a short distance west of Fort Smith, Arkansas, and the other crossing the river below said junction to the south side, and passing down that side of the river towards Natchitoches, dividing into several tracks in places, by reason of cut-offs; and the stream down which these roads passed was the stream known as the Rio Roxo de Natchitoches, the boundary line of the treaty of 1819, south and west of which is the territory of Greer County.

That the two roads were laid out from Santa Fé, the capital of the province of New Mexico, to the points mentioned above, is shown by the public archives of the territory of New Mexico.

The points to which they were laid out, the Illinois River and Natchitoches, are both delineated on Pike's map accompanying his published account of his expedition up the Arkansas River, put in evidence by complainants. That of the Illinois, as shown by several modern maps in the record, appears to be

a little over one half of a degree west of Fort Smith, Arkansas; while that of Natchitoches appears to be on the Red River, in the State of Louisiana. Mésières describes these two localities as being about the same distance from the Taovayase villages as San Antonio and Santa Fé.

The following facts in the record show that these roads were laid out and became well travelled roads, to and from the North Fork of Red River.

There remains an old, well worn and beaten road, long since fallen into disuse, but still visible and well marked on the face of the ground, from the northeast corner of Texas up the south side of Red River, by way of an old Spanish fort in Montague County on Red River, to a neighborhood above the mouth of the Wichita River, and thence across the Red River northward to the forks of the river, on the east side of the North Fork of Red River; thence up the same to the site of the old Panis villages, and to the site above occupied by the Kiowa Indians in 1833, about 75 miles above the forks of Red River; and thence by way of the head of the False Wichita River toward Santa Fé, in places dividing into two roads where there are bends in the river, which road, as far back as the memory of very old men reaches, has been known and reputed, in the neighborhood through which it passes, as the old Santa Fé road from Natchitoches; and as late as 1819 was frequented by Mexican traders coming from Santa Fé, and as late as 1838 or 1839 was used by a party of Chihuahua traders coming from Santa Fé; while as late as 1833 there existed an old, well worn, but disused, wagon road from the forks of Red River eastward to the region of the Illinois River, near Fort Smith, Arkansas, which was travelled by a large party of men from Fort Smith to the forks of Red River in 1833, where it intersected the other old road from Natchitoches to Santa Fé.

The ruins of a number of old Spanish villages and fortifications still exist along the route of the old Natchitoches and Santa Fé road, on the North Fork of Red River, and on this river below its junction with the Prairie Dog Town River, which conclusively demonstrates our proposition of familiar

knowledge with the North Fork, and shows the reason for the old road, and why the North Fork was deemed and named the Red River of Natchitoches, while the absence of any such evidence of occupancy and familiar knowledge of the Prairie Dog Town River country equally demonstrates the improbability that it was ever deemed the Rio Roxo of Natchitoches prior to the treaty of 1819.

In 1762, by the treaty of Fontainebleau, the territory of Louisiana was transferred by France to Spain. That this region was, at the time of that treaty, well known to the Spaniards counsel claimed was shown by an abundance of evidence in the record, which they referred to in detail.

The same region was well known to the government of the United States, at the date of the treaty, especially along its northern border, and along the Arkansas River, and at the point of intersection of that river by the 100th meridian, as laid down on Melish's map.

In 1803, the United States having arranged for the acquisition of Louisiana, both Upper and Lower, sent out Messrs. Lewis and Clark to explore the country between the mouth of the Missouri and the Pacific Ocean. These men performed this task with such wonderful fidelity, that their fame has to this day reached the ear of every schoolboy in the land; and their reports show that at that time the whole region between the Arkansas and Missouri rivers was occupied by American, English, and French traders.

They were particularly instructed by President Jefferson in these words, to wit: "Although your route will be along the Missouri, yet you will endeavor to inform yourselves by inquiry of the character and extent of the country watered by its branches, and especially on its south side. The North River, or Rio Bravo, which runs into the Gulf of Mexico, and the North River, or Colorado, which runs into the Gulf of California, are understood to be the principal streams heading opposite the headwaters of the Missouri, and running southwardly. Whether the dividing grounds between the Missouri and them are mountainous or flat lands, what are their distances from the Missouri, the character of the intermediate

country, and the people inhabiting it, are worthy of particular attention."

They met and had dealings and intercourse with divers traders from St. Louis, who traded up the Osage, Platte, and Kansas Rivers, and reported minutely the character of the country and its population, even extending to the Pawnees on Red River.

The statistical table prepared by them, to which the attention of the United States Congress was called by President Jefferson in his special message, in 1808, shows a minute knowledge of the localities occupied by the Indians from the mouth of the Canadian to the head of the Arkansas, Platte, and Kansas Rivers, as well as minute statistics of their numbers, character, habits, associations, commerce, the people with whom they traded or were at war, and their condition generally. Counsel also called attention to Zebulon Pike's expedition in 1806; to Sibley's account in the same year, and to the two maps published with the account of Pike's expedition in 1810, concerning which they said: On their face it conspicuously appears that the United States, by Officers Wilkerson and Pike, had made careful and precise reconnoissance of all the region along the Arkansas River, from its mouth to its source, and especially about the apex of the great bend of the Arkansas, at which Wilkerson and Pike had camped and separated, one to explore the river to its mouth, and the other to explore it to its source; and at which the boundary line of the treaty, the 100th meridian of Melish's map, intersected the river.

It is clear, therefore, that the United States government, before the date of the treaty, had at command abundant means of knowledge of the whole country from the junction of the Verdigris, Canadian and Illinois Rivers with the Arkansas, described by Lieutenant Wilkerson, to the head of the latter, and from the mouth of Red River to the home of the Panis on the North Fork of the Red River, which was utilized till the date of the treaty.

In 1818 John Melish published in the city of Philadelphia the map which was made the map of the treaty of 1819. Looking at it, and along the 100th meridian of west longitude,

between the Red River and the Arkansas River, we are struck with the aptness of the language of the treaty that it was intended to designate with precision the limits of the respective bordering territories; for on both sides of that line we see delineated great natural landmarks which, if they exist on the ground, must necessarily fix and determine its locality with remarkable precision.

The parties to the treaty were both definitely notified by this map that the Red River forked west of that line, at a point nearly due south, but a little east of south, and about 207 miles by the scale of the map from the apex of the Great South Bend of the Arkansas River, and south of a mountainous region that extended along the North Fork on its north side toward the northwest, and then northward to the Arkansas River; and that to the northeast of that South Bend of the Arkansas River, and in close proximity to the 100th meridian limit, lay the apex of a Great North Bend of the same river; while close by, but on the opposite side of that meridian, was the notable point where Pike had commenced his explorations of that river, under the auspices of the United States government, in 1806, and that from the apex of that North Bend the river took its course in a long stretch to the southeast, till it reached the neighborhood of several contiguous and peculiarly shaped bends, about the mouth of Jefferson River, in a region northeast from the forks of Red River, and southeast from the South Bend of the Arkansas. And especially were they notified by this map that both of the forks or branches of Red River, and all of their headwaters, lay west of that line agreed upon as a boundary from the Red River to the Arkansas.

It is obvious from the record, that these several great natural features and outlines exist on the ground in the corresponding relative position to each other and to Melish's 100th meridian delineated on this map, and that the information by which these striking correlations were delineated must have been remarkably accurate for that day and time; and that the allegation of plaintiff, that in fact Melish had no knowledge of the existence of said forks of Red River, is untrue and reckless.

The forks of Red River are found in the relative position delineated.

The record shows that those forks have been found by careful astronomical observation to be about 227 miles south and 36 miles east of the apex of the Great South Bend of the Arkansas. It shows that the mountainous country north of the forks and north of the North Fork, and extending northward towards the Arkansas River, exists on the ground. It shows that the apex of a Great North Bend of that river, to the northeast of the apex of the South Bend, exists on the ground, in close proximity to the point where Pike commenced his exploration of the river in 1806. It shows that the long stretch of the Arkansas River southeast from the apex of the Great North Bend to the several contiguous and peculiar bends of the river about the mouth of the Salt Fork of modern maps, which is the Jefferson's River of Melish's map, exist on the ground. It shows that these peculiar bends of the river lie southeast from the apex of its Great South Bend, and northeast of the forks of Red River. It shows that these several great landmarks, as they exist on the ground, lie approximately in the same relative position to the line delineated by Melish for the 100th meridian of west longitude, as they are represented to be on the map, and especially that the forks of Red River are west of that line; and that all of the headwaters of both the North and South Forks, and also the mountains along the North Fork, lie west of that line, as they exist on the ground. And the conclusion is inevitable that the boundary line of the treaty, from Red River to the Arkansas along the meridian of the 100th degree west longitude, as laid down on Melish's map, lies east of the forks of Red River, and intersects the Arkansas River in the immediate vicinity and west of the apex of the Great North Bend of that stream, and also intersects the Red River at a point far below and east of the forks of that river, and lies far to the eastward of Greer County, and that this fact must have been fully understood and acted upon by both parties to the treaty since they made the 100th meridian, as laid down on this map, the boundary.

The parties to the treaty were well advised of the difficulty

and uncertainty of determining with precision and accuracy the position of meridian lines at that day and time. They were fully informed that Pike, with the use of the astronomical instruments and appliances with which he was provided, had laid down the 100th meridian of west longitude in reference to the Great North Bend of the Arkansas, about two degrees farther east than Melish had done, with the assistance of the recent surveys of Bringier.

The telegraph was then unknown, and the methods then in use of ascertaining the differences in time between Greenwich or Washington and the locality of the observer had proved too crude to be relied upon to fix with precision a boundary line; of which fact the parties to the treaty had a demonstration in the two maps just mentioned.

Hence the necessity of agreeing upon a diagram laying down the line of boundary in reference to great and stable natural landmarks upon a map, which should point out the unchanging and unchangeable localities had in view, to fix the position of the line.

Had the treaty been in 1806, and the absolute 100th meridian been made the boundary, and Pike been called on to mark it on the ground, he would have located it nearly two degrees east of the apex of the Great North Bend of the Arkansas River. (See his map.) But if the parties had surveyed the ground and made observations twelve years later with Bringier, whose data were adopted by Melish, the line would have appeared to be two degrees farther west, where Melish laid it down; and had the survey been postponed till forty years more had elapsed, Jones and Brown would have made the line appear more than fifty miles still farther to the westward, and west of the apex of the Great South Bend of the Arkansas River, and at least three degrees farther west than its determination by Pike in the year 1806.

To suppose the treaty-makers intended a line whose position might be shifted with every improvement in methods and instruments used in making astronomical observations, when expressly declaring that it should be as laid down on the map of the treaty, in the midst of great and unmistakable natural

land marks, is too unreasonable for discussion. It is worthy of remark, that after the treaty of boundary, Melish furnished his map to the historian Bonnycastle, and the latter published it in his New Spain as Melish's map in 1819, and that on its face the line of demarcation between the territories of Spain and the United States, indicated by a dotted line, is laid down as intersecting the Arkansas River at the Great Bend of that river (see Bonnycastle's New Spain); and that George Catlin's map of Indian Localities in 1833 still laid down the same boundary as intersecting that river at the same bend, where Melish laid down the 100th meridian, and corresponds to the line established as the boundary by Exhibit B. of C. Corner and his testimony.

II. If the treaty and map of Melish be disregarded, considered scientifically and historically, the North Fork is the main Red River, and consequently the territory is rightfully part of Texas.

Scientifically the North Fork is the main river, because it is the permanent and longest stream, discharges annually the greater volume of water, and imposes its course upon the river at and below the confluence; and historically it is the main river, because it was first discovered and was named and known as Red River, while the South Fork was named Prairie Dog Town River.

Without regard to the comparative length and breadth of their beds, however, the North Fork is shown to be the principal river in reference to the most important attributes of a river, to wit, the quantity of water which it furnishes, and its permanency as a flowing stream, and for that reason it was and is the stream properly considered the Red River of Natchitoches; and if the 100th meridian of west longitude, as laid down on Melish's map, and designated in the treaty of boundary as the boundary line, lies as far west as the forks of Red River, then the North Fork should be deemed the boundary line, and the territory to the south of it, including Greer County, should be held to be Texas territory.

After examining in detail a mass of testimony, which, they contended, established these propositions, counsel said: If it

be conceded, against the overwhelming testimony in the case, that the South Fork discharges the greater volume of water, the North Fork is yet the river of the treaty and the main Rio Roxo of Natchitoches, because of its first discovery and historical designation as such, upon which there is no conflict in the testimony. It is well known that the Missouri is the real continuation of the Mississippi River, but it is no more competent to reverse history there, upon principles of justice and national honor, than to disrupt conditions which have existed on Red River for three quarters of a century.

III. Since its independence, Texas has likewise asserted its ownership of said territory, and has persisted in such assertion down to the present day by acts of government, of legislation and of occupancy. No governmental act of the State can be tortured or perverted into acquiescence on its part in the claim of the United States. To the contrary the government of the United States has recognized the right of Texas to the territory in dispute by solemn acts of government, and is now estopped to claim the same or any part thereof.

One of the earliest acts of the Republic of Texas was the assertion of its boundary rights under the treaty of 1819 by virtue of an act of Congress of the Republic of Texas approved December 19, 1836, the first section of which read as follows:

Section 1. "That the civil and political jurisdiction of this Republic be and is hereby declared to extend to the following boundaries, to wit: Beginning at the mouth of the Sabine River and running west along the gulf of Mexico three leagues from land to the mouth of the Rio Grande; thence up the principal stream of said river to its sources; thence due north to the 42d degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning." 1 Paschal's Dig. of Laws, Art. 438.

After its admission as a State, by joint resolution adopted April 29, 1846, Texas asserted its exclusive right to its soil and boundaries in the following words:

Section 1. "That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of

Texas was acquired by the valor of the people thereof, and was by them vested in the government of the said Republic; that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States by the Constitution of the United States and by the general resolution of annexation subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes resident within the limits of the State to any portion of the soil thereof, and that we recognize no right in the government of the United States to make any treaty of limits with the said Indian tribes without the consent of the government of this State." 1 Paschal's Dig. of Laws, Art. 441.

It continued to assert its jurisdiction over the territory in dispute by legislation beginning in 1839, and extending through all the intervening years.

In addition to this, Texas has donated to Greer County, outside of the limits of Greer County, 17,712 acres (four leagues) for county school purposes. It has erected sixty public school buildings in the county. In 1892 there were 2250 enrolled scholars in the public schools. In 1892, by the last school apportionment, Texas was distributing annually $11,844 of taxes collected from the people of Texas, among the inhabitants of Greer County for the purpose of public education on the basis of $5.26⅔ per pupil. It had established sixty-six district schools besides school communities, and sometimes they organized two or more institutions in a community for school purposes. Every school district had a school except two, in which they had exhausted their school money in erecting school buildings.

These facts briefly cited from the record, (and there is a vast accumulation of other evidence therein; but to which the attention of the court is directed,) manifest most clearly that Texas has been in the actual possession of the particular territory claimed by the United States in this suit, for a period of more than fifty years, claiming expressly under the treaty of 1819, as Mexico, its predecessor, had claimed before, and as had been claimed by Spain prior to the independence of

Mexico, from the date of the treaty until the termination of her dominion.

The record further abundantly attests, some of the evidence as to which has been cited already by us, that the United States by solemn acts of Congress had recognized this possession of Texas and had ripened it into a confirmed right, long anterior to the commencement of these proceedings.

In *Phillips* v. *Payne*, 92 U. S. 130, where an effort was made to avoid payment of taxes because of the alleged unlawful retrocession of Alexandria to Virginia, the court held that the party was estopped from questioning that.

Greer County is fixed, and has been since its organization in 1860, in a senatorial district and in a legislative district, one of the legislative districts of Texas, and has been constantly represented. It has been, and is, in a judicial district of the United States by act of Congress. It has been, and is, in a Congressional district. All that time it has had its position in a state judicial district. Not till about seven years ago did the Post Office Department cease to fix post offices in Greer county, Texas, which it had done regularly before then. At that time it, for some reason, changed the description, but it was too late for any purpose touching the rights of Texas to this property.

All this and much more that could be added, if need be, show that Greer County, Texas, has been recognized by people, private and public officials, both state and national, and by both state and national authorities, legislative, executive and judicial. Not more firmly fixed in their respective statehoods is Cook County in Illinois, or Bourbon County in Kentucky, or Bucks County in Pennsylvania.

Nations are prescribed and estopped as individuals, so are we told in *Phillips* v. *Payne*, *sup.* In this discussion we stand alone upon acts open and undisguised, and say nothing upon propositions to settle or to compromise, after it was thought by some that the line should be away below where it is, as all such efforts are for peace and quiet, and the law commends them and does not draw any admission from them.

The facts disclose two real acts of estoppel against the United States, substantial in their character.

(1.) The reimbursement of Texas for the disarmament of Snively's command was recommended by the President to Congress, and Congress in pursuance of such recommendation, promptly provided compensation. If Snively's command was not upon United States territory at the time of its disarmament by Captain Cooke, the Texans were there wrongfully and ought to have been disarmed, and their arms confiscated. There could be no claim for indemnity on the part of Texas for a wrongful act such as this. If it invaded the territory of a neighboring Republic in 1843 its troops should have been captured and their arms and supplies should have been confiscated; because for all intents and purposes they were acting as public enemies and by the law of nations were entitled to no grace. Yet, as is admitted, in 1847, the government of the United States made public reparation for the wrong done, practically confessing the wrong, and in effect declaring by the legislation, that the Texas troops were rightfully upon Texas territory at the time they were captured and their arms seized by Captain Cooke. This territory comprises the territory of Greer County, now in dispute, and it is too late now for the government to contend for a different finding.

(2.) A governmental act of more potent significance is in the legislation by Congress of 1879 creating the Northern Judicial District of Texas. The force and effect of this legislation is attempted to be parried by complainant in this cause by the insertion of long extracts from the reports of House Committees and statements by Chairmen of House Committees that this legislation was inadvertent and had and done in ignorance by the members of the Congress and Senators as to the true status of the territory embraced within such legislation. The counsel for the government seems to misapprehend or to defiantly disregard the force and potency of his own suggestion. Notwithstanding these reports of committees and *ex cathedra* utterances of chairmen of committees, this statute of Congress so disposing of Greer County, Texas, as a part of the territory of Texas, has been upon the statute

book for fifteen years unrepealed, unqualified, and unaffected. Can this court disregard such legislation? Can this court, with all its powers, afford to say, and especially upon the faint intimations of the record, that Congress did wrong, either from ignorance or any other motive? Not so. The record is made up, and this court and every State in the Union and every citizen of every State, and the United States itself, must abide by the record as made. Greer County is a part of Texas, so conceded by the government of the United States, which stands in law estopped by such governmental act.

IV. Should the court determine all questions submitted against the State of Texas, including that of estoppel, there certainly can be no doubt of the right of defendant to insist that the intersection of the 100th meridian with the river be accurately fixed. This has been done by Professor H. S. Pritchett against whose conclusion not a syllable of testimony has been adduced, and the line should be established as found by him, 3797.3 feet east of the initial monument placed by Messrs. Jones and Brown in 1858.

Mr. Justice Harlan delivered the opinion of the court.

By the act of Congress of May 2, 1890, c. 182, establishing a temporary government for the Territory of Oklahoma, and enlarging the jurisdiction of the United States court in the Indian Territory, it was declared that that act should not apply to "Greer County" until the title to the same had been adjudicated and determined to be in the United States. And that there might be a speedy judicial determination of that question the Attorney General of the United States was directed to institute in this court a suit in equity against the State of Texas, setting forth the title and claim of the United States "to the tract of land lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary and a part of its land, and designated on

its map as Greer County;" the court, on the trial of the case, in its discretion, and so far as the ends of justice would warrant, to consider any evidence taken and received by the Joint Boundary Commission under the act of Congress, approved January 31, 1885. 26 Stat. 81, 92, § 25.

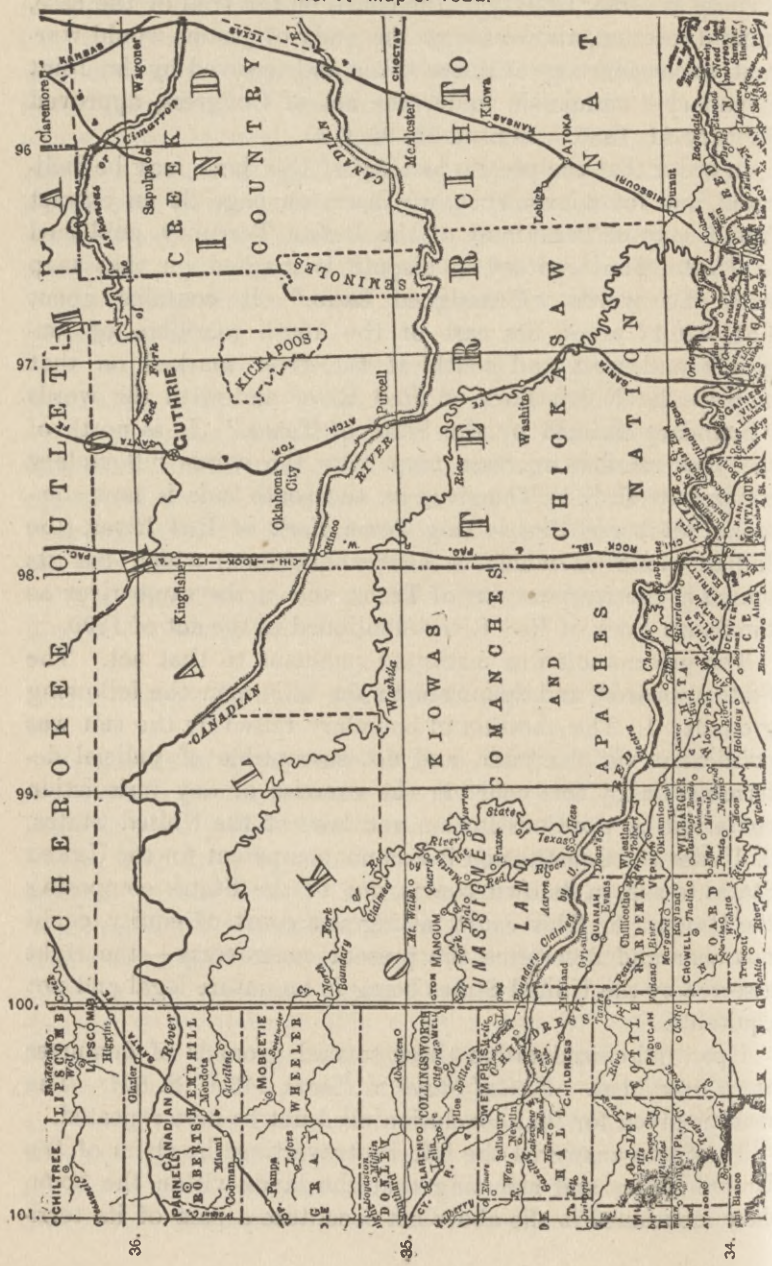
In order that the precise locality of this land may be indicated, and for convenience, we insert on page 22 an extract from a map of Texas and of the Indian Territory, published in 1892. The territory in dispute is marked on that map with the words "Unassigned Land." It contains about 1,511,576.17 acres, lies east of the 100th meridian of longitude and west and south of the river marked on that map as the North Fork of Red River and with the words "Boundary claimed by the State of Texas." It is north of the line marked on that map with the words "Boundary claimed by U. S." The river on the south side is now commonly known as Prairie Dog Town Fork of Red River, (the Indian name of which is Kecheahquehono,) which has its source in the western part of Texas, and is the same river as the South Fork of Red River mentioned in the act of 1890.

The present suit was instituted pursuant to that act. The State appeared, and demurred to the bill upon the following grounds: 1. The question of boundary raised by the suit was political in its character, and not susceptible of judicial determination by this court in the exercise of any jurisdiction conferred by the Constitution and laws of the United States. 2. Under the Constitution it was not competent for the United States to sue, in its own courts, one of the States composing the Union. 3. This court, sitting as a court of equity, could not hear and determine the present controversy — the right asserted by the United States being in its nature legal and not equitable.

Upon full consideration these several grounds of demurrer were overruled. *United States* v. *Texas*, 143 U. S. 621. The reasons given for that conclusion need not be here repeated.

The State answered the bill, controverting the claim of the United States and asserting that the lands within the boundary mentioned in the above act constitute a part of its terri-

No. 1. Map of 1892.



tory. The United States filed a replication, and proofs having been taken, the case is now before the court upon its merits.

Both parties assert title under certain articles of the treaty between the United States and Spain, made February 22, 1819, and ratified February 19, 1821. 8 Stat. 252, 254, 256.

Before examining those articles, it will be useful to refer to the diplomatic correspondence that preceded the making of the treaty. That correspondence commenced during the administration of President Madison, and was concluded under that of President Monroe. It appears that the negotiations upon the subject of the boundaries between the respective possessions of the two countries was more than once suspended because certain demands on the part of Spain were regarded by the United States as wholly inadmissible. 4 American State Papers, Foreign Relations, pp. 425, 430, 438, 439, 452, 464, 465, 466, 478. Finally, on the 24th day of October, 1818, the Spanish minister, "to avoid all cause of dispute in future," proposed to Mr. Adams, Secretary of State, that the limits of the possessions of the two governments west of the Mississippi should be designated by a line beginning "on the Gulf of Mexico, between the rivers Mermento and Calcasia, following the Arroyo Hondo, between the Adaes and Natchitoches, crossing the Rio or Red River at the thirty-second degree of latitude, and ninety-third of longitude from London, according to Melish's map, and thence running directly north, crossing the Arkansas, the White and the Osage Rivers, till it strikes the Missouri, and then following the middle of that river to its source, so that the territory on the right bank of the said river will belong to Spain, and that on the left bank to the United States. The navigation, as well of the Missouri as of the Mississippi and Mermento, shall remain free to the subjects of both parties." He also proposed that, in order "to fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations," each of the contracting parties should appoint a commissioner and surveyor, who should run and mark the line, and make out plans and keep journals of

their proceedings, the result agreed upon by them to be considered part of the treaty, and have the same effect as if inserted in it. Annals of Congress, 15th Cong. 2d Sess. 1819, 1890, 1900.

To this proposition Mr. Adams, under date of October 31, 1818, replied: "Instead of it, I am authorized to propose to you the following, and to assure you that it is to be considered as the final offer on the part of the United States: Beginning at the mouth of the river Sabine, on the Gulf of Mexico, following the course of said river to the thirty-second degree of latitude; the eastern bank and all the islands in the said river to belong to the United States, and the western bank to Spain; thence, due north, to the northernmost part of the thirty-third degree of north latitude, and until it strikes the Rio Roxo, or Red River; thence, following the course of the said river, *to its source, touching the chain of the Snow Mountains* in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts, as marked on Melish's map; thence to the summit of the said mountains, and following the chain of the same to the forty-first parallel of latitude; thence, following the said parallel of latitude, 41°, to the South Sea. The northern bank of the said Red River, and all the islands therein, to belong to the United States, and the southern bank of the same to Spain." "It is believed," Mr. Adams said, "that this line will render the appointment of commissioners for fixing it more precisely unnecessary, unless it be for the purpose of ascertaining the spot where the river Sabine falls upon latitude 32° north, and the line thence due north to the Red River, and the point of latitude 41° north on the ridge of the Snow Mountains." Annals of Congress, 15th Cong. 2d Sess. 1903, 1904.

This proposition was rejected by the Spanish minister, and in his letter of November 16, 1818, he said: "I will undertake to admit the river Sabine instead of the Mermento as the boundary between the two powers, from the Gulf of Mexico, on condition that the same line proposed by you shall run due north from the point where it crosses the river Roxo (Red River) until it strikes the Mississippi, and extend thence along

the middle of the latter to its source, leaving to Spain the territory lying to the right, and to the United States the territory lying to the left of the same." To this Mr. Adams replied under date of November 30, 1818: "As you have now declared that you are not authorized to agree, either to the course of the Red River (Rio Roxo) for the boundary, or to the forty-first parallel of latitude, from the Snow Mountains to the Pacific Ocean, the President deems it useless to pursue any further the attempt at an adjustment of this object by the present negotiation. I am therefore directed to state to you that the offer of a line for the western boundary, made to you in my last letter, is no longer obligatory upon this government. Reserving, then, all the rights of the United States to the ancient western boundary of the colony of Louisiana by the course of the Rio Bravo del Norte, I am," etc. Annals of Congress, 15th Cong. 2d Sess. 1908, 1942.

The negotiations were resumed in the succeeding year and the Spanish minister wrote to Mr. Adams, under date of February 1, 1819: "Having thus declared to you my readiness to meet the views of the United States in the essential point of their demand, I have to state to you that His Majesty is unable to agree to the admission of the Red River *to its source*, as proposed by you. *This river rises within a few leagues of Sante Fé*, the capital of New Mexico, and as I flatter myself the United States have no hostile intentions towards Spain, at the moment we are using all our efforts to strengthen the existing friendship between the two nations, it must be indifferent to them to accept the Arkansas instead of the Red River as the boundary. This opinion is strengthened by the well known fact, that the intermediate space between these two rivers is so much impregnated with nitre as scarcely to be susceptible of improvement. In consideration of these obvious reasons, I propose to you, that, drawing the boundary line from the Gulf of Mexico, by the river Sabine, as laid down by you, it shall follow the course of that river to its source; thence, by the ninety-fourth degree of longitude, to the Red River of Natchitoches, and along the same to the ninety-fifth degree, and crossing it at that point, to run by a line due north to the Ar-

kansas, and along it to its source; thence, by a line due west till it strikes the source of the river San Clemente, or Multnomah, in latitude 41°, and along that river to the Pacific Ocean; the whole agreeably to Melish's map." Annals of Congress, 15th Cong. 2d Sess. 2111, 2112.

The last proposition made by Mr. Adams to the Spanish minister contained the following: "Art. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine in the sea; continuing north, along the western bank of that river, to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; thence following the course of the Rio Roxo westward, to the degree of longitude one hundred and two degrees west from London and twenty-five degrees from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence following the course of the southern bank of the Arkansas, to its source in latitude forty-one degrees north; and thence, by the parallel of latitude, to the South Sea; the whole being as laid down in Melish's map of the United States, published in Philadelphia, improved to the 1st of January, 1818. But, if the source of the Arkansas River should be found to fall north or south of latitude forty-one degrees, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude forty-one degrees, and thence along the said parallel to the South Sea; the Sabine and the said Red and Arkansas Rivers, and all the islands in the same, throughout the course thus described, to belong to the United States, and the western bank of the Sabine, and the southern banks of the said Red and Arkansas Rivers throughout the line thus described to belong to Spain. And the United States hereby cede to His Catholic Majesty all their rights, claims and pretensions to the territories lying west and south of the above described line; and His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of said line, and, for himself, his heirs and successors, renounces

all claims to said territories forever." The Spanish minister required that "the boundary between the two countries shall be the middle of the rivers, and that the navigation of the said rivers shall be common to both countries." Mr. Adams replied that the United States had always intended that "the property of the river should belong to them," and he insisted on that point "as an essential condition, as the means of avoiding all collision, and as a principle adopted henceforth by the United States in its treaties with its neighbors." He agreed, however, "that the navigation of the said rivers to the sea shall be common to both people." The Spanish minister assented "to the 100th degree of longitude and to remove all difficulties, to admit the 42d instead of the 43d degree of latitude from the Arkansas to the Pacific Ocean." Annals of Congress, Appendix, 15th Cong. 2d Sess. 2120, 2121, 2123.

We have alluded to this diplomatic correspondence to show the circumstances under which the treaty of 1819 was made, and to bring out distinctly two facts that are of some importance in the present discussion: 1. That the negotiators had access to the map of Melish, improved to 1818 and published at Philadelphia. 2. That the river referred to in the correspondence as Red River was believed by the negotiators to have its source near Santa Fé and the Snow Mountains.

This brings us to the treaty itself. Its third and fourth articles are in these words:

"ART. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or *Red River; then following the course of the Rio Roxo, westward, to the degree of longitude* 100 *west from London and* 23 *from Washington;* then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's

map of the United States, published at Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas River shall be found to fall north or south of latitude 42°, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine, and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say: the United States hereby cede to His Catholic Majesty, and renounce forever all their rights, claims and pretensions to the territories lying west and south of the above-described line; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever.

"Art. 4. To fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a Commissioner and a Surveyor, who shall meet before the termination of one year, from the date of the ratification of this treaty, at Natchitoches, on the Red River, and proceed to run and mark the said line, from the mouth of the Sabine to the Red River, and from the Red River to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42, to the South Sea: they shall make out plans, and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree

respecting the necessary articles to be furnished to those persons, and also as to their respective escorts, should such be deemed necessary." 8 Stat. 252, 254, 256.

So much of the Melish map of 1818 as is necessary to show its bearing on the present inquiry is reproduced on pages 30 and 31.

It may be observed here that the 100th meridian of longitude is inaccurately located on this map. That meridian, astronomically located, is more than one hundred miles farther west than is indicated by the Melish map. This fact is clearly shown by the record, and is not seriously questioned.

By the treaty of 1828, between the United States of America and the United Mexican States, concluded January 12, 1828, the dividing limits of the respective countries were declared to be the same as those fixed by the treaty of 1819. 8 Stat. 372.

The Republic of Texas, by an act passed December 19, 1836, declared that the civil and political jurisdiction of that Republic extended to the following boundaries, to wit: "Beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line, as defined in the treaty between the United States and Spain, to the beginning; and that the President be, and is hereby, authorized and required to open a negotiation with the government of the United States of America, so soon as, in his opinion, the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty." 1 Sayles' Early Laws of Texas, Art. 257.

On the 25th of April, 1838, a convention was concluded between the United States and the Republic of Texas for marking the boundary referred to in the above treaty of 1828, as follows:

"Whereas the treaty of limits made and concluded on the twelfth day of January, in the year of our Lord one thousand, eight hundred and twenty-eight, between the United States of America of the one part and the United Mexican States of

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No. 2. Melish Map of 1818, Western Half.

No. 2. Melish Map of 1818, Eastern Half.

the other, is binding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the United Mexican States; And whereas it is deemed proper and expedient, in order to avoid future disputes and collisions between the United States and Texas in regard to the boundary between the two countries as designated by said treaty, that a portion of the same should be run and marked without unnecessary delay: The President of the United States has appointed John Forsyth their Plenipotentiary, and the President of the Republic of Texas has appointed Memucan Hunt its Plenipotentiary; and the said Plenipotentiaries having exchanged their full powers, have agreed upon and concluded the following articles: Article I. Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the termination of twelve months from the exchange of the ratifications of the convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red River. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. Article II. And it is agreed that until this line is marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised." Treaties and Conventions, 1079, ed. 1889. By the act of Congress of January 11, 1839, c. 2, provision was made for carrying this convention into effect. 5 Stat. 312. It does not appear that anything of importance was accomplished under that act.

By a joint resolution passed March 1, 1845, Congress consented that "the territory properly included within and rightfully belonging to the Republic of Texas" might be erected into a State to be admitted into the Union, one of the conditions of such consent being that the new State be formed, subject to the adjustment by the United States of all questions of boundary that might arise with other governments. 5 Stat. 797. The conditions prescribed were accepted by Texas. 1 Sayles' Early Laws of Texas, Art. 1531. And by the joint resolution of Congress, approved December 29, 1845, Texas was admitted as one of the States of the Union, on an equal footing in all respects with the original States. 9 Stat. 108.

Then came the act of Congress, approved September 9, 1850, c. 49, 9 Stat. 446, entitled "An act proposing to the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico." By that act certain propositions were made to the State of Texas, which, being accepted, were to be binding upon the United States and the State. Among them were the following:

"First. The State of Texas will agree that her boundary *on the north* shall commence at the point *at which the meridian of one hundred degrees west from Greenwich* is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico. Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she *agrees to establish* by the first article of this agreement. Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender

to the United States of her ships, forts, arsenals, custom houses, custom-house revenues, arms and munitions of war, and public buildings, with their sites, which became the property of the United States at the time of the annexation. Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States," and agreed to "be bound by the terms thereof, according to their import and meaning." 9 Stat. 446, 447.

The State accepted these propositions by an act, approved November 25, 1850, and agreed to "be bound by the terms thereof according to their import and meaning." 2 Sayles' Early Laws of Texas, Art. 2127.

In the light of these general facts, we recur to the treaty of 1819, from which it will be seen that the line agreed upon — starting from the point where the line due north from the Sabine River, at the 32d degree of latitude, strikes the Rio Roxo of Natchitoches or Red River — followed "the course of the Rio Roxo *westward* to the degree of longitude 100 west from London and 23 from Washington."

The contention of the United States is that this requirement cannot be met except by going westward along and up the Prairie Dog Town Fork of Red River to the point where (as shown on the first of the above maps) that river intersects the 100th meridian — the government claiming that that river, and not the North Fork of Red River, is a continuation or the principal fork of the Red River of the treaty.

The State insists that, even if the treaty be interpreted as referring to the true 100th meridian of longitude, and not to that meridian as located on the Melish map of 1818, "the course of the Rio Roxo westward" from the intersection of the line extending north from Sabine River to Red River, takes the line, not westwardly along the Prairie Dog Town Fork of Red River, but northwardly and northwestwardly up the North Fork of the Red River, (from its intersection

with Red River,) to the point where the latter fork crosses the true 100th meridian, between the thirty-fifth and thirty-sixth degrees of latitude.

But at the outset of the discussion the State propounds this proposition: That the treaty of 1819 having declared that the boundary lines between the United States and Spain should be as laid down on Melish's map of 1818, it is immaterial whether the location of the 100th meridian of longitude on that map was astronomically correct or not, or whether the one or the other fork of Red River was or is the continuation of the main river; that the map of Melish having fixed the 100th degree of longitude west from Greenwich below and east of the mouth of the North Fork of Red River, as now known, is conclusive upon both governments, their privies and successors. If this position be sound, the case is for the State; for it is conceded that the entire territory in dispute is *west* of the 100th meridian, *as that meridian appears on the Melish map of* 1818, although it is, beyond all question, east of the true 100th meridian, astronomically located and as long recognized both by the United States and Texas.

The State's answer thus presents this issue: "That the line of said 100th meridian of longitude west from London, as laid down on said map of Melish, intersects the Rio Roxo, or Red River, a distance of many miles east of what is claimed by the complainant to be the true line of said meridian, and many miles east of the point where the Kecheahquehono [Prairie Dog Town Fork of Red River] empties its waters into the Rio Roxo of the treaty; and said meridian so laid down on Melish's map and extended north to the 42d parallel of north latitude includes, *as territory properly belonging to and conceded to Spain* under the terms of the treaty, *and belonging of right to Texas* by virtue of the establishment of her independence, a large part of the lands *now belonging to the Chickasaw and other tribes of Indians, under concessions by treaty, as well as a portion of the present States of Kansas and of Colorado, and a part of the territory of New Mexico.* Defendant shows that long before and after the date of said treaty of 1819 the King of Spain claimed all this territory

lying west of said 100th meridian of longitude and south of said 42d parallel of latitude as laid down upon Melish's map; and in effectuation of such claim exercised repeated acts of ownership and dominion over the same without question; and after securing her independence and establishment as an independent nation, the United Mexican States likewise asserted their dominion and authority over said territory; and Texas, both as a separate Republic and as a State of the Union, has claimed and exercised complete ownership and dominion over said territory, including the territory now in controversy, by occupation of said territory by her armies, and by extending the operation of her laws over the same, and by various other acts and declarations, until the happening of the matters and things now here to be shown and set forth."

Referring to the pleadings and to the act of Congress of January 31, 1885, in which the terms of the treaty are recited, and which directs the commissioners appointed under it to "mark the point where the 100th meridian of longitude crosses Red River in accordance with the terms of the treaty," the counsel for the State says: "But if the intersection of the 100th meridian of longitude with the parallel 36° 30′ north latitude, constituting the beginning of the north boundary line of Texas under the act of 1850, 9 Stat. 446, c. 49, shall be held to mean the actual, and not the Melish, intersection, it does not follow that the actual and not the Melish 100th meridian constitutes the eastern boundary line of the State. . . . Nor is the situation altered by the fact that this construction will leave *for future determination* the ownership of a portion of the northeastern territory."

If, as asserted by the State, this case should be determined upon the basis that the 100th meridian is where the Melish map located it, and not where it is in fact, this court may well decline to recognize a claim attended with such grave consequences as those suggested by the answer, unless it be clearly established.

Undoubtedly, the intention of the two governments, as gathered from the words of the treaty, must control; and the entire instrument must be examined in order that the real in-

tention of the contracting parties may be ascertained. 1 Kent Com. 174. For that purpose the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty. *McIver's Lessee* v. *Walker*, 9 Cranch, 173; *McIver's Lessee* v. *Walker*, 4 Wheat. 444; *Noonan* v. *Lee*, 2 Black, 499; *Cragin* v. *Powell*, 128 U. S. 691, 696; *Jefferis* v. *Omaha Land Co.*, 134 U. S. 178, 194. But are we justified, upon any fair interpretation of the treaty, in assuming that the parties regarded that map as absolutely correct, in all respects, and not to be departed from in any particular or under any circumstances? Did the contracting parties intend that the words of the treaty should be literally followed, if by so doing the real object they had in mind would be defeated? The boundary line was to begin at the mouth of the river Sabine, and continue north along the western bank of that river to the 32d degree of latitude. Was it intended that the Melish map should control in fixing the point where the Sabine River met that degree of latitude? Was the line due north from Sabine River to Red River to begin at the intersection of Sabine River with the true 32d degree of latitude, or where Melish's map indicated the place of such intersection? The two governments certainly intended that the line should be run from the Gulf along the western bank of the Sabine River, and after it reached Red River that it should follow the course of that river, leaving both rivers within the United States. But it cannot be supposed that they had in view the intersection of Sabine River with any degree of latitude other than the true 32d degree of latitude, nor the crossing of the line extending along the Red River westward with any meridian of longitude other than the true 100th meridian. The fourth article of the treaty shows that the contracting parties contemplated that the line should be fixed with more precision than it was then possible to do; and to that end provision was made for the appointment of commissioners and surveyors, who should run and mark it, and designate exactly the limits of both nations — the results of such proceedings, it was declared, to be considered part of the treaty, having the same force as if

inserted therein. Melish's map of 1818 was taken as a general basis for the adjustment of boundaries, but the rights of the two nations were made subject to the location of the lines, with more precision, at a subsequent time, by commissioners and surveyors appointed by the respective governments. So far as is disclosed by the diplomatic correspondence that preceded the treaty, the negotiators assumed for the purposes of a settlement of their controversy that Melish's map was, in the main, correct. But they did not and could not know that it was accurate in all respects. Hence they were willing to take it as the basis of a final settlement, the fixing of the line with more precision, and the designating of the limits of the two nations with more exactness, to be the work of commissioners and surveyors, who were to meet at a named time, and the result of whose work should become a part of the treaty. While the line agreed upon was, speaking generally, to be as laid down on Melish's map, it was to be fixed with more precision, and designated with more exactness, by representatives of the two nations.

But there is another, and, perhaps, stronger view of this question, and which is equally conclusive, even if the 100th meridian originally contemplated by the treaty of 1819 were assumed to have been the erroneous meridian line of Melish's map. This view rests upon the official acts of the general government and of Texas, and requires that the present controversy shall be determined upon the basis that the line, which by the treaty was to follow "the course of the Rio Roxo westward," extends to the true 100th meridian, thence by a line due north.

As heretofore stated, the Republic of Texas, by an act passed December 19, 1836, declared that its civil and political jurisdiction extended to the following boundaries: "Beginning at the mouth of the Sabine River and running west along the Gulf of Mexico three leagues from the land, to the mouth of the Rio Grande; thence up the principal stream of said river to its source; thence due north to the forty-second degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain, to

the beginning." The President of that Republic was authorized and required by the same act to open a negotiation with the United States to ascertain and define the boundary as agreed upon in that treaty. 1 Sayles' Early Laws of Texas, Art. 257. This boundary had not been defined when Texas was admitted as a State into the Union, with the territory "properly included within and rightfully belonging to the Republic of Texas." The settlement of that question, together with certain claims made by Texas against the United States, were among the subjects that engaged the attention of Congress during the consideration of the various measures constituting the Compromises of 1850. The result was the passage of the above act of September 9, 1850, c. 49, the provisions of which were promptly accepted by the State of Texas. This legislation of the two governments constituted a convention or contract in respect of all matters embraced by it. The settlement of 1850 fixed the boundary of Texas "on the north" to commence at the point at which *the 100th meridian* intersects the parallel of 36° 30′ north latitude, and from that point the northern line ran due west to the 103d meridian, thence due south to the 32d degree of north latitude, thence on that parallel to the Rio Bravo del Norte, and thence with the channel of that river to the gulf of Mexico. Texas, in the same settlement, ceded its claim to territory exterior to the limits and boundaries so established, and relinquished all claims upon the United States for liability for its debts, and for compensation or indemnity for the surrender to the United States of its ships, forts, arsenals, custom houses, custom-house revenues, arms and munitions of war and public buildings, with their sites, which became the property of the United States at the time of the admission of the State into the Union. In consideration of that establishment of boundaries, cession of claim to territory, and relinquishment of claims, the United States agreed to pay and has paid to Texas the sum of ten millions of dollars. 9 Stat. 446.

The words "the meridian of one hundred degrees west from Greenwich," in the act of 1850, manifestly refer to the true 100th meridian, and not to the 100th meridian as located

on the Melish map of 1818. The precise location of that meridian has not been left in doubt by the two governments. The United States has erected a monument at the point where the 100th meridian is intersected by the parallel of 36° 30′ north latitude. This was done many years ago, upon actual survey, and Texas has, by its legislation, often recognized the true 100th meridian to be as located by the United States. Looking at the above map of 1892, it will be seen that the counties of Lipscomb, Hemphill, Wheeler, Collingsworth and Childress are all immediately west of the 100th meridian. These counties were established in 1876. 3 Sayles' Early Laws of Texas, Art. 4285. The boundaries of each, as defined in the legislative enactments of Texas, are given in the margin.[1] It will be seen that the eastern boundary of each county is the 100th meridian. By the act creating Lipscomb County, its boundary immediately south of the parallel of 36° 30′ north latitude, begins "at a monument on the intersection of the 100th meridian and the thirty-sixth and a half degree of latitude." That monument is the one established by the United States after the settlement of 1850. Peculiarly significant is the boundary of Childress County, one of the lines of which runs up Prairie Dog Town River — which river, the United States insists, constitutes the southern boundary of

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[1] *The county of Lipscomb.* — Beginning at a monument on the intersection of the one hundredth meridian, and the thirty-sixth and a half (36½) degree of latitude, 1629 feet north of the 132d mile post *on the one hundredth meridian;* thence west thirty miles to the thirtieth mile post on the 36½ degree of latitude; thence south thirty miles and 1629 feet; thence east thirty miles to the 102d mile post; thence north thirty miles and 1629 feet to the beginning.

The county of Hemphill. — Beginning at the northeast corner of Roberts County, and the southeast corner of Ochiltree County and southwest corner of Lipscomb County; thence east thirty miles to the southeast corner of Lipscomb County, to the 102d mile post *on the one hundredth meridian;* thence south thirty miles to the 72d mile post; thence west thirty miles to the southeast corner of Roberts County; thence north thirty miles to the place of beginning.

The county of Wheeler. — Beginning at the 72d mile post, on the one hundredth meridian, the southeast corner of Hemphill County; thence west thirty miles to the southwest corner of Hemphill County and the southeast

the territory in dispute — "to the initial monument on the 100th meridian." The "initial monument" here referred to was erected in 1857 under the authority of the United States to mark the place where, as its representatives then and have ever since claimed, the line, "following the course of the Rio Roxo westward," crossed the 100th meridian.

It thus appears that the two governments, with knowledge that the treaty of 1819 referred to Melish's map of 1818, have, by official action, declared that the 100th meridian is located on the line that marks the eastern boundaries of the counties of Lipscomb, Hemphill, Wheeler and Collingsworth, in the State of Texas. Besides, the proof in the cause leaves no room to doubt that the true 100th meridian is, as shown by the above map of 1892, immediately east of those counties. The acts of the two governments and the evidence, therefore, concur in showing that the 100th meridian is not correctly delineated on the Melish map of 1818. And in the above settlement of a part of the boundary lines between the United States and Texas, the two governments have accepted the true 100th meridian and discarded the Melish 100th meridian. Giving effect to the compromise act of 1850, the suggestion that the 100th meridian must be taken, in the present controversy, to be as located on the Melish map of 1818, is wholly inadmissible. It cannot be supposed that the United States

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corner of Roberts County; thence south thirty miles; thence east thirty miles to the 42d mile post, *on the one hundredth meridian;* thence north thirty miles to the place of beginning.

The county of Collingsworth. — Beginning at the northeast corner of Donley County and southeast corner of Gray County, and southwest corner of Wheeler County; thence east thirty miles to the southeast corner of Wheeler County at the 42d mile post, *on the one hundredth meridian;* thence south thirty miles; thence west thirty miles to the southeast corner of Donley County; thence north thirty miles to the place of beginning.

The county of Childress. — Beginning at the southeast corner of Collingsworth County at the 12th mile post, *on the one hundredth meridian;* thence west 23 miles; thence south thirty miles; thence east about thirty-five miles, to the new west line of Hardeman County; thence north to Prairie Dog Town River; thence up said river to the *initial monument on the one hundredth meridian;* thence north to the 12th mile post at the place of beginning. 3 Sayles' Early Laws of Texas, Art. 4285.

would have agreed to pay ten millions of dollars to the State of Texas, as provided in the act of 1850, if it had been suggested that any dispute in respect of boundary not covered by that act, and so far as such dispute depended upon degrees of longitude, was to be determined otherwise than by reference to the true 100th meridian. Assuming that the two governments did not intend by the settlement of 1850 to fix the point where the line, "following the course of the Rio Roxo westward," crossed the 100th meridian, nevertheless it is inconceivable that the two governments intended that, in establishing the boundary of Texas "on the north," the 100th meridian mentioned in the enactment of 1850 should be the true 100th meridian, but that the State should be at liberty to insist, in respect of its boundary *along Red River*, that the 100th meridian be taken to be as delineated on the Melish map, and thereby obtain all the land, within the limits of Indian Territory, between the true 100th meridian and the Melish 100th meridian.

We have said that the treaty itself, upon a reasonable interpretation of its provisions, left it open to the contracting parties, through commissioners and surveyors, to fix the lines with precision, and, therefore, to show, by competent evidence, where the true 100th meridian was located. But if this were not so, we should feel obliged to hold that the convention or contract between the United States and Texas, as embraced in their respective enactments of 1850, together with the subsequent acts of the two governments, require in the determination of the present controversy that the 100th meridian, mentioned in the treaty of 1819, be taken to be the true 100th meridian, and, consequently, that the line, "following the course of the Rio Roxo westward to the degree of longitude 100 west from London," must go, and was intended to go, to the true or actual 100th meridian, and not stop at the Melish 100th meridian.

So that the real question for solution is whether, as contended by the United States, the line "following the course of the Rio Roxo *westward* to the degree of longitude 100 west from London," meets the 100th meridian at the point where

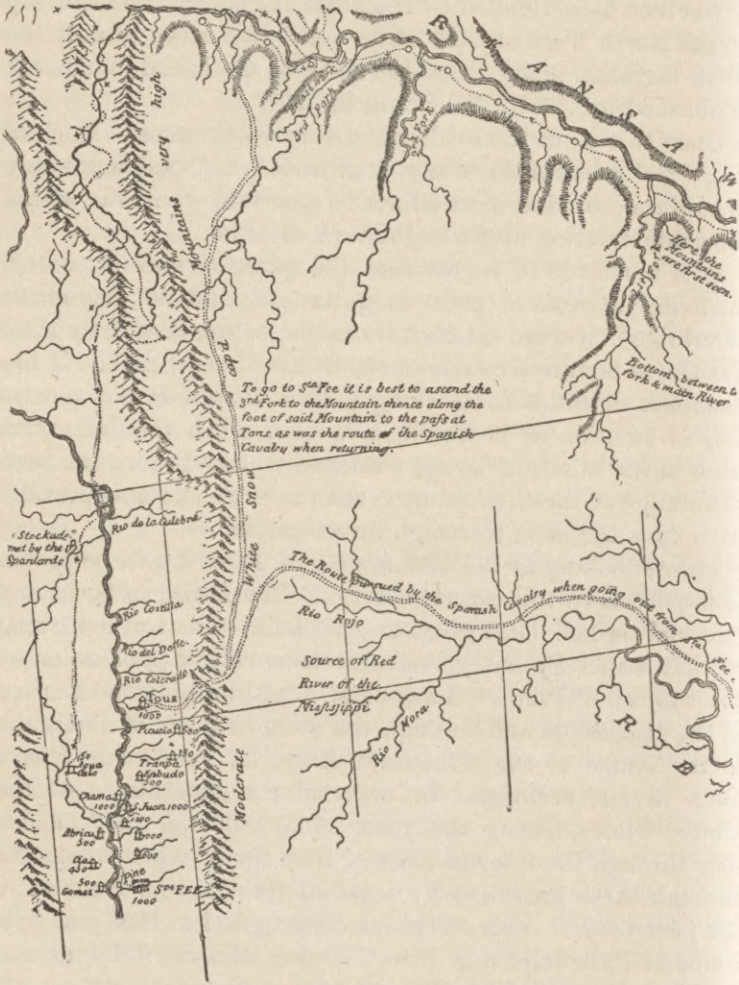
Prairie Dog Town Fork of Red River crosses that meridian, or whether, as contended by the State, it goes *northwestwardly* up the North Fork of Red River until *that* river crosses the 100th meridian many miles due north of the initial monument established by the United States in 1857.

Upon this point the evidence is very voluminous. Much of it, we feel constrained to say, is of little value, and tends only to confuse the mind in its efforts to ascertain what was within the contemplation of the negotiators of 1819.

It is a matter of regret that the question now presented, involving interests of great magnitude, should not have been determined, in some satisfactory mode, before or shortly after Texas was admitted as one of the States of the Union. It has remained unsettled for so long a time that it is not now so easy of solution as it would have been when the facts were fresh in the minds of living witnesses who had more intimate knowledge of the circumstances than any one can now possibly have upon the most thorough investigation.

Before looking at the Melish map of 1818, it will be proper to inquire as to the general course of Red River, so far as any information had been given to the public prior to the making of that map. Probably the most trustworthy publication on the subject is Pike's "Account of expeditions to the sources of the Mississippi and through the western parts of Louisiana to the source of the Arkansaw, Kans, La Platte and Pierre Juan Rivers, performed by order of the government of the United States, during the years 1805, 1806 and 1807; and a tour through the interior parts of New Spain, when conducted through these provinces by order of the Captain General in the year 1807." This work was copyrighted in 1808 and published at Philadelphia in 1810. It was illustrated by numerous charts, copies of which are found on pages 44, 45, 46, 47, *post* — one of them being "A Chart of the Internal Part of Louisiana," the other, "A Map of the Internal Provinces of New Spain." Those charts show a large river called Red River, extending from a point near Santa Fé between latitude 37° and 38° across what is now the State of Texas, passing Natchitoches, Louisiana. Both show a chain of mountains

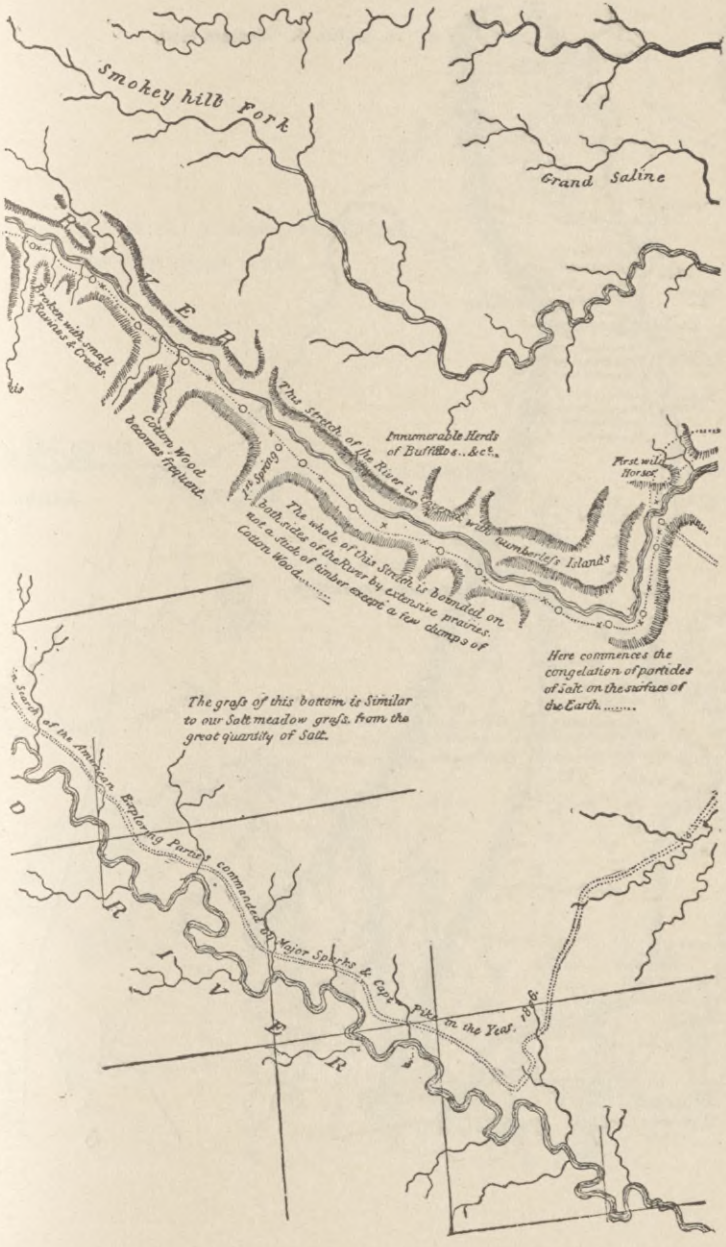
No: 3. Western Half.



PIKE'S CHART OF THE INTERNAL PART OF LOUISIANA, &c.—PT. 1—1810.

Opinion of the Court.

No. 3. Eastern Half.




No. 4. Western Half.
Rio del Norte
Rio Rojo
Rio Morro
Sierra Obscura
Sierra de el Sacramento
Sierra de Guadelupe
Rio Colorado de Ietan
Immense Herds of
Immense Herds of wild Horses
NEW MEXICO
Apaches Faraone
Apaches Mescaleros
PASSO
Sierra de los Organos
Sierra de la cola de Aguila
Sierra de las Piedras de media
Pres del Norte ó de las Santas
Rio Puerto
Lago del muerto
Las Pemudas
Horse
Dead
La Sobrera
Christopher
Copper worked
S. Diego
Sabinas
Xacales
Tousac
Gomra
Abiqui
Cra
Sandia
Tanos
Travesia
Trementina
Embudo
Chamas
Village
Vamps
Sibi-Yeta
Ojo Malaleta
Ojo de Lobario
Carpatos
Yanis

No. 4. Eastern Half.

PIKE'S MAP OF THE INTERNAL PROVINCES OF NEW SPAIN—1810.

running north and south, marked on one chart as "White snow capped mountains, very high."

These are undoubtedly the Snow Mountains referred to in the letter of Mr. Adams to the Spanish minister, of October 31, 1818, in which, as we have seen, the former proposed that the line from east to west should follow the course of Red River "to its source, touching the chain of the Snow Mountains, in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts." East of the Snow Mountains, as delineated on these charts, are two prongs or small streams, "Rio Rojo" and "Rio Moro," the source of the former being northeast, and the latter nearly east, of Santa Fé. The Rio Rojo rises between the 37th and 38th, and the Rio Moro between the 36th and 37th degrees of latitude, both near the 106th degree of longitude. Between those prongs, on one of the charts, are the words "Source of Red River of the Mississippi." The prongs or streams Rio Rojo and Rio Moro unite at about the 37th degree of latitude, and form one stream, marked on one chart as Red River, and on the other as "Rio Colorado [Red River] of Natchitoches." The stream, thus formed, runs for a short distance eastwardly, then southeastwardly until it reaches a point a little west of the 100th meridian, then eastwardly, then a little northeastwardly, then southeastwardly, passing Natchitoches, to a junction with the Wichita River near the Mississippi River. It should also be stated that on these charts is marked a road or line extending from Tous, (which is north of Santa Fé,) through a gap of the Snow Mountains, and thence along the north side of Red River. That line is described as "The route pursued by the Spanish cavalry when going out from Santa Fé in search of the American exploring parties commanded by Major Sparks and Captain Pike in the year 1806." These charts or maps, in connection with the chart of the lower part of Red River, not here reproduced, also show throughout the entire distance from Natchitoches to the source of Red River near the Snow Mountains, small streams emptying into the main river from the north and northwest, none of which, however, are marked with names; and that north of Red River, as delineated by

Pike, and east of the 100th meridian of longitude, is an unnamed stream, not of great length, but having the same general course as the stream now known as the North Fork of Red River.

That prior to Melish's map of 1818 it was believed that the Red River that passed Natchitoches had its source in the mountains near Santa Fé is manifest from Melish's own publications. In 1816 he published at Philadelphia a small book, with the title "A geographical description of the United States with the contiguous British and Spanish possessions." It accompanied his map of those countries. In that work it appears that he used Humboldt's map of 1804, and Pike's Travels. He said: "The Red River rises in the mountains to the eastward of Santa Fé, between north latitude 37° and 38°, and, pursuing a general southeast course, makes several remarkable bends, as exhibited on the map; but it receives no very considerable streams until it forms a junction with the Wachitta, and its great mass of waters, a few miles before it reaches the Mississippi." pp. 13 and 39. See also the third edition of his work published in 1818, pp. 14 and 42.

On Darby's map of the United States, including Louisiana, published in 1818, and prefixed to his "Emigrant's Guide," appears the "Red River of Natchitoches," formed by two prongs, and extending southeastwardly from a point near the intersection of the 107th degree of longitude and the 40th degree of latitude to its junction with waters near the Mississippi. East of the 100th meridian are two unnamed streams coming from the northwest, each much shorter than the main Red River, as delineated on that map. It is stated in this work that the Red River "rises near Santa Fé in N. lat. 37° 30′ and 29° west of Washington, runs nearly parallel to the Arkansas, joins the Mississippi at 31° N. lat. after a comparative course of 1100 miles." p. 50.

In view of the facts stated, particularly in view of Melish's knowledge of Pike's publication and the statements in his own work, it cannot be doubted that when the Melish map of 1818 was published it was believed that there was a Red River that continued without break from its source near Sante Fé or the

Snow Mountains until it joined other waters east and southeast of Natchitoches, near the Mississippi.

Following the course of Red River, as laid down on the Melish map of 1818, it is impossible to doubt that in the mind of Melish the Red River was the stream represented by Pike as having two prongs, Rio Rojo and Rio Moro, near Santa Fé, and as running without break, first easterly, then southeastwardly, then eastwardly for a comparatively short distance, and then southeastwardly to its mouth near the Mississippi River. On the north and east of Red River, as thus marked, there was no stream connected with it that was marked by any name. There was an unnamed stream, on the north side of the main river, which emptied into the latter between the 101st and 102d degrees of west longitude *as defined on that map*. If regard be had alone to the map of 1818, it is more than probable that the river marked on it as having near its source two prongs, Rio Rojo and Rio Moro, and which formed one stream that continued without break southeastwardly, and *into which*, between the 101st and 102d degrees of longitude, as *marked on that map*, came from the northwest an unnamed stream, was the river designated on Pike's chart as Red River, and was the Red River of the treaty of 1819. The suggestion that the river marked on the Melish map as having the two prongs, Rio Rojo and Rio Moro, and running southeastwardly, was the river now known as the North Fork of the Red River, is without any substantial foundation upon which to rest. If the latter river is delineated at all on the Melish map, it is the unnamed stream that entered the main river from the northwest, between the 101st and 102d meridians as located on that map.

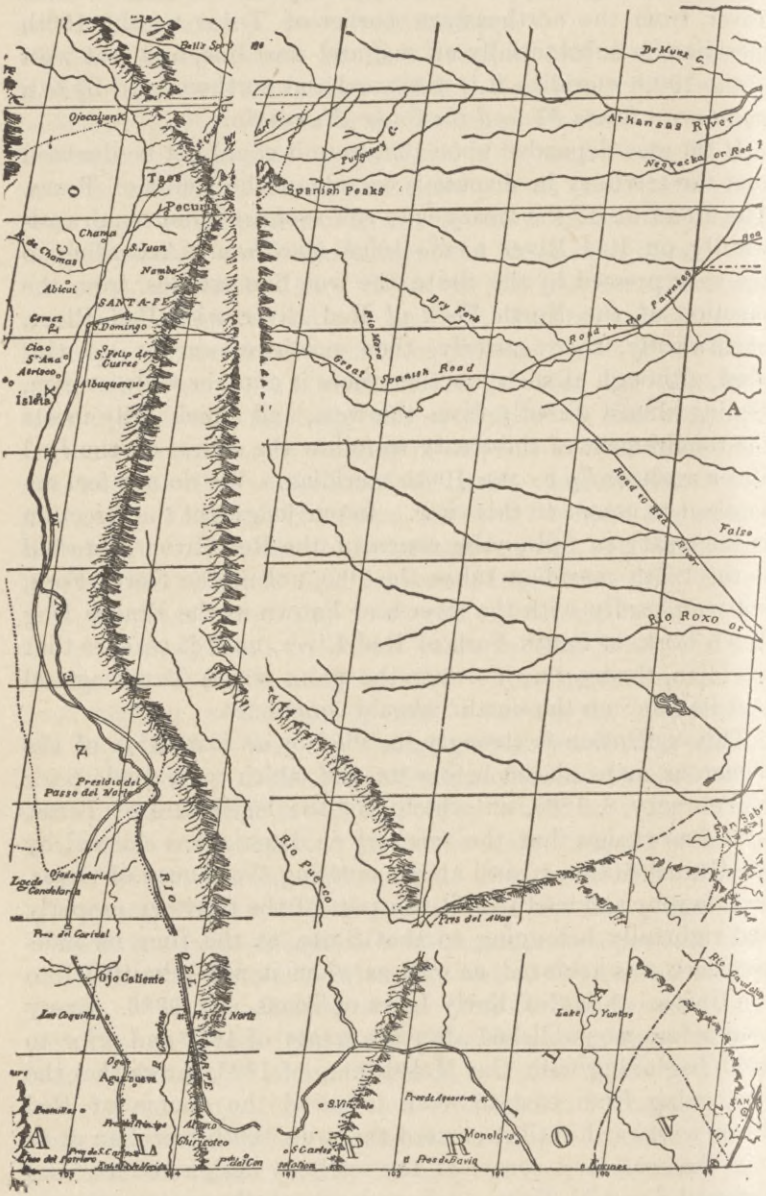
There is a large amount of evidence of a documentary character showing that this interpretation of the Melish map is correct. We have before us "A map of the United States, with the contiguous British and Spanish possessions, compiled from the latest and best authorities by John Melish." It was copyrighted June 16, 1820, and published at Philadelphia by Finlayson, the successor of Melish. A part of that map is reproduced on pages 52, 53. It is spoken of as Melish's map of 1823, because that is the year to which it was improved.

From that map it appears that a line up the Rio Roxo or Red River, from the northeastern corner of Texas to the 100th meridian, is substantially an east and west line, and that west of the 100th meridian it is westward and northwestwardly *to a point near Santa Fé and the Snow Mountains.*

If the case depended upon that map it could not be doubted that the territory in dispute is outside of the limits of Texas. The direction of the treaty is to run *westward*, not northwestwardly, on Red River *to the 100th meridian.* According to the view pressed by the State, the true line extends, from the junction of the North Fork of Red River with Red River, northwardly, then easterly, then northwestwardly *up that fork*, although at such junction there is another wide stream, coming almost directly from the west, and which fully meets the requirement of the treaty to follow the course of the Red River *westwardly* to the 100th meridian. We do not feel authorized to assent to this view. In our judgment the direction in the treaty to follow the course of the Red River *westward* to the 100th meridian takes the line, not up the North Fork, but westwardly with the river now known as the Prairie Dog Town Fork, or South Fork of Red River, until it reaches that meridian, thence due north to the point where Texas agreed that its line "on the north" should commence.

This conclusion is strongly fortified by an inspection of the numerous maps placed before us, and which were made prior to February 8, 1860, on which day the legislature of Texas, with knowledge that the territory in dispute was claimed by the United States, passed an act creating the county of Greer, and thereby assumed that it was part of the territory properly and rightfully belonging to that State, at the time its independence was achieved, as well as when it was admitted into the Union. 2 Sayles' Early Laws of Texas, Art. 2886. Every map before us, published after the treaty of 1819 and prior to 1860, beginning with the Melish map of 1823, shows that the line, going from east to west, followed the course of Red River westward until it crossed the true 100th meridian at or near the southwest corner of the territory designated as "Unassigned Land." Upon each and all of these maps appear

No. 5. Melish Map of 1823, Western Half.



No. 5. Melish Map of 1823, Eastern Half.

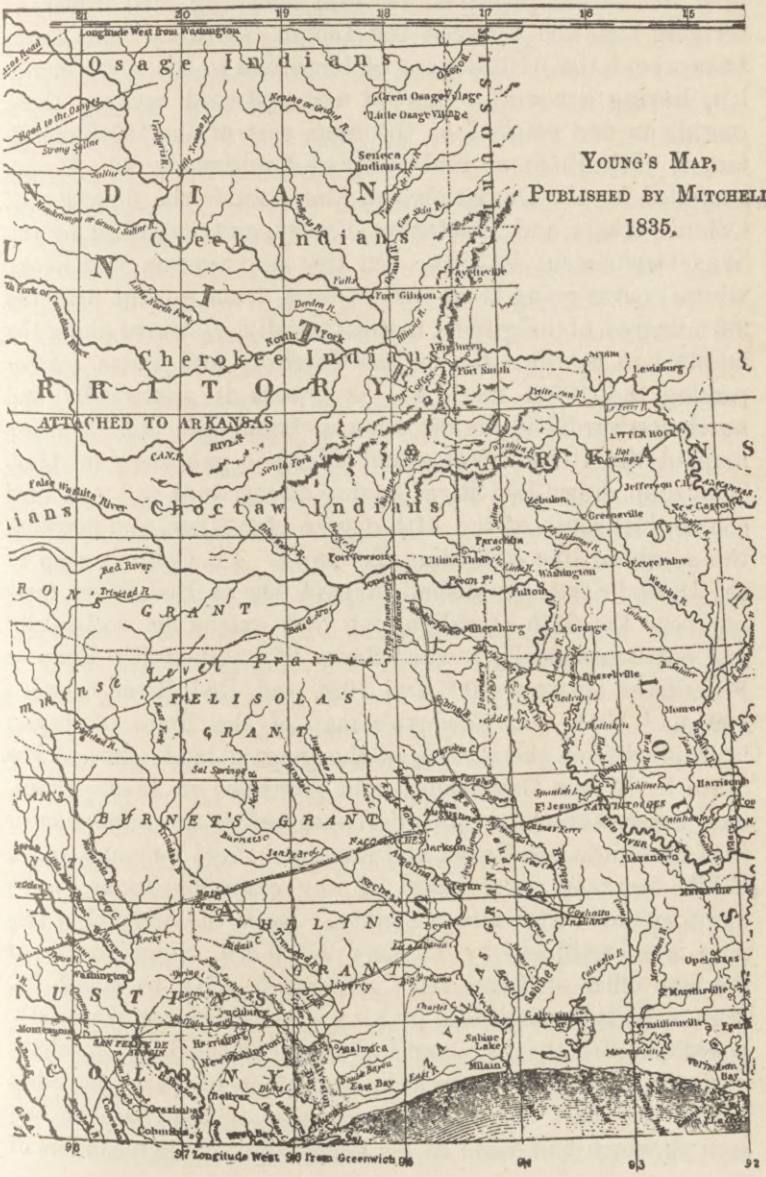
streams coming from the northwest, having a northwest and southeast course, that empty into the main river. But none of those streams are marked as a part of the line established by the treaty of 1819.

Among the maps to which we refer are the following: 1. "A map of Mexico, Louisiana and the Missouri Territory, including the States of Mississippi, Alabama Territory, East and West Florida, Georgia, South Carolina and part of the Island of Cuba," by John H. Robinson, M.D., copyrighted in 1819, and published at Philadelphia. The author is no doubt the gentleman of the same name who accompanied Major Pike in his expeditions, and is spoken of by that officer as a man of enterprise and science. The river marked on that map as Red River east of the 100th meridian has its source in the region of Santa Fé, and corresponds with the Red River or the Rio Colorado of Natchitoches, as delineated on Pike's map. 2. Morse's map of the United States, published in 1822, and which accompanied an official report, made by him in that year to the Secretary of War, of the conditions of the various Indian tribes of the country. On this map appears Red River with its source not far from Santa Fé, and running southeastwardly to a short distance west of the 100th meridian, from which point it extends eastwardly all along the southern line of Indian Territory, thence southeastwardly to the Mississippi. 3. Carey & Lea's Atlas of 1822. On this map appears Red River having a *westward* course the entire distance from about the 94th to the 102d degree of longitude, between the 33d and 34th degrees of latitude, and constituting the southern line of the Indian Territory. Red River on this map has its source near the Snow Mountains. 4. The map of Major Long, of the Topographical Engineers, inscribed to Mr. Calhoun, Secretary of War, and published in 1822. On this map appears a river with its source near the mountains of Santa Fé, and running southeastwardly, then eastwardly to the 100th meridian, and continuing then eastwardly along the entire line between Indian Territory and Texas. As delineated on Long's map, between the 103d and 101st meridians, that river is marked "Rio Roxo or Red River," and near the

95th meridian it is marked "Red River." 5. Tanner's map of North America, 1822. 6. Tanner's map of North America (1823) shows a river on the south border of what is now Indian Territory, marked Red River. On each side of it, after it passes the 100th meridian, there are prongs or streams north and south, and the river, near its end, after it has passed 25° west from Washington, is marked Red River. Going off from the Red River at about 20° longitude west from Washington is the river marked False Washitta, which comes from the northwest. Red River as marked on that map extends nearer to Santa Fé than the False Washitta. 7. Finley's American Atlas (1826) shows Red River on the south boundary of Arkansas, whose course, going from the east, is westward until about the 100th meridian is reached, and west of the 100th meridian it is marked "R. Roxo or Red R." At longitude 20° west from Washington a river comes from the northwest marked False Washitta. The extension marked as above is much longer than any stream emptying into Red River from the north or the northwest. 8. "A Complete historical, chronological and geographical American atlas," published by Carey & Lea, at Philadelphia, in 1826, on which will be found marked Red River, whose course going from east to west, is westwardly past the 100th meridian and then northwestwardly in the direction of Santa Fé. At about the 98th meridian a much shorter stream comes into it from the northwest, and is unmarked. 9. A German atlas of America, published at Leipsic in 1830, contains a map which shows the boundary established in 1819 on the west side of Louisiana, and shows Red River along the whole southern line of the Indian Territory. Coming into that river from the northwest, at 99° longitude, is an unmarked stream; and coming from the northwest, and emptying into Red River, at about 97° longitude, is another stream marked Falsche Washitta. 10. Young's New Map of Texas, published at Philadelphia in 1835 by Mitchell, and a copy of part of which is given on pages 56, 57. On this map appears Red River with its source a short distance from Santa Fé, and marked, east of the 100th meridian, as "Rio Roxo or Red River of Louisi-

No. 6. Western Half.

No. 6. Eastern Half.



YOUNG'S MAP, PUBLISHED BY MITCHELL. 1835.

ana," running first southeastwardly, then eastwardly along the southern boundary of Indian Territory. 11. Maillard's map of Texas, published in 1841, showing Red River as forming the line between the Indian Territory and Texas from about the 94th degree of longitude to the 100th meridian, having a course westward and eastward between those meridians, and marked, on the map, east of the 100th meridian, as "Rio Roxo or Red River of Louisiana." 12. A map compiled for the Department of State, under the direction of Colonel Abert and Lieutenant Emory, and published by the War Department in 1844. On this map appears Red River, whose course going from east to west, from a point near the 94th degree of longitude, is substantially westward along the whole line between the Indian Territory and Texas. After passing the 100th meridian, its course is westwardly and northwestwardly in the direction of Santa Fé. 13. Tanner's map of the United States and Mexico, published in 1846. That map shows Red River having an eastward and westward course, just south of the 34th degree of latitude, and marking the southern line of Indian Territory. 14. Colton's map of the United States, published in 1848, shows Red River forking near the 98th meridian, one fork extending westwardly and northwestwardly toward Santa Fé, marked Rio Roxo or Red River between 100° and 102°, and Red River between 102° and 104°. 15. Cordova's map of the State of Texas, "compiled from the records of the general land office of the State by Robert Creuzbaur," and published in 1849. Creuzbaur entered the land office in Texas before the admission of that State into the Union, and remained there for many years. While there he never heard of any claim by Texas to the territory now called Greer County. Upon the original of this map is a certificate by Thomas W. Ward, commissioner of the land office of Texas from January 5, 1841, to March 20, 1848, and also a certificate by his successor, George W. Smyth. Ward certified that the map had been compiled by Creuzbaur from the records of the general land office of Texas, and that it was the most correct representation of the State he had seen or which had come to his knowledge; "the meanders of

the rivers are all correctly represented, being made from actual survey." Smyth certified that he "has no hesitancy in declaring it as his firm conviction that this map is a very correct representation of the State, representing all returns up to date, having been compiled with great care from the records of the general land office." On this map is also the certificate of the governor and secretary of state as to the official character of Ward and Smyth. It is further attested, under date of August 12, 1848, by Senators Rusk and Houston, and by Representatives Kauffman and Pilsbury, as follows: "We, the undersigned Senators and Representatives from the State of Texas, do hereby certify that we have carefully examined J. de Cordova's map of the State of Texas, compiled by R. Creuzbaur from the records of the general land office of Texas, and have no hesitation in saying that no map could surpass this in accuracy and fidelity. It has delineated upon it every county in the State, its towns, rivers and streams, and we cordially recommend it to every person who desires correct geographical information of our State. To the persons desirous of visiting Texas it would be invaluable." 16. Mitchell's New Atlas of North and South America, published by Thomas Cowperthwaite & Co., Philadelphia, 1851, shows on the map of Texas a river marked Red River, whose course, after the latitude midway between 33° and 34° is reached, is westward. It continues in a westerly direction with scarcely any change until it reaches the 102d meridian, and then turns northwestwardly in the direction of Santa Fé.

All of these maps place the territory in dispute east of the 100th meridian and *north* of the southern line of the Indian Territory *as that line is claimed by the United States.* They are all inaccurate, if any part of that territory is within the limits of Texas. No one of them so locates Red River that its course, going westward (from the point where the line between Texas and Louisiana intersects the Red River) to the 100th meridian would take the line of the treaty of 1819 up the North Fork of Red River until it intersected that meridian near the 35th degree of latitude.

The conclusion to be drawn from the maps to which we

have referred is sustained by other maps, namely: 1. A map of the State of Texas purporting to have been compiled by Stephen F. Austin and published at Philadelphia by H. S. Tanner in 1837. The original is in the general land office of Texas, and upon it is the certificate of the commissioner of such land office, dated March 13, 1882, showing that it was temporarily deposited in that office. 2. A map of Texas purporting to have been compiled from surveys on record in the general land office of the Republic of Texas, in the year 1839, by Richard S. Hunt and Jesse F. Randel. Upon this map is a certificate of the secretary of state of Texas, approving the map, and stating that it had been compiled "from the best and most recent authorities." This certificate is followed by one from the commissioner of the general land office of the Republic of Texas, dated April 25, 1839, stating that "the compiler of this map has had access to the records of this office, and that the map was compiled from them." 3. Disturnel's map of the United States of Mexico, published in 1847 and used at the making of the treaty of Guadalupe Hidalgo. 4. A map prepared for the President of the United States under the direction of the commissioner of the land office in 1849. 5. A Travellers' map of the State of Texas, "compiled from the records of the general land office, the maps of the Coast Survey, the reports of the boundary commission, and various other military surveys and reconnoissances, by Charles W. Pressler." This map was published in 1867. The author held a position in the land office of Texas for more than thirty years.

But it is said that the United States has in many ways, and during a very long period, recognized the claim of Texas to the territory in dispute, and upon principles of justice and equity should not be heard at this late day to question the title of the State.

Is there any basis for the suggestion that the United States has ever acquiesced in the claim of the State that the treaty line *westward* along Red River to the 100th meridian follows the course of the North Fork from its mouth northwardly and northwestwardly until that meridian is reached at a point

north of the 35th degree of latitude? This question deserves the most careful examination; for, long acquiescence by the General Government in the claim of Texas would be entitled to great weight.

In support of the suggestion that the United States has recognized the claim of Texas, reference is made to the fact that in 1843 some Texan troops under the command of Colonel Snively went into the territory here in dispute and were arrested and disarmed by Captain Cooke of the United States Army, who had been specially assigned to the duty of protecting caravans of Santa Fé traders through the territories of the United States to the Texan frontier. Of his conduct the Republic of Texas complained. Connected with that matter was an alleged forcible entry into the custom house at Bryarly's Landing on Red River by certain citizens of the United States, and the taking therefrom of goods that had been seized as forfeited under the laws of Texas. The settlement of that dispute between the two governments is now relied on as showing a recognition by the United States of the claim of Texas to the territory here in controversy. We have been unable to find anything in the history of those proceedings to justify this contention of the State. From the letter of Mr. Calhoun, Secretary of State, to Mr. Van Zandt, Chargé d'affaires of the Republic of Texas, of date August 14, 1844, it appears that Captain Cooke's conduct in this matter was made the subject of a court of inquiry. Mr. Calhoun said: "The court was ordered, at the request of my immediate predecessor, in conformity to the intimation contained in his communication to Mr. Van Zandt, of the 19th of January last, in order to ascertain more fully and in the most authentic form the circumstances and facts connected with the proceedings of Captain Cooke and his command, in the disarming of the Texan force under the command of Colonel Snively. Mr. Van Zandt will find, on recurring to the extract, that the opinion of the court is, that the place where the Texan force was disarmed was *within the territory of the United States;* that there was nothing in the conduct of Captain Cooke which was harsh or unbecoming, and that he did not exceed the

authority derived from the orders under which he acted. It is proper to add that the court consisted of three officers of experience and high standing; that the case was fully laid before it, and that its opinion *appears to be fully sustained by the evidence.* There seems to be no doubt that Captain Cooke was sincerely of the opinion that the Texan force was within the territory of the United States, and that the fulfilment of his orders to protect the trade made it his duty, under such circumstances, to disarm them. It is readily conceded that the commander of the Texan forces, with equal sincerity, believed the place he occupied was within the territory of Texas. Which was right or which wrong can be ascertained with certainty only by an actual survey and demarcation of the line dividing the two countries between the Red and Arkansas Rivers." After observing that it was neither necessary nor advisable to renew between the two governments the discussion on the question whether the Texan force was or was not within the limits of the United States, Mr. Calhoun proceeded: "In the hope, therefore, of closing the discussion and putting an end to this exciting subject, the undersigned renews the offer of his predecessor contained in the communication above refered to, 'to restore the arms taken from the Texan force, or to make compensation for them,' and his assurance, given at the same time that 'his government never meditated and will not sanction any indignity towards the government of Texas, nor any wrong towards her people, and will repair any injury of either kind which may be made to appear.'" This offer was accepted by the government of Texas, its Chargé d'affaires saying: "As it is not probable that the arms could be returned in the order in which they were taken, compensation will be received for them." House Ex. Doc. 28th Congr. 2d Sess. Vol. 1, pp. 12, 109–10. This was followed by an appropriation by Congress by the act of March 30, 1847, c. 47, of a sum of not exceeding $30,000, "for settling the claims of the late Republic of Texas, according to principles of justice and equity, for disarming a body of Texan troops under the command of Colonel Snively, and for entering the custom house at Bryarly's Landing, and tak-

ing certain goods therefrom." 9 Stat. 155, 168. It seems to the court too clear to require discussion that, while, during the above controversy, the United States and Texas asserted their authority, respectively, over the place where the Texan troops were disarmed, the determination of the question of territorial boundary was expressly waived, and a settlement was reached, upon the basis indicated in the diplomatic correspondence and in the act of Congress solely (to use the words of Mr. Calhoun) to allay "irritated feelings between two countries, whose interest it is to be on the most friendly terms."

Proceeding with the inquiry whether the United States has recognized the claim of Texas to own the territory in dispute, we find that by the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw Indians, the boundary of the Choctaw and Chickasaw country was thus defined: "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point *where the meridian of one hundred degrees west longitude crosses the same;* thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning." 11 Stat. 611, 612. It may be here stated that the Kiowas, Comanches and Apaches were settled in the Choctaw and Chickasaw country, as originally defined, in virtue of the treaty of 1867. 15 Stat. 581, 582. In execution of the treaty of 1855 the Commissioner of Indian Affairs made a contract with A. H. Jones and H. M. C. Brown for a survey of some of the boundaries of the original Choctaw and Chickasaw country. From the field-notes of those surveyors, which were duly reported to the proper office, and certified to be correct by the astronomer and examiner of the Indian Boundary Survey, we make these extracts: "The initial monument for the 100th meridian west longitude boundary line between the State of Texas and the Choctaw and Chickasaw countries is established 30 chs. dist. from the north bank of Red River on an elevation near 50 ft. above the bed of the same. The situ-

ation was selected with a view to protect the monument so as never to be destroyed by high water. . . . The river due south from the monument is 76 chs. and 85 lks. wide from high water mark to high water mark. Course N. 85° E. It will be sufficient to say to those interested that there can be no doubt as to the fact of its being the main branch of Red River, as was doubted by some persons with whom we had conversed relative to the matter before seeing it, for the reason the channel is larger than all the rest of the tributaries combined, besides affording its equal share of water, though like the other branches in many places the water is swallowed up by its broad and extensive sand beds, but water can at any season of the year be obtained from one to three feet in main bed of stream."

We come now to the act of June 5, 1858, c. 92, by which (in harmony with the act of the legislature of Texas of February 11, 1854, 2 Sayles' Early Laws of Texas, Art. 2412) it was provided: "§ 1. That the President of the United States be, and he hereby is, authorized and empowered to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appointed by and on behalf of the State of Texas for the same purpose, shall run and mark the boundary lines between the Territories of the United States and the State of Texas: Beginning at the point where the one hundredth degree of longitude west from Greenwich crosses Red River, and running thence north to the point where said one hundredth degree of longitude intersects the parallel of thirty-six degrees thirty minutes north latitude; and thence west with the said parallel of thirty-six degrees and thirty minutes north latitude to the point where it intersects the one hundred and third degree of longitude west from Greenwich; and thence south with the said one hundred and third degree of longitude to the thirty-second parallel of north latitude; and thence west with the said thirty-second degree of north latitude to the Rio Grande. § 2. That such landmarks shall be established at the said point of beginning on Red River, and at the other corners, and on the said several lines of said boundary, as may be agreed on by the President of the United States, or

those acting under his authority, and the said State of Texas, or those acting under its authority." 11 Stat. 310.

This act was passed before Jones and Brown had completed and reported the survey made by them. Pursuant to this act of 1858 a commissioner was appointed on behalf of the United States. The Secretary of the Interior in his letter of instructions to that commissioner said, among other things: "After surveying and marking that portion of the boundary defined by the parallel of 36° 30′ north latitude, and which is known to you to present no obstacle to a rapid survey and demarcation, to prevent delay and expense, you will take the 100th meridian of west longitude as laid down on the map of the southern boundary of Kansas, or as determined and marked upon the surface of the earth by Messrs. Jones and Brown, surveyors of the Chickasaw and Choctaw boundaries, from observations made by Daniel G. Major, astronomer on the part of the United States, at its intersection with the Northern Creek boundary, about midway between the North Fork of the Canadian and the Canadian River, or by independent observations, whichever, in your judgment from comparison, may be found to be the most correct method. Having connected with, or observed for, the 100th meridian at its intersection with the Creek boundary, as determined by the parties above mentioned, you will proceed as rapidly as possible over the remaining portion of this meridian to Red River, the termination of your field work, making such observations and measurements as you may deem sufficient to verify it." The governor of Texas having insisted upon the work of the survey being commenced on Red River rather than on the north line, the Secretary of the Interior, after saying that that course would involve a serious delay in fixing the initial point of the 100th meridian, which could only be done after several months of careful astronomical observations and an exchange of observations with some fixed observatory, said: "And, besides, by the time the commissioners of the respective governments are prepared to commence their labors at that point, that line will probably have been determined and marked by the United States surveyors, Messrs. Jones and Brown, who

are now engaged upon the surveys of certain boundaries in the Choctaw and Chickasaw country, under the provisions of the treaty of January 22, 1855. . . . The above named surveyors are provided with a competent astronomer and excellent instruments, and their line will probably require but simple verification on the part of the joint commission; and for all purposes appertaining to the interests of the citizens of Texas along and adjacent to the proposed boundary line north of the Red River, Brown and Jones' survey must prove sufficient and satisfactory."

For reasons that need not be here detailed, the commissioners of the two governments separated before their joint work was concluded. The commissioner of the United States in a preliminary report, November 14, 1860, to the Secretary of the Interior, stated that he commenced his survey by tracing the 100th meridian from its intersection with the Canadian River northward to its intersection with the parallel 36° 30′, forming the northeast corner of the boundary. Having traced and marked that parallel to the northwest corner, he returned along the bed of the Canadian River, and came again to the 100th meridian, when he turned southward, and followed that meridian "to its intersection with the south [Prairie Dog Town] or main branch of Red River." In a subsequent report to the Commissioner of the Land Office, under date of September 30, 1861, he said: "That part of the 100th meridian lying between the main branch of Red River" — by which was meant Prairie Dog Town Fork or South Fork — "and the southern boundary of the *Cherokee* country had been determined, run and marked by Messrs. Jones and Brown in 1859, under the direction of the Indian Bureau, as constituting the boundary between Texas and a part of the Indian Territory. So much of the boundary line as was thus established, Hon. Jacob Thompson, then Secretary of the Interior, directed me to adopt, and in pursuance of this instruction I simply retraced the meridian up to where the work of Messrs. Jones and Brown ended. Thence I prolonged it up to its intersection with the parallel 36° 30′."

It should be here stated that the governor of Texas, under

date of April 28, 1860, instructed the commissioner appointed by him to "insist upon the North Fork as the main Rio Roxo or Red River, and as the true boundary line, as described in the treaty of 1819." And just before that date, namely, on the 8th day of February, 1860, when there was no reason to suppose that the United States acquiesced in the claim of Texas, the legislature of that State passed the act heretofore referred to, creating the county of Greer with the following boundary: "Beginning at the confluence of Red River and Prairie Dog River, thence running up Red River, passing the mouth of South Fork and following Main or North Red River to its intersection with the 23d degree of west longitude; thence due south across Salt Fork and to Prairie Dog River, and thence following that river to the place of beginning." 2 Sayles' Early Laws of Texas, Art. 2886. Of course, the purpose of that enactment was to assert, in solemn form, the claim of the State to the territory in dispute.

During the Civil War, and for many years thereafter, this vexed question did not receive any attention from either government. The reason for this will be understood by every one.

But the fact upon which the State seems to lay most stress is, that on the 24th day of February, 1879, Congress passed an act entitled "An act to create the Northern Judicial District of the State of Texas, and to change the Eastern and Western Judicial Districts of said State, and to fix the time and place of holding courts in said Districts." 20 Stat. 318, c. 97. By the first section of that act it was provided "that a judicial district is hereby created in the State of Texas, to be called the Northern Judicial District of said State, and the territory embraced in the following named counties, as now constituted, shall compose said district, namely." Here follows a list of one hundred and ten counties, including all the recognized counties of Texas (except Red River and Bowie) that are immediately south of the line between the Indian Territory and Texas, as that line is defined on the above map of 1892; and midway in this long list appears the word "Greer."

The learned counsel representing the State insist with confi-

dence that this act of Congress should be regarded as an expression of a purpose by the United States to surrender its claim to the territory in dispute, and as a recognition that that territory was a part of Texas. But we cannot so construe it without doing violence to the strong conviction we have that Congress did not, for a moment, intend by this legislation to part with extensive territorial possessions which the General Government had during a long period claimed to be under its exclusive jurisdiction, and outside of the jurisdiction of any State. We have been unable to find in the history of the act of 1879 any intimation or suggestion that the placing of the territory in dispute in the Northern Judicial District of Texas was made for the purpose of finally determining the controversy as to boundary that had long existed between the United States and Texas. It was entirely competent for Congress for judicial purposes to have included the whole or any part of the Indian Territory within a judicial district established in an adjoining State. If Congress was aware of the state enactment of 1860, the county of Greer might well have been referred to as a county then "constituted," and to be placed, for judicial purposes, within the Northern Judicial District of the State of Texas. Thus the act of 1879 may not unreasonably be interpreted; and we think that any other construction of its provisions would impute an intention to Congress to dispose of an important part of the territory of the United States without disclosing such intention, either by the title of the act passed, or by any words in its body indicating a purpose to settle a disputed question of boundary. The respect due to a coördinate department of the government forbids this court from taking any view of its action that would imply a willingness to accomplish by indirection, or by the use of vague forms of expression, what, perhaps, could not have been accomplished in an open manner, or by employing such clear, distinct language as the occasion and the interests involved alike demanded.

We are the more inclined to take this view because it is manifest that, prior to the present litigation, the State of Texas never regarded the act of 1879 as recognizing its

jurisdiction over the territory in question, nor supposed that that act placed Greer County, so called, in the Northern Judicial District of Texas for any except judicial purposes.

In the early part of the year 1882, Senator Maxey of Texas, at the instance of the governor of that State, (and in anticipation of like action by the Texas legislature,) introduced into the Senate of the United States a bill providing for the appointment of a commission to consider the unsettled boundary dispute between the United States and Texas. There was no pretence that the matter had been disposed of by the act of 1879. That bill passed the Senate, but did not pass the House of Representatives. In the latter body a bill was introduced by a Representative from Texas which defined the boundary between the Indian Territory and Texas as follows: "Beginning at the southeast corner of said Indian Territory, in the middle of Red River; thence up said river to the junction of the Prairie Dog Town and North Forks of said river; thence up the middle of said North Fork to the 100th meridian west from London; thence crossing said North Fork by a line due north to the northeast corner of said State of Texas, as now established." The Judiciary Committee reported adversely to this bill, and, as a substitute for it, reported a joint resolution providing for the appointment of a joint commission to ascertain and mark the point where the 100th meridian crosses Red River, in accordance with the treaty of 1819. House Report No. 1282, 47th Cong. 1st Session. The report of that committee will be found in the margin.[1] It contains

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[1] *The Committee on the Judiciary, by Mr. Willits, to whom was referred the bill (H. R.* 1715) *to define the boundary between the Indian Territory and the State of Texas, begs leave to report:*

That said bill seeks by legislative enactment to define said boundary at the point in dispute, as the North Fork of the Red River, instead of the South Fork, commonly called the Prairie Dog Town Fork of the Red River.

The importance of the issue involved may be seen at a glance, when it is observed that the tract in dispute, lying within said two forks of Red River, and bounded on the west by the one hundredth meridian of longitude west of Greenwich, is about 60 miles long and 40 miles wide, probably over 2000 square miles, and containing a large amount of valuable land. If

a full statement of the views entertained by that committee in opposition to the claim of the State.

In the same year the State of Texas, by an act approved

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this tract is a part of Texas, the lands belong to that State under the act of her admission, while if it is a part of the area of the Indian Territory it becomes a portion of the public domain.

The real question in dispute is which branch or fork of Red River is its main branch, or the continuation of the river. The initial point of investigation is the treaty between the United States and Spain, dated February 22, 1819, in which this part of the boundary is defined as follows: After it strikes the "Rio Roxo of Natchitoches or Red River," it then follows "the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing said Red River and running thence by a line due north to the Arkansas, etc. . . . the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818."

By this it will be seen that the western boundary of that portion of the United States lying on the north of the Red River was said one hundredth meridian, and that its southwestern corner was where said meridian crosses the river. At the date of that treaty this region had never been accurately explored, and the fact was not known that Red River divided into two branches before it reached said meridian; in fact, the very map referred to in the treaty makes the river a continuous stream, and does not lay down the North Fork at all. Subsequent surveys have discovered the two forks, and have definitely located said one hundredth meridian about 80 miles west of where the two forks form the river proper. The treaty with Mexico dated January 12, 1828, recognizes the boundary as stipulated in the aforesaid treaty with Spain, as did the joint resolution admitting Texas into the Union. Even at as late a date as her admission into the Union there was no knowledge of uncertainty in this boundary. Lieutenant Emory made a map for the War Department in 1844 (which is now in the Land Office), on which the North Fork is not laid down, and on that Red River traces nearly the course of the Prairie Dog Town Fork. Disturnell's map of Mexico, dated 1848, follows in this regard Emory's and Melish's maps.

The first accurate knowledge of these streams seems to have been obtained by Captain R. B. Marcy and Captain George B. McClellan, who, under the direction of the War Department, explored the headwaters of the Red River in 1852, and made an elaborate report, which was published under the authority of Congress. (See Ex. Doc. Senate, No. 54, Thirty-second Congress, Second Session.)

Even this report did not develop the data for this dispute, as Captain McClellan, doubtless from the inaccuracy of his instruments, located said one hundredth meridian below the fork of the river several miles, over one degree of longitude east of its actual location.

May 2, 1882, authorized and empowered its governor "to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appointed by, or on

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The question does not seem to have arisen until after the astronomical survey of said meridian by Messrs. Jones and Brown in 1857 to 1859, in pursuance of a contract between them and the Commissioner of Indian Affairs, who wished to know the boundary line between the Choctaw and Chickasaw country. They located the one hundredth meridian, as before stated, some 80 miles west of the junction of the two forks, and they designated the Prairie Dog Town branch as the main branch of the Red River.

It appears that this designation was at once questioned by Texas, and, at the instigation of the Senators of that State, Congress passed an act, approved June 5, 1858, 11 U. S. Stat. 319, authorizing the President in conjunction with the State of Texas to run and mark said boundary line. Commissioners were appointed on the part of the United States and of Texas, who proceeded to their work in May and June, 1860.

Governor Sam Houston of Texas instructed the commissioner of that State as follows:

"In the prosecution, then, of the survey you will be guided by Melish's map, and insist upon the North Fork as the main Rio Roxo or Red River, and as the true boundary line, as described in the treaty of 1819."

He refers in his letters of instructions to the Marcy survey, and claims that Marcy was clearly of the opinion that the North Fork was the true Rio Roxo, or Red River proper, and further claims that said map of Melish's lays down the North Fork as the main prong.

The commissioners were unable to agree, the one on the part of the United States claiming that at and across the Red River and to a point about half way from the North Fork to the Canadian River the line had been definitely located by Messrs. Jones and Brown the year before, and that nothing now remained but to extend the line north to latitude 36° 30′, its northern extremity. To this the commissioner on the part of Texas objected, and the latter proceeded south to the North Fork, and placed a monument thereon on the north bank fifteen feet in diameter and seven feet high, claiming that as the true southwest corner of Indian Territory, and reported his doings to the governor of Texas. The commissioner on the part of the United States seems never to have completed his report.

Texas adopted and acted upon the report of her commissioner as settling the question of boundary, and established the territory in dispute as a county of that State, naming it Greer, and has assumed jurisdiction over it; and by an inadvertence, not singular in our legislative history, the United States by act of Congress approved February 24, 1879, 20 U. S. Stat. 318, included said county of Greer as a part of Texas in the Northern Judicial District of that State, not annexing it for judicial purposes, but recognizing it apparently as an integral part of Texas.

behalf of, the United States, for the same purpose, shall run and mark the boundary line between the Territories of the United States and the State of Texas, as follows: Beginning at a point where a line drawn north from the intersection of the thirty-second degree of north latitude with the western bank of the Sabine River crosses Red River, and thence following the course of said river westwardly to the degree of longitude one hundred west from London, and twenty-three degrees west from Washington, as said line was laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818, and designated

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It is manifest, therefore, that some means should be taken to settle this dispute as soon as possible. Conflicts are arising between the United States authorities and persons claiming to exercise rights on the disputed tract under the jurisdiction of the State of Texas; bloodshed and even death has resulted from this conflict. As long ago as May, 1877, the attention of the Secretary of the Interior was called to the dispute by the War Department, and the Secretary of the Interior replied to the letter of inquiry under date of May 10, 1877, which letter we add as part of this report.

On a careful review of the facts in the case — for the question as to which prong of the river is the true river is really a question of fact — your committee is decidedly of the opinion that the South Fork is the true boundary, and that therefore the claim of the State of Texas is unwarranted.

So far from Captain Marcy being clearly of the opinion, as Governor Houston claimed, that the North Fork is the main branch, his final opinion was in favor of the South Fork. It is true that in his diary, on the day he struck the North Fork, he used the language attributed to him, under the date of May 26, to wit:

"We are now in the immediate vicinity of the Wichita Mountains [a range of mountains lying east by northeast from the mouth of Otter Creek, which empties into the North Fork, and where he was encamped]. Red River, which passes directly through the western extremity of the chain, is different in character at the mouth of Otter Creek from what it is below the junction of the Ke-che-ah-que-ho-no (the Dog Town Fork)."

But he had been for several days travelling along the north bank of the Red River west, and struck the North Fork when it, as well as the South Fork, was swollen with the rains, and both branches he says "were of apparently about equal magnitude," and he naturally spoke of the North Fork as "Red River." But he continued up the North Fork to its source, which he located at longitude 101° 55′. Then he took a southwesterly course till he came to the headwaters of the Prairie Dog Town (or South Fork), which he located at longitude 103° 7′ 11″, and from that time he repeatedly speaks

in the treaty between the United States and Spain, made February 22, 1819. § 2. Said joint commission will report their survey, made in accordance with the foregoing section of this act, together with all necessary notes, maps and other papers, in order that in fixing that part of the boundary between the Territories of the United States and the State of Texas the question may be definitely settled as to the true location of the one hundredth degree of longitude west from London, and whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain

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of that branch as the main branch. (See his report, pp. 55, 58, 84, 86, and 87.) He also entitles his Plate No. 10, which is a picture of the rock and gorge out of which the headspring of that fork flows, as "Head Ke-che-ah-que-ho-no, or the main branch of the Red River." It is manifest that, whatever may have been his first impressions, he finally came to the conclusion, both from its greater length and size, that the South Fork is the main branch.

A reference to the letter of the Commissioner of the Land Office, hereto annexed, will show that Messrs. Brown and Jones had no doubt of the south being the main branch. The reasons they give seem to be conclusive. The width of the South Fork at the one hundredth meridian is 76 chains and 85 links; that of the North Fork 23 chains. The field-notes of the commissioner on the part of the United States, acting under the act of June 5, 1858, of the date of August 29, 1860, say the channel of the North Fork is only 25 chains and 44 feet, and that he found "no water on the surface, (*i.e.*) the river bed, but it is found by digging 2 feet 3 inches below the surface." While in his field-notes of August 30, he says: "Struck main Red River. Main Red River where crossed, 65 chains and 38 feet; channel of running water, 22 feet 6 inches deep. Plenty of long, large lagoons of water in the bed besides the running channel."

If the data given in these reports are correct there would seem to be no doubt of the claim of the United States to the tract in dispute, and, therefore, your committee report adversely to the bill referred to it.

But, inasmuch as the claim is disputed, and that with the earnestness of belief on the part of Texas, and inasmuch as none of the surveys referred to have been made with the privity of the State of Texas, the joint commission appointed having failed to act in concert, your committee are of the opinion that that State should have a hearing in the matter, and should have an opportunity to coöperate with the United States in settling the facts upon which the question in dispute rests. A substitute is reported for the appointment of a joint commission, the passage of which is recommended.

made February 22, 1819; and in locating said line said commissioners shall be guided by actual surveys and measurements, together with such well established marks, natural and artificial, as may be found, and such well authenticated maps as may throw light upon the subject. § 3. Such commissioner or commissioners, on the part of Texas, shall attempt to have said survey, herein provided for by the joint commission, made and performed between the first day of July and the first day of October of the year in which said survey is made, when the ordinary stage of water in each fork of said Red River may be observed; and when the main or principal Red River is ascertained as agreed upon in said treaty of 1819, and the point is fully designated where the one hundredth degree of longitude west from London, and twenty-third degree of longitude west from Washington, crosses said Red River, the same shall be plainly marked and defined as a corner in said boundary, and said commissioner shall establish such other permanent monuments as may be necessary to mark their work." Gen. Laws, Texas, 1882, p. 5.

In the year 1884 the attention of the Secretary of the Interior was called to the attempted occupation of a part of the territory in dispute by white settlers, who assumed that it was a part of the State of Texas. That officer called the attention of the Secretary of War to the subject, and suggested that as this territory had been included within the limits of the Indian Territory, and treated as part thereof for many years, the military should protect the interests of the United States. President Arthur issued his proclamation, warning all persons from obtruding upon the lands embraced within the limits of the Indian Territory. At the request of the authorities of Texas action was suspended to await the determination of the disputed question of boundary between that State and the United States.

At the next session of Congress the joint resolutions reported at the previous session were embodied in the act of January 31, 1885, c. 47. That act provided:

"Whereas the treaty between the United States and Spain, executed February twenty-second, eighteen hundred and nine-

teen, fixed the boundary line between the two countries west of the Mississippi River as follows: Beginning on the Gulf of Mexico at the mouth of the Sabine River, in the sea, and continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; thence following the course of the Rio Roxo westward to the one hundredth degree of longitude west from London, and the twenty-third from Washington; thence crossing the said Red River and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source, in latitude forty-two degrees north; and thence by that parallel of latitude to the South Sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, eighteen hundred and eighteen; and whereas a controversy exists between the United States and Texas as to the point where the one hundredth degree of longitude crosses the Red River, as described in the treaty; and whereas the point of crossing has never been ascertained and fixed by any authority competent to bind the United States and Texas; and whereas it is desirable that a settlement of this controversy should be had, to the end that the question of boundary, now in dispute because of a difference of opinion as to said crossing, may also be settled; therefore,

"*Be it enacted, etc.*, That the President of the United States be, and he is hereby, authorized to detail one or more officers of the army who, in conjunction with such person or persons as may be appointed by the State of Texas, shall ascertain and mark the point where the one hundredth meridian of longitude crosses Red River, in accordance with the terms of the treaty aforesaid, and the person or persons appointed by virtue of this act shall make report of his or their action in the premises to the Secretary of the Interior, who shall transmit the same to Congress at the next session thereof after such report may be made, for action by Congress." 23 Stat. 296, 297.

Under the act of Texas of 1882 and the act of Congress of 1885, the two governments appointed commissioners, but they were unable to agree upon the vital point as to whether the line which by the treaty was to follow the course of Red River westward to the 100th meridian went up the North Fork of Red River until that meridian was reached, or went westward along the Prairie Dog Town Fork to the point designated by the survey of Jones and Brown.

On the 30th day of December, 1887, President Cleveland issued a proclamation asserting that title in, and jurisdiction over, all the territory lying between the North and South Forks of the Red River and the 100th meridian, as part of the Indian Territory, was vested in the United States. That proclamation recites the fact that the commissioners appointed on the part of the United States, under the act of January 31, 1885, authorizing the appointment of a commission to run and mark the boundary lines between a portion of the Indian Territory and the State of Texas, in connection with a similar commission to be appointed by the State of Texas, had, by their report, determined that the South or Prairie Dog Town Fork was the true Red River designated in the treaty, the commissioners appointed on the part of said State refusing to concur in that report. The President admonished and warned all persons, whether claiming to act as officers of the county of Greer, in the State of Texas, or otherwise, against selling or disposing of or attempting to sell or dispose of any of said lands, or from exercising or attempting to exercise any authority over said lands, or purchasing any part of said territory from any person or persons whatsoever.

We have referred, with perhaps more fullness than was necessary, to the action, legislative and otherwise, of the two governments after the passage of the act of 1879, for the purpose of showing that, notwithstanding the passage of that act, the United States continuously asserted its rightful jurisdiction over the territory in dispute as a part of what is commonly called the Indian Territory ; and that, finally, as the only peaceful method of ending the dispute, Congress passed the act of 1890, under the authority of which the present suit was instituted.

In addition to what has been stated, we may add that the governor of Texas, in his message to the legislature of January 10, 1883, enforced the claim of his State by an exhaustive argument, covering the whole field of controversy, but without intimating that the United States, by the act of 1879 creating the Northern Judicial District of Texas, had admitted that "Greer County" was rightfully a part of Texas and subject to its jurisdiction. No one can read that message without perceiving that the author was familiar with every phase of this question of boundary. It did not occur to him that the question had been concluded by the act of Congress establishing a judicial district in the State of Texas. If he had so interpreted that act, a reference to it would have been made in the course of his presentation of the matter on behalf of his State.

In our judgment the act of Congress of 1879, establishing the Northern Judicial District in Texas, must be interpreted as meaning that the territory in dispute was placed in that district only for such judicial purposes as were competent to the courts of the United States, holden in that district, and that Texas can take nothing in the present controversy by reason of its provisions.

In support of the contention that the United States is estopped by its action to claim the territory in dispute, the answer alleges that "the Executive Department of the government of the United States has established and maintained post offices and post roads in said county, has advertised publicly for bids for carrying the United States mails over the routes in said county, designating, as defendant is advised, said post office and post roads as lying in Greer County, Texas, and not lying in the territory allotted to the Indians." In the amended bill filed by the United States it is alleged that, in 1886, after the passage of the act of 1885 providing for a commissioner to ascertain the line between Texas and the United States, as established by the treaty of 1819, and while the commissioners appointed under that act were actually engaged in their duties, certain residents of the disputed territory, describing themselves as residents of Greer County,

Texas, petitioned the Post Office Department of the United States for the establishment of post offices respectively at Mangum and Frazier, in Greer County, Texas; that in that year the prayers of the petitions were granted; that acting upon the designation of locality as set forth in such petitions such post offices were established and designated as in Greer County, Texas; but "during the same year 1886, and on the 27th day of December in said year, it was discovered by the authorities of the Post Office Department that said post offices were located in the territory in dispute; that said territory was claimed by the United States; that it was designated and outlined on the maps of the General Land Office and of the Post Office Department as not within the limits of the State of Texas, but a part of the Indian Territory of the United States; that thereupon, on the last mentioned day, in order to correct the error, the designations of those post offices were changed so as to locate them within the Indian Territory, and they have been from that date and are still only known, recognized and described in orders and official acts of the Post Office Department as located in the Indian Territory; and that all other post offices established within that territory since December, 1886, have been established, recognized and described, and are still so described and recognized, as within the Indian Territory."

It is quite sufficient to say in respect to this point that the evidence fully sustains the allegations of the amended bill, and, therefore, the designation, for a short time, of the post office referred to as being in Greer County in the State of Texas cannot, under the circumstances, be deemed of any weight in our determination of the main issue.

There is another view of the case upon which the State relies, to which much of the argument of counsel was directed. It is indicated in the following clauses of the answer filed by the State: "That in accordance with their usual custom the Spanish conquerors upon taking possession of Natchitoches and the territory lying on or adjacent to 'Rio Roxo,' established and laid out a road or route between Santa Fé, in New Mexico, and Natchitoches, now in the State of Louisiana, for

the uses of commerce between said places, which road or route traversed the country west and northwest of Natchitoches, along the south bank of said 'Rio Roxo,' to a point now in —— County, Texas, then crossed said stream to its north bank, and thence along said north bank to the source of what complainant now styles the 'North Fork of Red River,' and thence to Santa Fé. That this road was for many years frequently travelled by merchants, traders, trappers, explorers and other persons trading or travelling between said points of Santa Fé and Natchitoches, and at the date of said treaty of 1819, 'Rio Roxo of Natchitoches,' from its mouth to its source, was well known to the Spaniards, as well as to the Indians and trappers of that region of country, as the stream now called Red River, having its source near the source of the Canadian River, southeast of and near to Santa Fé, in the now Territory of New Mexico; thence running in an eastern or southeastern direction, receiving in its course at intervals the waters of the False Wachita River, the Kecheahquehono or 'Prairie Dog Town River,' Pease River, Little and Big Wichita Rivers, and divers other streams, and emptying its waters into the Mississippi River, above New Orleans, in the State of Louisiana. At the date of said treaty of 1819 there was only one 'Rio Roxo of Natchitoches' known to geographers or to the people who inhabited the locality of the territory in controversy, and that was the river above described."

In a former part of this opinion we endeavored to show from early maps and printed publications that, at the date of the treaty of 1819, it was believed that the Rio Roxo of Natchitoches or Red River extended without any break from its source not far distant from Santa Fé, first southeasterly, then eastwardly, and then southeastwardly to a point near the Mississippi River. We have here in the answer filed by the State an admission that such was the fact, its position, as we have seen, being that the river that connected the country near Santa Fé with the country bordering on the Mississippi was what is now called the North Fork of Red River. This contention, the State insists, is supported by evidence of the existence of a road or route established in early times between

Natchitoches and Santa Fé, and which passed along that fork.

It is to be observed that this road or trail is not marked upon what is called the treaty map of 1818, nor upon any map that preceded it. Looking at the diplomatic correspondence that resulted in the treaty of 1819, and at the map which was before the negotiators, we find nothing to show that the existence or non-existence of a road or trail between Natchitoches and Santa Fé was an important factor in determining the boundary between the United States and Spain. So far as the record discloses, the negotiators had no knowledge of such a road or trail; and there is no substantial ground upon which to rest even a conjecture that the line was fixed with any reference to routes or trails traversed by traders and trappers. The negotiators had in mind rivers and degrees of latitude and longitude, and that fact appears on the face of the treaty. It cannot be known that they were controlled in any degree by information as to routes across the country used by traders or explorers.

Looking at maps published after the treaty was made, we find that a "great Spanish road to Red River" is marked on the Carey & Lea atlas of 1822. Leaving Santa Fé it extends in a southeasterly and easterly direction on the north side of the Canadian River to about 101° 30′ of west longitude, then across that river in a southeasterly direction, crossing the False Wachita east of the one hundredth meridian, then passing southeastwardly and north of a stream which is probably the North Fork of Red River, as now known, and then eastwardly and north of Red River until it reaches and crosses Red River just east of the ninety-seventh degree of longitude. The same road is delineated on the Melish map of 1823 and the Young-Mitchell map of 1835. According to those maps each of those roads crossed Red River near the mouth of the Wachita, far east of the junction of the North Fork with Red River. If this be the trail that extended from Santa Fé to Natchitoches, or if there was a trail which, in early times, passed along the North Fork of Red River to or in the direction of Santa Fé, (upon which point the evidence

is by no means clear,) we should not necessarily conclude that such trail marked the line established by the treaty, nor that its existence proved that the river near or along which it ran was the main branch of Red River. The direction of the treaty was to follow the course of Red River *westward* to the 100th meridian. As we have seen, the treaty did not refer to any road or trail used by traders or trappers, but only to rivers and degrees of longitude. At the point where the North Fork empties into Red River there is a river which, to say the least, is as large as the North Fork, and which extends *westward.* By following the course of *that stream* to the 100th meridian the terms of the treaty are fully met, while they will not be met by departing from a westward course, before reaching that meridian, and going first in a northerly, then in an easterly, and then in a northwestwardly direction up the North Fork. The location of the line established by the treaty should be determined by the course of rivers and degrees of latitude and longitude, rather than by routes, trails or roads, the extent and character of which cannot be certainly known at this day, and over which, at the date of the treaty and prior thereto, travel by traders and trappers could have been only occasional and limited.

There are other matters to which, in view of the large amount of evidence relating to them, we must advert. Many witnesses were examined upon the question whether the Prairie Dog Town Fork or the North Fork was the longer river, which the broader and deeper stream, and which drained the most territory. The State insists, in this case, that if regard be had to width and depth of stream and extent of country drained, the North Fork must have been deemed, in early times, or when the treaty of 1819 was made, the more important of the two forks of Red River, and, therefore, that that fork should be held to be the river whose course, going from the east, was required by the treaty to be followed westward until the 100th meridian was reached.

These questions were considered by the Boundary Commission appointed after the passage of the act of Congress of January 31, 1885, c. 47. The commissioners on behalf of the

United States and Texas united in declaring that "in finding the point where the 100th meridian of west longitude crosses Red River, if it should appear that said meridian crosses Red River west of the confluence of what are now known as the North Fork and Prairie Dog Town Fork, then the true boundary should be taken at that one of those streams which best satisfies the provisions of the treaty of 1819." They concurred in holding that of those two streams the Prairie Dog Town Fork was the longer. The commissioners on behalf of the United States voted that the Prairie Dog Town Fork was the wider stream. In this view the Texas commissioners concurred, with the qualification that that stream was the "wider between the banks, but not in ordinary flow of water." The United States commissioners held that the Prairie Dog Town Fork drained a larger area than the North Fork. In this view the Texas commissioners concurred, with the qualification that "there is little or no rainfall on the sources of the stream, and hence is taken out of the usual rule of estimating the size of rivers, while the North Fork rises in the mountains, where it rains more, and its sources are living streams." House Ex. Doc. No. 21, 50th Cong. 1st Sess. pp. 165 to 168. Touching these matters, the evidence in the present case is very voluminous. Many witnesses, who had apparently equal opportunities of observation, express opinions that are directly conflicting. Governor Roberts, in his message of January 10, 1883, after referring to the disputed question as to which of these two rivers was the main branch of the Red River, said: "I have shown how nearly equal are the claims of each to be called the main branch from facts pertaining to them derived from observation. From this, either one of them, in the absence of the other, would be taken to be the main branch. It may be admitted that the South Fork [Prairie Dog Town Fork] is the larger and longer, and, therefore, the main branch in reference to the two nearly equal branches of Red River, but that admission does not settle the fact that the line must run up that branch." The true question, he said, was "which one of the two nearly equal branches corresponds most nearly with the 'Red River of Natchitoches or Red River,' as it was

known in 1819, when the treaty was made, and as 'laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818.' "

We have found that the 100th meridian mentioned in the treaty must, especially since the Compromise Act of 1850, be taken to be the 100th meridian astronomically located. And we are now further considering whether the two governments intended the line, running from the east to the west, should leave Red River at the mouth of what is now known as the North Fork, and go northwardly and northwestwardly up that fork, or should go westwardly up what is now known as the Prairie Dog Town or South Fork. So far as this question depends upon evidence as to the relative width and length of these two rivers, and the extent of country drained by each, we are of opinion that, although a large number of witnesses sustain the position taken by the State, the Prairie Dog Town or South Fork, according to the decided weight of evidence, is wider and longer, and drains a much greater extent of territory than the North Fork. This is the conclusion reached by the court after a careful and patient scrutiny of all the proof. So that the evidence of living witnesses corroborates that furnished by maps, and sustains the position taken by the United States as to the scope and effect of the words in the treaty of 1819, "following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington."

But suppose the evidence left it in doubt as to which was the wider and longer stream, and which of the two drains the largest extent of territory; and let it be assumed, as suggested by Governor Roberts, that upon the facts, derived from observation, the claims of each river to be the main branch of the Red River mentioned in the treaty are nearly equal; what, in such a contingency, is our duty? It is to ascertain which river more nearly meets the requirement that the line from the east to the west must follow "the course of the Rio Roxo *westward* to the degree of longitude 100 west from London." If, in following the course of Red River *westward* it be found that that river forks before the 100th meridian of longitude

is reached — one of the forks coming from the north and northwest, and the other from the west — it would seem to be our duty to hold that the river coming from a westward direction was the one whose course the treaty directed to be followed. Those who insist that the course should be *north and northwestwardly* for any material distance from the main river to the 100th meridian, are under an obligation to sustain that position by such evidence as would justify the court in departing from the plain direction of the treaty to follow the Red River "westward" to the named meridian. But that has not been done.

Much stress has been laid by the State upon the testimony of the late General Marcy given before the Boundary Commission of 1886. In the year 1852 that officer, being then a captain in the United States Army, was directed by General Scott to make an examination of the Red River and the country bordering upon it from the mouth of Cache Creek to its source. During his explorations he camped, on the 30th of May, 1852, at a certain point on Red River, and in his daily journal of his movements said: "Red River at this place is a broad, shallow stream, six hundred and fifty yards wide, running over a bed of sand. Its course is nearly due west to the forks, and thence the course of the south branch is W. N. W. for eight miles, when it turns to nearly N. W. The two branches are apparently of about equal magnitude, and between them, at the confluence, is a very high bluff, which can be seen for a long distance around." Senate Ex. Doc. No. 54, 32d Cong. 2d Sess. p. 20. We take it that, in his reference to the forks of Red River, he had in mind the Prairie Dog Town Fork and the North Fork.

Thirty-two years later, that is, in 1886, Captain, then General, Marcy appeared as a witness before the Boundary Commission. He referred to his report of 1852, and said: "As the time that has elapsed since I made that exploration (thirty-three years) is so great, many of the facts and events connected therewith have passed from my memory; but some matters relative to the objects for which this commission was convened, as I understand, may not be found in the report.

I have this morning, for the first time, seen a copy of that portion of Melish's map of the United States, embracing the part of the Red River country which the commission has under consideration at this time, which is authenticated by the signature of the Secretary of State of the United States. Upon this map only one large fork of Red River is delineated, with one more northerly small affluent, which is not named, but may have been intended for Washita River or Cache Creek." House Ex. Doc. No. 21, p. 59.

That the full force of General Marcy's statements may appear we here give so much of his deposition as is embodied in the brief filed by counsel for the State:

"I regarded the Prairie Dog Town branch as the main Red River, for the reason that its bed was much wider than that of the North Fork, although the water only covered a small portion of its bed, and as the sandy earth absorbed a good deal of water after it debouched from the cañon through which it flows, it may not contribute any more water to the lower river than the North Fork. The Prairie Dog Town branch and the North Fork of Red River, from their confluence to their sources, are of about equal length — the former being 180 miles and the latter 170 miles in length. For reasons which I will presently state, I have been unable to resist the force of my own convictions, that the branch of Red River that I called the North Fork of that stream was what is designated upon Melish's map as Rio Roxo. I doubt if the Prairie Dog Town River was ever known to civilized men prior to my exploration in 1852; and, if it was ever mapped before then, I am not aware of it. The character of the country through which this stream flows is such that travellers would not have been likely to pass over it when there was a much more favorable route north of the North Fork. The water in the Prairie Dog Town branch, from its confluence with the North Fork to within two miles of its head spring (about 100 miles), I found so bitter and unpalatable that many of the men became sick from drinking it. But one pool of fresh water was found throughout the entire distance, and the Indians told me they never went up this stream

with their families if it could be avoided, for the reason that the nauseous water frequently proved fatal to their children. Hence, it is not surprising that but little, if anything, should have been known of this repulsive region before my exploration in 1852. And this probably accounts for the entire absence of most of its southern branches upon Melish's map. It is very certain that the 'Prairie Dog Town River' was never delineated by any Spanish, French or English name, as were most of the other streams in that country, and it was only known to the Indians, and possibly to some Mexican traders, as 'Kecheahquehono,' a Comanche appellation, the signification of which the Delawares informed me was 'Prairie Dog Town River.' . . . As before stated, owing to the absence of good water, the sandy character of the soil along the river, and the formidable obstruction presented by the elevated and staked plain, and the extensive belt of gypsum crossing this route, the Mexicans would never have attempted to traverse it with their carts in their trading expeditions from Santa Fé to Natchitoches, especially when there was so good a route a little further north, possessing all the requirements for prairie travelling. The Rio Roxo upon Melish's map is almost entirely south and west of the Wichita Mountains, but in close proximity to them — which is in accord with my determination of the position of the North Fork, while there are no mountains upon the Prairie Dog Town branch. The head of the Rio Roxo upon Melish's map is put down as in about latitude 37°, while upon my map the true latitude is 35½°, while the Prairie Dog Town River rises in about thirty-four and one-half degrees; so that, if his Rio Roxo was intended to represent the 'Prairie Dog Town River,' it would be two and one-half degrees of latitude too far north." House Ex. Doc. No. 21, pp. 59, 60.

It thus appears that at the time (1852) General Marcy made his exploration of the Red River country he regarded the Prairie Dog Town River as the main Red River, and his conclusion then formed by actual observation was in harmony with the maps that had been previously given to the public. After many of the facts connected with the subject had, as he

frankly admitted, passed from his memory, he expressed the opinion that the river that he had called the North Fork of Red River was what was designated on Melish's map of 1818 as Rio Roxo. However persuasive his reasons, for that conclusion might be regarded, if the facts then stated by him were alone taken into consideration, they do not satisfy us that he was in error when, the facts being fresh in his mind, he expressed the opinion, from personal examination on the ground, that Prairie Dog Town Fork was the main Red River. One of the reasons assigned, in support of his last view of this question, is that Prairie Dog Town River was never delineated upon any map of this country or of Europe prior to his exploration, and that it was only known to the Indians, and possibly to some Mexican traders, as the Kecheahquehono, which means Prairie Dog Town River. Now it is quite true that no map, prior to 1852, *marked* any river *as Prairie Dog Town River*, or as the Kecheahquehono. But it is shown, beyond all question, that on all the maps above referred to which appeared after 1819 and down to the time when General Marcy testified before the Boundary Commission, a river was marked whose course (going from east to west) is substantially westward from the point where the line from the Sabine River meets the 32d degree of latitude to the 100th meridian, and that the line, thus delineated, extending to and westwardly beyond the true 100th meridian, is the southern boundary of the Indian Territory, *as that boundary is claimed by the United States.* Between the mouth of the North Fork and the initial monument established by the government in 1856, there is a river whose course is substantially east and west. *That river* is *marked* on Long's map of 1822 and the Melish map of 1823, west of the 100th meridian, as "Rio Roxo or Red River;" on Finley's map of 1826 as "R. Roxo or Red R.;" on the Young-Mitchell map of 1835, and Maillard's map of 1841 as "Rio Roxo or Red River of Louisiana;" and on Mitchell's map of 1851 as "Red River." On all the other maps the same river is plainly delineated. That the name of Prairie Dog Town Fork does not appear on maps published prior to 1852, or that that name was not known to civilized people until after the explora-

tions made by Captain Marcy, is not therefore a circumstance of serious moment, certainly not conclusive. The river itself, though unnamed on any map prior to 1852, was in fact delineated on maps for more than a quarter of a century before that officer entered the Red River country with his company.

The character of the country through which the Prairie Dog Town River flowed and the bad quality of its water for drinking purposes, are also referred to by General Marcy as reasons why the North Fork should be regarded as the stream whose course was intended to be followed in establishing the boundary. We do not think that the evidence upon this point is entitled to very great weight. There is no reason to suppose that the negotiators of the treaty had any knowledge or information as to the relative qualities for drinking purposes of the waters of the two streams in question; and if they had, it is difficult to perceive why such facts would control the determination of a disputed question of boundary between two nations. The negotiators knew or believed that there was a Red River, whose source was not far from Sante Fé, and which, in its course, passed Natchitoches. Their purpose was to establish a line which would extend from the point where the line due north from Sabine River met Red River, thence along and up Red River "westward" to the 100th meridian of longitude, then due north to the Arkansas River. The reference in the treaty was to rivers and degrees of longitude and latitude. It was a question of territory without regard to a special trail, the location of which might have been affected by the quality of the waters of any particular stream.

Much significance is attached by the State to the fact that as early as 1860, by legislative enactment, it created the county of Greer with boundaries that include the whole of the territory in dispute, and that it has ever since asserted its jurisdiction over both that territory and the people who inhabit it. However important such facts might under some circumstances be deemed, it must be remembered that during the whole of the period referred to the constituted authorities of Texas have been aware that the United States regarded the territory in dispute as under its exclusive jurisdiction and as a part of what

is known as the Indian Territory. The government has always disputed the claim of Texas. The only qualification of this broad statement is that suggested by the language inadvertently used in the act of Congress creating the Northern Judicial District of Texas. But that language, we have held, was not intended to express the purpose of the United States to surrender its jurisdiction over the territory in dispute.

It is also said that many titles to land in the disputed territory are held under the State and that much confusion may follow, and injustice be done to individuals, if the claim of the United States be sustained. On the other hand, it is to be inferred that there are many settlers in the disputed territory who assert title to land under the United States. It appears in evidence that in 1873 and 1874 a part of that territory was sectionized under the authority of the General Government. We suppose that Governor Roberts referred to that fact when, in his message of 1883, he said that "the authorities of the United States had established an initial corner on the South Fork of Red River, on the line claimed to be the 100th degree of longitude, had sectionized the country east of that line, and protected it from settlement of white people as a part of the Indian Territory." He further said: "Application was made to me to know if I would sign the patents, if certificates were located and surveyed in Greer County. Under the then existing circumstances I felt it to be my duty to discourage such locations, as they might be to our prejudice in the settlement of our claim with the United States, when the merits of it could be more fully ascertained." But whatever may be the facts bearing upon this point, our duty is to determine the present issues according to the settled principles of law, without reference to considerations of inconvenience to individuals residing in the disputed territory. We cannot doubt that the Congress of the United States will do all that justice requires to be done in order to avoid any injury to individuals that ought not to be inflicted upon them.

It is further said that the State, since it assumed to create Greer County, has expended a large amount of money in pro-

viding a public school system for the inhabitants of that locality. To what extent moneys have been so expended is not clearly shown. Whatever may be the facts, touching this point, we do not feel at liberty to give weight to them in this case. The question before us, we repeat, is one of law, and must be determined according to law. What may be fairly and justly demanded by the State, on account of moneys expended for the benefit of the inhabitants of the disputed territory, is a matter for the consideration of the legislative branch of the National Government.

In the argument it was suggested that this court ought not to forget how much was added to the power and wealth of this nation when Texas, with its imperial domain, came into the Union, and her people became a part of the political community for whom the Constitution of the United States was ordained and established. This fact cannot, of course, be forgotten by any American who takes pride in the prestige and greatness of the Republic. But the considerations which it suggests cannot affect the decision of legal questions, and must be addressed to another branch of the Government. The supposition is not to be indulged that that department of the Government will fail to recognize any duty imposed upon it by the circumstances arising out of this vexed controversy.

For the reasons stated the United States is entitled to the relief asked. And this court now renders the following decree:

This cause having been submitted upon the pleadings, proofs and exhibits, and the court being fully advised, it is ordered, adjudged and decreed that the territory east of the 100*th meridian of longitude, west and south of the river now known as the North Fork of Red River, and north of a line following westward, as prescribed by the treaty of* 1819 *between the United States and Spain, the course, and along the south bank, both of Red River and of the river now known as the Prairie Dog Town Fork or South Fork of Red River until such line meets the* 100*th meridian of longitude — which territory is sometimes*

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called Greer County — constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America. Each party will pay its own costs.

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

CENTRAL PACIFIC RAILROAD COMPANY *v.* CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 559. Argued January 15, 16, 1896. — Decided March 16, 1896.

The Central Pacific Railroad Company, being required by the laws of California to make returns of its property to the Board of Equalization for purposes of taxation, made a verified statement in which, among other things, it was said: "The value of the franchise and entire roadway, roadbed, and rails within this State is $12,273,785." The Board of Equalization determined that the actual value of the franchises, roadway, roadbed, rails, and rolling stock of the company within the State at that time was $18,000,000. The company not having paid the taxes assessed on this valuation, this action was brought by the State to recover them. *Held,*

(1) That the presumption was that the franchise included by the company in its return was a franchise which was not exempt under the laws of the United States, and that the board had acted upon property within its jurisdiction;

(2) That if the Board of Equalization had included what it had no authority to assess, the company might seek the remedies given under the law, to correct the assessment so far as such property was concerned, or recover back the tax thereon, or, if those remedies were not held exclusive, might defend against the attempt to enforce it;

(3) Where the property mentioned in the description could be assessed, and the assessment followed the return, the company ought to be

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held estopped from saying that the description was ambiguous, and this notwithstanding the fact that the statement was made on printed blanks, prepared by the board.

The decision of the Supreme Court of the State that the findings of the trial court on the question of whether the franchises taxed covered franchises derived from the United States was conclusive, and is binding on this court.

The fact that a court, after giving its decision upon an issue, gives its opinion upon the manner in which it would have decided the issue under other circumstances, does not constitute an error to be reviewed in this court.

The Central Pacific company is a corporation of California, recognized as such by the acts of Congress granting it aid and conferring upon it Federal franchises, and it was not the object of those acts to sever its allegiance to the State or transfer the powers and privileges derived from it; nor did those consequences result from the acceptance of the grant by the corporation.

The property of a corporation of the United States may be taxed by a State, but not through its franchise.

Although a corporation may be an agent of the United States a State may tax its property, subject to the limitation pointed out in *Railroad Co.* v. *Peniston*, 18 Wall. 5.

It is immaterial in this case whether the railroad company operates its road under the franchise derived from the United States, or under that derived from the State.

When it is considered that the Central Pacific company returned its franchise for assessment, declined to resort to the remedy afforded by the state laws for the correction of the assessment as made if dissatisfied therewith, or to pay its tax and bring suit to recover back the whole or any part of the tax which it claimed to be illegal, its position is not one entitled to favorable consideration; but, without regard to that, the court holds, for reasons given, that the state courts rightly decided that the company had no valid defence to the causes of action proceeded on.

This was an action brought in the name of the People of the State of California against the Central Pacific Railroad Company in the Superior Court of the city and county of San Francisco, under section 3670 of the Political Code of that State, to recover a certain sum of money alleged to be due the State and various other sums of money alleged to be due eighteen counties of the State, for taxes for the fiscal year 1887 upon the assessment of the state Board of Equalization, judgment being demanded for the several sums of state and county taxes delinquent and unpaid as stated in the complaint, with

five per cent thereon added for delinquency and non-payment, and interest from the time of such delinquency; and also for costs of suit and attorneys' fees, as allowed by law.

The provisions of the state constitution on the subject of revenue are found in article XIII; and sections 1, 4, and 10 of that article and sections 3664, 3665, 3666, 3667, 3668, 3669, 3670, and 3671 of the Political Code of California are given in the margin.[1]

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[1] SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership: *Provided*, That growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits or debts due to *bona fide* residents of this State.

SECTION 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: *Provided*, That if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

SECTION 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the state Board of Equalization, at their actual value, and the same shall be apportioned to the

Statement of the Case.

The complaint contained nineteen counts on nineteen alleged causes of action, and each count averred that the defendant was, at all times therein mentioned, a corporation organized

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counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

Provisions of Political Code.

SECTION 3664. The president, secretary, or managing agent, or such other officer as the state Board of Equalization may designate of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year —

1. The whole number of miles of railway in the State, and where the line is partly out of the State, the whole number of miles without the State and the whole number within the State, owned or operated by such corporation, person, or association:

2. The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the State:

3. The width of the right of way:

4. The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway, including the part without the State:

5. Number, kind, and value of rolling stock owned and operated in the State:

6. Number, kind, and value of rolling stock used in the State, but owned by the party making the returns:

7. Number, kind, and value of rolling stock owned, but used out of the State either upon divisions of road operated by the party making the returns, or by and upon other railways.

Also showing in detail for the year preceding the first of January —

1. The gross earnings of the entire road:

2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental:

3. The cost of operating the entire (road), exclusive of sinking fund, expenses of land department, and money paid to the United States:

4. Net income for such year and amount of dividend declared:

5. Capital stock authorized:

6. Capital stock paid in:

7. Funded debt:

8. Number of shares authorized:

9. Number of shares of stock issued:

and existing under the laws of the State of California, and engaged in operating a railroad in more than one county of that State; and that on August 13, 1887, the state Board of

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10. Any other facts the state Board of Equalization may require:

11. A description of the road, giving the point of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given no other annual description thereafter is necessary, unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold for taxes, either state or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, person, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same.

If such statement is not furnished as above provided, the assessment made by the state Board of Equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final.

SECTION 3665. The state Board of Equalization must meet at the state capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way, are assessed by the assessors of the county wherein they are situate. Within ten days after the third Monday of August, the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The board must also, within said time, transmit by mail to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way, by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the State, and the amount apportioned to the county, or city

Equalization, for the purposes of state and county taxation for the fiscal year ending June 30, 1888, assessed to defendant, then the owner and operator thereof in more than one county

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and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the first Monday in October, the board of supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the state Board of Equalization within the county; the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxing district in the county, or city and county, through which such railway runs, as fixed by the state Board of Equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council, or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the state Board of Equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provision of section thirty-six hundred and ninety-two of the Political Code, between the third Monday in August and the third Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment, of the change made, and the auditor must note such change upon the assessment book or roll of the county as directed by the board. [In effect March 9, 1883.]

Section 3666. The state Board of Equalization must prepare each year a book, to be called "Record of Assessment of Railways," in which must be entered each assessment made by the board, either in writing, or by both writing and printing. Each assessment so entered must be signed by the chairman and clerk. The record of the apportionment of the assessments

in said State, the franchise, roadway, roadbed, rails and rolling stock of defendant's railroad, then situated and being within said State, at the sum of eighteen millions of dollars.

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made by the board to the counties, and cities and counties, must be made in a separate book, to be called "Record of Apportionment of Railway Assessments." In such last described book must be entered the names of the railways assessed by the board, the names of the corporation to which, or the name of the person or association to whom, each railway was assessed, the whole number of miles of the railway in the State, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, roadbed, rails, and rolling stock for purposes of State taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county taxation. Before the third Monday of October of each year the clerk of the state Board of Equalization must prepare and transmit to the comptroller of the State, duplicates of the "Record of Assessment of Railways," and "Record of Apportionment of Railway Assessments," each certified by the chairman and clerk of the board, and to be known respectively as "Duplicate Record of Assessment of Railways," and "Duplicate Record of Apportionment of Railway Assessments." In the last named duplicate two columns must be added, in one of which the comptroller must enter the state taxes due the State upon the whole assessment by each corporation, person, or association, and in the other the county, or city and county taxes, due upon the assessment apportioned to each county, or city and county, by each corporation, person, or association. The two duplicates constitute the warrant for the comptroller to collect the state and county, and city and county, taxes levied upon such property assessed by the board, and the amount of the apportionment of the assessment to each county, and city and county, respectively. [In effect March 9, 1883.]

SECTION 3667. When the board of supervisors of each county, and city and county, to which the state Board of Equalization has apportioned the assessment of railways shall have fixed the rate of county, or city and county, taxation, the clerk of the board of supervisors must forthwith by mail, postage paid, transmit to the comptroller a statement of the rate of taxation levied by the board of supervisors for county, or city and county, taxation. If the clerk fails to transmit such statement, the comptroller must obtain the information as to such rate of taxation from other sources. On or before the fourth Monday of October the comptroller must compute and enter in separate money columns in the "Duplicate Record of Apportionment of Railway Assessments" the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor as the state tax upon the total amount of the assessment, and the county, or city and county, tax upon the apportionment of the assessment to each county, and city and county, or the property

The first count then averred that within ten days after the third Monday in August, 1887, the state Board of Equalization apportioned the total assessment of the franchise, road-

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assessed to such corporation, person, or association named in said duplicate record. [In effect March 9, 1883.]

SECTION 3668. Within ten days after the fourth Monday in October, the comptroller must publish a notice for two weeks in one daily newspaper of general circulation at the state capital, and in two daily newpapers of general circulation published in the city of San Francisco, specifying:

1. That he has received from the state Board of Equalization the "Duplicate Record of Assessments of Railways" and the "Duplicate Record of Apportionment of Railway Assessments;"

2. That the taxes are now payable and will be delinquent on the last Monday in December next, at six o'clock P.M., and that unless paid to the state treasurer at the capitol prior thereto, five per cent will be added to the amount thereof. On the last Monday in December of each year, at six o'clock P.M., all of unpaid taxes are delinquent, and thereafter there must be collected by the state treasurer or other proper officer an addition of five per centum, which sum when collected must be set aside by the treasurer, as a fund with which to pay the contingent expenses of actions against any delinquents, the said expenses to be audited by the board of examiners. When any taxes are paid to the state treasurer by order of the comptroller, upon assessments made and apportioned by the state Board of Equalization, the comptroller must forthwith notify the auditor and treasurer respectively of each county, and city and county, that such taxes have been paid, and of the amount thereof to which each county and city and county interested is entitled. The State's portion of the taxes must be distributed by the treasurer to each fund entitled thereto, and the portion belonging to the counties, and cities and counties, must be placed in a fund, to be called "Railway Tax Fund," to the credit of each county, and city and county entitled thereto. When any taxes are placed in the "Railway Tax Fund" to the credit of a county, or city and county, the comptroller, at the next settlement with the comptroller by the treasurer of such county, or city and county, must draw and deliver to such treasurer, his warrant upon the state treasurer for the amount in the fund to the credit of such county, or city and county. [In effect March 9, 1883.]

SECTION 3669. Each corporation, person, or association assessed by the state Board of Equalization must pay to the state treasurer, upon the order of the comptroller, as other moneys are required to be paid into the treasury, the state and county, and city and county, taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association, dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent added, if to be added, on or before the first Monday in February, and the filing of notice with the comptroller of an intention to

way, roadbed, rails and rolling stock of defendant to the counties in the State in which the railway was located, in proportion to the number of miles of railway laid in such

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begin an action, may, not later than the first Monday of February, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the Superior Court of the county of Sacramento. The attorney general must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the comptroller, he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the comptroller may demand and receive from the county, or city and county, interested the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. [In effect March 9, 1883.]

SECTION 3670. After the first Monday of February of each year, the comptroller must begin an action in the proper court, in the name of the people of the State of California, to collect the delinquent taxes upon the property assessed by the state Board of Equalization; such suit must be for the taxes due the State, and all the counties, and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the "Duplicate Record of Apportionment of Railway Assessments."

The demands for state and county, and city and county taxes, may be united in one action. In such action a complaint in the following form is sufficient:

[Title of Court.]

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

(NAMING THE DEFENDANT).

Plaintiff avers that on the day of , in the year (naming the year), the state Board of Equalization assessed the franchise, roadway,

counties; and the amounts of the total assessment so apportioned by the board to those counties, and the number of miles of defendant's railway laid in said counties, were specifically set forth.

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roadbed, rails, and rolling stock of the defendant at the sum of (naming it) dollars. That the board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on naming each county).

That the defendant is indebted to plaintiff for state and county taxes for the year eighteen , in the following sums: For state taxes, in the sum of (naming it) dollars; for county taxes of the county of (naming it), in the sum of (naming it) dollars, etc., with five per cent added for nonpayment of taxes. Plaintiff demands payment for said several sums and prays that an attachment may issue in form as prescribed in section 540 of the Code of Civil Procedure.

(Signed by the comptroller or his attorney.)

On the filing of such complaint, the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, there shall be included in the judgment as counsel fees, and in case of judgment of taxes after suit brought but before judgment, the defendant must pay as counsel fees, such sum as the court may determine to be reasonable and just. Payment of the taxes or the amount of the judgment in the case must be made to the state treasurer. In such actions the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the comptroller, showing unpaid taxes against any corporation, person, or association for property assessed by the state Board of Equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State and counties, or cities and counties therein named, and that the corporation, person, or association is indebted to the people of the State of California, in the amount of taxes, state and county, and city and county, therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. [In effect March 9, 1883.]

Section 3671. The assessment made by the county assessor, and that of the state Board of Equalization, as apportioned by the board of supervisors to each city, town, township, school, road, or other district in their respective counties, or cities and counties, shall be the only basis of taxation for the county, or any subdivision thereof, except incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect. All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes. [In effect March 9, 1883.]

Statement of the Case.

The count then proceeded as follows:

"V. That within ten days after the third Monday in August, 1887, said state Board of Equalization did transmit to each of the county auditors of said counties a statement showing the length of the main track of defendant's railway within the counties of said auditors respectively, with a description of the whole of defendant's railway track within the counties of said auditors respectively, including the right of way sufficient for identification, the assessed value per mile of the same, as fixed by said *pro rata* distribution per mile of the said assessed value of the whole franchise, roadway, roadbed, rails and rolling stock of defendant's railway in said State, and the amount apportioned to the counties of said auditors respectively. . . .

"VI. That thereafter, and prior to the first Monday in October, 1887, the county auditor of each of said counties did enter said statement so transmitted to him upon the assessment roll of his county, and did enter upon said assessment roll of his county the said amount of said assessment apportioned by said state Board of Equalization to his county in the column of the assessment roll of his county which showed the total value of all property of his county for taxation. . . .

"VII. That thereafter, and on the first Monday of October, 1887, the board of supervisors of each of said counties did levy the state tax of said State of California according to the rate theretofore fixed for such state tax for the fiscal year ending June 30, 1888, by said state Board of Equalization, upon the taxable property in its county, including the property of defendant assessed and apportioned to its county as aforesaid, and the taxes so levied in all of said counties for the purposes of state taxation upon said property of defendant assessed and apportioned to said counties as aforesaid was the sum of $109,440.

"VIII. That upon the seventeenth day of September, 1887, said state Board of Equalization did fix the rate of state taxation for the fiscal year ending June 30, 1888, at the rate of $0.608 on each one hundred dollars.

"IX. That defendant has never at any time paid said state tax, amounting to said sum of $109,440, nor any part thereof. That said state tax became and was delinquent on the last Monday in December, 1887, at six o'clock P.M., and upon and at the time of and by reason of such delinquency five per cent of said state tax, to wit, the sum of $5472, was, by the comptroller of said State, added to said state tax, and no part of said $5472, so added for delinquency has ever been paid by defendant.

"X. That prior to the third Monday of October, 1887, the said state Board of Equalization did prepare and transmit to the comptroller of said State a duplicate record of assessment of railways, and a duplicate record of apportionment of railway assessments for the fiscal year ending June 30, 1888, both certified by the chairman and clerk of said state Board of Equalization, and which said duplicate records included the said assessment of defendant's said property, and the said apportionment of the assessment of defendant's property to the said counties.

"Before the fourth Monday of October, 1887, said comptroller did compute at the rates of taxation fixed and levied as aforesaid, and enter in separate money columns in the said duplicate record of apportionment of railway assessments, the respective sums, in dollars and cents, to be paid by the defendant as the state tax upon the total amount of said assessment, and as the county tax upon the apportionment of said assessment to each county, and city and county, of the property assessed to defendant named in said duplicate record. That within ten days after the fourth Monday in October, 1887, said comptroller did publish for two weeks in one daily newspaper of general circulation published at the state capital of said State, and in two daily newspapers of general circulation published in the city and county of San Francisco in said State, a notice that he had received from said state Board of Equalization said duplicate record of assessments of railways, and said duplicate record of apportionment of railway assessments, and that the said taxes were then due and payable and would become delinquent on the last Monday in December,

1887, at 6 o'clock P.M., and that unless paid to the state treasurer at the capital prior thereto, five per cent would be added to the amount thereof.

"That a reasonable compensation for legal services by Langhorne & Miller, attorneys for plaintiff, in the institution and prosecution of this cause of action, is a sum equal to ten per cent of the tax in this cause of action alleged to be delinquent."

Then followed eighteen counts for the county taxes in the several counties, all averring in detail compliance with the law in relation thereto.

Defendant demurred to the complaint, the demurrer was overruled, and defendant answered, setting up various defences, one of which was that the franchise assessed to defendant by the state Board of Equalization was derived by defendant from the government of the United States through certain acts of Congress, and that the same were used by defendant as one of the instrumentalities of the Federal government, and, hence, was not taxable by the State; that the assessment of this franchise was so blended with the whole assessment as not to be separable therefrom; and that the whole assessment was therefore void.

The plaintiff put in evidence the "Duplicate Record of Assessments of Railways by the state Board of Equalization for 1887," and the "Duplicate Record of Apportionment of Railway Assessments for 1887," filed in the office of the comptroller of the State of California on the 11th of October, 1887. These were admitted subject to defendant's objection. The duplicate record of the assessments of railways stated that "the state Board of Equalization being in session on this, the thirteenth day of August, 1887, all the members being present, and having under consideration the assessment of the franchise, roadway, roadbed, rails and rolling stock of the Central Pacific Railroad Company, within the State, for the year 1887, and it appearing to this board that said company, on the first Monday in March, in the year 1887, at 12 o'clock, meridian, of that day, owned, and still owns, 719.50 miles of railroad within this State, which at said time and day

in March was, and still is, operated in more than one county; being the entire railway of said company within this State, and which, with the right of way for the same, is described as follows:" [Here follows description of line of roadway, roadbed, rails and right of way.] "And it appearing that the actual value of the franchise, roadway, roadbed, rails and rolling stock of said company, within this State, at the said date and time in March, was, and still is, the sum of eighteen millions of dollars: Therefore, it is hereby ordered that the said franchise, roadway, roadbed, rails and rolling stock, for the year 1887, be and the same are hereby assessed to the said Central Pacific Railroad Company at the sum of eighteen million dollars."

The duplicate record of apportionment of railway assessments, under date of August 22, 1887, stated: "The state Board of Equalization met this day. All the members present. The board this day apportioned the total assessment of the franchise, roadway, roadbed, rails and rolling stock of each railroad assessed by it on the 13th day of August, 1887, for the year 1887, to the counties and the city and county of San Francisco in proportion to the number of miles of railway laid in each county, and in the city and county of San Francisco, which apportionment is set out in the following table. The apportionment is based upon the proportion the number of miles in each county of a railway bears to the total number of miles of such railway laid in the State."

The annexed table gave the name of the corporation to which each railway was assessed and the name of each railway assessed, in this instance as the "Central Pacific Railroad Company;" the names of the counties and city and county, to which the assessment was apportioned; the total number of miles of road in the State; the number of miles in each county and city and county; the value per mile; the total assessment of the franchise, roadway, roadbed, rails and rolling stock of each railway assessed; the amount apportioned to each county, and city and county, for purposes of county and city and county taxation; rate of taxation for each county, and city and county, levied by the board of supervisors; amount of

state taxes at the state rate; and amount due of county, and city and county, taxes upon the assessment as apportioned.

It was admitted that the apportionment was made as the Political Code required it to be made, and that the mileage for each county was correctly stated.

Plaintiff then proved, under objection, that the taxes sued for had not been paid, or any portion thereof. Evidence was also introduced in regard to the value of services of counsel.

Defendant called as a witness C. M. Coglan, clerk of the Board of Equalization, and identified the original minutes of the proceedings of the board relating to the assessment of the property of the Central Pacific Railroad Company for the year 1888, under date of August 17, 1888. It appeared therefrom that the attorney general recommended to the board that the franchises of the Central Pacific and Southern Pacific companies, derived from the State, be assessed, and that the valuation thereof be stated, separately in the record of assessments; that the board assess the moles, bridges and culverts of each road separately, and in respect of certain railroad companies declare that the steamers used in operating those roads were not assessed; whereupon the board proceeded to make such assessment, and ordered that the franchise of the Central Pacific Railroad Company, derived from the State of California, be assessed at $1,250,000, and that the franchise of the Southern Pacific Railroad Company, derived from the State of California, be assessed at $1,000,000; that the moles, culverts, bridges and wharves upon which the tracks of the Central Pacific are laid be assessed at $1,000,000; that the moles, culverts, bridges and wharves upon which the tracks of the Southern Pacific are laid be assessed at $400,000. The original record of the assessment of the Central Pacific Railroad Company made by the board for the year 1888 was offered in evidence, and was to the effect that the board assessed the franchise derived from the State of California, the roadway, roadbed and rolling stock of said company within said State, at the total sum of $15,000,000.

On the cross-examination of Mr. Coglan, plaintiff offered and the court admitted, in evidence, under defendant's objec-

tion, the verified statements furnished by defendant to the state Board of Equalization during the years 1887 and 1888, which were marked plaintiff's Exhibits 4 and 6. Exhibit four was the return made by the Central Pacific Railroad Company for 1888, which read thus:

"The Central Pacific Railroad Company answers the questions propounded by the board as follows: And makes the following statement in relation to its property subject to taxation in the State of California, owned by it for the year ending on the first Monday in March, 1888, and of all property used in operating its railway during such year:

"The length of railway owned and operated as a system in and out of the State is 1344.14 miles.

"Length of track, sidings and double track reduced to single track is ——; out of the State, 597 miles; in the State, 747.14 miles.

"The value of the franchise derived from the State within this State.....	$25 00
"The value of the entire roadway, roadbed, rolling stock and rails within this State is	9,376,607 00
	$9,376,632 00"

This was followed by a list of the mileage of the road in California in each of the counties through which it ran, and schedules of the rolling stock; the earnings and expenses of the road as a system in and out of the State; of the operating expenses; and of the earnings and expenses within the State. The return was duly sworn to.

Exhibit six was the return of the company for the year 1887. This opened with the same statement as the other, and after giving the length of the railway owned and operated as a system and the length of track, single and double, out of and in the State, continued: "The value of the franchise and entire roadway, roadbed and rails within this State is $12,273,785.00." The usual lists and schedules were attached.

Defendant then called as a witness one Morehouse, a member of the state Board of Equalization, whose evidence tended

to show that the assessment for 1887 was intended by him to and did include defendant's Federal franchise, but that he could not say that the value of the Federal franchise operated on the minds of the other members of the board in making up the items of the valuation. Defendant offered to prove by Morehouse that at every session from 1883 and prior to 1888, the board, in making its assessment of the valuation of the property of the Central Pacific Railroad Company, included in its total estimate the value of the Federal franchise held by that company, by virtue of the acts of Congress referred to, and that the valuation of the Federal franchise was blended into the general assessment of that company in such a manner as to be indistinguishable from it and not capable of separation. This was objected to as incompetent, irrelevant and immaterial, the objection sustained by the court, and exception saved.

E. W. Maslin, secretary of the state Board of Equalization from April, 1880, to March, 1891, who was present at the board meetings and kept the record of its proceedings, was called as a witness by defendant, and testified that from his acquaintance with the history of the assessment of the road since 1880, his relation to it with respect of the franchise and personal property, his conversation with many members through those years, the knowledge he had of how two members arrived at their conclusions and the knowledge that he thought he had as to how three members arrived at their conclusions, he thought he could state what elements of value were considered by the board in making their estimate for the total values for 1887. Thereupon defendant asked witness the following questions:

"Q. From the various sources of knowledge which you have enumerated, please state to the court what elements were taken into consideration by the state Board of Equalization in making the assessment of this company for the year 1887.

"Q. Did you hear any conversation between the members of the state Board of Equalization during the meeting when the assessment of this company was made for the year 1887, with reference to the elements that they proposed to and did include in the assessment?

"Q. At the time that the assessment of 1887 was made by the state Board of Equalization upon the property of the Central Pacific Railroad Company, what was said and done at the meeting of the state Board of Equalization on that day in your presence?"

To each of these questions plaintiff interposed objections, which were sustained by the court, and defendant excepted.

Defendant then made the following offer:

"Now, in view of the ruling of the court on this subject, we now offer to prove by this witness that from the time of the organization of the state Board of Equalization in 1880 down to and including the year 1887, that board had every year considered the value of the Federal franchise — that is, the franchise derived from the United States by the acts of Congress of the government of the United States, belonging to and owned by the Central Pacific Railroad Company, as an element of value in assessing the total value of the property of that railroad company; and that in 1888, in consequence of the decision of the Supreme Court of the United States upon the subject, the state Board of Equalization for the first time ceased to consider this Federal franchise as an element of value, and hence reduced their valuation by the sum of three million dollars on the Central Pacific Railroad Company's property."

This offer was disallowed by the court, and defendant excepted.

Plaintiff in rebuttal called C. E. Wilcoxen and J. P. Dunn, who were members of the board and participated in making the assessment of 1887, and they testified that the Federal franchise was not included in the assessment for that year. On the cross-examination of Mr. Wilcoxen an effort was made to introduce testimony that he had given before a committee of the general assembly of California in 1889, which the court excluded, except so far as it related to the year 1887.

The statement on motion for new trial then continued:

"In its written opinion, upon which the findings were based, the court after determining as a fact, from a preponderance of the evidence before it, that the Federal franchise of defendant was not assessed or included in the assessment of

the property of defendant by the state Board of Equalization, for the year 1887, uses the following language:

"'But if the parol evidence offered did not weigh in plaintiff's favor, and if by a preponderance of such evidence defendants could have shown that the State intended to and did include a Federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done.

"'The best and only evidence of the acts and intentions of deliberative bodies must be drawn from the record of its intentions. . . . From both standpoints of fact and of law, the findings must be that a Federal franchise was not included in these assessments.'"

On February 3 the Superior Court made and filed its written findings of fact and conclusions of law. The findings of fact included the following:

"XXX. That on the 13th day of August, 1887, the state Board of Equalization, of the State of California, did, for the purposes of taxation for the fiscal year 1887 assess as a unit, and not separately, the franchise, roadway, roadbed, rails and rolling stock of defendant's railroad, then being and situate within the State, at the sum and value mentioned in the amended complaint, and did then and there enter said assessment upon its minutes, and in its record of assessments. That such assessment is the one upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the one aforesaid was ever made by said Board of Equalization or other assessor of said property of the defendant for said fiscal year. That said state Board of Equalization did at the time and in the manner alleged in the amended complaint apportion said assessment and transmit such assessment and the apportionment to the county and city and county auditors, and said assessment and the apportionment thereof were entered upon the assessment rolls of said counties and said cities and counties as alleged in said amended complaint, as hereinbefore found.

"XXXI. That the said Board of Equalization, in making

said assessment, did assess the franchise, roadway, roadbed, rails and rolling stock of defendant's railroad, at their full cash value, without deducting therefrom the value of the mortgage, or any part thereof, or the value of said bonds issued under said acts of Congress, given and existing thereon, as aforesaid, to secure the indebtedness of said company to the holders of said bonds, and, in making said assessment, said board did not deem nor treat said mortgage or bonds as an interest in said property, but it assessed the whole value of said property as assessed to defendant in the same manner it would have done had there been no mortgage thereon. At the time said assessment and apportionment were made as aforesaid by said state Board of Equalization the assessment books or rolls for the said fiscal year had been completed and were in existence, and the assessment and valuation of defendant's property for the purposes of taxation for said fiscal year had been ascertained and fixed as provided by law, and said board, in making said valuation and apportionment, did exercise all necessary powers relative to the equalization of values for the purposes of taxation."

"XXXIII. Said state Board of Equalization, in making said assessment of defendant's roadway, did not include in the valuation of said roadway the value of any fences erected upon the land of coterminous proprietors, and did not value said roadway at a greater value than the value of other property similarly situated and greater than its actual cash value, and did not blend in said assessment the value of any fences. That said board, in making its said assessment and valuation therefor, did not adopt a system of valuation which operated unequally, or which was intended to or which did in any manner violate the rule prescribed in section 10 of article 13 of the state constitution, and said board, in making its said assessment and valuation therefor, did not value the rolling stock of defendant at sixty (60) or any other per cent above its actual value, and did not value nor assess defendant's franchise in excess of its actual value.

"XXXIV. That in making said assessment and valuation therefor said state Board of Equalization did not include the

value of or assess any steamboats or boats, nor blend the value or assessment of any steamboats or boats, with the value of or assessment of defendant's roadway, rails, roadbed and rolling stock.

"XXXV. That in making its assessment and valuation therefor of defendant's franchise said state Board of Equalization did not include, assess or value any franchise or corporate power held or exercised by defendant under the acts of Congress hereinbefore mentioned, or under any act of Congress whatever. And said board, in making said assessment and valuation therefor, upon defendant's franchise, roadbed, roadway, rails and rolling stock, for purposes of taxation for the fiscal year 1887, did not include in its said assessment and valuation therefor any Federal franchise, then possessed by defendant, nor any franchise or thing whatsoever, which said board could not legally include in such assessment of valuation. That the franchise, roadway, roadbed, rails and rolling stock of defendant's railroad were valued and assessed by said state Board of Equalization, for purposes of taxation for the fiscal year 1887, at their actual value, and in proportion to their values respectively."

The conclusions of law were that plaintiff was entitled to recover the sums claimed, with five per cent penalty, interest and counsel fees, the amounts being stated, and costs.

Judgment was rendered in plaintiff's favor accordingly.

On the 19th of June following, the statement, on motion for new trial, was approved and filed as part of the record, including an assignment and specification of errors. The defendant's motion for a new trial was overruled, and defendant appealed to the Supreme Court of the State from the judgment and from the order denying the motion for new trial. January 6, 1895, the Supreme Court rendered judgment, directing the court below to modify its judgment by striking therefrom the amount allowed for interest prior to the entry thereof, and also certain counsel fees, and that, as so modified, the judgment and order denying a new trial should stand affirmed. The opinion is reported in *People* v. *Central Pacific Railroad*, 105 California, 576.

Mr. J. Hubley Ashton (with whom was *Mr. Charles H. Tweed* on the brief,) for plaintiff in error.

Mr. J. P. Langhorne and *Mr. J. H. Miller*, (with whom was *Mr. W. F. Fitzgerald*, attorney general of the State of California, on the brief,) for defendant in error.

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

The assessment of the state Board of Equalization is not attacked on the ground of fraud, but it is contended that the value of the Federal franchise or franchises possessed by plaintiff in error was included therein, and that as the assessment embraced all the property assessed as a unit, it was thereby wholly invalidated. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *California* v. *Central Pacific Railroad*, 127 U. S. 1.

By section 1 of article XIII of the constitution of California, it is provided that "all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things real, personal and mixed, capable of private ownership;" and by section 10 that "the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the state Board of Equalization, at their actual value;" and the Political Code provided that this must be, and the mode in which it should be, done.

Railway corporations were required to furnish the Board of Equalization, before it acted, and as of the first Monday of March in each year, a statement signed and sworn to by one of their officers, showing in detail the whole number of miles of railway in the State, and, when the line was partly out of the State, the whole number of miles within and without, owned or operated by each corporation, and the value thereof; the value of the roadway, roadbed and rails of the whole, and

the value of the same within the State; the width of the right of way; the rolling stock and value; the gross earnings of the entire road and of the road within the State; the net income; the capital stock authorized and paid in; the number of shares authorized and issued, etc.

This verified statement for 1887 was made by plaintiff in error in due time, and purported to be a "statement in relation to its property subject to taxation in the State of California owned by it for the year ending on the first Monday in March, 1887, and of all property used in operating its railway during such year." And it was therein set forth, among other things: "The value of the franchise and entire roadway, roadbed and rails within this State is $12,273,785.00." The Board of Equalization determined "that the actual value of the franchise, roadway, roadbed, rails and rolling stock of said company, within this State, at the said date and time in March, was and still is the sum of eighteen million dollars," and thereupon assessed "the said franchise, roadway, roadbed, rails and rolling stock for the year 1887" at that sum.

By section 3670 of the Political Code, the duplicate record of assessments of railways, and the duplicate record of apportionment of railway assessments, or copies thereof, were made *prima facie* evidence of the assessment, and that the forms of law in relation to the assessment and levy of such taxes had been complied with, and these were put in evidence.

Under this state of facts, the presumption was that the franchise thus included by plaintiff in error in its return and by the board in its assessment was a franchise which was not exempt under the laws of the United States, and that the board had acted upon property within its jurisdiction rather than upon property which it had no power to include in the assessment. Indeed, as the Supreme Court points out, when plaintiff in error included the franchise in its statement, if there were two franchises, one of which could be assessed and the other could not, plaintiff in error ought not to be permitted to say that the one which was not capable of assessment was intended by it to be or was included therein. *People* v. *Central Pacific Railroad*, 105 California, 576, 592. And the

court cited *San Francisco* v. *Flood*, 64 California, 504; *Lake County* v. *Sulphur Bank Quicksilver Mining Co.*, 68 California, 14, and *Dear* v. *Varnum*, 80 California, 86, which rule that a party who furnishes a list of property for taxation is estopped from questioning the sufficiency of the description so furnished in an action to collect the taxes. Undoubtedly if the Board of Equalization had included what it had no authority to assess, the company might seek the remedies given under the law to correct the assessment so far as such property was concerned, or recover back the tax thereon, or, if those remedies were not held exclusive, might defend against the attempt to enforce it. But where the property mentioned in the description could be assessed and the assessment followed the return, as it did here, the company ought, at least, to be held estopped from saying that the description was ambiguous.

It is said that plaintiff in error should not be bound by this statement because it was on printed blanks prepared by the board; but when plaintiff in error filled out and swore to the statement of its property "as being subject to taxation," and the blank form called on plaintiff in error to give a statement of the value of its franchise within the State for the purpose of assessment and taxation, if it had intended to claim that its state and Federal franchises were so merged as to render the former not subject to taxation, or that it had no franchise subject to taxation, it was its duty to so indicate in making the return. Nothing in the law and nothing in the blank form could have compelled it to make a statement contrary to the facts.

Plaintiff in error attempted to rebut the case made by introducing evidence which it claimed tended to show that the franchise assessed covered franchises derived from the United States as well as from the State, but the findings of fact of the trial court were to the contrary, and there being a conflict of evidence on the point, the Supreme Court treated the findings as conclusive in accordance with the well-settled rule on the subject in that jurisdiction. In *Reay* v. *Butler*, 95 California, 206, 214, it was said: "It has been held here in

more than a hundred cases, commencing with *Payne* v. *Jacobs*, 1 California, 39, in the first published book of reports of this court, and ending with *Dobinson* v. *McDonald*, 92 California, 33, in the last volume of said reports, that the finding of a jury or court as to a fact decided upon the weight of evidence will not be reviewed by this court."

That rule is equally binding on us. *Republican River Bridge Co.* v. *Kansas Pacific Railway*, 92 U. S. 315; *Dower* v. *Richards*, 151 U. S. 658.

It was argued in the Supreme Court of California, as it has been here, that because the trial judge, after having determined as a fact from the preponderance of the evidence before him that the Federal franchise was not assessed, stated that he thought that if the parol evidence offered had not weighed in plaintiff's favor, and that if by a preponderance of such evidence defendants could have shown that the board intended to and did include a Federal franchise in the assessment, the court would have to disregard it as incompetent, because the effect would be to contradict the record, therefore the evidence had been disregarded by the court in making its decision, and that the rule in respect of the conclusiveness of a determination of facts on a conflict of evidence did not apply. We entirely concur with the disposition of this suggestion by the Supreme Court, which said: "It clearly appears, however, that the court did not disregard the evidence, but that, after determining as a fact from the preponderance of evidence before it that the Federal franchise had not been assessed, it stated that if the preponderance of evidence had been otherwise, it would have held as a matter of law that the assessment must be tested by its own language. The fact that a court, after giving its decision upon an issue, gives its opinion upon the manner in which it would have decided the issue under other circumstances, does not constitute an error to be reviewed in this court."

Counsel for plaintiff in error also urge that inasmuch as it appeared in the proceedings to assess for 1888 that the board placed "the franchise of the Central Pacific company derived from the State of California" at $1,250,000, and then assessed

"the franchise derived from the State of California, the roadway, roadbed and rolling stock of said company within said State at the total sum of $15,000,000," it should be inferred from the difference in the language used in the assessment of 1887, and the difference in the total amount, that the franchise then assessed included the Federal franchise. But it also appeared that the return of the company for 1888 in respect of this matter was as follows:

"The value of the franchise derived from the State within this State.....	$25 00
"The value of the entire roadway, roadbed, rolling stock and rails within this State is..	9,376,607 00
	$9,376,632 00"

And we think that neither the difference in valuation nor the difference in the mode of statement has a material bearing on the assessment of 1887. The proceedings in 1888 showed greater care on the part of the company in making the return and on the part of the board in making the assessment, and possibly if plaintiff in error had been equally careful in relation to the assessment in 1887, it might have resulted that the valuation would have been less, although it does not follow that the reduction in 1888 might not be attributed to a change of financial conditions.

After all, these are considerations which were presented to the trial judge, in connection with all the evidence, and they have been disposed of adversely to the company.

Exceptions were saved to the action of the trial court in respect of the exclusion of certain evidence, but we are unable to find in these rulings or in the decision of the Supreme Court thereon the denial of any title, right, privilege or immunity specially set up or claimed under the Constitution or laws of the United States.

The rulings passed on by the Supreme Court, and which we must assume were all that were called to its attention, relate to the cross-examination of the witness Wilcoxen, as to statements previously made by him, which the Superior Court confined to the assessment for 1887, in respect of which he had

been examined in chief. The Supreme Court held that, under the circumstances disclosed by the record, the Superior Court did not err in this particular.

And also to the exclusion of the evidence of Maslin as to the conversations of members of the board, in making the assessment, in relation thereto. The Supreme Court held as to this that "the intention of the board or of any of its members, or the signification to be given to the term 'franchise,' as used in the assessment, could not be shown in this manner, and the evidence could not be used for impeaching purposes, unless the members of the board had been previously questioned thereon."

The correctness of these rulings commends itself to us, but it is enough to say that it is impossible to predicate error raising a Federal question as to these or any of the rulings on evidence referred to by counsel.

Clearly no such error was committed in the rejection of the general offers of proof if we should treat them as open to consideration notwithstanding the apparent abandonment of the exceptions in that regard in the Supreme Court. The issue was upon the assessment for the year 1887. The decision in *California* v. *Pacific Railroad Company*, 127 U. S. 1, was announced April 30, 1888, but the last of the judgments of the Circuit Court therein considered and affirmed was rendered July 15, 1886. And the action of the board in years prior to 1887, as sought to be shown, was not necessarily relevant or material. Offers of proof must be offers of relevant proof, specific, not so broad as to embrace irrelevant and immaterial matter, and made in good faith. The exercise of the discretion of the trial court in rejecting these offers cannot properly be reviewed by us.

The errors assigned as to the non-deduction of outstanding mortgages from the valuation of the property are expressly waived, though it is assigned for error in the brief that the court erred in not holding that, as the state franchise was subject to the lien of a mortgage to the United States, the assessment was invalid because in effect taxing the interest of the United States in that franchise created by the mortgage.

As to this, no such question was raised or passed on in the state court; and, moreover, the objection is without merit, on principle and authority, on grounds hereafter stated.

We are thus brought to the consideration of the real question in the case, presented in various aspects and argued with much ability by counsel for plaintiff in error, namely, that the company's franchises are one and inseparable, constituting an indivisible unit, which cannot be subjected to taxation by the State of California because that would be necessarily to subject the Federal franchise to taxation.

The argument is that the franchise of railroads authorized by the state constitution and the provisions of the Political Code to be assessed is nothing but the right to operate the railroad and charge and take tolls thereon; that the right of the Central Pacific Railroad Company to construct, maintain and operate its railroad in California was conferred upon that company by, and derived by it from, the United States; and that the right is a single right, though granted also by the State.

The company is a corporation of California, made up of two California corporations consolidated by articles of association entered into under the laws of California, and recognized as a California corporation by the acts of Congress through which it obtained Federal assistance and Federal franchises, subsequently to its incorporation in 1861, act of July 1, 1862, c. 120, 12 Stat. 489; act of July 2, 1864, c. 216, 13 Stat. 356; act of March 3, 1865, c. 88, 13 Stat. 504; act of May 7, 1878, c. 96, 20 Stat. 56; and never otherwise regarded in the legislation of the State. Indeed, by the act of April 4, 1864, Stat. Cal. 1863–1864, c. 417, passed to "enable the said company more fully and completely to comply with and perform the provisions and conditions of said act of Congress," of July 1, 1862, California authorized the company to construct, maintain and operate the road and telegraph in the territory lying east of the State, with the usual incidental rights, privileges and powers, also vesting in the company the rights, franchises and powers granted by Congress, with the express reservation that the company should be "subject to all the

laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State, and of the said company, shall have priority of transportation and transmission over said line of railroad and telegraph." *Sinking Fund cases*, 99 U. S. 700, 754. Severance of the allegiance of the corporation to the State that created it, and deprivation or transfer of the powers and privileges conferred by the State, were not the object of the grant by the United States, nor the consequence of the acceptance of that grant by the corporation as thereto authorized by the State. *Pennsylvania Railroad* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290, 296. But it was not contended at the bar that the company ever became a corporation of the United States, or that it is other than a state corporation.

Even in respect of railway corporations created by act of Congress the claim of an exemption of their property from state taxation has been repeatedly denied. This was so ruled in *Railroad Company* v. *Peniston*, 18 Wall. 5, 30, 36, and Mr. Justice Strong said:

"It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise. . . .

"It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax;

that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

"In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thomson* v. *Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of this agent, taxed in common with all other property of the State of a similiar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the General Government, and if it is not, it is prohibited by no constitutional implication."

In *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590, the Union Pacific Railway Company, Eastern Division, a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road to become one link in the transcontinental line known as the Union Pacific system, in accordance with the same acts of Congress relating to plaintiff in error, and conferring the same functions and privileges. The State of Kansas having subsequently taxed the roadbed, rolling stock and certain personal property of the corporation, its stockholders sought to enjoin the collection of the tax on the ground that the property was mortgaged to the United States and that it was bound under the Congressional grant to perform certain duties and ultimately pay five per cent of its net earnings to the United States, and that state taxation would retard and burden it in the discharge of its obligations to the general government. But the contention was overruled, and Mr. Chief Justice Chase said:

"But we are not aware of any case in which the real estate or other property of a corporation not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

"It is true that some of the reasoning in the case of *McCulloch* v. *Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States.

"And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon state taxation, derived from the express permission to tax shares in the national banking associations, is to be so construed as not to embarrass the imposition or collection of state taxes to the extent of the permission fairly and liberally interpreted. *National Bank* v. *Commonwealth*, 8 Wall. 353.

"We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch* v. *Maryland*, beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection.

". . . No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the national government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection. *Lane County* v. *Oregon*, 7 Wall. 71, 77; *National Bank* v. *Commonwealth*, 8 Wall. 353. We perceive no limits to the principle of exemp-

tion which the complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government. . . .

"The nature of the claims to exemption which would be set up, is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the general government. The allegation is, that the government has advanced large sums to aid in the construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this state corporation, owing its being to state law, and indebted for these benefits to the consent and active interposition of the state legislature, has a constitutional right to hold its property exempt from state taxation; and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government."

In his dissenting opinion in *Railroad Co.* v. *Peniston*, 18 Wall. 5, 48, Mr. Justice Bradley distinguishes *Thomson* v. *Pacific Railroad* from that case thus: "That was a state corporation, deriving its origin from state laws, and subject to state regulations and responsibilities. It would be subversive of all our ideas of the necessary independence of the national and state governments, acting in their respective spheres, for the general government to take the management, control, and regulation of state corporations out of the hands of the State to which they owe their existence, without its consent, or attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions, to which their position, as creatures of state legislation, renders them liable."

Both these cases were referred to with approval by Mr.

Justice Miller in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, and by Mr. Justice Brewer in *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, 416. In the latter case it was contended that, as the Texas and Pacific Railway was a corporation organized under the laws of the United States, it was not subject to the control of the State even as to rates of transportation wholly within the State. The argument was that the company received all its franchises from Congress; that among those franchises was the right to charge and collect tolls, and that the State had not the power, therefore, in any manner to limit or qualify such franchise. But that position was not sustained, and Mr. Justice Brewer, delivering the opinion, said "that, conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating the company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."

Although the Central Pacific company is not a Federal corporation, it is nevertheless true that important franchises were conferred upon the company by Congress, including that of constructing a railroad from the Pacific Ocean to Ogden in the Territory of Utah. But as remarked in *California* v. *Central Pacific Railroad*, 127 U. S. 1, 38, 40, "this important grant, though in part collateral to, was independent of, that made to the company by the State of California, and has ever since been possessed and enjoyed." That case came up from the Circuit Court of the United States for the Northern District of California, and the Circuit Court found that the assessment made by the state Board of Equalization "included the full value of all franchises and corporate powers, held and exercised by the defendant;" and as it could not be denied that that embraced franchises conferred by the United States, it was held that the assessment was invalid, but it was not held nor intimated that if the Board of Equali-

zation had only included the state franchise, the same result would have followed.

Mr. Justice Bradley, delivering the opinion of the court, said:

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing.

"But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and power must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which

is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

Mr. Justice Bradley then referred to *McCulloch* v. *Maryland*, *Osborn* v. *Bank of the United States*, and *Brown* v. *Maryland* to the proposition that a power given to a person or corporation by the United States cannot be subjected to taxation by a State, and added "that these views are not in conflict with the decisions of this court in *Thomson* v. *Pacific Railroad*, 9 Wall. 579, and *Railroad Company* v. *Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall. 35, 37."

Thus it was reaffirmed that the property of a corporation of the United States might be taxed, though its franchises, as for instance its corporate capacity and its power to transact its appropriate business and charge therefor, could not be. It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of the agents, subject to the limitations pointed out in *Railroad Co.* v. *Peniston*. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 177.

Of course, if Congress should think it necessary for the protection of the United States to declare such property exempted, that would present a different question. Congress did not see fit to do so here, and unless we are prepared to overrule a long line of well considered decisions the case comes within the rule therein laid down. Although in *Thomson's case* it was tangible property that was taxed, that can make no difference in principle, and the reasoning of the opinion applies.

Under the laws of California plaintiff in error obtained from the State the right and privilege of corporate capacity; to construct, maintain and operate; to charge and collect fares

and freights; to exercise the power of eminent domain; to acquire and maintain right of way; to enter upon lands or waters of any person to survey route; to construct road across, along or upon any stream, watercourse, roadstead, bay, navigable stream, street, avenue, highway or across any railway, canal, ditch or flume; to cross, intersect, join or unite its railroad with any other railroad at any point on its route; to acquire right of way, roadbed and material for construction; to take material from the lands of the State, etc., etc. Stat. Cal. 1861, c. 532, 607; 2 Deering's Annotated Codes and Stat. Cal. 114.

It is not to be denied that such rights and privileges have value and constitute taxable property.

The general rule, as stated by Mr. Justice Miller, in *State Railroad Tax cases*, 92 U. S. 575, 603, is "that the franchise, capital stock, business and profits of all corporations, are liable to taxation in the place where they do business and by the State which creates them, admits of no dispute at this day." And the constitution of California expressly declares that the word "property" as used in section 1 of article 13, providing that "all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value," includes franchises as well as all other matters and things capable of private ownership.

The question here is not a question of the value of the state franchise, but whether that franchise existed, for if in 1887 plaintiff in error possessed any subsisting rights or privileges, otherwise called franchises, derived from the State, then they were taxable, and the extent of their value was to be determined by the Board of Equalization.

So far as the ability of the company to discharge its duties and obligations to the general government is concerned it is difficult to see that taxation of the state franchise would tend to impair that ability any more than taxation of the roadway, roadbed, rails and rolling stock. If the necessary effect of a tax on such tangible property is not to unconstitutionally hinder the efficient exercise of the power to serve the government, neither can it be so in respect of the state franchise.

Indeed the taxation by the State of the franchise granted by it does not, and could not, prevent plaintiff in error from acting under its Federal franchise.

This was an action to recover judgment against the company under the statute, and the franchise was only an element in arriving at the valuation in making the assessment, but if the power to tax the state franchise involved the power to dispose of it at delinquent tax sale or on execution, such sale would be subject to the superior and independent rights of the United States, and the fact that this would affect the value is of no consequence. If the state franchise should be voluntarily surrendered by the company to the State, or forfeited by the State, yet the United States through the Federal franchise could still operate the road in California. And, on the other hand, should plaintiff in error in any manner be deprived of its Federal franchise, it would not thereby be prevented from operating in California under its state franchise. The right and privilege, or franchise, of being a corporation, is of value to its members and is considered as property separate and distinct from the property which the corporation may acquire; but, apart from that, if the state franchise to be assessed were confined to the right to operate the road and take tolls, such a franchise was originally granted by the State to this company, and as such was taxable property. If the subsequent acts of Congress had the effect of creating a Federal franchise to operate the road, that merely rendered the state right subordinate to the Federal right, and did not destroy the state right nor merge it into the Federal right, and no authority is cited to sustain any such proposition. No act of Congress in terms attempted to bring about this result, and no such result can be deduced therefrom by necessary implication. Whether plaintiff in error now operates its road under the franchise derived from the United States or from the State is immaterial, as the Supreme Court well said. The right to operate the road is valuable, whether it is being exercised or not, and the question, we repeat, relates to the existence of the franchise, and not to the extent of its value.

When we consider that plaintiff in error returned its fran-

chise for assessment, declined to resort to the remedy afforded by the state laws for the correction of the assessment as made if dissatisfied therewith, or to pay its tax and bring suit to recover back the whole or any part of the tax which it claimed to be illegal, we think its position is not one entitled to the favorable consideration of the court; but, without regard to that, we hold, for the reasons given, that the state courts rightly decided that the company had no valid defence to the causes of action proceeded on.

Judgment affirmed.

Mr. Justice White concurred in the result.

Mr. Justice Field dissenting.

I am unable to concur with my associates in their opinion or judgment in the present case.

The case comes before us on writ of error to the Supreme Court of California, affirming the judgment of the Superior Court of the city and county of San Francisco, and an order of that court, denying a new trial in an action brought by the people of the State against the Central Pacific Railroad Company to recover moneys alleged to be due by it to the State for taxes for the fiscal year of 1887, upon assessments made by the state Board of Equalization. The Supreme Court of the State affirmed the judgment of the Superior Court against that company in disregard, in my opinion, of the long established doctrine of this court, that the powers of the general government and the instrumentalities of the State, called into exercise in enforcement of those powers, cannot be impaired or their efficiency lessened by taxation or any other action on the part of the State. This doctrine has been constantly asserted by this court when called upon to express its opinion thereon, its judgment being pronounced by the most illustrious Chief Justice in its history with the unanimous concurrence of his associates. It has become a recognized principle, made familiar in the courts of the country by the decision of this court in *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Osborn* v. *United States Bank*, 9 Wheat. 738. The disregard

of this doctrine in the present case recalls the aphorism of Coleridge, applied with equal force, but not more applicable, to moral principles. "Truths," he says, "of all others the most awful and interesting, are too often considered as so true that they lose all the power of truth and lie bed-ridden in the dormitory of the soul, side by side with the most despised and exploded errors." It would seem that the truth of the constitutional doctrine has lost some of its force by the very fact that it has heretofore been considered so true as never to be questioned.

By the act of Congress of July 1, 1862, c. 120, 12 Stat. 489, the Union Pacific Railroad Company was organized by Congress, and authorized and empowered to lay out, construct, furnish and maintain a continuous railroad and telegraph, with the appurtenances, from a point on the 100th meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada Territory; and was vested with all the powers, privileges and immunities necessary to carry into effect the purposes of the act. In aid of the great work thus inaugurated, railway corporations by the States through which the overland railroad projected was to pass were called into existence. If rights, powers, privileges and immunities were conferred by state authority upon these state corporations, they constituted a portion of their franchises, subordinate to those conferred by the general government, and comprised with those of that government an essential part of the means for the efficiency and usefulness of the auxiliary corporations.

The powers, privileges and immunities conferred upon the state corporations by the United States were necessarily paramount to those derived from the State. When the powers, privileges and immunities of such state corporations were derived solely from the authority of the State they were generally designated, when spoken of collectively, as the state franchise or franchises of the corporation, and when the rights, powers, privileges and immunities were supposed to be

derived solely from the United States they were generally designated, when spoken of collectively, as the Federal franchise or franchises of the corporation. When no indication of the source of the franchise or franchises was specified, the rights, powers, privileges and immunities involved in that term held by the defendant were usually designated as the franchise or franchises of the company specifically, without other description, and the term included the powers, privileges and immunities conferred by both Federal and state authority. The term embraced all those powers, duties and immunities which were conferred, or supposed to be conferred, upon the railroad company for its operation from either source, or from both sources.

By section 9 of the general act of 1862, mentioned above, the Central Pacific Railroad Company was 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 were contained in the act for the construction of the overland railroad and telegraph line, and to meet and connect with the railroad and telegraph line on the eastern boundary of California. Each of the companies was required to file its acceptance of the conditions of the act in the Department of the Interior within six months after its passage.

By the tenth section of the general act the Central Pacific Railroad Company, after completing its road across the State of California, was authorized to continue the construction of the railroad and telegraph through the territories of the United States to the Missouri River, including the branch roads specified in the act, upon the routes indicated, on the terms and conditions provided in the act in relation to the Union Pacific Railroad Company, until the roads should meet and connect, and the whole line of the railroad and branches and telegraph should be completed.

By section 16 of the act mentioned power was given to the Central Pacific to consolidate with the other companies named therein.

By section 17 it was provided that in case the company or companies failed to comply with the terms and conditions of the act, Congress might pass an act to insure the speedy completion of the road and branches, or put the same in repair and use, and direct the income of the railroad and telegraph line to be thereafter devoted to the use of the United States; and further, that if the roads mentioned were not completed so as to form a continuous line from the Missouri River to the navigable waters of the Sacramento River by July 1, 1876, the whole of the railroads mentioned and to be constructed under the provisions of the act, together with all their property of every kind and character, should be forfeited to and taken possession of by the United States.

The eighteenth section provided that when the net earnings of the entire road should reach a certain percentage upon its cost, Congress might reduce the rates of fare thereon, if unreasonable in amount, and might fix and establish the same by law; and it declared that the better to accomplish the object of the act, namely, to promote the public interest and welfare by the construction of the railroad and telegraph line, and to keep 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 might, at any time, having due regard for the rights of the companies named, add to, alter, amend or repeal the act, and the companies were required to make annual reports as to the matters mentioned to the Secretary of the Treasury.

By the act of Congress of July 2, 1864, c. 216, 13 Stat. 356, amendatory of the act of July 1, 1862, additional powers, rights, privileges, immunities and property were granted to the companies engaged in the great national work proposed by Congress in the former act, in order to secure the completion of that work, which, at that time, was of imminent necessity.

By section 16 of this last act it was provided that should the Central Pacific Railroad Company complete its line to the eastern boundary of the State of California before the line of

the Union Pacific Railroad shall have been extended westward so as to meet the line of the first named company, that company might extend its line eastward one hundred and fifty miles on the established route so as to meet and connect with the line of the Union Pacific Railroad, complying in all respects with the provisions and restrictions of the act as to the Union Pacific Railroad, and when it was completed should enjoy all the rights, privileges and benefits conferred by the act on the latter company.

It is found by the court that the Central Pacific Railroad Company accepted the provisions of the acts of 1862 and 1864; and that on or about October 21, 1864, that company assigned to the Western Pacific Railroad Company, a corporation created and then existing under the laws of California, all its rights under the acts of Congress, so far as they related to the construction of the railroad and telegraph line between the cities of San José and Sacramento, in California; and that this assignment was ratified and confirmed by Congress, in the act of March 3, 1865, to amend the constituting acts of 1862 and 1864.

The act of March 3, 1865, c. 88, 13 Stat. 504, provided that section 10 of the act of July 2, 1864, should be so modified and amended as to allow the Central Pacific Railroad Company, and the Western Pacific Railroad Company of California, the Union Pacific Railroad Company, and the eastern division of the Union Pacific Railroad Company, and all other companies provided for in the act of July second, eighteen hundred and sixty-four, to issue their six per centum thirty years' bonds, interest payable in any lawful money of the United States, upon their separate roads. And the companies were thereby authorized to issue respectively their bonds to the extent of one hundred miles in advance of a continuous completed line of construction, and the assignment made by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of the State, of the right to construct all that portion of the railroad and telegraph from the city of San José to the city of Sacramento, was thereby ratified and confirmed to the Western Pacific Railroad Company,

with all the privileges and benefits of the several acts of Congress relating thereto, subject to the conditions thereof.

The Central Pacific Railroad Company was empowered by the State of California to construct within its limits various lines of railroad, and to equip them with the appurtenances essential to give to their operations efficiency and usefulness. It is conceded that until April 4, 1864, the Central Pacific Railroad Company and other railroad corporations of the State exercised and enjoyed what are termed the franchises of its corporations, that is, the rights, powers, privileges and immunities conferred upon them by state authority, and also various powers, duties, privileges and immunities conferred upon them by the general government, and which are termed their Federal franchises. But on that date, the 4th of April, 1864, the legislature of California abrogated the state franchises of those corporations, and substituted by adoption in their place the Federal franchises which have remained in force ever since.

The provisions of the act of Congress of July 1, 1862, and of July 2, 1864, state with entire distinctness the rights, powers, duties, privileges and immunities of the principal railroad — that of the Union Pacific — and of the auxiliary roads connecting therewith. The most essential features are the following:

I. The act of July 1, 1862, authorized the Union Pacific Railroad Company to construct its road, vesting it with all powers necessary for that purpose, and requiring it to transport mails, troops and munitions of war. This was a plain exercise of the express power "to establish post roads" and of the implied power to construct military roads.

II. The same act authorized the Central Pacific Railroad Company to construct its road on the same terms and conditions as those of the Union Pacific.

III. The third section of the act of July 2, 1864, provided in the usual form for the exercise by both companies of the Federal right to acquire the right of way for the construction of these post and military roads.

IV. The Central Pacific company was thus made the agent of the government in its exercise of the constitutional

power to establish post roads and military roads. No state law could have obstructed or impeded the Federal government in the exercise of this power or in any degree whatever have limited or facilitated the Central Pacific company in the enjoyment of the Federal franchise thus conferred.

V. If the consent of the State was necessary to the establishment of this road by the United States it will be found in the statute of California enacted in 1852, which, independent of its preamble, reads as follows:

"SEC. 1. The right of way through this State is hereby granted to the United States for the purpose of constructing a railroad from the Atlantic to the Pacific Oceans." Statutes of California of 1852, ch. 77, § 1, p. 150.

If the consent of the State was necessary to the complete substitution of the Federal franchise for any then existing state franchise for the construction of the road, it will be found in the act of the legislature of the State of California of April 4, 1864, which, after a comprehensive grant to the company of all necessary privileges and powers, including the State's right of eminent domain, made, as the act recites, "to enable said company more fully and completely to comply with and conform to the provisions and condition of said act of Congress," concludes with the following language: "Hereby confirming to and vesting in said company all the rights, privileges, franchises, power and authority conferred upon, granted to, or vested in said company by said act of Congress; hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act or the rights and privileges herein granted." Statutes of California, 1863–'64, c. 417, § 1, p. 471. In the opinion of the majority of the court, delivered by the Chief Justice, it is said that the general rule expressed by Mr. Justice Miller in the *State Railroad Tax cases*, 92 U. S. 575, "that the franchises, capital stock, business and profits of all corporations are liable to taxation in the place where they do business and by the State which creates them," admits of no dispute at this day, and then the opinion adds that the question here is not a question of the value of the state franchises, but

whether those franchises existed, for if in 1887 the plaintiff in error (the Central Pacific Railroad Company) possessed any subsisting rights or privileges, otherwise called franchises, derived from the State, then they were taxable, and the extent of their value was to be determined by the Board of Equalization. A complete answer to the ground of the opinion is found in the act of the legislature of California of April 4, 1864, passed twenty-three years before 1887, to which I have above referred, which abrogated the state franchises previously existing, and substituted in their place the Federal franchises.

The Federal franchises for the construction of the Central Pacific Railroad from the Pacific coast to the eastern boundary line of California as a part of the continuous military and post road to the Missouri River established by Congress could have had no rival in a state franchise for the construction of the same road; but in order that this might never be questioned, the legislature of the State of California obliterated its own franchises when it ratified and confirmed the franchises given by the Federal government to the Central Pacific Railroad Company. How then can the State twenty-three years later tax alleged state franchises claimed by its authorities to underlie the Federal franchises? Suppose the alleged state franchises should be sold for a delinquent tax thereon under the authority of the State, and an attempt should be made to place the purchaser in possession, a Federal judge would, of course, be applied to for an injunction, which would undoubtedly be granted, and the shadow of the shade of the state franchises would appear no more.

But, notwithstanding this express abrogation of the state franchises, meaning by that the powers, duties, rights, privileges and immunities of the state corporations conferred by the legislature of the State of California, and the substitution in place thereof of the franchises conferred by the general government, the State of California has since the abrogation of the state franchises and the substitution of the Federal franchises in various ways subjected that railroad and its franchises, whether derived from state or Federal authority, which were

essential to the successful working of the road brought into existence by the Federal government, to heavy burdens in the way of taxation, and thus imposed an additional obstacle to the efficiency of the Central Pacific Railroad in the execution of the general operations of the overland railroad.

The question presented is whether the burden thus imposed upon the franchises, roadbed, rails and rolling stock of railroads, whether or not operated in more than one county, can be lawfully assessed upon them when they constitute the grant of the general government, or an essential part of, or are appurtenant to the franchises of the state corporation which is used as an instrumentality of the overland road. The state Board of Equalization has assessed the franchises of the State as a distinct element in the estimate of the valuation of the railroad, carrying its estimate to an enormous sum in many instances, as, in the present case, to the sum of eighteen millions, and at the same time it has assessed the Federal franchises, that is, those derived from the general government, as a distinct and separate element in the estimate of the valuation of the railroad, and has blended the two franchises in determining the valuation of the railroad for the purpose of taxation.

It seems to me as an extravagant if not an absurd position, in the face of the specific legislation by the State, abrogating its franchises of the Central Pacific Railroad Company, and substituting the Federal franchises in their place, to contend that the state franchises still exist and can be enforced and be made the subject of estimate in the valuation of the railroad for taxation. The Federal franchises, standing alone, cannot be impeded or hampered in any way by state legislation. This would follow had not the State expressed itself in the emphatic way it has done: "Confirming to and vesting in said company all the rights, privileges, franchises, powers and authority conferred by the grant to or vested in said company by said act of Congress, hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted." The state franchises thus abrogated and discarded cannot be again

restored to life by mere words, however often repeated and with whatever asseveration made. The dishonored franchises are gone forever.

Independently of this view, the two franchises, the so called state franchise and the so-called Federal franchise, if both exist at the same time, are to be treated as necessarily so blended together that they cannot be separated and given a distinct valuation in the total estimate. And even when separated, were that possible, the inevitable blending follows the moment the value of the railroad becomes a matter of serious consideration for the purpose of fixing the amount of the assessment. I construe the state and Federal franchises as being simply the right conferred upon them to complete and operate the road. And whatever part the state or Federal franchises may have played in accomplishing this result, the separate effect of either cannot be distinguished from the other, and apply to each and every mile of the road. The two franchises have interlaced each other at every step of their exercise. It follows that the separate estimation of the taxation of the so called state franchises when they existed, which, as appears, was only for a limited period, was impossible, and, for many reasons, which we will state, it was never intended that such state franchises should be assessed and taxed as a separate entity in the estimate of the value of the railroad.

In the case of *California* v. *Pacific Railroad*, 127 U. S. 1, 34, this court decided that, as the assessments of the state Board of Equalization against the Central Pacific Railroad Company of 1883 and 1884, and the assessment against the Southern Pacific Railroad Company of 1883, included the franchises conferred by the United States upon those corporations, respectively, the assessments were void as repugnant to the Constitution and laws of the United States and the power of Congress to regulate commerce among the several States. 127 U. S. 41, 42, 43.

It appears by the record that the complaint in this action contains nineteen counts, upon the same number of alleged causes of action. The first count is for state taxes; the other counts are for county taxes.

In *People* v. *Central Pacific Railroad Co.*, 83 California, 393, 399, it was held by the Supreme Court of the State that section 3670 of its Political Code, prescribing a special form of complaint, was in conflict with its constitution, and that a complaint in an action to recover taxes levied upon a railroad could not join causes of action in favor of the several counties through which the road runs. But that is not material in the present action.

Each of the eighteen counts alleges that the defendant is a corporation organized and existing under the laws of California, engaged in operating a railroad in more than one county of the State. The State sets forth its claims for a recovery, and asks for judgment in its favor for the several assessments stated against the franchises, or some portion thereof, which constitute a grant of the general government, or appurtenances to the grant of the state corporation, rendering it efficient and useful as an instrumentality of the overland road, the great work undertaken by the general government. The complaint alleges in its several counts that in August, 1887, which, as stated above, was twenty-three years after the state franchises to the defendant had been abrogated and annulled, the state Board of Equalization, for the purpose of state and county taxation for the fiscal year ending June 30, 1888, assessed to the defendant, then the owner and operator thereof in more than one county in the State, the franchise, roadway, roadbed, rails and rolling stock of the defendant's railway, then within the State, at the sum of eighteen millions of dollars; and that within ten days after the third Monday in August of that year the board apportioned the total assessment of the franchise, roadway, roadbed, rails and rolling stock of the defendant to the counties in the State in which defendant's railway was located, in proportion to the number of miles of defendant's railway laid in such counties; and the amounts of the total assessment thus apportioned by the board to the counties respectively, and the number of miles of defendant's railway laid in the counties respectively.

The complaint concludes with a demand for judgment

against the defendant for the several sums of state and county tax alleged to be delinquent and unpaid as stated therein, aggregating the sum of $295,740.71, with five per cent thereon for delinquency and non-payment, with interest at the rate of two per cent on the amount from the last of December, 1887; also for the costs of suit and for attorney's fees.

To the complaint a demurrer, general and special, was interposed by the defendant. The Superior Court overruled the demurrer with leave to the defendant to answer the complaint.

The answer of the defendant puts in issue most of the material allegations of the complaint, and sets up various special and affirmative defences. One of those defences is that the "franchise" assessed to the defendant by the state Board of Equalization was derived from the government of the United States through certain acts of Congress (commonly known as the Pacific Railroad Acts); that the same is held and used by the defendant as one of the means and instrumentalities of the Federal government, and was, therefore, not taxable by the State; and that the assessment of this franchise was so blended with the whole assessment as not to be separable therefrom; and that the whole assessment was, therefore, void.

On the trial of the issues presented by the pleadings, the complainant was allowed by the court, against the objection of the defendant, to introduce in evidence (1) the duplicate record of assessment of railways by the state Board of Equalization for 1887, filed in the office of the comptroller of the of the State of California, October 11, 1887. The court overruled the objections of the defendant and admitted the paper in evidence, and an exception was taken to the ruling of the court. The duplicate record of assessment of railways by the state Board of Equalization for 1887, which was dated August 13, 1887, simply states that the defendant owns a certain railway in the State, operated in more than one county, being the entire railway of the company in the State, and then follows this paragraph, without any evidence in support of its averment:

"And it appearing that the actual value of the franchises,

roadway, roadbed, rails and rolling stock of said company within the State, at the said date and time, was and still is the sum of eighteen million dollars; therefore, it is hereby ordered that the said franchise, roadway, roadbed, rails and rolling stock, for the year 1887, be, and the same are hereby, assessed to the said Central Pacific Railroad Company at the sum of eighteen million dollars."

The evidence mentioned in the duplicate record of assessment of railways was the only proof offered by the plaintiff in support of any of its causes of action, and that evidence, it is plain, was not entitled to any weight in the determination of the case, not being supported by any other evidence.

On the part of the defendant evidence was offered to show that the state Board of Equalization knowingly included the value of the "Federal franchise" in the assessment in question, as it had done in the assessment which was afterwards before this court, and declared void, in *California* v. *Pacific Railroad Company*, and in other assessments.

The findings of the Superior Court, as to the allegations of the complaint, were that they were true, except as to counsel fees, as to which it was found that a reasonable compensation for the services of two of the counsel employed was 7½ per cent on the amount recovered, and 2½ per cent for the third counsel.

As to the affirmative allegations for the answer, the court among other things found:

"That on the 13th day of August, 1887, the state Board of Equalization of the State of California did, for the purposes of taxation for the fiscal year 1887, assess, as a unit, and not separately, the franchise, roadway, roadbed, rails and rolling stock of defendant's railroad, then being and situate within the State, at the sum and value mentioned in the amended complaint, and did then and there enter such assessment upon its minutes and in its record of assessment; that such assessment is the one upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the one aforesaid was ever made by the Board of Equalization or other assessor of the property of defendant for the fiscal year;

that the board did, at the time and in the manner alleged in the amended complaint, apportion the assessment and transmit it and the apportionment to the county and city and county auditors, and the assessment and the apportionment thereof were entered upon the assessment rolls of the counties and the cities and counties as alleged in the amended complaint, as hereinbefore found.

"That the board of equalization, in making the assessment, did assess the franchise, roadway, roadbed, rails and rolling stock of defendant's railroad at their full cash value, without deducting therefrom the value of the mortgage or any part thereof, or the value of the bonds issued under the acts of Congress, given and existing thereon, as aforesaid, to secure the indebtedness of the company to the holders of the bonds, and, in making such assessment the board did not deem nor treat the mortgage or bonds as an interest in the property, but it assessed the whole value of the property as assessed to defendant in the same manner it would have done had there been no mortgage thereon."

The conclusions of law from the findings were that plaintiff was entitled to recover judgment for the several principal sums of state and county taxes, found in the record of assessments of railways to be delinquent and unpaid; also interest upon the principal sums from the 27th day of December, 1887, at the rate of seven per cent per annum, up to the date of judgment; also to recover five per cent penalty upon the principal sums; also fees for legal services rendered herein by two of the counsel, a sum equal to seven and one-half per cent on the amount recovered, and by the third counsel a sum equal to two and one-half per cent of that amount.

Judgment was entered upon the findings, in favor of the plaintiff, for the sums mentioned, and a motion for a new trial was overruled.

The majority of the Supreme Court of the State, in their opinion, sustained the contentions of the State upon the questions presented, with the exception of the questions in respect to interest on the amount of taxes, and the fees of one of the counsel, and affirmed the judgment entered.

Mr. Justice McFarland dissented from the opinion of the court. This dissenting opinion expresses so fully and clearly and satisfactorily the views which I entertain, that they are set forth in full:

"In my opinion," says Justice McFarland, pp. 598, 599, "the assessment in question [that of 1887] is void under the decisions of the Supreme Court of the United States in the cases of *California* v. *Central Pacific Railroad Company and Southern Pacific Railroad Company*, 127 U. S. 1, because it includes a Federal franchise, and thus attempts to tax one of the means or instrumentalities employed by the United States government for carrying into effect its sovereign powers. That this cannot be done by a State has been the established law ever since the decision of the Supreme Court in *McCulloch* v. *Maryland*, 4 Wheat. 316, in 1819. The principle was fully recognized and declared by this court in *San Benito County* v. *Southern Pacific Railroad*, 77 California, 518, and in *San Francisco* v. *Western Union Telegraph Co.*, 96 California, 140.

"The only difference between the cases in 127 U. S. and the case at bar is that in the former the trial court found that the state Board of Equalization included in the assessment the value of 'all franchises and corporate powers held and exercised by the defendant,' while in the case at bar the court below found that the said board in making the assessment for the year 1887 'did not include in its said assessment any Federal franchise.' But the assessment in both instances was exactly the same, namely, 'the franchise' of the railroad. In the former cases it does not appear that the trial court received any evidence on the question as to what 'the franchise' included; and it is probable that the finding was based upon the language of the assessment alone. In the case at bar the court did receive evidence as to what the members of the board intended by the words 'the franchise,' and it appears in the record that the court, after having concluded that 'from a preponderance of evidence before it the Federal franchise of defendant was not assessed or included in the assessment,' proceeded to say that 'if by a preponderance of such evidence defendants could have shown that the State

intended to and did include the Federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done.' Now, if it was competent to introduce testimony to show the intent of the members of the board when they made the assessment, then the court clearly erred in ruling out certain evidence offered on that point by appellant. . . .

"On the other hand, if the record of the board should alone be considered, then it simply appears that 'the franchise' was assessed; and I cannot possibly see how that phrase can be construed to mean anything else than the whole franchise of the railroad — all of the franchise belonging to it. It means just what the lower court has found it to mean, as above quoted, in said cases in 127 U. S. The words 'the franchise' clearly, in my judgment, include the right of the appellant to do business — and the whole of that right. That right is a unit and inseparable. The court below found [see finding 30] that the board 'did assess as a unit, and not separately, the franchise, roadway,' etc. And I cannot conceive how a court can, first, separate it, or, second, if it could, how it could determine which part to throw away. Moreover, the main foundation of the doctrine of *McCulloch* v. *Maryland*, 4 Wheat. 316, is that the power to tax includes the power to destroy; and thus a State might, under the guise of taxation, destroy or materially cripple an instrumentality of the Federal government. And is it not manifest that in the case at bar that principle protects the instrumentality here involved from injury or destruction under the pretence that only that part of the unity which comes from the State is taxed? Are not the effects and consequences the same?

"In my opinion, therefore," adds the dissenting Justice, "without discussing the other questions involved, the judgment should be reversed."

To review and reverse the judgment of the Supreme Court, affirming the judgment of the Superior Court for the city and county of San Francisco, a writ of error to the Supreme Court of the State was sued out of this court, and several assign-

ments of error were filed for its consideration. My attention will be confined to those deemed the most important.

1st. The Supreme Court should have reversed the judgment of the Superior Court for the city and county of San Francisco on the ground that upon the finding of facts in the record the value of the "franchise" of the Central Pacific Railroad, derived from the United States, called Federal franchise, was included in the assessment of the franchise, roadway, roadbed, rails and rolling stock of the railroad, made by the state Board of Equalization for the year 1887, and was inseparable therefrom; and that the whole of the assessment was therefore illegal and void under the Constitution and laws of the United States.

2d. The Supreme Court should have reversed the judgment of the Superior Court, because that court found that the state Board of Equalization on August 3, 1887, did, for the purpose of taxation for the fiscal year, 1887, assess as a unit, and not separately, the franchise, roadway, roadbed and rolling stock of the Central Pacific Railroad, then being within the State of California.

3d. The Supreme Court should have reversed the judgment of the Superior Court upon the ground that the property of the Central Pacific Railroad Company, including the franchise, and every part of the franchise of the railroad was and is subject to the lien of the mortgage of the United States to secure the indebtedness of that company to it, and the United States had and have an interest and ownership therein to the extent of the lien, and, therefore, the franchise of the railroad could not and cannot be taxed or assessed for taxation by the State of California, under the Constitution and laws of the United States.

4th. The Supreme Court should have reversed the judgment of the Superior Court on the ground that that court admitted in evidence the portion of the duplicate record of assessment of railways by the state Board of Equalization for the year of 1887, relating to the assessment of the property of the plaintiff in error for that year *without proof of its correctness.*

The facts which are the basis of the several assignments of

error are contained in the legislation or authorized statements of Congress or of the States mentioned, or in the findings of the court. Their legality and validity are thereby fully established.

By the legislation of Congress to which I have referred, as well as by the legislation of the State of California, it is plain that the Central Pacific Railroad Company was made one of the means of accomplishing the great work of Congress, and whenever, by any act of the state authorities of California, the franchise of the Central Pacific Railroad Company was included in the assessment of the franchise, roadway, roadbed, rails and rolling stock of that company, there was necessarily included the franchise thus derived from the legislation of Congress. Indeed, treating the franchise of the railroad as meaning its power to construct the work contemplated and to conduct its operations, it is difficult to see how, in any respect, its franchise could be treated other than as one entire whole. Its power to construct the road authorized by the government, and to carry on its operations, could not be under the control of the state authorities so as to interfere in any respect with the full exercise of the powers, privileges and immunities granted by Congress.

And it was specially found by the court below, in its thirtieth finding of fact, that the state Board of Equalization on August 13, 1887, for the purpose of taxation for the fiscal year 1887, assessed as a unit, and not separately, the franchise, roadway, roadbed, rails and rolling stock. It was, therefore, unlawful that its taxation by the State should in any respect impede, retard or delay the exercise of the powers conferred by Congress upon the Central Pacific Railroad Company or defeat its action. Nor could any part of the powers, privileges and immunities conferred upon the railroad be separated from the rest, so as to be treated as an independent part thereof, and any part considered as the special grant of the State, and superior to or in any way impairing the control thereof by the United States pursuant to their legislation.

It also appears from the legislation of Congress that the Secretary of the Treasury was authorized to issue and did

issue to the Central Pacific Railroad Company bonds of the United States, in designated amounts per mile, to aid in the construction of its road, which bonds and interest were to be repaid by the company, at their maturity, and that, to secure such repayment, the United States were to hold a lien upon all the property of the railroad company to the extent of the bonds thus issued. Any taxation of the property or franchises of the Central Pacific Railroad Company, without the consent of Congress, was hence an impairment of such lien of the United States, and, therefore, invalid.

The Superior Court of the city and county of San Francisco erred in receiving in evidence the portion of the duplicate record of the assessment of railways by the state Board of Equalization for the year 1887, relating to the assessment of the property of the plaintiff in error, for the obvious reason that such duplicate in no way established the legality and validity of the assessment.

This court, in the case of *California* v. *Pacific Railroad Companies*, 127 U. S. 1, adjudged that the State of California had no power, without the consent of Congress, to tax the franchises derived by the Central Pacific Railroad Company from the government of the United States, or any franchise conferred on it by that government, or any part of any franchise granted to that company by the United States. The opinion of the court was delivered by Mr. Justice Bradley.

"Assuming," he said, "that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? . . . Generalized, and divested of the special form

which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* v. *Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this

subject. The principles laid down by this court in *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *The Bank of the United States*, 9 Wheat. 738; and *Brown* v. *Maryland*, 12 Wheat. 419, and numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson* v. *Pacific Railroad*, 9 Wall. 579, and *Railroad Co.* v. *Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. 18 Wall. 35, 37.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present case."

The important cases bearing upon the subject intervening between the great *Bank cases* and *Thomson* v. *Pacific Railroad* and *Railroad Company* v. *Peniston*, were *Weston* v. *The City of Charleston*, 2 Pet. 449, 467; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435; *Bank of Commerce* v. *New York City*, 2 Black, 620; *The Banks* v. *The Mayor*, 7 Wall. 16, and *National Bank* v. *Commonwealth*, 9 Wall 353; and in those cases the doctrine was consistently maintained and enforced that a State cannot lay a tax which bears upon a power of the National Government, or, in the judgment of the court, may hinder, impair or burden any "operation" of that Government, or interfere with or affect the efficiency of any "agency" of the National Government in performing the functions by which it is designed to serve the United States.

In *Weston* v. *The City of Charleston*, this court declared the tax on the stock of the United States, involved, to be unconstitutional, because it "operated upon the power" to borrow

money on the credit of the United States, and was deemed by the court to be "a burden, however inconsiderable," on "the operations of government."

The court, speaking by Chief Justice Marshall, in that case, again declared that the State cannot by taxation, or otherwise, "retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

The case of *Dobbins* v. *The Commissioners of Erie County*, adjudged that a state tax on an officer of the United States, for his office, or its emoluments, was void, mainly because of "its interference with the constitutional means" employed by the government to execute its powers.

The court, speaking by Mr. Justice Wayne, said: "Does not a tax by a State upon the office, diminishing the recompense, conflict with the laws of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution."

The principles declared in *Weston* v. *The City of Charleston* governed the decisions of the court in *Bank of Commerce* v. *New York City* and in *The Banks* v. *The Mayor*, which adjudged that the bonds and other securities of the United States are "as much beyond the taxing power of the States as the operations themselves in furtherance of which they were issued."

The court again declared, in those cases, that any interference by the state governments tending to the interruption of, or in derogation of, the full legitimate exercise of the powers granted to the National Government was prohibited by the Constitution.

The theory of the majority of the court below was that the franchise of this railroad can be segregated into two franchises, a state franchise and a Federal franchise. But the franchise of the railroad, or the right in the company to operate its railroad, is a single right, from how many sources soever

derived; and, being derived from the National Government, that right could not be assessed for taxation, agreeably to the Constitution of the United States, whether or not the right had been granted by the State also to the railroad company. The theory of the separation of the franchise into two distinct rights for the purpose of taxation by California is effectually disposed of by Mr. Justice McFarland, at the close of his opinion, in these few words:

"The court below found that the board 'did assess as a unit, and not separately, the franchise, roadway,' etc. *People* v. *Cent. Pac. Rd. Co.*, 105 California, 599. I cannot conceive how a court can, first, separate it, or second, if it could, how it could determine which part to throw away. Moreover, the main foundation of the doctrine of *McCulloch* v. *Maryland* is that the power to tax includes the power to destroy, and thus a State might, under the guise of taxation, destroy or materially cripple an instrumentality of the Federal Government. And is it not manifest that in the case at bar that principle protects the instrumentality here involved from injury or destruction under the pretence that only that part of the unity which comes from the State is taxed? Are not the effects and consequences the same?"

The fact that each government has granted the right, does not create two rights. The two grants taken together confer nothing more than each of them separately conferred. A tax on "the franchise" of the Central Pacific Railroad, being nothing more nor less than a tax on the right of the company to operate its road, is a tax on its right to operate its railroad granted by the United States, or on the franchise granted by that government.

How is that part of the franchise granted by the State to be separated from that part granted by the General Government? What part of the life of this being is at the mercy of the State? Upon what member of its body may the tax collector execute his judgment of death?

If we should consider the right of the Central Pacific Railroad Company to operate its road, derived from the State, as one thing, and its same right derived from the United States

as another and distinct, or different, thing, what results will follow? Plainly these.

If the State can tax the right so derived from itself, it can levy a tax upon it as it pleases, and may sell the right assessed, in case of non-payment of the tax. There can be no such thing as taxable property which cannot be sold for the tax, and the title to which cannot be transferred to the purchaser. By such a sale the property will pass from the delinquent to the purchaser. If a sale could be made of this particular right, then the Central Pacific would lose the right, and the purchaser would gain it.

It is obvious that the right to operate its railroad cannot, by virtue of the State's taxing powers, be taken from the Central Pacific Railroad Company, or conferred upon any other corporation or individual. Nothing, then, would pass by such a sale, and as there is nothing to sell or transfer, there can be nothing to assess.

If the position asserted by the defendant in error, the State of California or the people of the State, (considering both expressions as meaning substantially the same contesting organization,) that the so called state franchise of the Central Pacific Railroad can be separated from the Federal franchise of that company, and separately valued, and subjected to taxation, be maintained, destructive consequences would follow, as will be seen from a brief consideration.

In *Northern Pacific Railroad* v. *Trail County*, 115 U. S. 600, 610, the court, in referring to a sale, for taxes, of lands belonging to a railroad company, said: "A valid sale for taxes being the highest exercise of sovereign power of the State must carry the title to the property sold, and if it does not do so, it is because the assessment is void. It follows that if the assessment of these taxes (those previously stated to have been levied upon the lands of the company) is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it." There would seem to be no doubt,

therefore, that the State cannot be held to have had the power to tax the so called state franchise of the Pacific Railroad so long as it was of any validity, and previously and subsequently to its abrogation the State plainly possessed no such power unless the court is prepared to decide expressly, as the effect of the legislation, that Congress intended that the State should be able to divest the company of that franchise, and to transfer by a tax sale the title of the franchise to the purchaser as against both the company and the United States; and in that way to destroy the right and interest of the government of the United States in the franchise. There is clear and conclusive evidence in the Pacific Railroad legislation that Congress intended that the so called state franchise, so long as it remained of any value, should not be subject to state legislation, and that the right and interest of the United States therein, whilst of any value, should not be destroyed by the State in the exercise of its taxing power. For example, section 5 of the act of July 1, 1862, provides that the issue and delivery of bonds to the company, referring to bonds the issue and delivery of which were authorized by the act, shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and on the refusal or failure of the company to redeem its bonds, or any part of them, when required by the Secretary of the Treasury in accordance with the provisions of the act, then the road, with all rights, functions, immunities and appurtenances thereunto belonging, also all lands granted to the company by the United States, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The only change made in this provision in regard to the security of the United States for the subsidy bonds is by section 10 of the act of 1864, which is that "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."

The subsidy bonds are, therefore, a mortgage upon any subsisting state franchise of the railroad, which may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States, on the refusal or failure of the company to redeem the bonds, or any part of them, when required by the Secretary of the Treasury. Congress manifestly intended that the rights of the United States under this mortgage, in respect to the state franchise, if any such existed, should not be destroyed or disturbed by the State in the exercise of its taxing power, or any other power. If the so called state franchise of the railroad is a thing of value, as the assessment in these cases claims it to be, in the estimation of the state Board of Equalization, it is a valuable part of the security of the United States for the redemption of the subsidy bonds, which the Secretary of the Treasury has the right to take possession of in the contingency mentioned in the act. The franchise, if it existed and possesses any value, cannot, therefore, in my opinion, be taken from under the mortgage, and transferred to a purchaser at a tax sale by the State of California.

Take, again, the provisions of the sinking fund act of May 7, 1878, which appropriates and applies the earnings of the company in the exercise of all the franchises of the company for the purposes and in the manner named. In the face of that act, it cannot be believed that Congress supposed that there was power reserved to the State to control or affect its interest or right in the franchise or franchises of the railroad, so long as it or they possessed any value.

There can be no doubt that a tax to be levied on the so called state franchise, whilst it was in existence, was a tax upon an instrumentality by which the government effects its objects, and a tax upon the operations of that instrumentality, within the doctrines of this court in the great cases to which I have referred.

The United States selected this corporation as an agency for carrying out a national object, and the right of the cor-

poration to operate its railroad, or, in other words, the franchise of the railroad, whether conferred by state or national authority, or by both the State and Nation, is an instrumentality by which the United States effects its objects.

As a tax on the franchise of the Central Pacific Railroad while in existence was nothing more nor less than a tax on the right of the company to operate its railroad, such a tax was a tax on its right to operate its railroad derived from the government of the United States, and, therefore, unconstitutional.

There are no operations of the corporation, as an agency of the government, which are performed exclusively in the exercise of any state franchise in connection with its railroad, assuming the existence of any such franchise, but all its operations are in the exercise of its entire franchise, and a tax purporting to be levied on any state franchise is, therefore, a tax on the operations of the corporation in the exercise of the Federal franchise, and a tax directly on the Federal franchise itself.

In *National Bank* v. *The Commonwealth*, where the right of the States to tax the shares of the national banks was reaffirmed, it was expressly conceded that the agencies of the National Government are uncontrollable by state legislation so far as it may interfere with, or impair, their efficiency, in performing the service, or the functions, for which they are employed, or designed to perform.

The Supreme Court of California in the case of *San Benito County* v. *Southern Pacific Railroad*, 77 California, 518, accepted the authority of the decision of this court, in *California* v. *Pacific Railroad Companies*, 127 U. S. 1, and held that an ordinance of the board of supervisors of San Benito County imposing a license tax upon corporations or individuals engaged in the business of carrying persons or freight for hire on railroad cars in the county was void, so far as it assumed to affect the Southern Pacific Railroad Company, as the tax was deemed to be levied upon the use of the franchise granted to the company by the United States, or the operations of the railroad in the exercise of that franchise

It was determined that the franchise of that company and its use were equally beyond the taxing power of the State, or any of its political subdivisions, agreeably to the decision of this court in *California* v. *Pacific Railroad Companies*, which the court felt constrained to obey.

"The franchise" of a railroad, which is contemplated by the state constitution, and authorized to be assessed for taxation by the state Board of Equalization, is nothing but the right to operate the railroad, including the incidental right to charge and take tolls thereon, and the like.

The constitution applies equally to all railroads, whether owned by corporations or associations or individuals, and the assessment provided for is wholly independent of the ownership or the character of the ownership of the railroad property assessed.

The tax proposed by the constitution is consequently and necessarily a tax upon the operations of the railroad, in the exercise of the franchise or right to operate the property.

The right of the Central Pacific Railroad Company to construct, maintain and operate its railroad, in the State of California, was conferred upon the company by and derived by it from the government of the United States, and any assessment of the right of the company to maintain and operate its railroad, in that State, for state taxation, is void, under the Constitution and laws of the United States, whether or not the company received the same right from the State of California.

The right of the company to operate its railroad in the State is a single right, and a single thing, whether the right was derived by the company from one or more than one government, and it cannot be subjected to taxation by the State of California.

In conclusion, it appears, beyond all controversy, that the State imposed burdens, in the way of taxation, upon the exercise of powers and privileges conferred by the Congress of the United States upon the Central Pacific Railroad Company and other companies of the State, rights, powers and privileges which were granted in furtherance of the great object

of Congress in the creation and operation of the overland railroad, and also imposed burdens by taxation upon the mortgage held by the United States as security for the subsidy bonds issued to the company. And for such irregular and illegal action the judgment of the Supreme Court of the State should be reversed.

I have shown that the franchises granted by the State of California to the Central Pacific Railroad Company were abrogated and annulled by express legislation of the State on the 4th of April, 1864, and that the taxation was subsequently made against the railroad company upon an assessment of the value of its franchises thus discarded and thrown away, and after the Federal franchises, that is, franchises derived by grant of the United States, had been substituted in their place and confirmed by the State, with a release of all inconsistent and conflicting provisions with the rights and privileges thus granted.

I have also shown that the assessment of the property of the defendant made in 1887 was twenty-three years after the law was passed abrogating and annulling the franchises of the State upon which the valuation for taxation was made.

I have also shown that the United States hold a lien, constituting a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, as security for certain subsidy bonds issued to the company, and on the refusal or failure of the company to redeem such bonds, or any part of them, when required by the Secretary of the Treasury, in accordance with the provisions of the act, then the road, with all rights, functions, immunities and appurtenances thereunto belonging, also all lands granted to the company by the United States, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.

If the taxation levied in the present case can be enforced against the defendant, in face of the facts thus stated, there will be developed a new and unknown power of taxation possessed by the State, in the existence of which I shall not willingly believe.

It seems to me, clear as the sun at noonday, that the taxation imposed by the State of California upon the exercise of the powers, rights, privileges and immunities constituting the franchises of the United States, or of the State to the overland railroad company, or to any of its auxiliary companies, to aid in the construction of the overland railroad and its connecting roads, is directly inimical to the rights and interests of the United States, and that the blending of the franchises of the United States and of the State, and the subjection of either to taxation and to sale, which must follow if the taxation be valid, would necessarily lead to the direct and speedy destruction of the different roads; and thus we should see, in the same century in which this greatest enterprise of our country was undertaken by its government and carried to completion and successful operation, that enterprise utterly destroyed — the completeness of the ruin being marked by the contrast with its original construction and successful operation, rendering its destruction the more significant and deplorable.

I am of opinion that the judgment of the Supreme Court of California affirming the judgment of the Superior Court of the city and county of San Francisco, and an order of that court denying a new trial in an action brought by the people of the State against the plaintiff corporation, should be reversed, and a new trial in that action granted.

Mr. Justice Harlan dissenting.

On the trial of this case in the state court of original jurisdiction, the secretary of the state Board of Equalization, from April, 1880, to March, 1891, was called as a witness by the defendant. His examination showed that he was present at the meetings of that board and kept the record of its proceedings. He said that from his knowledge of what passed at such meetings he could state what elements of value were considered by the board in making their estimate for the total values for 1887. He was asked the following questions separately: "From the various sources of knowledge which you

have enumerated, please state to the court what elements were taken into consideration by the state Board of Equalization in making the assessment of this company for the year 1887?" "Did you hear any conversation between the members of the state Board of Equalization during the meeting when the assessment of this company was made for the year 1887, with reference to the elements that they proposed to and did include in the assessment?" "At the time that the assessment of 1887 was made by the state Board of Equalization upon the property of the Central Pacific Railroad Company, what was said and done at the meeting of the state Board of Equalization on that day in your presence?"

The State objected to each question, as it was propounded, and its objection was sustained, the defendant excepting.

The company then made the following offer: "Now, in view of the ruling of the court on this subject, we now offer to prove by this witness that from the time of the organization of the state Board of Equalization in 1880 down to and including the year 1887, that board had every year considered the value of the Federal franchise — that is, the franchise derived from the United States by the acts of Congress of the government of the United States, belonging to and owned by the Central Pacific Railroad Company, as an element of value in assessing the total value of the property of that railroad company; and that in 1888, in consequence of the decision of the Supreme Court of the United States upon the subject, the state Board of Equalization for the first time ceased to consider this Federal franchise as an element of value, and hence reduced their valuation by the sum of three million dollars on the Central Pacific Railroad Company's property." This offer was disallowed, and the company duly excepted.

Notwithstanding this action of the court, the State was permitted to prove by two members of the board, who participated in the assessment of 1887, that the Federal franchise was not included in that assessment.

One of the findings of fact was in these words: "That in making its assessment and valuation therefor of defendant's franchise said state Board of Equalization did not include,

assess or value any franchise or corporate power held or exercised by defendant under the acts of Congress hereinbefore mentioned, or under any act of Congress whatever. And said board, in making said assessment and valuation therefor, upon defendant's franchise, roadbed, roadway, rails and rolling stock, for purposes of taxation for the fiscal year 1887, did not include in its said assessment and valuation therefor any Federal franchise, then possessed by defendant, nor any franchise or thing whatsoever, which said board could not legally include in such assessment or valuation. That the franchise, roadway, roadbed, rails and rolling stock of defendant's railroad were valued and assessed by said state Board of Equalization, for purposes of taxation for the fiscal year 1887, at their actual value, and in proportion to their values respectively."

A statement, on motion, was filed for a new trial and *approved by the court.* In that statement will be found the following: "In its written opinion, upon which the findings were based, the court after determining as a fact, from a preponderance of the evidence before it, that the Federal franchise of defendant was not assessed or included in the assessment of the property of defendant by the state Board of Equalization, for the year 1887, uses the following language: 'But if the parol evidence offered did not weigh in plaintiff's favor, and if by a preponderance of such evidence defendants could have shown that the State intended to and did include a Federal franchise in the assessment, I think the court would have to disregard it as incompetent. The effect of such parol evidence would be to contradict the record, which cannot be done. The best and only evidence of the acts and intentions of deliberative bodies must be drawn from the record of its intentions. . . . From both standpoints of fact and of law, the findings must be that a Federal franchise was not included in these assessments.' "

It thus appears that the trial court permitted the State to prove by oral testimony that the state board did not include the Federal franchises in its assessment, but denied to the defendant the privilege of showing, by the same kind of evidence, that such franchises were, in fact, included in the

assessment. This, in my judgment, was error, and directly affected the proper determination of the Federal question. The recital in the records of the board were not conclusive of the question. If, in fact, the board did include the Federal franchise in its assessment, the defendant should have been allowed to prove it by the best evidence capable of being produced; otherwise, it would be without remedy against a false statement on the records of the board.

Independently of this error, the judgment of the court below should be reversed upon the ground that the franchises of the Central Pacific Railroad Company are not subject to be taxed at all by the State, although some of its visible property may, according to the principles announced in former decisions of this court, be taxable for state purposes.

In the *Sinking Fund cases*, 99 U. S. 700, 710, 727, this court, speaking by Chief Justice Waite, and referring to the Central Pacific Railroad Company, said: "By the act of 1862, 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 to 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 the 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. . . . But for the corporate powers and financial aid granted by Congress it is not probable that the road would have been built."

In *California* v. *Pacific Railroad Company*, 127 U. S. 1, 38, this court, referring to the Pacific Railroad acts, so far as they related to the Central Pacific Railroad, said: "Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the act 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."

In the case of *United States* v. *Stanford*, 161 U. S. 412, recently decided, we said: "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." Again, in the same case: "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 in the

exercise of privileges granted by, and because of the aid derived from, the United States. . . . 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 [the Central Pacific Railroad Company] 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 establish those relations."

The relations between this railroad company as well to the United States and the State is shown by the act of the legislature of California, approved April 4, 1864, c. 417, entitled "An act to aid in carrying out the provisions of the Pacific Railroad and Telegraph act of Congress and other matters relating thereto," Stat. Cal. 1863, 1864, 471. That statute referred to the act of Congress of July 1, 1862, c. 120, 12 Stat. 489, and to enable the Central Pacific Railroad Company, therein named, more fully and completely to comply with and perform its provisions and conditions, provided that that company "are hereby authorized and empowered, and the right, power and privilege is hereby granted to, conferred upon and vested in them, to construct, maintain and operate the said railroad and telegraph line, not only in the State of California, but also in the said territories lying east of and between said State and the Missouri River, with such branches and extensions of said railroad and telegraph line, or either of them, as said company may deem necessary or proper; and also the right of way for said railroad and telegraph line over any lands belonging to this State, and on, over and along any streets, roads, highways, rivers, streams, water and water courses, but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same; and also the right to condemn and appropriate to the use of said company such private property, rights, privileges and franchises as may be proper, necessary or convenient for the purposes of said railroad and telegraph, the compensation therefor to be

ascertained and paid under and by special proceedings, as prescribed in the act providing for the incorporation of railroad companies, approved May twentieth, eighteen hundred and sixty-one, and the acts supplementary and amendatory thereof; said company to be subject to all the laws of this State concerning railroad and telegraph lines, except that messages and property of the United States, of this State and of the said company shall have priority of transportation and transmission over said line of railroad and telegraph; hereby confirming to and vesting in said company all the rights, privileges, franchises, power and authority conferred upon, granted to or vested in said company by said act of Congress; hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted."

Looking at the question in the light most favorable to the State, it may be said that the franchises which the railroad company possesses, with reference to the construction and maintenance of its road within California, came jointly from the United States and the State. If the rights, privileges and franchises granted by the United States to this company were not all that was needed for the accomplishment of the objects had in view by the construction of a national highway between the Missouri River and the Pacific Ocean, the state enactment of 1864, carried into the charter of the company, looking at the company simply as a state corporation, all the powers and franchises granted by the United States.

If the assessment in question had been separately upon the visible property of the company, as distinguished from its franchises, the case would have presented a different aspect; and we should then have been compelled to reëxamine the question as to the extent to which the property of the company, used in accomplishing the objects designed by Congress, could be taxed by the State. But, as the opinion of the court shows, the present assessment was upon the franchise, roadway, roadbed, rails and rolling stock of the company without stating separately their respective values. That which was invalid cannot be separated from that which was valid. So

that the question is presented whether it is competent for the State to sell for its taxes the franchise of the company. If it cannot, the whole assessment is void. *Santa Clara County* v. *South. Pacific Railroad*, 118 U. S. 394, 415.

The court says that the railroad company obtained from the State the right and privilege of corporate capacity; to construct, maintain and operate its road; to charge and collect fares and freights; to exercise the power of eminent domain; to acquire and maintain right of way; to enter upon lands or waters of any person to survey route; to construct road across, along or upon any stream, watercourse, roadstead, bay, navigable stream, street, avenue, highway, or across any railway, canal, ditch or flume; to cross, intersect, join or unite its railroad with any other railroad at any point on its route; to acquire right of way, roadbed and material for construction; to take material from the lands of the State, etc., etc.

But did it not acquire those rights and privileges also from the United States? Did not the United States grant "the fundamental franchise" to construct and maintain a railroad from San Francisco across the State and through the territories, until it met the Union Pacific Railroad? If that franchise be sold by the State for its taxes, how are the national objects contemplated by Congress to be accomplished? What becomes of the mortgage of the United States upon the entire property of the company, roadbed, right of way, rolling stock, station houses, etc., which mortgage was taken in order to secure the payment of the bonds issued by the United States under the acts of Congress? What becomes of the power of the United States reserved in the acts of Congress for the General Government, in certain contingencies, to take possession of this railroad? In *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600, 610, where the question was as to the power of a State or Territory to tax certain lands that had been granted by Congress to aid in the construction of the Northern Pacific Railroad Company, Mr. Justice Miller, speaking for the court, said: "No sale of land for taxes, no taxes can be assessed on any property, but by virtue of the

sovereign authority in whose jurisdiction it is done. If not assessed by direct act of the legislature itself, it must, to be valid, be done under authority of a law enacted by such legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this, it is because the assessment is void. It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the cost of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it."

It may be said that the franchise which the State may sell is that which was granted by it. But is the state franchise so distinct and separate from the franchise granted by the United States that it can be sold separately from the franchise granted by the United States? It seems to me that the franchise to build, operate and maintain a railroad from San Francisco to a point of junction with the Union Pacific Railroad is a unit, and that it is utterly impracticable to separate and sell so much of that franchise as originally came from the State, and leave intact that which was derived from the United States. The State cannot lawfully do anything to impair or cripple the franchise, rights and privileges derived from the United States. What was said in *Pacific Railroad Removal cases*, 115 U. S. 1, 16, in reference to the relations between the Union Pacific Railroad Company and certain State corporations which consolidated with that company, is applicable here: "The whole being, capacities, authority and obligations of the company thus consolidated are so based upon, permeated by and enveloped in the acts of Congress referred to, that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities, which have their source and foundation in these acts, from those which are derived from state or territorial authority."

This court has often declared that the Central Pacific Railroad Company was one of the instrumentalities that had been

selected and was being employed by the United States in accomplishing important national objects, to which the United States is competent under the Constitution. Upon the franchises, and upon all the property of that corporation, rests a mortgage to secure the government against liability for the bonds it issued to that corporation. With the consent of the State, if such consent was necessary, that corporation has received large grants of land upon the condition that it would meet and perform all the obligations imposed upon it by the acts of Congress. I cannot agree that the franchise which the corporation has received from the United States and the State can be assessed by the State for taxation, along with its roadbed, right of way, etc., and then sold. That is taxation of one of the instrumentalities of the National Government, which no State may do without the consent of the Congress of the United States. Of course, this corporation ought to contribute its due share to the support of the government of each State within whose limits its property is situated and its privileges exercised. But it is for Congress to prescribe the rule of taxation to be applied at least to the franchises of the corporation which, although created by the State, is as much a Federal agency as if it had been created a corporation by national enactment. It has never heretofore been recognized that a State could, without the assent of Congress, sell, for its taxes, the franchises, rights and privileges, employed, under the authority of the National Government, to accomplish national objects, particularly where such franchises, rights and privileges, are under mortgage to secure the government against specified liabilities.

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

SOUTHERN PACIFIC RAILROAD COMPANY *v.* CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 560. Argued January 15, 16, 1896.—Decided March 16, 1896.

Central Pacific Railroad Company v. *California*, *ante* 91, affirmed and followed.

THE case is stated in the opinion.

Mr. J. Hubley Ashton, (with whom was *Mr. Charles H. Tweed* on the brief,) for plaintiff in error.

Mr. J. P. Langhorne and *Mr. J. H. Miller*, (with whom was *Mr. W. F. Fitzgerald*, Attorney General of the State of California, on the brief,) for defendant in error.

THE CHIEF JUSTICE: This is a writ of error to a judgment of the Supreme Court of the State of California affirming the judgment of the Superior Court of the city and county of San Francisco, and affirming an order of the Superior Court denying a new trial, in an action brought in the name of the people of the State of California against the Southern Pacific Railroad Company, under section 3670 of the Political Code of California, for the recovery of moneys alleged to be due as taxes to the State, and the thirteen counties of the State in which the Southern Pacific Railroad is operated, under an assessment made by the state Board of Equalization, for the purpose of state and county taxation for the fiscal year 1887. The Congressional and state legislation calls for no special remark as contradistinguished from that in respect of the Central Pacific company. 14 Stat. 292, act of July 27, 1866, c. 278; 16 Stat. 573, act of March 3, 1871, c. 122; 17 Stat. 59, act of May 2, 1872, c. 132; act of California, April 4, 1870, Cal. Stat. 1869–'70, 883, c. 579; *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, 399. The record is sub-

stantially a duplicate, *mutatis mutandis*, of the record of the case in *The Central Pacific Railroad Company* v. *The People of the State of California*, and the Supreme Court of California on appeal decided this case on the authority of its decision in that. *People* v. *Southern Pacific Railroad*, 105 California, 576. We have just affirmed that judgment of the Supreme Court of California, and this must take the same course.

Judgment affirmed.

Mr. Justice White concurred in the result.

Mr. Justice Field dissenting.

I am unable to concur with my associates in their opinion or judgment in this case also, for the reason, as in the case of the *Central Pacific Railroad Company* v. *The People of the State of California*, that the judgment recovered against the Southern Pacific Railroad Company is based upon a pretended valuation of that road, in which valuation an assumed franchise granted to the company by the State of California is included.

It is conceded that until April 4, 1870, the Southern Pacific Railroad Company of the State exercised and enjoyed what are termed the franchises of its corporation, that is, the rights, powers, privileges and immunities conferred upon it by state authority, and also various powers, duties, privileges and immunities conferred upon it by the general government, and which are termed its Federal franchises. But on that date, the 4th of April, 1870, the legislature of California abrogated the state franchises of that corporation, and substituted by adoption in their place the Federal franchises which have remained in force ever since.

The provisions of the act of Congress of July 27, 1866, c. 278, 14 Stat. 292, and the subsequent amendments thereto, state with entire distinctness the rights, powers, duties, privileges and immunities of the Southern Pacific Railroad Company. I recite the most essential features:

Section one authorized the Atlantic and Pacific Railroad Company to construct its road, vesting it with all powers

necessary for that purpose, 14 Stat. 293; and section three made grants of land to the company "to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores" over the route of its line of railway and branches. 14 Stat. 294. This was a plain exercise of the power "to establish post roads," and of the implied power to construct military roads.

Section eighteen of the same act authorized the Southern Pacific Railroad to connect with the Atlantic and Pacific Railroad, made to it similar grants of land, and made it subject to all the conditions and limitations provided in the act for the latter road. 14 Stat. 299.

The Southern Pacific Railroad Company was thus made the agent of the Federal government in its exercise of the constitutional power to establish post and military roads.

If the consent of the State was necessary to the complete substitution of the Federal franchises thus granted for any then existing state franchises for the construction of the road, it will be found in the act of the legislature of the State of California of April 4, 1870, which, after referring to the grants made and the rights, privileges, powers and authority vested in and conferred upon the Southern Pacific Railroad Company, provided that "to enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said act of Congress and all other acts of Congress now in force or which may hereafter be enacted, the State of California hereby assents to said act . . . and the right, power and privilege is hereby granted to, conferred upon and vested in them, to construct, maintain and operate, by steam or other power, the said railroad and telegraph line mentioned in said acts of Congress, *hereby confirming* to and vesting in the said company, its successors and assigns, all the rights, privileges, *franchises*, power and authority conferred upon and granted to or vested in said company by the said act of Congress and any act of Congress which may be hereafter enacted." Statutes of California, 1869–'70, c. 579, p. 883.

The Federal franchises for the construction of the Southern

Syllabus.

Pacific Railroad from the Pacific coast to the eastern boundary line of California as a part of a continuous military and post road across the continent established by Congress could have had no rival in a state franchise for the construction of the same road; but in order that this might never be questioned, the legislature of the State of California obliterated its own franchise when it ratified and confirmed the franchises given by the Federal government to the Southern Pacific Railroad Company.

No assessment could, therefore, be laid upon any merely assumed state valuation, and, consequently, no tax enforced upon its alleged assessment. It follows that the judgment of the Supreme Court of California, affirming the judgment of the Superior Court of the city and county of San Francisco, should be reversed.

TELFENER *v.* RUSS.

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

No. 462. Argued March 2, 3, 1896. — Decided March 30, 1896.

Under the provisions of the act of the State of Texas of July 14, 1879, amended March 11, 1881, and repealed January 22, 1883, in respect of the purchase of unappropriated lands, the applicant was obliged, in order to obtain the right to purchase, to cause the land desired to be surveyed, and the survey, field-notes and maps to be returned within a time prescribed; and no tract could be purchased containing more than six hundred and forty acres. R. and T. entered into an agreement consisting of two papers but constituting and declared on in this case as one contract, whereby R. agreed to transfer to T. his rights to purchase acquired under applications for the survey of 1,160,320 acres; to make all the surveys, field-notes and maps thereof, and file them in the office of the surveyor and in the General Land Office of the State within the time prescribed by law; and T. agreed to pay twenty-five cents per acre for such rights, and five cents per acre for the surveys, field-notes and maps and the filing thereof. T. failed to make any of the payments, and R. failed to file the surveys, field-notes and maps in the General Land Office within the stipulated time excepting those covering 15,360 acres. *Held*,

Statement of the Case.

(1) That the covenants of the contract were mutual and dependent and subject to the rule that the party who insists upon performance from the other side must show a performance on his own part, while he who wishes to rescind a contract need only show non-performance or inability to perform by the other party;

(2) That as between applicants and the State, while it seems from the course of decision in Texas that an applicant could obtain more than a single tract at one time, yet the policy of the act was that each tract should be considered as independent of other tracts the purchase of which also might be sought, and as R. failed as to the larger number of tracts to file the surveys, field-notes and maps within the time prescribed, he lost the absolute right to demand patents from the State, on payment, for such tracts, and was therefore unable to perform his contract with T., for the whole number of acres, according to its terms;

(3) That if upon application the applicant obtained any right which under the act was susceptible of transfer, it was not vested until the surveys, etc., were filed;

(4) That the act contemplated that the surveys should be made upon the ground, and it not only did not appear in this case that such surveys had been made, but it would seem that they must have been made up from office documents and not from actual survey on the ground.

This case was first argued March 5, 6, 1895. On April 8 reargument was ordered before a full bench. The facts, as now stated by the court, are as follows:

This case comes up on a writ of certiorari, issued to the United States Circuit Court of Appeals for the Fifth Circuit. The action was brought for damages for an alleged breach of a contract, for the sale, by the defendant to the plaintiff, of certain unappropriated public lands of the State of Texas, the right to the title of which he claimed to have acquired from the State, and it arose upon the following facts: In July, 1879, the legislature of that State passed an act for the sale of a portion of its unappropriated public lands and the investment of its proceeds. It provided that any person, firm or corporation desiring to purchase any of such lands set apart and reserved for sale might do so by causing the tract of land which the parties desired to purchase to be surveyed by the authorized public surveyor of the county or district in which the land was situated. And it was made the duty of the surveyor, to

whom application was made by responsible parties, to survey the lands designated in such application within three months from the date thereof, and within sixty days after the survey, to certify to, record and map the field-notes of the survey, and to return to and file the same in the General Land Office, as required by law in other cases. The statute also provided in its fifth section that within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map and field-notes of the land desired, it should be the right of the parties who had the same surveyed to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and that upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for the purchase money, the commissioner should issue to the applicant a patent for the tract or tracts of land thus surveyed and paid for.

The statute declared that no tract of land should be sold under the provisions of the act which contained more than six hundred and forty acres, and that no tract should have a greater frontage on any running stream or permanent water than one vara per acre for each survey of three hundred and twenty acres or less, and three fourths of one vara per acre for all other surveys.

The statute also enacted that after the survey of any of the public domain authorized, it should not be lawful for any person to file or locate upon the lands surveyed, and that such file or location should be void. It also declared that should any applicant for the purchase of public lands fail, refuse or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section five of the act, that is, within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map and field-notes, he should forfeit all rights thereto, and should not thereafter be allowed to purchase the same, and that the land thus surveyed might be sold by the commissioner of the General Land Office to any other person, firm or corporation who would pay into the treasury the purchase money therefor.

The plaintiff below, the defendant in error in this case,

Statement of the Case.

George W. Russ, a citizen of Texas, alleged that some time in October, 1882, he, being a responsible party, and intending to purchase a body of land which was subject to purchase and sale, applied, under the act of Texas, as amended, to the surveyor of the county of El Paso for the purchase from the State and for the survey of eighteen hundred and thirteen sections of land of six hundred and forty acres each, *being, in the aggregate, one million one hundred and sixty thousand three hundred and twenty acres*, situated in that county, and forming part of the Pacific Reservation; that the application was made in two instruments, describing different portions of the land, and that his applications were filed and recorded in the office of the surveyor; that on the first of November, 1882, he was about to proceed to have the lands surveyed into tracts of six hundred and forty acres each, when the defendant below, Telfener, offered to assume the payment thereof and to contract for the sale and assignment of his, Russ's, right to purchase the lands applied for from the State, and that thereupon a contract was executed between them, Russ and Telfener, bearing date on that day, in two separate instruments, constituting, however, only one distinct contract in its entirety, and as such contract, with dependent conditions, it was declared upon, by the terms of which Russ, claiming to have made application in due form for the purchase of about one million of acres of land in El Paso County, and reciting that Telfener was desirous of purchasing of him all his right, title and interest in the lands under the applications made for their purchase, provided they were regularly made under the act of July 14, 1879, agreed and promised to transfer and assign to Telfener all his (Russ's) right, title and interest in the lands applied for, the consideration being twenty-five cents per acre, which consideration Telfener promised to pay, and Russ also agreed to have the surveys made and filed with the maps and field-notes in the General Land Office, for which Telfener was to pay him five cents per acre. It was for an alleged breach of this contract that the action of *Russ* (the plaintiff below) v. *Telfener* was instituted.

Mr. Andrew Wesley Kent and *Mr. J. L. Peeler* for plaintiff in error.

Mr. Clarence H. Miller, (with whom were *Mr. S. R. Fisher*, *Mr. E. B. Hancock* and *Mr. Franz Fiset* on the brief,) and *Mr. Joseph Wheeler*, (with whom was *Mr. Josiah Patterson* on the brief,) for defendant in error.

Mr. Justice Field, after stating the provisions of the act of Texas as above, delivered the opinion of the court, as follows:

No right, title or interest in the lands which Russ desired and applied to purchase passed to him solely by his application for the survey. Until that was followed by the survey, map and field-notes of the survey, and they were filed in the General Land Office of the State, it gave no right to the applicant to purchase the land.

In *White* v. *Martin*, 66 Texas, 340, the court, referring to the act of July 14, 1879, asks the pertinent question, "How may an applicant for lands under that statute become a purchaser?" and replies as follows:

"The statute answers the question. He 'may do so by causing the tract or tracts which such person, firm or corporation desires to purchase to be surveyed.' When this is done *as the act contemplates*, then *and not before*, *the State contracts*, *upon the purchaser's complying with the other requirements of the act*, *that it will convey to him the land surveyed.* When this point was reached there existed an executory contract which gave the purchaser a vested right, upon complying with his part of the contract, to have the land purchased."

In *Campbell* v. *Wade*, 132 U. S. 34, which was in this court at the October term, 1889, it was stated that it was contended in the state courts, and the contention was renewed here, that the petitioner, (who desired to purchase a portion of the unappropriated lands of Texas,) by his application for a survey, had acquired a vested interest in the lands he desired to purchase, which could not be impaired by their subsequent withdrawal

from sale. But the court replied that this position was clearly untenable; that the application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the State. The application was to be followed by a survey, and the surveyor was allowed three months in which to make it. By the express terms of the act, it was only after the return and filing in the General Land Office of the surveyor's certificate, map and field-notes of the survey, that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter. "But for this declaration of the act," said the court, "we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the State. Clearly," the court adds, "there was no such right in advance of the survey. The State was under no obligation to continue the law in force because of the application of any one to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter; nor, in the absence of other proceedings, could it bind the State to sell the lands."

There is another view of this case which merits consideration. The contract between Russ and Telfener was for Russ to sell to the latter his right to purchase from the State the entire tract of eighteen hundred and thirteen sections of its public lands for which he had applied, not for any particular portion of that tract. Telfener had never proposed to take any less than the whole amount nor contracted to do so. An offer of any less by Russ, had it been made, of which there is no evidence, would never have been a compliance with his contract with Telfener.

It does not appear that the entire tract of land was surveyed until after November 1, 1882. At that time ninety-eight sections, embracing sixty-two thousand seven hundred and twenty acres of the tract, were unsurveyed, and it could not, in truth, be alleged that on the 1st day of that month the plaintiff was the sole owner of a valuable, valid and transferable interest in the whole body of land, embracing eighteen hundred and thirteen tracts, amounting to more than a million acres of

land, as averred by him in his declaration. On the contrary, he possessed no interest in the whole body of land of that amount, and if the contract for the purchase was possessed of any validity, it must have applied to the whole body in its entirety and not to any particular portion thereof. And of the land surveyed, payment at the rate of fifty cents per acre was only made on twenty-five of the surveys, at least there was no evidence of the payment on any other land surveyed. And the applicant Russ had acquired no vested right to purchase of the State the whole of the land because he had not complied with the law in that behalf.

The ninth section of that statute declared in express terms that should the applicant for the purchase of public lands fail, refuse or neglect to pay for the same, at the rate of fifty cents per acre, within the time prescribed in section five of the act, which was within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map and field-notes of the land desired, he should forfeit all right thereto, and should not thereafter be allowed to purchase the same, and the land thus surveyed might be sold by the commissioner to any other party who would pay into the treasury the money therefor. No official survey, as it appears, was made of the whole amount of the lands which the plaintiff below, Russ, desired to purchase, and no map or field-notes of the whole amount were ever made and returned to the General Land Office, and no payment for the lands was ever made or tendered to the treasurer of the State. The claim therefore of having acquired any right or title in and to the whole amount of the lands by the proceedings taken was manifestly groundless. The plaintiff below could not convey any proprietary interest in the whole amount of the lands desired until the required payment therefor was made, and any promise by the defendant below, Telfener, to pay to him twenty-five cents, or any amount, for an acre of such hoped for, and not acquired, land or for any less quantity was worthless, without any value or consideration. The plaintiff below, however, pushed his claim for the compensation of twenty-five cents an acre, which, not being recognized, he brought an action against Telfener

to recover the same and for the surveys and the return and filing of the same and the map and field-notes in the district court for the county of Travis, in Texas. The defendant below, Telfener, appeared to the action, and on his motion it was removed to the Circuit Court of the United States for the Western District of Texas. He then answered the petition, denying its allegations, and averring that his pretended agent, one Baccarisse, through whom Russ alleged the contract was made, never had any authority to make a contract of the kind, and that Russ never acquired by his applications any right or interest in the land, the right to purchase which he claimed to have sold to the defendant, the survey, map and field-notes never having been returned to the General Land Office as required by the third section of the statute of Texas, and he never having made or tendered any payment for the same as also required by that section, and that any interest thus acquired was without any tangible or appreciable value.

The case was tried in the Circuit Court of the United States at Austin, Texas, and a judgment therein was rendered in favor of Russ against Telfener, the plaintiff in error, in July, 1893, for the sum of $518,440.50.

The latter thereupon took the case on writ of error to the United States Court of Appeals for the Fifth Circuit, where the judgment was affirmed in February, 1894.

He then filed a petition for rehearing in the Court of Appeals, which was overruled in May, 1894, and the case was afterwards removed into this court on petition of the plaintiff in error upon a writ of certiorari in October, 1894.

The plaintiff in error now submits, upon the writ of certiorari from this court, that there was manifest error in the rulings of the Circuit Court of Appeals requiring the reversal of its judgment, in this:

First. That the law of Texas expressly restricted the right of the applicant to purchase any portion of the unappropriated public lands of the State to six hundred and forty acres in one tract, and in this case the plaintiff claimed, and the Court of Appeals sustained his claim, that he had acquired a

right pursuant to the proceedings taken under the statute, to purchase one million one hundred and sixty thousand three hundred and twenty acres in one tract of the unappropriated lands of the State.

Second. That the evidence in the record shows that the alleged contract between the plaintiff in error and Russ was made on the first day of November, 1882, and that after that date Russ caused ninety-eight sections of the lands, embracing over sixty-two thousand seven hundred and twenty acres (the right or privilege to purchase which he pretended to have previously sold to the plaintiff in error) to be surveyed, and though, until such survey and its completion and return with map and field-notes to the commissioner of the General Land Office and filing of the same in that office, no right or privilege on the part of Russ to purchase any portion of the ninety-eight sections was initiated, the Court of Appeals held that Russ had a valuable and assignable right in those sections, whether the survey thereof and its field-notes were returned and filed in the General Land Office or not, directly in contravention of the third section of the statute of Texas, which declares that: "It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record and map the field-notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases." And also in disregard of the forfeiture of any right acquired by Russ to purchase the lands for which he had applied, imposed by section nine of the statute of Texas, which declares in express terms that should any applicant for the purchase of public land fail, refuse or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section five of this act, that is, within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map and field-notes of the land desired, he shall forfeit all right thereto, and shall not thereafter be allowed to purchase the same, but

the land so surveyed may be sold by the commissioner of the General Land Office to any other person, firm or corporation who shall pay into the treasury the purchase money therefor. And the evidence contained in the record shows the fact to be that out of the eighteen hundred and thirteen sections of land of which survey was desired, only the field-notes of a portion of the sections were returned and filed within the time required, yet the Circuit Court of Appeals held that it was wholly immaterial whether the surveys under the application of Russ were made and returned within the sixty days designated, or not returned at all, which ruling was plainly in disregard of the express provisions of the act of the Texas legislature, providing for the sale of any of the unappropriated public lands of the State.

Third. That the testimony contained in the record of the cause further shows that none of the sections which Russ alleged that he had requested to be surveyed, and had obtained a survey thereof, were surveyed on the ground, but that which was alleged to be a survey of the sections and returned as such consisted of work done in the office of the commissioner of the General Land Office and presented as a survey, and although it was held by the laws of Texas and the decision of its Supreme Court that the surveys of its unappropriated public land must be made on the ground, that the surveys not thus made were null and void, and did not confer upon the applicant any right of purchase, the Court of Appeals held that it was immaterial whether the surveys were actually made on the ground or consisted of office work.

Fourth. But assuming that the plaintiff finally pursued fully all the proceedings required to obtain a right to purchase of Texas the whole amount of her unapportioned lands claimed, namely, one million one hundred and sixty thousand three hundred and twenty acres, and the contract alleged between Russ, the plaintiff, and Telfener, the defendant, was made, yet such contract was conditional and dependent upon the performance by the respective parties of the conditions devolving upon each party at the time stipulated, and ceased to be binding upon either one on the failure of the other to

comply with the performance stipulated on his part. Russ, the plaintiff, was to acquire of the State such interest in the property as would authorize him to sell and transfer to the defendant a valid title thereto, and to acquire such a valid title he was bound to make performance of his contract with the defendant by filing the surveys, map and field-notes of the whole within the prescribed time so that the defendant might have the right to demand patents of the State on payment of the purchase money of such property to its treasury, which he never did, and therefore released the defendant of all obligation to perform the alleged contract on his part. Authority for this position will be found in the cases of *Bank of Columbia* v. *Hagner*, 1 Pet. 455, 465; *Hill* v. *Grigsby & Smittle*, 35 California, 656; and *Englander* v. *Rogers*, 41 California, 420.

In *Bank of Columbia* v. *Hagner*, 1 Pet. 455, 464, this court, speaking by Mr. Justice Thompson of the distinctions made in covenants or promises of parties to a contract for the purchase and sale of real property, whether they were to be considered as independent or dependent, said: "It is evident that the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence in such cases, if either a vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration upon the contracts containing dependent undertakings, and that averment must be supported by proof."

In this case there was no offer or tender of performance by the plaintiff to the State, which was essential to create an obligation to pay any money on the part of the defendant. There is, therefore, no ground for recovery by the plaintiff upon his alleged contract with the defendant, there having been no such performance, or offer of performance, on his

part to the State as would enable him to acquire such an interest in the property that he could comply with his engagement to the defendant.

In *Hill* v. *Grigsby & Smittle*, the Supreme Court of California held that "in a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or as soon as it is paid, the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform on his part. Performance, or an offer to perform on the one part, is a condition precedent to the right to insist upon a performance on the other part." 35 California, 656.

And in *Englander* v. *Rogers*, the same court held that "the obligations of the parties to an agreement for the sale of land are mutual and dependent, where one is to convey, and the other at the same time to pay the purchase money; and neither can put the other in default, except by tendering a performance on his part, unless the other party waives the tender, or by his conduct renders it unnecessary." 41 California, 420.

It is only upon the return and filing in the General Land Office as stated above, that any right to the land surveyed attaches to the applicant, and until such filing the State does not agree to part with any interest in the lands surveyed, and the purchaser does not acquire any.

Such was the decision of this court when the case was before it at the October term of 1891. 145 U. S. 522, 532. "An applicant," we there said, "under the laws of Texas, for the purchase of a portion of its unappropriated public lands, could acquire no vested interest in the land applied for, that is, no legal title to it, until the purchase price was paid, and the patent of the State was issued to him. If the price was not paid within sixty days after the return to the general land office of a map of the land desired and the field-notes of its survey, he forfeited all right to the land and was not thereafter allowed to purchase it." We added, however, "that he had the right to complete the purchase and secure a patent

within the prescribed period, *after the map and field-notes of the survey were filed* in the general land office," which is designated in the decisions of the Supreme Court of the State as a vested right that could not be defeated by subsequent legislation.

This reserved right, however, only applies where the map and field-notes of the survey have been previously filed in the general land office. No such reserved right could be asserted in the present case, for no such field-notes of all the lands were previously filed. The claim of Russ, the plaintiff below, was that he had an assignable right on November 1, 1882, to eighteen hundred and thirteen sections of land for which he had made application in October of that year. There are objections to recognizing that the field-notes of such alleged eighteen hundred and thirteen sections were filed before the expiration of three months. They were of no validity if not made on the ground, and it is not pretended that the field-notes were made by a survey on the ground, and it is not shown that they were made or could be made in any other way.

Each of the eighteen hundred and thirteen sections was to be in a tract of six hundred and forty acres. It appears by the record that the field-notes of the survey purport to have been made between the 13th of October and the 3d of November, 1882, except sections one to twenty-four. It is to be borne in mind that each section of six hundred and forty acres comprises a distance around it of four miles, and the eighteen hundred and thirteen sections, leaving out the twenty-four sections which are claimed to have been surveyed on the 9th of November, 1882, would embrace a circumference of seven thousand one hundred and fifty-six miles, and the survey of the twenty-four sections would have embraced ninety-six miles additional. No survey of land on the ground, of that extent, could have been made during the time designated. Neither the twenty-four sections, embracing ninety-six miles, could have been surveyed in one day — the 9th of November — nor the seventeen hundred and eighty-nine remaining, embracing seven thousand one hundred and fifty-six miles, in the twenty-

one days between the 13th of October and the 3d of November, 1892. Therefore, if any surveys were returned in such sections they must have been made up from office documents, and not by actual survey on the ground.

In *Jumbo Cattle Co.* v. *Bacon*, 79 Texas, 5, the Court of Civil Appeals of Texas decided that under the act of July 14, 1879, as amended by the act of March 11, 1881, providing that any person desiring to purchase any unappropriated land may do so by causing the tract which said person desires to purchase "to be surveyed" by the authorized public surveyor of the county in which the land is situated, a survey not actually made in the field, but copied from the field-notes of a prior survey on file in the surveyor's office, is not such a survey as is contemplated by the act of the legislature; and that such a survey does not entitle the proposed purchaser to a deed to the land.

The claim that the plaintiff below, Russ, had parted with valuable property, for which he was entitled to a judgment exceeding half a million of dollars from Count Telfener, for having transferred to him his hopes of securing a million acres of land from the State, for which he did not hold any promise or obligation of the State, does not merit consideration. As a claim it rests upon no solid foundation.

It follows that, for the errors stated,

The judgment of the Circuit Court of Appeals should be reversed, and the judgment of the Circuit Court should also be reversed, and the cause remanded with a direction to set aside the verdict and grant a new trial, and it is so ordered.

Syllabus.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

INTERSTATE COMMERCE COMMISSION *v.* CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

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

Nos. 394, 473. Argued January 30, 31, 1896. — Decided March 30, 1896.

When a state railroad company whose road lies within the limits of the state, enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but by an arrangement for the continuous carriage or shipment from one State to another; and thus becomes amenable to the Federal act in respect to such interstate commerce; and, having thus subjected itself to the control of the Interstate Commerce Commission, it cannot limit that control in respect to foreign traffic to certain points on its road to the exclusion of other points.

When goods shipped under a through bill of lading, or in any other way indicating a common control, management or arrangement, from a point in one State to a point in another State are received in transit by a state common carrier, such carrier, if a railroad company, must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce.

The Interstate Commerce Commission is not empowered either expressly, or by implication, to fix rates in advance; but, subject to the prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.

Statement of the Case.

On October 18, 1889, the James and Mayer Buggy Company, a corporation of the State of Ohio, and doing business at Cincinnati, filed a complaint before the Interstate Commerce Commission against the Cincinnati, New Orleans and Texas Pacific Railway Company, the Western and Atlantic Railroad Company and the Georgia Railroad Company, alleging that said defendants were common carriers "under a common control, management or arrangement for continuous carriage or shipment," and charged the same rate for transporting vehicles shipped by the complainants from Cincinnati, whether shipped to Atlanta, Georgia, a distance of about 474 miles, or to Augusta, Georgia, a distance of 645 miles, and charged 30 cents per hundred pounds more on such vehicles shipped to Social Circle, Georgia, than when shipped to either Atlanta or Augusta.

The Cincinnati, New Orleans and Texas Pacific Railway extends from Cincinnati to Chattanooga, Tennessee; the road of the Western and Atlantic Railroad Company begins at Chattanooga and extends to Atlanta; and that of the Georgia begins at Atlanta and ends at Augusta. These respondents filed answers, from which, and from the allegations of the complaint, it appeared that the complainants shipped their goods, at first class rates, by through bills of lading, from Cincinnati to Atlanta, to Social Circle, and to Augusta; that through rates, of $1.07 per hundred pounds, were charged to both Atlanta and to Augusta, of which the Cincinnati, New Orleans and Texas Pacific Railway Company received $55\frac{7}{10}$ cents; the Western and Atlantic, $22\frac{9}{10}$ cents; and the Georgia Railroad Company, $28\frac{4}{10}$ cents. Social Circle is a local station on the Georgia Railroad, 52 miles east of Atlanta, and 119 miles west of Augusta. When goods were shipped to Social Circle the complainants had to pay $1.37 per hundred pounds, of which $75\frac{9}{10}$ cents went to the Cincinnati, New Orleans and Texas Pacific company, $31\frac{1}{10}$ to the Western and Atlantic and 30 cents to the Georgia — the said amount of 30 cents per hundred pounds being the local charge made by the Georgia company on similar freight carried by it from Atlanta to Social Circle.

The complainants contended that as the rate to Augusta was $1.07 per hundred pounds, that charge was excessive when made against similar freight carried to Atlanta, which is 171 miles nearer to the point of shipment. They also contended that the charge of $1.37 to Social Circle was excessive and undue, as the defendants carried similar freight for $1.07 to Augusta, a greater distance of 119 miles.

The respondents claimed that they were justified in charging the same rate to Augusta as to Atlanta, because the former was a competitive point; and as to the rates to Social Circle, they claimed that the goods were not carried to that point under a common control, management or arrangement for continuous carriage or shipment, but that the additional 30 cents per hundred pounds was the local charge for similar service by the Georgia company, and that, therefore, the case of goods carried to Social Circle was not within the provisions of the act to regulate commerce.

The controversy before the Commission resulted in an order, requiring the defendants to cease and desist from making any greater charge in the aggregate on buggies, carriages and other freight of the first class, carried in less than carloads from Cincinnati to Social Circle, than they charged on such freight from Cincinnati to Augusta, and to cease and desist from making any charge for the transportation of such freight from Cincinnati to Atlanta in excess of $1 per hundred pounds. This order was dated June 29, 1891, and was to operate from July 20, 1891.

The defendants having refused to obey this order and failed to alter or modify their charges, the Interstate Commerce Commission filed a bill or petition in the Circuit Court of the United States for the Northern District of Georgia, seeking to enforce the said order.

To this bill the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia filed a joint and several answer, in which they alleged that the said companies jointly operated the railroad from Atlanta to Augusta as assignees of one William Wadley, to whom that road had been previously leased by "the Georgia Rail-

road and Banking Company," a corporation of the State of Georgia, and that they so operated said railroad under the adopted name of the "Georgia Railroad Company," but that there was no such corporation as the "Georgia Railroad Company." This answer further denied the allegation of the petition of the Commission in so far as they charged that rates charged by them were undue or excessive, or in disregard of the provisions of the act to regulate commerce.

An answer was filed by the Cincinnati, New Orleans and Texas Pacific Railway Company, traversing the allegations of the bill, so far as it alleged the charging of undue or unreasonable rates to Atlanta or to Social Circle. The Western and Atlanta Railroad Company set up in its answer that it had no existence as a corporation at the time of the proceedings before the Interstate Commerce Commission, and had no connection with the matters therein complained of, and therefore prayed that, as against it, the petition of the Commission should be dismissed. (This position was subsequently abandoned.)

Under the issues thus formed a considerable amount of testimony was taken; the cause came on to be heard, was argued by counsel, and thereupon, on June 5, 1893, the court, holding that the matters of equity alleged in the bill were fully denied in the answers, and were not sustained by the proof, decreed that the bill be dismissed.

From this decree an appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit, and was there so proceeded in that on May 27, 1894, the decree of the Circuit Court was reversed, 13 U. S. App. 730, and the cause was remanded to that court with instructions to enter a decree in favor of the Interstate Commerce Commission and against the defendants, commanding the latter to cease and desist from making any greater charge in the aggregate on buggies, carriages and on other freight of the first class carried in less than carloads, from Cincinnati to Social Circle than they charged on such freight from Cincinnati to Augusta.

Appeals were taken from this decree and errors assigned respectively by the defendants and by the Commission.

Mr. N. J. Hammond and *Mr. George F. Edmunds* for the Interstate Commerce Commission.

Mr. Edward Baxter for the railway companies. *Mr. Edward Colston*, *Mr. George Hoadly, Jr.*, *Mr. J. B. Cumming* and *Mr. George Hilyer* were on his brief.

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

The investigation before the Interstate Commerce Commission resulted in an order in the following terms:

"It is ordered and adjudged that the defendants, the Cincinnati, New Orleans and Texas Pacific Railway Company, the Western and Atlantic Railroad Company and the Georgia Railroad Company, do, upon and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater compensation in the aggregate for the transportation in less than carloads of buggies, carriages and other articles classified by them as freight of the first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the State of Ohio, to Social Circle, in the State of Georgia, than they charge or receive for the transportation of said articles in less than carloads for the longer distance over the same line from Cincinnati aforesaid to Augusta, in the State of Georgia; and that the said defendants, the Cincinnati, New Orleans and Texas Pacific Railway Company, do also, from and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages and other first class articles in less than carloads, from Cincinnati aforesaid to Atlanta, in the State of Georgia, than one dollar per hundred pounds."

The decree of the Circuit Court of Appeals, omitting unimportant details, was as follows:

"It is ordered, adjudged and decreed . . . that this cause be remanded to the Circuit Court, with instructions to enter a decree in favor of the complainant, the Interstate

Commerce Commission, and against the defendants, the Cincinnati, New Orleans and Texas Pacific Railway Company, the Western and Atlantic Railroad Company and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants and attorneys, to cease and desist from making any greater charge in the aggregate on buggies, carriages and on all other freight of the first class carried in less than carloads from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta; that they so desist and refrain within five days after the entry of the decree, and in case they or any of them shall fail to obey said order, condemning the said defendants and each of them to pay one hundred dollars a day for every day thereafter they shall so fail; and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta."

It will be observed that, in its said decree, the Circuit Court of Appeals adopted that portion of the order of the Commission which commanded the defendants to make no greater charge on freight carried to Social Circle than on like freight carried to Augusta, and disapproved and annulled that portion which commanded the Cincinnati, New Orleans and Texas Pacific Railway Company and the Western and Atlantic Railroad Company to desist from charging for the transportation of freight of like character from Cincinnati to Atlanta more than one dollar per hundred pounds.

The railroad companies, in their appeal, complain of the decree of the Circuit Court of Appeals in so far as it affirmed that portion of the order of the Commission which affected the rates charged to Social Circle. The Commission in its appeal complains of the decree in that it denies the relief prayed for in relation to charges on freight from Cincinnati to Atlanta.

The first question that we have to consider is whether the defendants, in transporting property from Cincinnati to Social Circle, are engaged in such transportation "under a common control, management or arrangement for a continuous carriage or shipment" within the meaning of that language, as used in the act to regulate commerce.

We do not understand the defendants to contend that the arrangement whereby they carry commodities from Cincinnati to Atlanta and to Augusta at through rates which differ in the aggregate from the aggregate of the local rates between the same points, and which through rates are apportioned between them in such a way that each receives a less sum than their respective local rates, does not bring them within the provisions of the statute. What they do claim is that, as the charge to Social Circle, being $1.37 per hundred pounds, is made up of a joint rate between Cincinnati and Atlanta, amounting to $1.07 per hundred pounds, and 30 cents between Atlanta and Social Circle, and as the $1.07 for carrying the goods to Atlanta is divided between the Cincinnati, New Orleans and Texas Pacific and the Western and Atlantic, $75\frac{1}{10}$ cents to the former and $31\frac{1}{10}$ cents to the latter, and the remaining 30 cents, being the amount of the regular local rate, goes to the Georgia company, such a method of carrying freight from Cincinnati to Social Circle and of apportioning the money earned, is not a transportation of property between those points "under a common control, management or arrangement for a continuous carriage or shipment."

Put in another way, the argument is that, as the Georgia Railroad Company is a corporation of the State of Georgia, and as its road lies wholly within that State, and as it exacts and receives its regular local rate for the transportation to Social Circle, such company is not, as to freight so carried, within the scope of the act of Congress.

It is, no doubt, true that, under the very terms of the act, its provisions do not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one State, not shipped to or from a foreign country from or to any State or Territory.

In the answer filed by the so-called "Georgia Railroad Company" in the proceedings before the Commission there was the following allegation: "This respondent says that while no arrangement exists for a through bill of lading from Cincinnati to Social Circle, as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made

on a through bill of lading, the rate of which was fixed by adding this respondent's local rate, from Atlanta to Social Circle, to the through rate from Cincinnati to Atlanta."

The answer of the Louisville and Nashville Railroad Company and Central Railroad and Banking Company of Georgia, which companies, as operating the Georgia railroads, were sued by the name of the "Georgia Railroad Company," in the Circuit Court of the United States, contained the following statement:

"So far as these respondents are concerned they will state that on July 3, 1891, E. R. Dorsey, general freight agent of said Georgia Railroad Company, issued a circular to its connections earnestly requesting them that thereafter, in issuing bills of lading to local stations on the Georgia railroad, no rates be inserted east of Atlanta, except to Athens, Gainesville, Washington, Milledgeville, Augusta or points beyond. Neither before nor since the date of said circular have these respondents, operating said Georgia railroad, been in any way parties to such through rates, if any, as may have been quoted, from Cincinnati or other western points to any of the strictly local stations on said Georgia railroad. The stations excepted in said circular are not strictly local stations. Both before and since the date of said circular respondents have received at Atlanta eastbound freight destined to strictly local stations on the Georgia railroad and have charged full local rates to such stations — said rates being such as they were authorized to charge by the Georgia railroad commission. Said rates are reasonably low and are charged to all persons alike without discrimination."

Upon this part of the case the conclusion of the Circuit Court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company, was local, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the Interstate Commerce Commission.

We are unable to accept this conclusion. It may be true that the "Georgia Railroad Company," as a corporation of the

State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another State. It may be that if, in the present case, the goods of the James and Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the Commission, by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the State of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points.

The Circuit Court sought to fortify its position in this regard by citing the opinion of Mr. Justice Brewer in the case of *Chicago & Northwestern Railroad* v. *Osborne*, 10 U. S. App. 430, when that case was before the United States Circuit Court of Appeals for the Eighth Circuit. It is quite true that the opinion was expressed that railroad companies, incorpo-

rated by and doing business wholly within one State, cannot be compelled to agree to a common control, management or arrangement with connecting companies, and thus be deprived of its rights and powers as to rates on its own road. It was also said that it did not follow that, even if such a state corporation did agree to form a continuous line for carrying foreign freight at a through rate, it was thereby prevented from charging its ordinary local rates for domestic traffic originating within the State.

Thus understood, there is nothing in that case which we need disagree with in disapproving the Circuit Court's view in the present case. All we wish to be understood to hold is, that when goods shipped under a through bill of lading, from a point in one State to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested.

Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the Commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property, in transit between States, under "substantially similar circumstances and conditions."

We do not say that, under no circumstances and conditions, would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line, but it is for the tribunal appointed to enforce the provisions of the statute, whether the Commission or the court, to consider whether the exist-

ing circumstances and conditions were or were not substantially similar.

It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion.

We understand the record as disclosing that the Commission, in view of the circumstances and conditions in which the defendants were operating, did not disturb the rates agreed upon whereby the same charge was made to Augusta as to Atlanta, a less distant point. Some observations made by the Commission in its report on the nature of the circumstances and conditions which would justify a greater charge for the shorter distance, gave occasion for an interesting discussion by the respective counsel. But it is not necessary for us, in the present case, to express any opinion on a subject so full of difficulty.

These views lead to an affirmance of the decree of the Circuit Court of Appeals, in so far as the appeal of the defendant companies is concerned; and we are brought to a consideration of the appeal by the Interstate Commerce Commission.

That appeal presents the question whether the Circuit Court of Appeals erred in its holding in respect to the action of the Interstate Commerce Commission in fixing a maximum rate of charges for the transportation of freight of the first class in less than carloads from Cincinnati to Atlanta.

This question may be regarded as twofold, and is so presented in the assignment of error filed on behalf of the Commission, namely: Did the court err in not holding that, in point of law, the Interstate Commerce Commission had power to fix a maximum rate, and, if such power existed, did the court err in not holding that the evidence justified the rate fixed by the Commission and not decreeing accordingly?

It is stated by the Commission, in its report, that "the only testimony offered or heard as to the reasonableness of the rate

to Atlanta in question was that of the vice president of the Cincinnati, New Orleans and Texas Pacific Company, whose deposition was taken at the instance of the company." And in acting upon the subject, the Commission say:

"This statement or estimate of the rate from Cincinnati to Atlanta, ($1.01 per hundred pounds in less than carloads,) we believe is fully as high as it may reasonably be, if not higher than it should be, but without more thorough investigation than it is now practicable to make we do not feel justified in determining upon a more moderate rate than $1 per hundred pounds of first class freight in less than carloads. The rate on this freight from Cincinnati to Birmingham, Alabama, is 89 cents as compared with $1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or in fact to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati."

But when the Commission filed its petition in the Circuit Court of the United States, seeking to enforce compliance with the rate of one dollar per hundred pounds, as fixed by the Commission, the railroad companies, in their answers, alleged that, "the rate charged to Atlanta, namely $1.07 per hundred pounds, was fixed by active competition between various transportation lines, and was reasonably low."

Under this issue evidence was taken, and we learn, from the opinion of the Circuit Court, that, as to the rate to Birmingham, there was evidence before the court which evidently was not before the Commission, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been $1.08, was forced down to 89 cents by the building of the Kansas City, Memphis and Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and by reason of water route to the Northwest such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result.

Without stating the reasoning of the Circuit Court, which will be found in the report of the case in 64 Fed. Rep. 981, the conclusion reached was that the evidence offered in that court

was sufficient to overcome any *prima facie* case that may have been made by the findings of the Commission, and that the rate complained of was not unreasonable.

As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court, in respect to the reasonableness of the rate charged on first class freight carried on defendants' line from Cincinnati to Atlanta; and as both courts found the existing rates to have been reasonable, we do not feel disposed to review their finding on that matter of fact.

We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the Circuit Court. The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission, but that the purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved.

Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates, was mooted in the courts below, and is discussed in the briefs of counsel.

We do not find any provision of the act that expressly, or by necessary implication, confers such a power.

It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of

withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable.

We prefer to adopt the view expressed by the late Justice Jackson, when Circuit Judge, in the case of the *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.*, 43 Fed. Rep. 37, and whose judgment was affirmed by this court, 145 U. S. 263:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

The decree of the Circuit Court of Appeals is

Affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

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

No. 321. Argued January 29, 30, 1896. — Decided March 30, 1896.

The Interstate Commerce Commission is a body corporate, with legal capacity to be a party plaintiff or defendant in the Federal courts.

The Circuit Court for the Southern District of New York had jurisdiction of the acts complained of in this suit.

The Southern Pacific Company, although a proper, was not a necessary party to this suit.

In enacting the interstate commerce acts Congress had in view, and intended to make provision for commerce between States and Territories, commerce going to and coming from foreign countries, and the whole

field of commerce except that wholly within a State; and it conferred upon the Commission the power of determining whether, in given cases, the services rendered were like and contemporaneous, whether the respective traffic was of a like kind, and whether the transportation was under substantially similar circumstances and conditions.

If the Commission has power, of its own motion, to promulgate general decrees or orders, which thereby become rules of action to common carriers, such exertion of power must be confined to the obvious purposes and directions of the statute, since Congress has not granted it legislative powers.

The action of the defendant company in procuring from abroad, by steamship connections, through traffic for San Francisco which, except for the modified through rates, would not have reached the port of New Orleans, and in taking its *pro rata* share of such rates, was not of itself an act of "unjust discrimination" within the meaning of the interstate commerce act.

In construing the terms of a statute, especially when the legislation is experimental, courts must take notice of the history of the legislation, and, out of different possible constructions, must select the one that best comports with the genius of our institutions.

In enacting the statutes establishing the Interstate Commerce Commission, the purpose of Congress was to facilitate and promote commerce, and not to reinforce the provisions of the tariff laws; and the effort of the Commission to deprive inland consumers of the advantage of through rates, seems to create the mischief which it was one of the objects of the act to remedy.

The conclusions of the court, drawn from the history and language of the acts under consideration, and from the decisions of the American and the English courts, are:

(1) That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations;

(2) That in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment;

(3) That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States,

Statement of the Case.

competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered;

(4) That if the Commission, instead of confining its action to redressing on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country.

The mere fact that in this case the disparity between through and local rates was considerable did not warrant the Circuit Court of Appeals in finding that such disparity constitutes an undue discrimination, especially as that disparity was not complained of by any one affected thereby.

THIS was an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the Circuit Court of the United States for the Southern District of New York, filed October 5, 1892.

The original bill of complaint was brought by the Interstate Commerce Commission, created by virtue of an act of Congress, entitled "An act to regulate commerce," approved February 4, 1887, c. 104, 24 Stat. 379, as amended by an act approved February 10, 1891, c. 128, 26 Stat. 743, against the Texas and Pacific Railway Company, a corporation chartered and existing under and by virtue of the laws of the United States, having its principal office at New York City.

The object of the bill was to compel the defendant company to obey an order of the Interstate Commerce Commission, made on January 29, 1891, whereby the said defendant was ordered to "forthwith cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of des-

tination, or at any other than the same rates established in such inland tariff for the carriage of other like kind of freight, in the elements of bulk, weight, value and expense of carriage;" and which order the said defendant was alleged to have wholly disregarded and set at naught.

It appears by the bill that on March 23, 1889, the Commission, of its own motion and without a hearing of the parties to be affected, had made a certain order wherein, among other things, it was provided as follows:

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights." 2 Interstate Com. Com. Rep. 658.

Subsequently complaint was made to the Interstate Commerce Commission, in a petition filed by the New York Board of Trade and Transportation, that certain railroad companies were disregarding said order, and, in violation of the act to regulate commerce, were guilty of unjust discrimination in that they were in the habit of charging the regular tariff rates upon property when delivered to them at New York and Philadelphia for transportation to Chicago and other Western points, while charging other persons rates which were lower and even fifty per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions, when the property was delivered to them at New York or Philadelphia by vessel or steamship lines, under through bills of lading from foreign ports and foreign interior points, issued under an arrangement between the said railroad companies and such vessels and steamship lines and foreign railroads, for the continuous carriage at joint rates from the point or port of shipment to Chicago and other Western points, the railroad companies' share of each through rate being lower than their regular tariff rates.

The Commercial Exchange of Philadelphia and the San Francisco Chamber of Commerce intervened and became parties complainant also.

The companies first warned and called upon to answer the

complainant were the Pennsylvania Railroad Company, the Pittsburgh, Ft. Wayne and Chicago Railway Company, and the Pittsburgh, Cincinnati and St. Louis Railway Company, but, after the coming in of the answers of said companies, it was deemed necessary to make quite a number of other railroad companies parties defendant — among them the Texas and Pacific Railway Company, the defendant in the present case, and the Southern Pacific Company. The several defendant companies filed answers. The answer of the Texas and Pacific Railway Company, admitting that both before and since March 23, 1889, it had carried imported traffic at lower rates than it contemporaneously charged for like traffic originating in the United States, justified by claiming that through shipments from a foreign country to the interior of the United States differ in circumstances and conditions from shipments originating at the American sea-board bound for the same interior points, and that defendant company has a legal right to accept for its share of the through rate a lower sum than it receives for domestic shipment to the same destination from the point at which the imported traffic enters this country.

The result of the hearing before the Interstate Commerce Commission was, so far as the present case is concerned, that the Commission held that the Texas and Pacific Railway Company was not justified in accepting, as its share of a through rate on imported traffic, a less charge or sum than it charged and received for inland traffic between the port of reception and the point of delivery, and the said order of January 29, 1891, commanding that said company desist from distinguishing in its charges between foreign and inland traffic, was made. 4 Interstate Com. Com. Rep. 447.

As the Texas and Pacific Railway Company declined to observe said order, the Commission filed its present bill against said company in the Circuit Court of the United States for the Southern District of New York.

The railway company filed a plea in abatement, denying that its principal office was in the Southern District of New York, and denying that it had violated or disobeyed the order of the Commission within the State of New York, or

at any place within the jurisdiction of the Circuit Court. Certain affidavits were filed, upon a stipulation, as to the facts, and, after hearing, the plea was overruled, and also a motion to dismiss the proceedings for want of jurisdiction was denied — and to these rulings exceptions were taken and allowed.

The defendant company answered, alleging that the Interstate Commerce Commission was not a corporation, person or body politic capable of bringing or maintaining this suit — that the petition or bill failed to allege or show any facts constituting a violation by the defendant of the order of January 29, 1891, and did not show or allege any specific act or acts by the defendant in violation of the act of Congress — that the Southern Pacific Company, as participant with the defendant in the making and division of the through rates, was a necessary party, and that the bill should be dismissed for want of such necessary party.

The answer, admitting that the company had charged and received, since January 29, 1891, rates for the transportation of commodities from Liverpool and London, England, via New Orleans and the Texas and Pacific Railway and the Southern Pacific Company to San Francisco, California, different from the rates charged and received for the transportation of inland commodities from New Orleans by the same route to San Francisco, asserted that it had a legal right so to do, and that such action was not in violation of the act of Congress regulating commerce, or of any valid order of the Interstate Commerce Commission. The answer set up a number of facts which it alleged sustained its defence.

The cause was heard upon the petition, answer and sundry exhibits, and resulted in a decree declaring that the order of January 29, 1891, was lawful, and that the same had been disobeyed by the defendant, and enjoining the defendant from further continuing such disobedience of said order. An appeal, with errors assigned, was taken from this decree to the Circuit Court of Appeals of the Second Circuit, by which, on June 3, 1893, the decree of the Circuit Court was affirmed with costs. 20 U. S. App. 1. An appeal was then taken, on errors assigned, from said decree to this court.

Mr. John F. Dillon and *Mr. E. Baxter*, (with whom was *Mr. Winslow F. Pierce* on the brief,) for appellant.

Mr. Simon Sterne and *Mr. John D. Kernan* for appellee.

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

It was claimed in the courts below, and it is also urged in this court, that the Interstate Commerce Commission is not a corporate body or person in whose name a suit can be instituted. It seems to be thought that the Commission can only sue in the names of the persons composing it.

The 16th section of the act to regulate commerce, as amended March 2, 1889, c. 382, 25 Stat. 859, provides that "whenever any common carrier, as defined in and subject to the provisions of that act, shall violate, or refuse or neglect to obey or perform, any lawful order or requirement of the Commission created by the act, not founded upon a controversy requiring a trial by jury, as provided by the Seventh Amendment to the Constitution of the United States, it shall be lawful for the Commission, or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do equity in the premises."

The language contained in the 11th section creating the Commission is as follows, act of February 4, 1887, c. 104, 24 Stat. 379, 383: "That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. . . . No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission," and in the 17th section it is provided that "said Commission shall have an official seal, which shall be judicially noticed."

In the case of *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, a suit was instituted by the Commission in the Circuit Court of the United States for the Southern District of Ohio, and the decree of that court was affirmed by this court. 145 U. S. 264. Likewise, in the case of *Interstate Commerce Commission* v. *Atchison, Topeka & Santa Fé Railroad*, a suit was brought in the Circuit Court of the United States for the District of California, by the Commission *eo nomine* against that company, wherein it was held by this court that an appeal did not lie directly to this court since the creation of the Circuit Court of Appeals. 149 U. S. 264.

In neither of these cases was any objection made to the right of the Commission to sue by its statutory designation.

We think that the language of the statute, in creating the Commission, and in providing that it shall be lawful for the Commission to apply by petition to the Circuit Court sitting in equity, sufficiently implies the intention of Congress to create a body corporate with legal capacity to be a party plaintiff or defendant in the Federal Courts.

Another formal objection made to the jurisdiction of the Circuit Court was raised by a plea in abatement denying that the Texas and Pacific Railway Company had its principal office in the State of New York, or that the acts complained of took place within the judicial district of said court.

Upon facts made to appear by affidavits submitted by both parties, under a stipulation, the Circuit Court overruled the plea. Our examination of the facts so submitted, and which

are brought before us by a bill of exceptions, has not convinced us that the court erred in overruling the plea.

Another objection urged is that, as the order of the Commission involves rates participated in by the Southern Pacific Company, as owner of a portion of the line over which the through freight is carried, that company was a necessary party. Undoubtedly that company would have been a proper party, but we agree with the Circuit Court in thinking that it was not a necessary one.

We come now to the main question of the case, and that is whether the Commission erred, when making the order of January 29, 1891, in not taking into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the sea-board in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic.

The answer of the Texas and Pacific Railway Company to the petition of the New York Board of Trade and Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the Commission filed in the Circuit Court, allege that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels in connection with railroads across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these under through arrangements with the Southern Pacific Company to San Francisco: That, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company: That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and work no injury to that community,

because, if said company is prevented from participating in said traffic, such traffic would move via the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage: That the foreign or import traffic is upon orders by persons, firms and corporations in San Francisco and vicinity buying direct of first hands in London, Liverpool, and other European markets; and if the order of the Commission should be carried into effect it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event: That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City and other Missouri River points: And that by such order the defendant company would be prevented from competing for freight to important points in the State of Texas with the railroad system of that State, having Galveston as a receiving port, and which railroad system is not subject to the control of the Interstate Commerce Commission. These allegations of the answer were not traversed or denied by the Commission, but are confirmed by the findings of the Commission attached as an exhibit to the petition in the case; and by said findings it further appears that the proportion the Texas and Pacific Railway receives of the through rate is remunerative — that the preponderance of its empty cars go north during eight months of the year, and if something can be obtained to load, it is that much found, and anything is regarded as remunerative that can be obtained to put in its cars to pay mileage — that the competition which controls the making of rates to the Pacific coast is steamship by way of the Isthmus and in cheap heavy goods around Cape Horn — that the competition to interior points, such as Missouri River points and Denver, is from the trunk lines direct from the Atlantic sea-board — that the ships engaged in carrying to San Francisco around Cape Horn are almost wholly British bottoms — that the through bill of lading furnishes a collateral for the transaction of business, takes from the shipper and consignee both the care as to intermediate charges, elevators, wharves and cost of handling, and puts it on the

carrier; it reduces the intermediate charges, very much facilitates the transaction of business, and helps to swell its volume — and that the tendency of the through bill of lading is to eliminate the obstacles between the producer and consumer, and it has done much in that direction.

These and other uncontroverted facts that appear in this record would seem to constitute "circumstances and conditions" worthy of consideration, when carriers are charged with being guilty of unjust discrimination or of giving unreasonable and undue preference or advantage to any person or locality.

But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts — that it was shut up by the terms of the act of Congress, to consider only such "circumstances and conditions" as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada.

It is proper that we should give the views of the Commission in its own words:

"The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail and partly by water, or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country, on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received and at which it is delivered, and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and as between these ports has provided for no publication of tar-

iffs of rates and charges, but has left it to the unrestrained competition of ocean carriers and all the circumstances and conditions surrounding it. These circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the States of the American Union by rail carriers; but as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction. To hold otherwise would be for the Commission to create exceptions to the operation of the statute not found in the statute; and no other power but Congress can create such exception in the exercise of legislative authority.

"In the one case the freight is transported from a point of origin in the United States to a destination within the United States, or port of transhipment, if it be intended for export, upon open published rates, which must be reasonable and just, not unjustly preferential to one kind of traffic over another, and relatively fair and just as between localities; and the circumstances and conditions surrounding and involved in the transportation of the freight are in a very high degree material. In the other case the freight originates in a foreign country, its carriage is commenced from a foreign port, it is carried upon rates that are not open and published, but are secret, and in making these rates it is wholly immaterial to the parties making them whether they are reasonable and just or not, so they take the freight and beat a rival, and it is equally immaterial to them whether they unjustly discriminate against surrounding or rival localities in such foreign country or not. Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the

ocean carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the act to regulate commerce must be under the inland tariff from such port of entry to such place of destination, covering other like kind of traffic in the elements of bulk, weight, value and of carriage; and no unjust preference must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from the port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition, under the operation of the act to regulate commerce, which entitles it to lower rates or any other preference in facilities and carriage over home merchandise, or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line. . . .

"The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls, rates or charges for, or any difference in the treatment of home and foreign merchandise in respect to the same or similar service rendered in the transportation, when this transportation is done under the operation of this statute. Certainly it would require a proviso or exception plainly engrafted upon the face of the act to regulate commerce, before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates or charges made for, or any difference in its treatment for, the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when

handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges and treatment for similar services rendered.

"The business complained of in this proceeding is done in the shipment of foreign merchandise from foreign ports through ports of entry of the United States, or through ports of entry in a foreign country adjacent to the United States, to points of destination in the United States, upon through bills of lading." 4 Interstate Com. Com. Rep. 512–516.

It is obvious, therefore, that the Commission, in formulating the order of January 29, 1891, acted upon that view of the meaning of the statute which is expressed in the foregoing passages.

We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not.

Before we consider the phraseology of the statute, it may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with mak-

ing unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several States, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers — particularly that one which requires uniformity of treatment in like conditions of service.

As, however, the powers of the States were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result.

The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.

Addressing ourselves to the express language of the statute, we find, in its first section, that the carriers that are declared

to be subject to the act are those "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State) as well that between the States and Territories as that going to or coming from foreign countries.

In a later part of the section it is declared that "the term 'transportation' shall include all instrumentalities of shipment or carriage."

Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the section proceeds to declare that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

The significance of this language, in thus extending the judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers, is obvious.

Proceeding to the second section, we learn that its terms forbid any common carrier, subject to the provisions of the act, from charging, demanding, collecting or receiving "from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of the act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," and declares that disregard of such prohibition shall be deemed "unjust discrimination," and unlawful.

Here, again, it is observable that this section contemplates that there shall be a tribunal capable of determining whether, in given cases, the services rendered are "like and contemporaneous," whether the respective traffic is of a "like kind," and whether the transportation is under "substantially similar circumstances and conditions."

The third section makes it "unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, to any undue or unreasonable prejudice or disadvantage in any respect whatever." It also provides that every such common carrier shall afford "all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their respective lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

The fourth section makes it unlawful for any such common carrier to "charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within

the longer distance; but this shall not be construed as authorizing any common carrier to charge and receive as great compensation for a shorter as for a longer distance," and provision is likewise made that, "upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property;" and that "the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of the act."

The powers of the Interstate Commission are not very clearly defined in the act, nor is its method of procedure very distinctly outlined. It is, however, declared in the 12th section, as amended March 2, 1889, and February 10, 1891, that the Commission "shall have authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of the act." It is also made the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court, and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of the act and for the punishment of all violations thereof. And provision is made for complaints to be made by any person, firm, corporation, association or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, before the Commission; and for an investigation of such complaints to be made by the Commission; and it is made the duty of the Commission to make reports in writing in respect thereof, which shall include the findings of fact upon which the conclusions of the Commission are based, together with

its recommendation as to what reparation, if any, should be made by any common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter in all judicial proceedings be deemed *prima facie* evidence as to each and any fact found.

In the present case no complaint seems to have been made before the Commission by any person, firm, company or other organization against the Texas and Pacific Railway Company, of any disregard by said company of any provision of the statute resulting in any specific loss or damage to any one, nor has the Commission, in its findings, disclosed any such loss or damage to any individual complainant. And it is made one of the contentions of the defendant company that the entire proceeding was outside of the sphere of action appointed by the act to the Commission, which only had power as claimed by defendant, to inquire into complaint made by some person or body injured by some described act of the defendant company.

The complaint in the present case was made by certain corporations of New York, Philadelphia and San Francisco, known as Boards of Trade, or Chambers of Commerce, which appear to be composed of merchants and traders in those cities, engaged in the business of reaching and supplying the consumers of the United States with imported luxuries, necessities, and manufactured goods generally, and as active competitors with the merchants at Boston, Montreal, Philadelphia, New Orleans, San Francisco, Chicago and merchants in foreign countries who import direct on through bills of lading issued abroad.

We shall assume, in the disposition of the present case, that a valid complaint may be made before the Commission, by such trade organizations, based on a mode or manner of treating import traffic by a defendant company, without disclosing or containing charges of specific acts of discrimination or undue preference, resulting in loss or damage to individual persons, corporations, or associations.

We do not wish to be understood as implying that it would be competent for the Commission, without a complaint made

before it, and without a hearing, to subject common carriers to penalties. It is also obvious that if the Commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the Commission.

With these provisions of the act and these general principles in mind, we now come to consider the case in hand.

After an investigation made by the Commission on a complaint against the Texas and Pacific Railway Company and other companies by the boards of trade above mentioned, the result reached was the order of the Commission made on January 29, 1891, a disregard of which was complained of by the Commission in its bill or petition filed in the Circuit Court of the United States.

The Texas and Pacific Railway Company, a corporation created by laws of the United States, and also possessed of certain grants from the State of Texas, owns a railroad extending from the city of New Orleans, through the State of Texas, to El Paso, where it connects with the railroad of the Southern Pacific Company, the two roads forming a through route to San Francisco. The Texas and Pacific Railway Company has likewise connections with other railroads and steamers, forming through freight lines to Memphis, St. Louis and other points on the Missouri River, and elsewhere.

The defendant company admitted that, as a scheme or mode of obtaining foreign traffic, it had agencies by which, and by the use of through bills of lading, it secured shipments of merchandise from Liverpool and London, and other European ports, to San Francisco and to the other inland points named. It alleged that, in order to get this traffic, it was necessary to give through rates from the places of shipment to the places of final destination, and that, in fixing said rates, it was controlled by an ocean competition by sailing and steam vessels by way of the Isthmus and around the Horn, and also,

to some extent, by a competition through the Canada route to the Pacific coast. These rates, so fixed and controlled, left to the defendant company and to the Southern Pacific Company, as their share of the charges made and collected, less than the local charges of said companies in transporting similar merchandise from New Orleans to San Francisco, and so, too, as to foreign merchandise carried to other inland points. The defendant further alleged that unless it used said means to get such traffic the merchandise to the Pacific coast would, none of it, reach New Orleans, but would go by the other means of transportation; that neither the community of New Orleans nor any merchant or shipper thereof was injured or made complaint — that the traffic thus secured was remunerative to the railway company and was obviously beneficial to the consumers at the places of destination, who were thus enabled to get their goods at lower rates than would prevail if this custom of through rates was destroyed.

As we have already stated, the Commission did not charge or find that the local rates charged by the defendant company were unreasonable, nor did they find that any complaint was made by the city of New Orleans, or by any person or organization there doing business. Much less did they find that any complaint was made by the localities to which this traffic was carried, or that any cause for such complaint existed.

The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the "circumstances and conditions" attendant upon the foreign traffic as such "circumstances and conditions" as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of "unjust discrimination," within the meaning of the act.

In so construing the act we think the Commission erred.

As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition.

So far from finding such language, we read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case — among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public.

Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended

by the law-making power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not "unjust." Some charges might be unjust to shippers — others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission.

The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is, in a given

case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

The same observations are applicable to the fourth section, or the so-called long and short haul provision, and it is unnecessary to repeat them.

The only argument, urged in favor of the view of the Commission, that is drawn from the language of the statute, is found in those provisions of the statute that make it obligatory on the common carriers to publish their rates, and to file with the Commission copies of joint tariffs of rates or charges over continuous lines or routes operated by more than one common carrier; and it is said that the place at which it would seem that joint rates should be published for the information of shippers would be at the place of origin of the freight, and that this cannot be done, or be compelled to be done, in foreign ports.

The force of this contention is not perceived. Room is left for the application of these provisions to traffic originating within the limits of the United States, even if, for any reason, they are not practically applicable to traffic originating elsewhere. Nor does it appear that the Commission may not compel all common carriers within the reach of their jurisdic-

tion to publish such rates, and to furnish the Commission with all statements or reports prescribed by the statute. Nor was there any allegation, evidence or finding, in the present case, that the Texas and Pacific Railway Company has failed to file with the Commission copies of its joint tariffs, showing the joint rates from English ports to San Francisco, nor that the company has failed to make public such joint rates in such manner as the Commission may have directed.

Another position taken by the Commission in its report, and defended in the briefs of counsel, is, that it is the duty of the Commission to so construe the act to regulate commerce as to make it practically coöperate with what is assumed to be the policy of the tariff laws. This view is thus stated in the report:

"One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case, that many American manufacturers, dealers and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers and localities, for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute." 4 Interstate Com. Com. Rep. 514, 515.

Our reading of the act does not disclose any purpose or intention, on the part of Congress, to thereby reinforce the provisions of the tariff laws. These laws differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government, and those of their provisions, whereby Congress seeks to so adjust rates as to protect American manufacturers and producers from competition by foreign low-priced labor, operate equally in all parts of the country.

The effort of the Commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large sea board cities, seems to create the very mischief which it was one of the objects of the act to remedy.

Similar legislation by the Parliament of England may render it profitable to examine some of the decisions of the courts of that country construing its provisions.

In fact, the second section of our act was modelled upon section 90 of the English "Railway Clauses Consolidation Act" of 1845, known as the "Equality Clause," and the third section of our act was modelled upon the second section of the English "act for the better regulation of the traffic on railways and canals" of July 10, 1854, and the eleventh section of the act of July 21, 1873, entitled "An Act to make better provision for the carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith."

One of the first cases that arose under the act of 1854 was that of *Hozier* v. *The Caledonian Railway*, 1 Nev. & Mac. Railway Cases, 27; *S. C.* 17 Sess. Cas. 302; 24 Law Times, 339; where Hozier filed a petition against the railway company, alleging that he was aggrieved by being charged nine shillings for travelling between Motherwell and Edinburgh, a distance of forty-three miles, while passengers travelling in the same train and in the class of carriage between Glasgow and Edinburgh were charged only two shillings, which was alleged to amount to an undue and unreasonable preference. But the petition was dismissed, and the court, by Lord Curriehill, said: "The only case stated in the petition is that passengers passing from Glasgow to Edinburgh are carried at a cheaper aggregate rate than passengers from Motherwell to either of these places. Now that is an advantage, no doubt, to those passengers travelling between Edinburgh and Glasgow. But is it an *unfair* advantage over other passengers travelling between intermediate stations? The complainer must satisfy us that there is something *unfair* or *unreasonable* in what he complains of, in order to warrant any interference. Now, I have read the statement in the petition and I have listened to

the argument in support of it to find what there is *unreasonable* in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer was given to this, except that there was none. This petitioner's complaint may be likened to that of the laborer who, having worked all day, complained that others who had worked less received a penny like himself."

The case of *Foreman* v. *Great Eastern Railway Co.*, 2 Nev. & Mac. 202, was decided by the English Railway Commissioners in 1875. The facts were that the complainants imported coal, in their own ships, from points in the North of England to Great Yarmouth, and forwarded the coal to various stations on the defendants' railway, between Great Yarmouth and Peterborough. The complaint was that the defendants' rates for carrying coal from Yarmouth to stations in the interior, at which complainants dealt, were unreasonably greater than the rates charged in the opposite direction, from Peterborough to such stations; and that such difference in rates was made by the defendants for the purpose of favoring the carriage of coal from the interior as against coal brought to Yarmouth by sea, and carried thence into the interior over the defendants' railway. The Commissioners found that it was true that the defendants did carry coal from the interior to London, Yarmouth and other seaports on their line, at exceptionally low rates, but that this was done for the purpose of meeting the competition existing at those places. It appeared that the rate from Peterborough to Thetford, 51 miles, was 4 shillings, while the rate from Peterborough to Yarmouth, 100 miles, was only 3 shillings. The Commissioners said: "As, however, the complainants do not, as far as their trade in Yarmouth itself is concerned, use the Great Eastern Railway at all, the company cannot be said to prefer other traffic to theirs; nor does the Traffic Act prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other routes or other modes of carriage with which theirs is in competition."

In *Harris* v. *Cockermouth Railway*, 1 Nev. & Mac. 97; *S. C.* 3 C. B. (N. S.) 693, the court held it to be an undue preference

for a railway company to concede to the owner of a colliery a lower rate than to the owners of other collieries, from the same point of departure to the same point of arrival, merely because the person favored had threatened to build a railway for his coal, and to divert his traffic from defendant's railway. But Chief Justice Cockburn said: "I quite agree that this court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic. . . . As, for instance, in respect of terminal traffic, there might be competition with another railway; and in respect to terminal traffic as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionately so, than they could over an intermediate part of the line."

In the case of *Budd* v. *London & Northwestern Railway Co.*, 4 Eng. Ry. and Canal Traffic Cases, 393, and in *London & Northwestern Railway* v. *Evershed*, 3 App. Cas. 1029, it was held that it was not competent for the railway company to make discriminations between persons shipping from the same point of departure to the same point of arrival, but, even in those cases, it was conceded that there might be circumstances of competition which might be considered. At any rate, those cases have been much modified, if not fully overruled by the later cases — particularly in *Denaby Main Colliery Company* v. *Manchester, Sheffield & Lincolnshire Railway Co.*, 11 App. Cas. 97, and in *Phipps* v. *London & Northwestern Railway*, 2 Q. B. D., 1892, 229, 236.

The latter was the case of an application under the Railway and Canal Traffic acts for an order enjoining the defendants to desist from giving an undue preference to the owners of Butlins and Islip furnaces, and from subjecting the traffic of the complainants to an undue preference, in the matter of the rates charged for the conveyance of coal, coke and pig-iron traffic; and also for an order enjoining the defendants to desist from giving an unreasonable preference or advantage to the owners of Butlins and Islip furnaces and the

traffic therefrom, by making an allowance of four pence per ton in respect of coal, coke and pig-iron conveyed for them by the defendants. The sidings of the Duston furnaces, belonging to the complainants, were situated on the London and Northwestern Railway, at a distance of about sixty miles from Great Bridge, one of the pig-iron markets to the westward. The sidings of the Butlins and Islip furnaces were situated on the same railway to the east of the Duston furnaces, and a distance from the pig-iron market as to Butlins, of about seventy-one miles, and as to Islip of about eighty-two miles. Duston had only access to the London and Northwestern, but Butlins and Islip had access not only to the London and Northwestern, but also to the Midland Railway. The London & Northwestern Company, which carried the Butlins pig-iron eleven miles further and the Islip pig-iron twenty-two miles further than the Duston pig-iron, charged Butlins 0.95*d.* per mile, and Islip 0.84*d.* per mile, while they charged Duston 1.05*d.* per mile, so that the total charge per ton of pig-iron from Duston to the western markets was five shillings two pence, while the total charge per ton from either Butlins or Islip was five shillings eight pence.

When the case was before the Railway Commissioners, it was said by Wills, J.: "It is complained that, although along the London and Northwestern Railway every ton of pig-iron, every ton of coal, and every ton of coke travels a longer distance in order to reach Islip than in order to reach the applicant's premises, the charge that is put upon it, although greater than the charge which is put upon the traffic which goes to the applicant's premises, is not sufficiently greater to represent the increased distance. . . . I first observe that these are, in my judgment, eminently practical questions, and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief and no good. . . . It seems to me that we must take into account the fact that at Butlins and Islip there is an effective competition with the Midland. Although effec-

tive competition with another railway company or canal company will not of itself justify a preference, which is otherwise quite beyond the mark, yet still it is not a circumstance that can be thrown out of the question, and I think there is abundance of authority for that. It follows also, I think, from the view which I am disposed to take of these, being eminently practical questions, that you must give due consideration to the commercial necessities of the companies as a matter to be thrown in along with the others. . . . I wish emphatically to be considered as not having attempted to lay down any principles with regard to this question of undue preference, or as to the grounds upon which I have decided it. In my judgment, undue preference is a question of fact in each case."

The Railway Commissioners refused to interfere, and the case was appealed. Lord Herschell stated the case and said:

"This application is made under the second section of the Railway and Canal Traffic act, 1854, which provides that 'no railway company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever.'

"The question, therefore, which the tribunal, whether it be the court or the Commissioners, before whom such a question comes, has to determine is, whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage as compared with the other. I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

"Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or

prejudice. And it cannot be doubted that whether in particular instances there has been an undue or unreasonable prejudice or preference is a question of fact. In *Palmer* v. *London & Southwestern Railway Co.* (L. R. 1 C. P. 593), Chief Justice Erle said: 'I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact depending on the matters proved in each case.'

"In *Denaby Main Colliery Company* v. *Manchester, &c., Railway Co.*, 3 Railway and Canal Traffic Cases, 426, when it was before the Court of Appeals, on an appeal arising out of the proceedings before the Railway Commissioners, Lord Selborne, then Lord Chancellor, said: 'The defendants gave a decided, distinct and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable, but, under these circumstances, is not the reasonableness a question of fact? Is it not a question of fact and not of law whether such a preference is due or undue? Unless you can point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question not of law but of fact.'

"The Lord Chancellor there points out that the mere circumstance that there is an advantage does not of itself show that it is an undue preference within the meaning of the act, and further, that whether there be such undue preference or advantage, is a question of fact, and of fact alone of the act of 1854. No rule is given to guide the court or the tribunal in the determination of cases or applications made under this second section. The conclusion is one of fact to be arrived at, looking at the matter broadly and applying common sense to the facts that are proved. I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction, such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the one case from the other, you cannot say that a difference of circumstances represents or is equivalent to such a fraction of a penny dif-

ference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to attempt to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at; because, of course, the very question in this case is whether a particular circumstance ought or ought not to be considered; but keeping in view all the circumstances which may legitimately be taken into consideration, then it becomes a mere question of fact. . . . Now, there is no doubt that in coming to their determination the court below did have regard to competition between the Midland and the Northwestern, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that, in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little, becomes a question of fact and not of law. The point is undoubtedly a very important one. . . .

"As I have already observed, the second section of the act of 1854 does not afford to the tribunal any kind of guide as to what is undue or unreasonable. It is left entirely to the judgment of the court on a review of the circumstances. Can we say that the local situation of one trader, as compared with another, which enables him by having two competing routes to enforce upon the carrier by either of these routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader.

It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow-trader who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competitive routes is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the matter as a matter of what is reasonable and right as between the two traders, I cannot understand.

"Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantages which he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the act which indicates that when you are left at large, for you are left at large, as to whether as between two traders the company is showing an undue and unreasonable preference to the one as compared with the other, you are to leave out that circumstance any more than any other circumstance which would affect men's minds. . . . One class of cases, unquestionably intended to be covered by the section, is that in which traffic from a distance, of a character that competes with the traffic nearer the market, is charged low rates, because unless such low rates were charged, it would not come into the market at all. It is certain, unless some such principle as that were adopted, a large town would necessarily have its food supply greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it

possible for those at a greater distance to compete with those situate nearer to it. . . . I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence is one of the cases which may be taken into account under those provisions, and which would fall within the terms of the enactment.

"Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that these members of the public who are in the neighborhood where they can have the benefit of this competition, would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charges, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices."

The learned judge then proceeded to discuss the authorities, and pointed out that the case of *Budd* v. *London & Northwestern Railway Co.*, and *Evershed's case*, are no longer law, so far as the second section of the act of 1854 is concerned.

Lindley and Kay, Lord Justices, gave concurring opinions, and the conclusion of the court was that the Commissioners did not err in taking into consideration the fact that there was a competing line together with all the other facts of the case, and in holding that a preference or advantage thence arising was not undue or unreasonable.

The precise question now before us has never been decided in the American cases, but there are several in which somewhat analogous questions have been considered.

Atchison, Topeka & Santa Fé Railroad v. *Denver & New Orleans Railroad*, 110 U. S. 667, was a case arising under a provision of the constitution of the State of Colorado which declares "that all individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unrea-

sonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company shall give any preference to individuals, associations or corporations in furnishing cars or motive power." This court held that under this constitutional provision a railroad company which had made provisions with a connecting road for the transaction of joint business at an established union junction was not required to make similar provisions with a rival connecting line at another near point on its line, and that the constitutional provision is not violated by refusing to give to a connecting road the same arrangement as to through rates which are given to another connecting line, unless the conditions as to the service are substantially alike in both cases.

The sixth section of the act of Congress of July 1, 1862, relative to the Union Pacific Railroad Company provided that the government shall at all times have the preference in the use of the railroad "at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service." In the case of *Union Pacific Railway* v. *United States*, 117 U. S. 355, it was, in effect, held that the service rendered by a railway company in transporting local passengers from one point on its line to another is not identical with the service rendered in transporting through passengers over the same rails.

A petition was filed before the Interstate Commerce Commission by the Pittsburgh, Cincinnati and St. Louis Railway Company against the Baltimore and Ohio Railroad Company, seeking to compel the latter company to withdraw from its lines of road, upon which business competition with that of the petitioner was transacted, the so called "party rates," and to decline to give such rates in the future — also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate. The cause was heard before the Commission, which held the so called party rate tickets, in so far as they were sold for lower rates for each member of a party of ten or more than rates contemporaneously charged for the transportation of single

passengers between the same points, constituted unjust discrimination and were therefore illegal. The defendant company refusing to obey the mandate of the Commission, the latter filed a bill in the Circuit Court of the United States for the Southern District of Ohio, asking that the defendant be enjoined from continuing in its violation of the order of the Commission. The Circuit Court dismissed the bill. Some of the observations made by Jackson, Circuit Judge, may well be cited. 43 Fed. Rep. 37: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation service?" Again: "The English cases establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other as competitive or otherwise."

The case was brought to this court and the judgment of the Circuit Court dismissing the bill was affirmed. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263. The court, through Mr. Justice Brown, cited with approval passages from the opinion of Judge Jackson in the court below, and among other things said: "It is not all dis-

criminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable."

Again, speaking of the sale of a ticket for a number of passengers at a less rate than for a single passenger, it was said: "It does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously to any one it is to the rival road, which has not adopted corresponding rates, but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. . . . If these tickets were withdrawn the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing."

The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations: That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment: That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at

a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered: That if the Commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country.

It may be said that it would be impossible for the Commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law-making power, and that the general orders made by the Commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy.

This is manifest from the facts furnished us in the report and findings of the Commission, attached as an exhibit to the bill filed in the Circuit Court.

It is stated in that report that the Illinois Central Railroad Company, one of the respondents in the proceeding before the Commission, averred in its answer that it was constrained, by its obedience to the order of March, 1889, to decline to take for shipment any import traffic, and, to its great detriment, to refrain from the business, for the reason that to meet the action of the competing lines it would have to make a less rate on the import than on the domestic traffic.

Upon this disclosure that their order had resulted in depriving that company of a valuable part of its traffic (to say nothing of its necessary effect in increasing the charges to be finally paid by the consumers), the Commission in its report naively remarks: "This lets the Illinois Central Railway Company out." 4 Interstate Com. Com. Rep. 458.

We also learn from the same source that there was competent evidence adduced before the Commission, on the part of the Pennsylvania Railroad Company, that since that company, in obedience to the order of March, 1889, has charged the full inland rate on the import traffic, the road's business in that particular has considerably fallen off — that the steamship lines have never assented to the road's charging its full inland rates, and have been making demands on the road for a proper division of the through rate — that if it were definitely determined that the road was not at liberty to charge less than the full inland rate, the result would be that it would effectually close every steamship line sailing to and from Baltimore and Philadelphia.

The Commission did not find it necessary to consider this evidence, because the Pennsylvania Railroad Company was before it in the attitude of having obeyed the order.

We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the Commission or by the courts below in respect to what were proper rates to be charged by the Texas and Pacific Railway Company. That was a question of fact, and if the inquiry had been conducted on a proper basis we should not have felt inclined to review conclusions so reached. But we mention them to show that there manifestly was error in excluding facts and circumstances that ought to have been considered, and that this error arose out of a misconception of the purpose and meaning of the act.

The Circuit Court held that the order of January 29, 1891, was a lawful order, and enjoined the defendant company from carrying any article of import traffic shipped from any foreign port through any port of entry in the United States, or any port of entry in a foreign country adjacent to the United

States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over its line from such port of entry to such place of destination, or from charging or accepting for its share of through rates upon imported traffic a lower sum than it charges or receives for domestic traffic of like kind to the same destination from the point at which the imported traffic enters the country.

In treating the facts of the case the court says: "It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are, in effect, fixed and controlled by the competition of sailing vessels between these ports, and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the act to regulate commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to revert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic, by reason of the competition referred to, and the revenue derived therefrom, unless it carries at the lower rates, and by so doing is enabled to get part of it, which would otherwise go from London and Liverpool to San Francisco around the Horn or by the way of the Isthmus." *Interstate Commerce Commission* v. *Texas & Pacific Railway*, 52 Fed. Rep. 187.

The Circuit Court did not discuss the case at length, either as to its law or facts, but, in effect, approved the order of January 29, 1891, as valid, and enjoined the defendant company from disregarding it.

The Circuit Court of Appeals seems to have disapproved of the construction put on the act by the Commission. The language of the court was as follows: "The Commission contended that the defendant had violated the second section of the act to regulate commerce, which prohibits unjust discrimination in the compensation charged for like and contempo-

raneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and had also violated the third section, which prohibits any undue or unreasonable preference or advantage to any particular description of traffic. The defendant insisted that the dissimilar conditions growing out of the ocean competition freed its conduct from the prohibition of the statute. The Commission held that this class of dissimilar conditions was not in the contemplation of the statute, and was not to be regarded in the regulation of inland tariffs of rates." Then, after citing a passage from the report of the Commission, the court proceeds to say: "Its conclusion was that foreign and home merchandise 'under the operation of the statute, when handled and transferred by interstate carriers engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, charges, and treatment for similar services rendered.' This rule, having been founded upon a construction of the statute, is a very broad one. It is applicable to all the foreign circumstances and conditions which affect rates, and the question whether it must be universally applied without regard to any circumstances which may exist in a foreign country, and whether dissimilarities which have a foreign origin are to be excluded from consideration under the operation of the statute, is an exceedingly important one, the ultimate decision of which may have a wider influence upon the interstate commerce of the country than we can foresee. This legal question was not discussed in the export rate case, which was treated 'as one of practical policy.' We are not disposed to pass authoritatively upon this question, except in a case which demands it, and in which the effect of this construction of the statute is naturally the subject of discussion." 20 U. S. App. 6–9.

Having thus intimated its dissent from, or, at least, its distrust of, the view of the Commission, the court proceeded to affirm the decree of the Circuit Court and the validity of the order of the Commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that, in the present case, the disparity in rates was too great to be justified by that condition.

This course proceeded, we think, upon an erroneous view of the position of the case. That question was not presented to the consideration of the court. There was no allegation in the Commission's bill or petition that the inland rates charged by the defendant company were unreasonable. That issue was not presented. The defendant company was not called upon to make any allegation on the subject. No testimony was adduced by either party on such an issue. What the Commission complained of was that the defendant refused to recognize the lawfulness of its order; and what the defendant asserted, by way of defence, was that the order was invalid, because the Commission had avowedly declined to consider certain "circumstances and conditions" which, under a proper construction of the act, it ought to have considered.

If the Circuit Court of Appeals was of opinion that the Commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order, and remand the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defence considered, in the first instance at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the Commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.

We do not, of course, mean to imply that the Commission may not directly institute proceedings in a Circuit Court of the United States charging a common carrier with disregard of provisions of the act, and that thus it may become the duty

of the court to try the case in the first instance. Nor can it be denied that, even when a petition is filed by the Commission for the purpose of enforcing an order of its own, the court is authorized to "hear and determine the matter as a court of equity," which necessarily implies that the court is not concluded by the findings or conclusions of the Commission; yet as the act provides that, on such hearing, the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated, we think it plain that if, in such a case, the Commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court ought not to accept the findings of the Commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the Commission to be lawfully proceeded in.

The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination — much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed; and the cause is remanded to that court, with directions to dismiss the bill.

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

The Interstate Commerce Act, as amended March 2, 1889, requires every common carrier, subject to its provisions, to print and keep open to public inspection schedules showing its rates and charges for the transportation of passengers and property. It also requires that such schedules "shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force;" further, that any common carrier subject

to the provisions of the act, "receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment."

The act contains no provision for printed schedules to be kept open to public inspection, of freight shipped from a foreign country, not adjacent to this country, on a through bill of lading, and to be carried, after it reaches an American port, to some place in the United States. I think the reason for this is that Congress did not intend that the rates to be charged for service by carriers subject to the provisions of the Interstate Commerce Act should depend upon or be affected by rates established abroad for ocean transportation.

The Commission, thus interpreting the act of Congress, and in order that American interests might not be injuriously affected by freight arrangements made by railroad companies with companies engaged in ocean transportation and which were not subject to our laws, issued on the 23d day of March, 1889, the following general order: "Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff covering other freights."

Subsequently, November 29, 1889, proceedings were commenced before the Commission by the petition of the New York Board of Trade and Transportation against the Pennsylvania Railroad Company, the Pittsburgh, Fort Wayne and Chicago Railroad Company and the Pittsburgh, Cincinnati and St. Louis Railroad Company.

The petition charged that those companies violated the Interstate Commerce Act and were guilty of unjust discriminations, in that they charged their regular tariff rates upon property delivered to them at New York and Philadelphia for transportation to Chicago and other Western points, while

charging rates much lower for a like cotemporaneous service under substantially similar circumstances and conditions when the property was or is delivered to them at New York or Philadelphia by vessels and steamship lines, under through bills of lading from foreign ports and foreign interior ports, issued under common arrangement between the defendants and such vessels and steamship lines and foreign railroads for continuous carriage at joint rates from the point or port of shipment to Chicago and other Western points; the defendants' share of such through rate for the inland transportation being lower than its regular tariff rates, in some cases as low as fifty per cent thereof.

The petition further charged that the defendants failed to state in their published tariffs or in such through bills of lading the inland charge separately from the ocean and other charges in order to prevent ascertainment of the actual inland rates; that they made and gave undue and unreasonable preferences and advantages to persons, firms, companies, corporations and localities interested in the transportation of imported traffic from the seaboard under such through bills of lading, and had subjected persons, companies, firms and corporations, in and about some localities to undue and unreasonable prejudice and disadvantage by reason of the higher rates charged to them for like and contemporaneous service under substantially similar circumstances and conditions; that there are no conditions or circumstances relating to the transportation of imported traffic which justify any difference in rates between imported traffic transported to any place in the United States from a port of entry and other traffic from such ports, and that the inland published tariff must by law be the same for all such freights.

In the course of the proceedings different Commercial Exchanges and Chambers of Commerce became co-plaintiffs, and other railroads were made defendants.

It appears from the opinion of the Interstate Commerce Commission that numerous roads conformed to the order of March 23, 1889, and insisted that their inland rates were the same for all traffic, whether domestic or imported.

In the progress of the proceedings the Texas and Pacific Railway Company was brought before that tribunal; and on the 29th day of January, 1891, an order was made that certain railroad companies, including the Texas and Pacific Railway Company, should wholly cease and desist from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, or at any other than the same rates established in said published inland tariff for the carriage of other like kind of traffic in the elements of bulk, weight, value and expense of carriage.

The present case was commenced by the Interstate Commerce Commission by petition filed in the Circuit Court of the United States for the Southern District of New York against the Texas and Pacific Railway Company.

A decree was entered by that court, enjoining the latter company, its board of directors, officers, agents, attorneys, clerks, servants, employés and all persons claiming or holding under them, or either, or any of them, from carrying any article of import traffic shipped from any foreign port through any port of entry in the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over its line from such port of entry to such place of destination; or at any other than the same rates established in said published tariff for the carriage of other like kinds of traffic in the elements of bulk, weight, value and expense of carriage; or from carrying imported traffic at lower rates for like service than the defendant charges for like traffic originating in the United States; or from charging or accepting for its share of through rates upon imported traffic a lower sum than it

charges or receives for domestic traffic of like kind to the same destination from the point at which the imported traffic enters the country; or for such share of through rates upon imported traffic any other than the rates established in the defendant's published tariff for the carriage of other like kind of traffic in the elements of bulk, weight, value, distances and expense of carriage.

This decree was affirmed in the Court of Appeals for the Second Circuit.

The record shows that the rate in cents per one hundred pounds charged for the transportation, on through bills of lading, of books, buttons, carpets, clothing and hosiery, from Liverpool and London, via New Orleans, over the Texas and Pacific Railway and the railroads of the Southern Pacific system, to San Francisco, is 107, while upon the same kind of articles — carried, it may be, *on the same train* — the rate charged from New Orleans, *over the same railroads*, to San Francisco, is 288. The rate in cents per one hundred pounds charged for the transportation, on through bills of lading, of boots and shoes, cashmeres, cigars, confectionery, cutlery, gloves, hats and caps, laces, linen, linen goods, saddlers' goods and woollen goods, from Liverpool and London, via New Orleans, over the same railroad, to San Francisco, is 107, while upon like goods, starting from New Orleans and destined for San Francisco, over the same line — it may be, *on the same train* — the rate charged is 370. Discrimination, in the matter of rates, is also made by the railway company (though not to so great an extent) in favor of blacking, burlaps, candles, cement, chinaware, cordage, crockery, common drugs, earthenware, common glassware, glycerine, hardware, leather, nails, soap, caustic soda, tallow, tin plate and wood pulp, manufactured abroad and shipped, on through bills of lading, from Liverpool and London, via New Orleans, to San Francisco, and against goods of like kind carried from New Orleans to San Francisco over the same railroads.

These rates have been established by agreement between the railway company whose line, with its connections, extends from New Orleans to San Francisco, and the companies whose

vessels run from Liverpool to New Orleans. And the question is presented, whether the Texas and Pacific Railway Company can, consistently with the act of Congress, charge a higher rate for the transportation of goods starting from New Orleans and destined to San Francisco, than for the transportation between the same places, of goods of the same kind in all the elements of bulk, weight, value and expense of carriage, brought to New Orleans from Liverpool on a through bill of lading, and to be carried to San Francisco. If this question be answered in the affirmative; if all the railroad companies whose lines extend inland from the Atlantic and Pacific seaboards indulge in like practices — and if one may do so, all may and will do so; if such discrimination by American railways, having arrangements with foreign companies, against goods, the product of American skill, enterprise and labor, is consistent with the act of Congress, then the title of that act should have been one to regulate commerce to the injury of American interests and for the benefit of foreign manufacturers and dealers.

The railway company insists that the competition existing between it and the ocean lines running between Liverpool and San Francisco, via Cape Horn and the Pacific Ocean, and between Liverpool and San Francisco, via the Isthmus of Panama, compel it to charge a higher rate from New Orleans to San Francisco for the transportation of goods originating at New Orleans than on like goods originating at Liverpool and destined to San Francisco, via New Orleans; otherwise, it contends, goods that originate at Liverpool would fall into the hands of its competitors in the business of transportation. The Interstate Commerce Commission held that, in determining the question before it, no weight could be attached to the circumstances arising from the conduct of ocean lines by corporations or associations who were in no wise subject to the provisions of the act of Congress; and that the provision which expressly forbids common carriers from making or giving undue preferences or advantages in any respect whatsoever was intended to be so far rigid in its nature that it could not be relaxed by reason of circumstances or condi-

tions arising out of or connected with foreign countries or that were caused by agencies beyond the control or supervision of the Commission. The court now holds that the Commission erred in thus interpreting the act of Congress.

To what common carriers does the Interstate Commerce Act of 1887 apply? 24 Stat. 379, c. 104; 25 Stat. 855, c. 382. This question is answered by the first section of that act.

By that section, the provisions of the act are declared to "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid." Again: "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

From this section it is clear that the Texas and Pacific Railway Company is, and that the ocean lines connected with that company are not, subject to the provisions of the act.

This interpretation is supported by the declaration made on the floor of the Senate by the chairman of the select committee which reported the original bill. He said: "While the provisions of the bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively, it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, such as shipments between the United States and *adjacent* countries by railroad, and the transportation by railroad of shipments between points in the United States and ports of transshipment or of entry, when such shipments are destined to or received from a foreign country on through bills of lading. To avoid any uncertainty as to the meaning of these provisions in regard to what may be at the same time, in some instances, state and foreign commerce, it is expressly provided that the bill shall not apply to the transportation of property wholly within the State *and* not destined to *or received from* a foreign country."

We have then an explicit declaration by Congress that the act not only embraces common carriers of the class to which the Texas and Pacific Railway Company belongs, but that its provisions as to rates apply to the transportation of property "shipped from a foreign country to any place in the United States, *and* carried to such place *from a port of entry either in the United States or an adjacent foreign country.*"

What is the rule declared by Congress in respect to rates for the transportation of property or goods of the kind just described? It is clearly defined by the second, third and fourth sections, which declare:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him

or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which designated common carriers may be relieved from the operation of this section of this act."

I am unable to find in these sections any authority for the Commission, or for a carrier subject to the provisions of the act of Congress, to take into consideration the rates established by ocean lines as affecting the charges that an American carrier may make for the transportation of property over its routes. The transportation, for instance, by the Texas and

Pacific Railway Company of boots and shoes from New Orleans to San Francisco for A, and the transportation of like goods over the same route for B, is "a like and contemporaneous service" by the carrier for each shipper, and is performed under precisely the same circumstances and conditions. A discrimination between A and B, in respect of charges for a like and contemporaneous service in transporting the same kind of property, over the same route, is an unjust discrimination, because it necessarily operates to give that one to whom the most liberal rates are given, an undue or unreasonable preference or advantage over the others.

I am unwilling to impute to Congress the purpose to permit a railroad company, because of arrangements it may make, for its benefit, with foreign companies engaged in ocean transportation, to charge for transporting from one point to another point in this country goods of a particular kind manufactured in this country three or four times more than it charges for carrying, over the same route and between the same points, goods of the same kind manufactured abroad and received by such railroad company at one of our ports of entry.

The fourth section of the statute relating to long and short distances, and which authorizes the Commission, in special cases, to allow less to be charged for longer than for shorter distances for the transportation of passengers or property over the same route, does not refer to distances covered and services performed on the ocean, between this country and foreign countries not adjacent to this country, nor to transportation between the same points in this country over the same road. When the question is as to rates for service by a carrier between two given points in this country, and in reference to the same kind of property, Congress, I think, intended that for such "like and contemporaneous service," performed, as they necessarily are, under the same circumstances and conditions, no preference or advantage should be given to any particular person, company, firm, corporation or locality. Consequently, when goods are to be carried from one point in the United States to another, the rate to be

charged cannot properly be affected by an inquiry as to where such goods originated or were manufactured.

Congress intended that all property, transported by a carrier subject to the provisions of the act, should be carried without any discrimination because of its origin. The rule intended to be established was one of equality in charges, as between a carrier and all shippers, in respect of like and contemporaneous service performed by the carrier over *its* line, between the same points, without discrimination based upon conditions and circumstances arising out of that carrier's relations with other carriers or companies, especially those who cannot be controlled by the laws of the United States.

After referring to the fact that goods originating in a foreign country are carried upon rates that are practically fixed abroad, and are not published here, while carriers governed by the act of Congress are required to publish their rates for transportation in this country, the Commission, speaking by Commissioner Bragg, well said: "Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which it is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States, under the operation of the act to regulate commerce, must be under the inland tariff from such port of entry to such place of destination covering other like-kind of traffic in the elements of bulk, weight, value and of carriage, and no unjust preferences must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from a port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign

port is not a circumstance or condition under the operation of the act to regulate commerce, which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line." I concur entirely with the Commission when it further declared: "One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers and localities for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute. Such a deprivation would be so obviously unjust as to shock the general sense of justice of all the people of the country, except the few who would receive the immediate and direct benefit of it."

It seems to me that any other interpretation of the act of Congress puts it in the power of railroad companies which have established, or may establish, business arrangements with foreign companies engaged in ocean transportation, to do the grossest injustice to American interests. I find it impossible to believe that Congress intended that freight, originating in Europe or Asia and transported by an American railway from an American port to another part of the United States, could be given advantages in the matter of rates, for services performed in this country, which are denied to like freight originating in this country and passing over the same line of railroad between the same points. To say that Con-

gress so intended is to say that its purpose was to subordinate American interests to the interests of foreign countries and foreign corporations. Such a result will necessarily follow from any interpretation of the act that enables a railroad company to exact greater compensation for the transportation from an American port of entry, of merchandise originating in this country, than is exacted for the transportation over the same route of exactly the same kind of merchandise brought to that port from Europe or Asia, on a through bill of lading, under an arrangement with an ocean transportation company. Under such an interpretation, the rule established by Congress to secure the public against unjust discrimination by carriers subject to the provisions of the Interstate Commerce Act would be displaced by a rule practically established in foreign countries by foreign companies, acting in combination with American railroad corporations seeking, as might well be expected, to increase their profits, regardless of the interests of the public or of individuals.

I am not much impressed by the anxiety which the railroad company professes to have for the interests of the consumers of foreign goods and products brought to this country under an arrangement as to rates made by it with ocean transportation lines. We are dealing in this case only with a question of rates for the transportation of goods from New Orleans to San Francisco over the defendant's railroad. The consumers at San Francisco, or those who may be supplied from that city, have no concern whether the goods reach them by way of railroad from New Orleans, or by water around Cape Horn, or by the route across the Isthmus of Panama.

Nor is the question before the court controlled by considerations arising out of the tariff enactments of Congress. The question is one of unjust discrimination by an American railway against shippers and owners of goods and merchandise originating in this country, and of favoritism to shippers and owners of goods and merchandise originating in foreign countries. If the position of the Texas and Pacific Railway Company be sustained, then all the railroads of the country that extend inland from either the Atlantic or the Pacific Ocean

will follow their example, with the inevitable result that the goods and products of foreign countries, because alone of their foreign origin and the low rates of ocean transportation, will be transported inland from the points where they reach this country at rates so much lower than is accorded to American goods and products, that the owners of foreign goods and products may control the markets of this country to the serious detriment of vast interests that have grown up here, and in the protection of which, against unjust discrimination, all of our people are deeply concerned.

It is said that only Boards of Trade or Commercial Exchanges have complained of the favorable rates allowed by railroad companies for foreign freight. It seems to me that this is an immaterial circumstance. So long as the questions under consideration were properly raised by those Boards and Exchanges, it was unnecessary that individual shippers, producers and dealers should intervene in the proceedings before the Commission. But, I may ask whether the interests represented by these Boards of Trade and Commercial Exchanges are not entitled to as much consideration as the interests of railroad corporations? Are all the interests represented by those who handle, manufacture and deal in American goods and merchandise that go into the markets of this country to be subordinated to the necessities or greed of railroad corporations? As I have already said, Congress, by enacting the Interstate Commerce Act, did not seek to favor any special class of persons, nor any particular kind of goods because of their origin. It intended that all freight of like kind, wherever originating, should be carried between the same points, in this country, on terms of equality.

It is said that the Interstate Commerce Commission is entitled to take into consideration the interests of the carrier. My view is, that the act of Congress prescribes a rule which precludes the Commission or the courts from taking into consideration any facts outside of the inquiry whether the carrier, for like and contemporaneous services, performed in this country under substantially similar circumstances and conditions, may charge one shipper more or less than he charges

another shipper of like goods, over the same route, and between the same points. Undoubtedly, the carrier is entitled to reasonable compensation for the service it performs. But the necessity that a named carrier shall secure a particular kind of business is not a sufficient reason for permitting it to discriminate unjustly against American shippers, by denying to them advantages granted to foreign shippers. Congress has not legislated upon such a theory. It has not said that the inquiry, whether the carrier has been guilty of unjust discrimination, shall depend upon the financial necessities of the carrier. On the contrary, its purpose was to correct the evils that had arisen from unjust discrimination made by carriers engaged in interstate commerce. It has not, I think, declared, nor can I suppose it will ever distinctly declare, that an American railway company, in order to secure for itself a particular business and realize a profit therefrom, may burden interstate commerce in articles originating in this country, by imposing higher rates for the transportation of such articles from one point to another point in the United States, than it charges for the transportation between the same points, under the same circumstances and conditions, of like articles originating in Europe, and received by such company on a through bill of lading issued abroad. Does any one suppose that, if the Interstate Commerce bill, as originally presented, had declared, in express terms, that an American railroad company might charge more for the transportation of American freight, between two given places in this country, than it charged for foreign freight, between the same points, that a single legislator would have sanctioned it by his vote? Does any one suppose that an American President would have approved such legislation?

Suppose the Interstate Commerce bill, as originally reported, or when put upon its passage, had contained this clause: "Provided, however, the carrier may charge less for transporting from an American port to any place in the United States, freight received by it from Europe on a through bill of lading, than it charges for American freight carried from that port to the same place for which the foreign freight is

destined." No one would expect such a bill to pass an American Congress. If not, we should declare that Congress ever intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted.

Let us suppose the case of two lots of freight being at New Orleans, both destined for San Francisco over the Texas and Pacific Railway and its connecting lines. One lot consists of goods manufactured in this country; the other, of goods of like kind manufactured in Europe, and which came from Europe on a through bill of lading. Let us suppose, also, the case of two passengers being at New Orleans — the act of Congress applies equally to passengers and freight — both destined for San Francisco over the same railroad and its connecting lines. One is an American; the other, a foreigner who came from Europe upon an ocean steamer belonging to a foreign company that had an arrangement with the Texas and Pacific Railway Company, by which a passenger, with a through ticket from Liverpool, would be charged less for transportation from New Orleans to San Francisco than it charged an American going from New Orleans to San Francisco. The contention of the railroad company is, that it may carry European freight and passengers, between two given points in this country, at lower rates than it exacts for carrying American freight and passengers between the same points, and yet not violate the statute, which declares it to be unjust discrimination for any carrier, directly or indirectly, by any device, to charge, demand, collect or receive from any person or persons a greater *or* less compensation for any service rendered, or to be rendered, in the transportation of passengers or property than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. And that discrimination is justified upon the ground that, otherwise, the railroad company will lose a particular traffic. Under existing legislation, such an interpretation of the act of Congress enables the great railroad corporations of this country to place American travellers, in their own

country, as well as American interests of incalculable value, at the mercy of foreign capital and foreign combinations — a result never contemplated by the legislative branch of the government.

I cannot accept this view, and, therefore, dissent from the opinion and judgment of the court.

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

MR. CHIEF JUSTICE FULLER dissenting:

In my judgment the second and third sections of the Interstate Commerce Act are rigid rules of action, binding the Commission as well as the railway companies. The similar circumstances and conditions referred to in the act are those under which the traffic of the railways is conducted, and the competitive conditions which may be taken into consideration by the Commission are the competitive conditions within the field occupied by the carrier, and not competitive conditions arising wholly outside of it.

I am, therefore, constrained to dissent from the opinion and judgment of the court.

STANLEY *v.* SCHWALBY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 653. Submitted January 10, 1896. — Decided March 23, 1896.

Neither the Secretary of War, nor the Attorney General, nor any subordinate of either, is authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers.

In an action of trespass to try title, under the statutes of Texas, brought by one claiming title in an undivided third part of a parcel of land, and possession of the whole, against officers of the United States, occupying the

Syllabus.

land as a military station, and setting up title in the United States, a judgment that the plaintiff recover the title in the third part, and possession of the whole jointly with the defendants, is a judgment against the United States and against their property.

The United States are not liable to judgment for costs.

In order to charge a purchaser with notice of a prior unrecorded conveyance of land, he or his agent in the purchase must either have knowledge of the conveyance, or, at least, of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; vague rumor or suspicion is not sufficient; and notice of a sale does not imply knowledge of an unrecorded conveyance.

A conveyance of land by a city to the United States, in consideration of the establishment of military headquarters thereon, to the benefit of the city, is for valuable consideration.

A purchaser of land, for valuable consideration, and without notice of a prior deed, takes a good title, although his grantor had notice of that deed.

Even where, as in Texas, a purchaser taking a quitclaim deed is held to be affected with notice of all defects in the title, a purchaser from him by deed of warranty is not so affected.

The United States, by warranty deed duly recorded, purchased land from a city for a military station, in consideration of the benefits to enure to the city from the establishment of the station there. The attorney employed by the United States to examine the title testified that the city acquired the land by quitclaim deed, describing it as "known as the McMillan lot;" that he had information of a sale to McMillan, but satisfied himself that he had not paid the purchase money; and searched the records, and ascertained that no deed to him was recorded; and advised the United States that the title was good. There was no evidence that the attorney had any other means of ascertaining whether a deed had been made to McMillan. *Held*, that the evidence was insufficient in law to warrant the conclusion that the United States took no title as against an unrecorded conveyance to McMillan.

Where the judgment of the highest court of a State against the validity of an authority set up under the United States necessarily involves the decision of a question of law, it is reviewable by this court on writ of error, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.

An action to recover the title and possession of land against officers of the United States setting up title in the United States, and defended by the District Attorney of the United States, was dismissed by the highest court of the State as against the United States; but judgment was rendered against the officers, upon the ground that they could not avail themselves of the statute of limitations. This court, on writ of error, reversed that judgment, and remanded the case for further proceedings. The highest court of the State thereupon held that the United States were a party to

Statement of the Case.

the action, and decided, upon evidence insufficient in law, that the United States had no valid title, because they took with notice of a prior conveyance; and gave judgment against the officers for title and possession, and against the United States for costs. This court, upon a second writ of error, reverses the judgment, and remands the case with instructions to dismiss the action against the United States, and to enter judgment for the individual defendants, with costs.

This was an action of trespass to try title, brought in the district court of Bexar county in the State of Texas, by Mary U. Schwalby, joining her husband, J. A. Schwalby, against David S. Stanley, William R. Gibson, Samuel T. Cushing and Joseph C. Bailey, to recover a parcel of land in the city of San Antonio.

The original petition was filed February 23, 1889; and, as amended by leave of court December 2, 1889, alleged that Mrs. Schwalby was seized and possessed in fee simple of an undivided third part of the land, and she and her husband were entitled to the possession of the whole, and that the defendants, without any right or title, ousted them from the possession thereof; and prayed "judgment for the recovery of the title to one third of said premises, and possession of the whole thereof, for costs of said suit, and for general relief."

The individual defendants, and "the United States, by their attorney, Andrew J. Evans, acting by and through instructions from the Attorney General of the United States, here exhibited to the court," (but not at that time made part of the record,) filed an amended answer, in which they pleaded not guilty; and set up, among other defences, that the title to the land was in the United States, and the individual defendants had and claimed no title therein, but were lawfully in possession thereof as officers and agents of the United States; and specially pleaded that the city of San Antonio in 1875 purchased the land, and on June 16, 1875, conveyed it to the United States, with no notice of the plaintiffs' claim, and the United States were innocent purchasers for valuable consideration; and that from June 16, 1875, to the bringing of this action the United States had been in the actual, peaceable and adverse possession of the land, continuously enjoying and improving it, no taxes being due thereon — under deed duly re-

corded, and "under title, and color of title, from and under the sovereignty of the soil, down to the defendant, the United States, duly registered" — and therefore pleaded the statutes of limitations of the State of Texas of three, five and ten years; and also that the United States had made permanent and valuable improvements on the land.

The plaintiffs, by supplemental petition, excepted to the answer, so far as it was filed in behalf of the United States, upon the ground that the United States were not a party defendant, and that neither the District Attorney nor the Attorney General of the United States had authority to submit for adjudication, in the courts of the State of Texas, the rights of the United States of America; as well as upon the ground that the pleas of the statutes of limitations of the State of Texas constituted no defence to the action, because the United States were neither bound by nor protected by those statutes, and because the plaintiffs could not, in any court, bring suit against the United States; and to the pleas of the statutes of limitations replied that on January 18, 1871, and long before their adverse possession commenced, the plaintiff, Mary U. Schwalby, was lawfully married to her co-plaintiff, and had ever since continued to be a married woman.

Joseph Spence, Jr., intervened by leave of court, and filed a petition, similar to the principal one, likewise claiming an undivided third part of the land.

The parties submitted the case to the decision of the court without a jury. At the trial the following facts were proved or admitted:

The common source of title, through whom all parties, the plaintiffs, the intervenor, and the United States, claimed this land, was Antony M. Dignowity.

On September 13, 1858, he executed to Amanda J. Dignowity, his wife, a general power of attorney to sell and convey his real estate; and by virtue thereof she, on May 9, 1860, executed a warranty deed to Duncan B. McMillan of this parcel, reciting the payment by him of a consideration of $100. This deed was acknowledged on the same day before William H. Cleveland, notary public; but was not recorded until Sep-

tember 30, 1889. McMillan died in Louisiana in February, 1865, intestate, a widower, leaving three children: Mary, the female plaintiff, who was born September 11, 1848, was married to J. A. Schwalby January 18, 1871, and was still his wife when this action was tried; Sarah, who was born August 3, 1854, married to one Neely February 14, 1875, and died August 17, 1878, leaving two children, who were still living; and Duncan W. McMillan, born November 2, 1850, who by deed, dated and acknowledged March 26, 1889, and recorded March 29, 1889, conveyed his interest in this land to the intervenor, Joseph Spence, Jr.

Dignowity died in April, 1875, and by his will, admitted to probate April 22, 1875, devised and bequeathed all his property to his wife, and made her independent executrix, with full power of sale and disposition of all his property, and requiring of her no bond or inventory. By deed of quitclaim and release, dated May 1, 1875, and recorded June 1, 1875, the widow, in her own right, and as independent executrix, for the consideration of $1500, conveyed to the city of San Antonio four lots of land, one of which was that now in question, described as "lot number one, in block number two, known as the McMillan lot," with special warranty against all persons claiming by, under or through Dignowity or his estate. By warranty deed in the statutory form, dated June 16, 1875, and recorded October 21, 1875, the city of San Antonio conveyed the four lots to the government of the United States of America for military purposes, "in consideration of one dollar paid to the said city of San Antonio by the said government, the receipt whereof is hereby acknowledged, and for divers and other good and sufficient considerations thereunto moving."

The defendant Stanley, being called as a witness for the plaintiffs, testified as follows: "Myself and the other defendants were in possession of the lot when this suit was brought. I am a brigadier general in the United States Army; my co-defendants are officers in the United States Army. We took, held and hold such possession as such officers of the United States Army. The government of the United States took

actual possession of the land in controversy in the year 1882. The land sued for is part of the military reservation of the United States of America at San Antonio. We hold possession under the United States of America. According to my understanding, the United States first took possession of this lot in the year 1875 or 1876; it was then open prairie. We do not claim title to the land in our own right, but hold it for the United States. The United States have made the following improvements upon the lot in controversy before the institution of this suit" (stating them). "These improvements were made since the year 1881; before that, the lot was open prairie. I never heard of a claim against this land until the commencement of this suit."

Mrs. Dignowity, in a deposition taken by the plaintiffs July 23, 1889, before William H. Houston, notary public, but introduced in evidence by the defendants, after being shown her deed to the city of San Antonio, dated May 1, 1875, testified as follows: "Lot 1 in block 2, named in that deed, was called by me the McMillan lot, because it was the habit of my husband during his lifetime, whenever he sold a city lot, to mark the name of the purchaser in pencil on the map, and, when the lot was paid for, to write the name in ink. I presume I found this lot marked in the name of McMillan in pencil, and therefore called it the McMillan lot. This is the only explanation I am now able to give." "I must have known in some way that the lot had been sold and a payment made on it; and I know of no other way I should have known it, except as stated above." "I have no recollection of ever making a deed to Duncan B. McMillan of lot 1 in block 2, though I may have done so. If such a deed was made by me twenty-nine years ago, I do not see why it was not recorded, unless perhaps the full purchase money had not been paid." "I do not know who was in possession of the lot from 1860 until my husband's death in 1875, but believe it was unoccupied. I do not know that it was claimed by any one but him. I paid the taxes on it during that time. I never took actual possession of the lot, but continued to pay the taxes until it was sold to the city. I never had said lot in

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actual possession, and never had a tenant on it." "Neither Duncan B. McMillan, nor any one for him, nor any of his heirs, ever claimed an interest in the lot in suit in this case, from 1860 to 1875, to my knowledge. When I sold the lot in controversy to the city of San Antonio, I acted in good faith. I believed for some reason that Duncan B. McMillan had some claim on the lot, or I should not have specially quit-claimed it to the city."

In a second deposition, taken by the defendants December 31, 1889, she testified: "I am in my seventieth year, and reside in San Antonio." "I have seen the original of the deed from me to Duncan B. McMillan, dated May 9, 1860. I was shown the deed by Captain William Houston. I have never seen it but that one time, since it was executed by me, until to-day. I carefully examined it, and it is a genuine deed. I don't know why said deed was never recorded until a few months ago. I don't know whether I ever delivered possession of the lot in controversy to Duncan B. McMillan or his agent for him formally, or not. I paid taxes on the land until it was sold subsequently. I don't remember of receiving but fifty dollars on the transaction, and think that was paid before the date of the deed. I don't recollect anything more than that I was paid fifty dollars on the trade, and I executed the deed, and acknowledged it before Mr. Cleveland, and left it with him." "I have not seen Duncan B. McMillan since 1860. He was then on his way home to Louisiana." "I do remember W. H. Cleveland. He was a lawyer in good standing about the year 1860. He did at times attend to business both for myself and husband. I have owned and sold considerable real property in Texas, and still own property and have experience in dealing in lands and city lots." "The deed from me to McMillan recites a consideration of $100; but I do not recollect of receiving but fifty. I received fifty dollars, as before stated; my husband never received a cent. I don't know anything about what other persons may have received. I know nothing of any note. I don't know anything about the money having been paid to Cleveland; if it was, I don't know anything about it."

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George C. Altgelt, being called as a witness for the defendants, testified: "I am plaintiffs' attorney. I do not know Mrs. Mary U. Schwalby personally. I received the deed to Duncan B. McMillan from Amanda J. Dignowity, attorney in fact for Anthony M. Dignowity, by mail. It was sent to me by Joseph Spence, Jr., who is a lawyer and land agent of San Angelo, Tom Green county, Texas. I never saw Mrs. Schwalby."

James H. French, a witness for the defendants, testified: "I was mayor of the city of San Antonio in 1875, at the time the city purchased the property from Mrs. Dignowity. The city paid the consideration, $——, to Mrs. Dignowity, in 1877. The government buildings, the officers' quarters, were placed upon the Dignowity property. The city had the title examined by A. J. Evans. When the city purchased from Mrs. Dignowity and paid the money, the city had notice of this claim; that is, the claim of D. B. McMillan. We had this notice from Mrs. A. J. Dignowity. Mrs. Dignowity refused to give a warranty deed to the lot in controversy. I, as mayor of the city, had notice of the McMillan claim at the time the city purchased. There was no consideration paid direct from the government to the city for the property. It was a donation from the city to the government. The city never received any consideration from the government for the conveyance; but, by reason of the establishment of the military headquarters here, the city has received a thousand-fold benefit on the consideration paid by her to Mrs. Dignowity."

Andrew J. Evans, being called by the defendants, testified: "I, as United States District Attorney for the Western District of Texas, in 1875, made an examination of the title to the lot in controversy, and traced the title back to the case of *Lewis* v. *City of San Antonio*. I examined the records of deeds for Bexar county, Texas, and did not find any deed of record from Dignowity, and after I had made the examination I believed the title was good. I so advised the department at Washington, and upon my advice the government took the deed from the city in good faith."

Upon cross-examination, Evans testified: "I made the ex-

amination of the title as United States Attorney, and advised that the title was good. I saw the deed from Mrs. Dignowity as executrix, etc., to the city of San Antonio, read it, and had notice of all its recitals. I had information of the sale to Duncan B. McMillan, but I satisfied myself that he had never paid the purchase money." He was then asked, "When you read the deed from Mrs. Dignowity to the city of San Antonio, and saw there the lot in dispute was quitclaimed, and described as being 'known as the McMillan lot,' did not these facts create in your mind a suspicion that the title to this lot was not all right?" To this question the witness answered, "They did not."

There was no evidence, beyond that above stated, bearing upon the question whether the deed from Dignowity to McMillan was ever delivered; or upon the question whether the United States took the deed from the city of San Antonio with notice of a previous conveyance to McMillan.

The district court of Bexar county sustained the plaintiffs' exceptions to the pleas of the statutes of limitations, and ordered those pleas to be struck out; overruled the other exceptions of the plaintiffs; and gave judgment for the plaintiffs and the intervenor against the individual defendants and the United States for two thirds of the title to the land, and for possession jointly with the defendants of the whole, and for costs, and allowed to the United States the value of their improvements. On March 24, 1890, the United States and the other defendants appealed to the Supreme Court of the State of Texas, which, on March 4, 1892, ordered the judgment to be set aside and the action dismissed as against the United States, and affirmed the judgment as against the individual defendants. *Stanley* v. *Schwalby*, 85 Texas, 348. Upon a writ of error sued out by the United States and the other defendants, the judgment of the Supreme Court of Texas was reversed by this court, at October term, 1892, and the case remanded for further proceedings not inconsistent with its opinion, reported 147 U. S. 508. The Supreme Court of the State thereupon vacated its own judgment, reversed the judgment of the district court, and re-

manded the case to that court for such further proceedings.

In that court, leave to file an amended answer was then requested by the individual defendants, with whom, as the record stated, "come also the United States of America, by their attorney, Andrew J. Evans, who is United States Attorney for the Western District of Texas, duly appointed and commissioned as such, and who so appears for the said United States of America by direction of the Attorney General of the United States of America;" and who, as evidence of such direction, exhibited and filed a letter dated April 18, 1889, from the Secretary of War to the Attorney General, relating to this suit, and requesting that "the proper United States Attorney be requested to appear and defend the interests of the United States in this matter;" and a letter dated April 20, 1889, from the Attorney General, enclosing the letter of the Secretary of War, and "in compliance with his request" instructing the District Attorney "to appear and defend the interests of the United States involved therein."

Leave being granted, the United States, by the District Attorney, "by direction of the Attorney General, as heretofore exhibited to the court," together with the individual defendants, filed two pleas in bar: 1st, that this was an action, nominally against the individual defendants, "but in fact against the United States of America, a sovereign corporation not liable to suit in this court or any other, in the absence of an act of Congress;" 2d, that the action was against the property of the United States; and, in connection with each of these pleas, alleged that the individual defendants were officers in the military service of the United States, in possession as such of this land, under and by direction of the President of the United States of America, the Commander in Chief of the Army and Navy of the United States, and not of their own volition, will or wish, and that neither of them ever pretended to hold or have possession, or right of possession, or title, or color of title, of the land, as individuals, and that this suit was but a palpable device to maintain an action at law against the United States and their

property, and should not be further maintained; and also pleaded not guilty; and that the United States had held adverse possession in good faith, under a warranty deed made to them in 1875 by the city of San Antonio, and without knowledge or suspicion of any adverse title; and that the United States were innocent purchasers of the land for a valuable consideration, without notice of the plaintiffs' unrecorded claim; and set up the statutes of limitations, and a claim for improvements, as in their former answer.

The case was again tried by the district court, without a jury, and the same evidence introduced as at the first trial. The court overruled the first and second pleas in bar; and adjudged that Spence, the intervenor, take nothing by his petition; that the plaintiffs recover from the individual defendants one undivided third part of the lot in question, and the sum of $126.66 for their use and occupation of that part, and costs, and be put in joint possession with the defendants; and that the United States be allowed the sum of $333.33 for improvements.

Thereupon, as the record stated, "all parties, to wit, the plaintiff, the intervenor, the defendants, and the United States of America, in open court excepted to the judgment of the court, and gave due notice of appeal." And a report or statement of the case, called in the Texas practice "a statement of facts, or agreed statement of the pleadings and proof," (the material parts of which are given above,) was made up by the parties and certified by the judge. Texas Rev. Stat. of 1879, §§ 1377, 1414; Stat. April 13, 1892, c. 15, § 24.

Upon a writ of error sued out by the United States, and an assignment of errors by the defendants, and upon cross assignments of errors by the plaintiffs and by the intervenor, the case was taken to the Court of Civil Appeals for the fourth supreme judicial district of the State of Texas, which affirmed the judgment, except as to the allowance for improvements; and thereupon, "proceeding to render such judgment as should have been rendered by the court below," adjudged that the plaintiffs recover of the individual defendants one undivided third part of the land, (describing it,) and the sum of $126.66 for the use and

occupation of that part, with interest thereon from the date of the judgment below, and costs, and "have their writ of possession against said defendants and all other persons who have entered said premises since the filing of this suit on the 23d day of February, 1889, placing them in joint possession with the defendants;" that Spence, the intervenor, take nothing by his suit; and "that the plaintiff in error, the United States of America, who voluntarily made itself a party in the court below, take nothing by its plea, and pay all costs of this court and of the court below." The opinions on rendering that judgment, and on denying a motion for a rehearing, are reported, under the name of *United States* v. *Schwalby*, in 8 Texas Civ. App. 679, 685.

The Supreme Court of the State of Texas denied a petition of the United States for a writ of error from that court to the Court of Civil Appeals. The Chief Justice of the Court of Civil Appeals refused to allow to the United States a writ of error to bring up the case to this court. The present writ of error was thereupon sued out by the individual defendants and the United States, and was allowed by a justice of this court.

Mr. Solicitor General for the United States, plaintiffs in error, submitted on a printed argument.

Mr. A. H. Garland and *Mr. R. C. Garland*, for defendants in error, submitted on the record.

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

This action was brought in a district court of the State of Texas, by Mary A. Schwalby and her husband against General Stanley and other officers of the Army, to try the title to a parcel of land, part of the military reservation of the United States at San Antonio. The plaintiffs claimed title in one third of the land, and possession of the whole; and Joseph Spence, Jr., intervening, also claimed title in one third. The District Attorney, professing to act in behalf of the United States under instructions from the Attorney General, joined with the defendants in an answer setting up these

defences: 1st. That the action was really against the United States, who were not liable to be sued. 2d. Not guilty. 3d. Title in the United States. 4th. The statutes of limitations of Texas. 5th. Permanent and valuable improvements by the United States.

At the first trial, the inferior court gave judgment for the plaintiffs and the intervenor, against the United States, as well as against the original defendants, for two thirds of the title in the land, and for joint possession with the defendants of the whole, and allowed the United States for their improvements. On appeal from that judgment, the Supreme Court of the State, on March 4, 1892, held that the District Attorney could not submit the rights of the United States to the jurisdiction of the court; that the plaintiffs and the intervenor had made out their title; that the United States were not innocent purchasers, and had no title to the land; and that the statutes of limitations, as they did not bind the United States, could not be pleaded by the United States, or by their officers acting under them; and therefore disallowed the claim for improvements, set aside the judgment and dismissed the action as against the United States, and affirmed the judgment against the other defendants. 85 Texas, 348. But this court, at October term, 1892, upon writ of error, held that the United States and their agents were entitled to the benefit of the statutes of limitations; and therefore, without any consideration of the case upon its merits, reversed the judgment, and remanded the case for further proceedings not inconsistent with its opinion. 147 U. S. 508, 519, 520.

The case having been remanded accordingly to the Supreme Court of the State, and by that court to the district court, an amended answer, setting up substantially the same defences as before, was filed by the individual defendants, and by the District Attorney, purporting to act in behalf of the United States under the instructions of the Attorney General. Those instructions (then first filed in the case) appear to have been given by the Attorney General at the request of the Secretary of War, and to have been only "to appear and defend the interests of the United States involved" in this suit. The

district court, upon the same evidence as at the first trial, adjudged that the plaintiffs recover from the individual defendants one undivided third part of the land, and costs, and be put in joint possession with them; and that the United States be allowed for their improvements.

The case was taken by writ of error to the Court of Civil Appeals, which had been vested, by the statutes of Texas of April 13, 1892, with appellate jurisdiction from the district courts, with a provision for the review of its decisions by the Supreme Court of the State upon petition for a writ of error. Texas Rev. Stat. §§ 1011a–1011c; Stat. 1892, c. 14, § 1; c. 15, § 5: Gen. Laws, 1st sess. 22d legislature, pp. 19, 20, 26.

The Court of Civil Appeals affirmed the judgment of the district court, except as to the allowance for improvements; and, "proceeding to render such judgment as should have been rendered by the court below," adjudged that the plaintiffs recover judgment against the individual defendants for one undivided third part of the land, and for costs, and "have their writ of possession against said defendants and all other persons who have entered said premises since the filing of this suit, placing them in joint possession with the defendants," and that the United States pay all the costs in the case. The views of that court are shown by the following extracts from its opinion: "In 1881 or 1882 the United States went into possession of the lot by virtue of the deed [from the city of San Antonio] and were occupying, using and enjoying the same up to the time the suit was instituted on February 23, 1889. The United States had actual notice that the land had been conveyed by Mrs. Dignowity to Duncan B. McMillan, at the time the deed was made to them by the city of San Antonio, and did not make the improvements in good faith. The claim of Joseph Spence was barred by five years' limitation; but Mrs. Schwalby being under the disability of coverture, the statute did not run as to her." "The United States were not sued, and neither was it attempted to subject the property of the United States to suit; and neither of these propositions was advanced or held by the district court. Stanley and others were sued individually as trespassers, not as

officers of the United States; and the United States voluntarily made themselves parties to the suit. That this suit was properly brought has been decided in a number of cases, and has been reaffirmed in this identical case by the Supreme Court of the United States. The jurisdiction of the court is not ousted because the individuals sued assert authority to hold possession of the property as officers of the United States government. They must show sufficient authority in law to protect them. The mere fact that individuals have been placed in possession by the government would not be a valid defence, unless the government had the lawful authority to so place them." "If McMillan had not paid the purchase money, that did not place appellants in any better position as to notice. They had actual notice of his claim, and took the risk in making the improvements." 8 Texas Civ. App. 679, 681, 682, 684.

A petition for a writ of error to the Court of Civil Appeals having been presented to the Supreme Court of the State, and denied, the present writ of error from this court was properly addressed to the Court of Civil Appeals, in which the record remained. Rev. Stat. § 709; *Gregory* v. *McVeigh*, 23 Wall. 294; *Polleys* v. *Black River Co.*, 113 U. S. 81; *Fisher* v. *Perkins*, 122 U. S. 522.

It is contended by the Solicitor General in behalf of the United States that, upon the facts shown by the record, the judgment should be reversed, for several reasons, all of which are worthy of consideration, and may conveniently be considered in the following order:

First. That the suit is against the United States, and against property of the United States.

Second. That the claim of the plaintiffs was barred by the statute of limitations.

Third. That the deed from Dignowity to McMillan, under whom the plaintiffs claim, was never delivered.

Fourth. That the United States, when they took their deed from the city of San Antonio, had no notice of a previous conveyance to McMillan.

It is a fundamental principle of public law, affirmed by a

long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States, or against their property, in any court, without express authority of Congress. 147 U. S. 512. See also *Belknap* v. *Schild*, 161 U. S. 10. The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. *Case* v. *Terrell*, 11 Wall. 199, 202; *Carr* v. *United States*, 98 U. S. 433, 438; *United States* v. *Lee*, 106 U. S. 196, 205. The original instructions from the Attorney General to the District Attorney, having now been filed and made part of the record, are shown to have been, (as they were at the former stage of this case supposed by the Supreme Court of Texas and by this court to be,) no more than "to appear and defend the interests of the United States involved" in this suit, that is to say, by appearing and taking part in the defence of the officers, and, if deemed advisable, by bringing the rights of the United States more distinctly to the notice of the court by formal suggestion in their name. 85 Texas, 354; 147 U. S. 513. As the present Chief Justice then remarked, repeating the words of Chief Justice Marshall in the leading case of *The Exchange*, 7 Cranch, 116, 147: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States." The answer actually filed by the District Attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instructions of the Attorney General, and of any power vested by law in him or in the District Attorney, and could not constitute a voluntary submission by the United States to the jurisdiction of the court.

Opinion of the Court.

The judgments of the courts of the State of Texas appear to have been largely based on *United States* v. *Lee*, above cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession; and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action; and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers. 106 U. S. 199, 206, 222.

In an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to the possession, but may be (as it was in this case) for title also. By section 4784 of the Revised Statutes of the State, "the method of trying title to lands, tenements or other real property shall be by action of trespass to try title." By section 4808, "upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title, or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession." By section 4811, the judgment "shall be conclusive, as to the title or right of possession established in such action, upon the party against whom it is recovered, and upon all persons claiming from, through or under such party, by title arising after the commencement of such action."

And it has been declared by the Supreme Court of the State that, by the statutory action of trespass to try title, "it was unquestionably the legislative intention to provide a simple and effectual remedy for determining every character of conflicting titles and disputed claims to land, irrespective of the fact of its actual occupancy or mere pedal possession;" and "a method of vesting and divesting the title to real estate, in all cases where the right or title, or interest and possession, of land may be involved," by partition or otherwise. *Bridges* v. *Cundiff*, 45 Texas, 440; *Titus* v. *Johnson*, 50 Texas, 224, 238; *Hardy* v. *Beaty*, 84 Texas, 562, 568.

In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third, to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

The judgment for costs against the United States was clearly erroneous, in any aspect of the case. *United States* v. *Hooe*, 3 Cranch, 73, 91, 92; *United States* v. *Barker*, 2 Wheat. 395; *The Antelope*, 12 Wheat. 546, 550; *United States* v. *Ringgold*, 8 Pet. 150, 163; *United States* v. *Boyd*, 5 How. 29, 51.

But, with a view to the ultimate determination of the case, it is fit to proceed to a consideration of the other questions arising therein.

That the United States and their officers were entitled to avail themselves of the statutes of limitations, was adjudged when this case was first brought before this court. 147 U. S. 508. The Court of Civil Appeals of the State has now held that those statutes did not run against Mrs. Schwalby, because she was under the disability of coverture.

The principal grounds, upon which the Solicitor General

contends that this conclusion was unwarranted by the facts of the case, are as follows: Dignowity, under whom all parties claimed title, had the title and the consequent right of possession of the land, at the time of his supposed deed to McMillan in 1860. The possession is to be presumed to have continued in him, and in those claiming under the subsequent deed of his widow to the city of San Antonio in May, 1875, and the city's deed to the United States in June, 1875. There was no evidence that McMillan, or any one claiming under him, was ever in actual possession of the land. If the title and the right of possession were ever in McMillan, they descended to his daughter Mary and her co-heirs upon his death in 1865. She was then under the disability of infancy, having been born September 11, 1848. On September 11, 1869, she became of age, and the statutes of limitations began to run against her, and could not, by a general rule of law, recognized alike by this court and by the Supreme Court of Texas, be again suspended by the new disability created by her subsequent marriage to Schwalby on January 18, 1871. *McDonald* v. *Hovey*, 110 U. S. 619; *White* v. *Latimer*, 12 Texas, 61. See also *McMasters* v. *Mills*, 30 Texas, 591; *Jackson* v. *Houston*, 84 Texas, 622.

But the statutes of limitations of Texas do not appear to run against a suit to recover real estate, except in favor of one in "adverse possession," which is defined to be "an actual and visible appropriation of land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." Paschal's Digest, arts. 4621–4624; Rev. Stat. §§ 3191–3199. There was no affirmative evidence showing that such adverse possession of the United States, or of their predecessors in title, the city of San Antonio, and Dignowity, began before 1882, at which time Mrs. Schwalby was under the disability of coverture; or who, if any one, before that time, was in actual possession of the land; although Mrs. Dignowity testified that she paid the taxes upon it from 1860 until she conveyed it to the city in May, 1875. The conclusion that the plaintiffs' claim was not barred may, therefore, have rested upon a possible inference of fact, rather than upon a determination of law.

Upon the question whether the deed from Dignowity to McMillan was ever delivered to the grantee, or to any one in his behalf or claiming under him, the evidence was in substance as follows: The deed was executed May 9, 1860, by Mrs. Dignowity, under a power of attorney from her husband; was acknowledged by her on the same day before William H. Cleveland, who was a notary public, and was a lawyer who had sometimes done business for her husband and herself; and was left by her with Cleveland. The consideration named in the deed was $100, only $50 of which was paid; and that was received by her about the time of executing the deed. She testified that she did not know whether or not she ever formally delivered possession of the land to McMillan or his agent; but that she continued to pay the taxes on the land until she sold and conveyed it to the city of San Antonio in May, 1875. The deed to McMillan was not recorded until September 30, 1889, more than twenty-nine years after its execution. There was no evidence where the deed was during that time, or by whom it was left for record; nor was there any explanation of the delay in recording it. Mrs. Schwalby's attorney testified that he never saw her, and did not know her personally; and that he received the deed by mail from Spence, a lawyer and land agent. Spence was the intervenor in this case, claiming title in one third of the land under a deed from McMillan's son, executed, acknowledged and recorded in March, 1889.

This evidence is far from satisfactory as proof of an actual delivery of the deed. But, considering that the deed to McMillan may possibly have come from him into the hands of his son, and thence into those of Spence, and that some presumption of delivery may arise from the plaintiffs' possession of the deed, we are not prepared to say that the evidence was insufficient, as matter of law, to warrant the conclusion that the deed was in fact delivered. See *Sicard* v. *Davis*, 6 Pet. 124, 137; *Gaines* v. *Stiles*, 14 Pet. 322, 327.

The more serious question is whether there was any evidence that the United States took the deed from the city of San Antonio in June, 1875, with notice of a previous convey-

ance to McMillan. All the evidence which can be supposed to have any bearing upon this point was as follows:

The deed from Mrs. Dignowity to the city of San Antonio was a quitclaim deed; and the mayor testified that, at the time of the purchase by the city, he had notice from Mrs. Dignowity of McMillan's claim. But the deed from the city to the United States was a deed of warranty, conveying this and other lands to the United States for military purposes; the consideration recited therein was not merely the payment of the nominal sum of one dollar, but "divers and other good and sufficient considerations thereunto moving;" and the conveyance was in fact, as appears by the uncontradicted testimony of the mayor, for the very valuable consideration enuring to the city from the establishment of the military headquarters there.

The District Attorney, who made the examination of the title for the United States, testified that he examined the records of the county; that he read the quitclaim deed from Dignowity to the city, and had notice of all its contents; that he found no record of any other deed from Dignowity; and that, after making the examination, he believed the title was good, and so advised the department at Washington, and upon his advice the government took the deed from the city in good faith. Upon cross-examination, he testified that he "had information of the sale to McMillan," but satisfied himself that he had never paid the purchase money; and that the facts that the deed from Dignowity to the city was a quitclaim deed, and described the land as "known as the McMillan lot," created no suspicion in his mind that the title was not all right.

By the statutes of Texas, lands cannot be conveyed from one to another, except by instrument in writing; and unrecorded conveyances of lands are void as against subsequent purchasers for valuable consideration without notice; but are valid as between the parties and their heirs, and as to all subsequent purchasers with notice thereof or without valuable consideration. Paschal's Digest, arts. 997, 4988; Rev. Stat. §§ 548, 549, 4332. These provisions have not been regarded

as introducing a new rule; but only as declaratory of the law, as recognized in the chancery jurisprudence of England and of the United States. *Parks* v. *Willard*, 1 Texas, 350.

A purchaser of land for valuable consideration may doubtless be affected by knowledge which an attorney, solicitor or conveyancer, employed by him in the purchase, acquires or has while so employed, because it is the duty of the agent to communicate such knowledge to his principal, and there is a presumption that he will perform that duty. *The Distilled Spirits*, 11 Wall. 356, 367; *Rolland* v. *Hart*, L. R. 6 Ch. 678, 682; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Kauffman* v. *Robey*, 60 Texas, 308. But in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or, at least, of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. *Wilson* v. *Wall*, 6 Wall. 83; *Flagg* v. *Mann*, 2 Sumner, 486, 551; *Montefiore* v. *Browne*, 7 H. L. Cas. 241, 262, 269; *Bailey* v. *Barnes*, (1894) 1 Ch. 25; *Wethered* v. *Boon*, 17 Texas, 143. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance. *Mills* v. *Smith*, 8 Wall. 27; *Holmes* v. *Stout*, 2 Stockton, (10 N. J. Eq.) 419; *Lamb* v. *Pierce*, 113 Mass. 72.

A valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance. *Prewit* v. *Wilson*, 103 U. S. 22; *Hitz* v. *Metropolitan Bank*, 111 U. S. 722, 727; 4 Kent Com. 463; Dart on Vendors, (6th ed.) 1018, 1019. The advantage enuring to the city of San Antonio from the establishment of the military headquarters there was clearly a valuable consideration for the deed of the city to the United States.

A purchaser of land, for value, and without notice of a prior deed, holds and can convey an indefeasible title; and therefore the title, either of one who, without notice, purchases from one who purchased with notice, or of a purchaser with notice from a purchaser without notice, is good. *Har-*

rison v. *Forth*, before Lord Somers, Pre. Ch. 51; *Boone* v. *Chiles*, 10 Pet. 177, 209; *Flynt* v. *Arnold*, 2 Met. 619, 623; 4 Kent Com. 179. While it is held, in Texas, that a purchaser who takes a quitclaim deed of his grantor's interest only is affected with notice of all defects in the title, yet mere knowledge that the deed is in that form cannot affect the title of one claiming under a subsequent deed of warranty from the grantee. *United States* v. *California Land Co.*, 148 U. S. 31, 46, 47; *Moore* v. *Curry*, 36 Texas, 668; *Graham* v. *Hawkins*, 38 Texas, 628. Still less, could oral notice to the mayor of McMillan's claim, not shown to have been communicated to the United States or their attorney, affect their title under the subsequent deed of warranty from the city.

The attorney's "information of the sale to McMillan," with the purchase money unpaid, was evidently no more than of a bargain between Mrs. Dignowity and McMillan, and not of any deed of conveyance. He searched the records, and found no such deed, and advised the United States that the title was good. The deed from Mrs. Dignowity to McMillan, now produced, had then already remained unrecorded for fifteen years; and there is no evidence in whose custody it was, or that the attorney had any reason to suppose that it existed, or could have learned anything about it from Mrs. Dignowity, or knew, or had the means of ascertaining, where McMillan lived, or whether he was living or dead. The mere description of the land as "known as the McMillan lot" raised no inference that it was still owned, if it ever had been, by any one of that name.

The evidence appears to us wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan, or any knowledge of such circumstances tending to prove the existence of such a deed, that he should have considered or treated them as of any weight, or have reported them to the authorities at Washington. The inevitable conclusion, as matter of law, is that the United States acquired a good and valid title, as innocent purchasers, for valuable consideration, and without notice of a previous conveyance to McMillan.

As was said by this court, when this case was brought here before, "The validity of an authority exercised under the United States is drawn in question; and where the final judgment or decree in the highest court of a State in which a decision could be had is against its validity, jurisdiction exists in this court to review that decision on writ of error." 147 U. S. 519; Rev. Stat. § 709.

The validity of the authority exercised by the defendants as officers of the United States depends, according to the decision in *United States* v. *Lee*, before cited, upon the question whether the United States had or had not a good title in the land.

In *United States* v. *Thompson*, 93 U. S. 586, 588, Chief Justice Waite said: "Judgments in the state courts against the United States cannot be brought here for reëxamination upon a writ of error, except in cases where the same relief would be afforded to private parties." This dictum, in so general a form, is in danger of misleading; and it went beyond anything required by the decision of that case, in which the only issue understood to have been decided in the state courts was one of payment, and no authority under the Constitution, laws or treaties of the United States was set up and decided against. The United States are in the same condition as other litigants, in the sense that neither can invoke the jurisdiction of this court by writ of error to a state court, unless that court has decided against a right claimed under the Constitution, laws or treaties of the United States. But surely the United States have, and may assert, a right, privilege or immunity under the Constitution of the United States, which private parties could not have.

We do not undertake to review the conclusions of the state court as to the effect of Mrs. Schwalby's disability under the statutes of limitations, or as to the delivery of the deed to McMillan, both perhaps depending, as has been seen, upon questions of fact. *Dower* v. *Richards*, 151 U. S. 658; *Israel* v. *Arthur*, 152 U. S. 355; *In re Buchanan*, 158 U. S. 31, 36.

But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the

United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a state court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the State, he may bring the case by writ of error to this court; and, as his justification depends upon the question whether the title to the property was in the defendant in attachment, or in the plaintiff in the action of trespass, this court, upon the writ of error, has the power to decide that question, so far as it is one of law, even if it depends upon local law, or upon general principles. *Buck* v. *Colbath*, 3 Wall. 334; *Etheridge* v. *Sperry*, 139 U. S. 266; *Bock* v. *Perkins*, 139 U. S. 628. And see *McNulta* v. *Lockridge*, 141 U. S. 327, 331; *Dushane* v. *Beall*, 161 U. S. 513.

The decision of the Court of Civil Appeals that the United States had notice of the deed to McMillan, and therefore had no title in the land, and judgment should be rendered against their officers for both title and possession, was a decision in matter of law against the validity of the authority set up by those officers under the United States; and as such was reviewable by this court, and, being erroneous, must be reversed.

The proper form of the judgment to be entered by this court remains to be considered; and in order to ascertain this, it will be convenient to trace the history of the statutes and decisions upon that subject.

Under the Judiciary Act of September 24, 1789, c. 20, § 25, a final judgment or decree in the highest court of a State in which a decision could be had might "be reëxamined and reversed or affirmed" in this court upon a writ of error, "in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree com-

plained of had been rendered or passed in a Circuit Court; and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution." 1 Stat. 86.

The qualification, "if the cause shall have been once remanded before," restricted only the power to proceed to a final decision and award execution in this court, and did not restrict the power of this court to reverse or affirm the judgment of the state court, as justice might require. Accordingly, in the leading case upon the subject of the appellate jurisdiction of this court from the courts of a State, this court, upon the first writ of error to the Court of Appeals of Virginia, not only reversed the judgment of that court, but affirmed the judgment of the inferior court of the State, which had been reversed by the Court of Appeals, and issued its mandate to the Court of Appeals accordingly; and, upon that court declining to obey the mandate, this court, upon a second writ of error, rendered judgment in the same terms as before. *Fairfax* v. *Hunter*, 7 Cranch, 603, 628; *Martin* v. *Hunter*, 1 Wheat. 304, 323, 362.

The act of February 15, 1867, c. 28, § 2, revising the subject, omitted the qualification "if the cause shall have been once remanded before," and put the last clause of the section in this form: "and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to an inferior court." 14 Stat. 386. The sections of the acts of 1789 and 1867 are printed side by side in 17 Wall. 681, 682.

In *Maguire* v. *Tyler*, this court, at December term, 1869, adjudged that a decree in equity of the Supreme Court of Missouri be reversed, and the case remanded with directions to enter a decree affirming the decree of an inferior court of the State; but, upon motion of counsel, modified its judgment so as to remand the cause for further proceedings in conformity to the opinion of this court, and declared this to "be more

in accordance with the usual practice of the court in such cases." 8 Wall. 650, 658, 662. The Supreme Court of Missouri, after receiving the mandate of this court, entered a decree dismissing the suit because there was an adequate remedy at law; and thereupon this court, at December term, 1872, upon a second writ of error, entered judgment here, reversing that decree, with costs, and ordering a writ of possession to issue from this court; and, speaking by Mr. Justice Clifford, after referring to the difference between the provisions of the acts of 1789 and 1867, said: "Much discussion of those provisions is unnecessary, as it is clear that the court, under either, possesses the power to remand the cause or to proceed to a final decision. Judging from the proceedings of the state court under the former mandate, and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time, as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate. Such being the fact, the duty of this court is plain, and not without an established precedent." 17 Wall. 253, 289, 290, 293. The precedent referred to was *Martin* v. *Hunter*, above cited.

Section 2 of the act of 1867 was substantially reënacted in Rev. Stat. § 709. By the act of February 18, 1875, c. 80, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," section 709 of the Revised Statutes was amended by striking out this provision: "and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed." 18 Stat. 318; Rev. Stat. (2d ed.) p. 133.

The repeal of this provision may not have revived that provision of the act of 1789 which had been superseded by the act of 1867. Rev. Stat. § 12. But it did not affect the general power, conferred by section 709 of the Revised Statutes, as by all former acts, by which the judgment of the state court may be "reëxamined and reversed or affirmed" by this

court, and in the exercise of which this court, in *Fairfax* v. *Hunter*, and *Martin* v. *Hunter*, above cited, ordered the proper judgment to be entered in the state court.

Under the statutes and practice of the State of Texas, the appellate court, upon a statement of the case certified by the judge, may, as the Supreme Court and Court of Civil Appeals did in this case, and as this court does upon a finding of facts by the Circuit Court of the United States in cases tried by the court upon a jury being duly waived, render such judgment as should have been rendered by the court below. Texas Rev. Stat. § 1048; Stat. April 13, 1892, c. 14, § 1; c. 15, § 36; *McIntosh* v. *Greenwood*, 15 Texas, 116; *Creager* v. *Douglass*, 77 Texas, 484; *Fort Scott* v. *Hickman*, 112 U. S. 150, 165; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 264.

In the present case, the previous course of the proceedings has been such as to make it proper that the usual practice, by which, upon reversing a judgment of the highest court of a State, the case is remanded generally for further proceedings not inconsistent with the opinion of this court, should be departed from; and that this court should instruct the state court to enter a judgment finally disposing of the case.

The Supreme Court of Texas, after the first trial, held that the United States were not a party to the action, and dismissed it as to the United States; but held that the United States were not innocent purchasers for value, and denied to the United States and their officers the benefit of the statutes of limitations, and therefore gave judgment for the plaintiffs against those officers. This court, upon the first writ of error, reversed that judgment, and, assuming the statutes of limitations to afford a conclusive defence, refrained from considering the case upon its merits, and remanded it for further proceedings in the courts of the State. The case was then submitted to the inferior court of the State of Texas, and to the Court of Civil Appeals, upon the same facts as before; and the Court of Civil Appeals, held that the United States were a party to the action, thereby in effect overruling the former judgment of the Supreme Court of the State; and decided, upon evidence wholly insufficient in law, that the

Syllabus.

United States had no valid title to the land, because they took with notice of a prior conveyance to McMillan; and gave judgment for the plaintiffs against the individual defendants, acting under lawful authority of the United States, for the title in an undivided third part of the land demanded, and for joint possession of the whole; and also gave judgment against the United States for costs, to which the United States are never liable. The Supreme Court of the State denied a petition for a writ of error to review that judgment; the Chief Justice of the Court of Civil Appeals refused to allow a writ of error from this court to review it; and the allowance of the present writ of error was obtained from a justice of this court.

Judgment of the Court of Civil Appeals reversed, and case remanded to that court with instructions to dismiss the action as against the United States, and to enter judgment for the individual defendants, with costs.

SENECA NATION *v.* CHRISTY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 180. Argued March 26, 1896. — Decided April 13, 1896.

On the 31st day of August, 1826, the Seneca Nation by treaty and conveyance conveyed away the lands sued for in this action for a valuable consideration, the receipt of which was acknowledged, but the treaty was not ratified by the Senate or proclaimed by the President. On the 13th of October, 1885, this action was commenced in the Supreme Court of New York to recover a portion of the lands so conveyed. It was brought under the provisions of the act of May 8, 1845, c. 150, of the Laws of New York for that year, entitled "An act for the protection and improvement of the Seneca Indians," etc. The trial court gave judgment for defendant, which judgment was sustained by the Court of Appeals of the State on two grounds: (1) that the grant of August, 1826, was a valid transaction, not in contravention of the Constitution of the United States, or of the Indian Intercourse Act of 1802; and, (2) that

the right of recovery under the New York Act of 1845 was barred by the statute of limitations. *Held*, that as the judgment could be maintained upon the second ground, which involved no Federal question, this court, under the well-established rule, must be held to be without jurisdiction, and the writ of error must be dismissed.

THE case is stated in the opinion.

Mr. James C. Strong for plaintiff in error.

Mr. Norris Morey for defendant in error.

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

This was an action of ejectment brought by the Seneca Nation of Indians against Harrison B. Christy in the Supreme Court, Erie County, New York, to recover possession of "all that certain piece or parcel of land situate, lying and being in the town of Brant, county of Erie and State of New York, and known and distinguished as being lot number twenty-five (25) in the tract of land known as being the three thousand eight hundred and forty acre tract taken from the Cattaraugus Indian reservation, as surveyed by James Read, surveyor, and commonly known as the mile strip in the said town of Brant, and containing one hundred acres;" and for damages.

The complaint was verified December 1, 1885, and the answer January 11, 1886. The answer consisted of a general denial; the plea of the statute of limitations of twenty years; and that the plaintiff had not the legal right, title, capacity or authority to maintain the action. The case was tried upon facts stipulated and documentary evidence.

The premises in question were part of a large tract of land in the western part of the State of New York, the title to which was in controversy between the States of New York and Massachusetts prior to the adoption of the Federal Constitution, which controversy was settled by a compact between those States, December 16, 1786. By that compact the State of New York ceded, granted, released and confirmed

to the State of Massachusetts and its grantees, their heirs and assigns forever, the right of preëmption of the soil from the native Indians and all other estate, right, title and property therein belonging to the State of New York, but New York retained the right of government, sovereignty and jurisdiction. Massachusetts was empowered to hold treaties and conferences with the native Indians to extinguish the Indian title; and it was provided that that Commonwealth might grant the right of preëmption of the whole or any part of said lands and territories to any person or persons, who, by virtue of such grant, should have a good right to extinguish by purchase the claims of the native Indians, provided that such purchase should be made in the presence of a superintendent appointed by Massachusetts and be approved by the Commonwealth. This compact was duly ratified by the United States after the adoption of the Federal Constitution.

By a treaty between the Six Nations of Indians, which included the Senecas, and the United States, dated November 11, 1794, at Canandaigua, New York, Timothy Pickering, acting as commissioner on behalf of the United States, (7 Stat. 44,) it was agreed that the lands of the Senecas situated in the western part of the State of New York, described in the treaty, (embracing the land in controversy,) "shall remain theirs until they choose to sell to the people of the United States who have the right to purchase."

Prior to August 31, 1826, all the right of preëmption and title of Massachusetts in a large part of these lands had been conveyed by sundry mesne conveyances to Robert Troup, Thomas L. Ogden and Benjamin W. Rogers. By a treaty and conveyance on that day the Seneca Nation, by its sachems, chiefs and warriors, in the presence of a superintendent on behalf of the State of Massachusetts and a commissioner appointed by the United States, conveyed a tract of eighty-seven thousand acres of the lands, including that in suit, to Troup, Ogden and Rogers, for the consideration of $48,216, acknowledged by the deed to have been in hand and paid. This conveyance was approved and confirmed by the State of Massachusetts, but the treaty was not ratified by

the Senate of the United States or proclaimed by the President.

Soon after the making of said treaty or conveyance, Troup, Ogden and Rogers entered into full and exclusive possession of the lands described therein; they were divided into parcels, sold and conveyed; extensive and valuable improvements were made thereon; and for more than fifty years they have been in the possession of the grantees and purchasers under them, claiming title under the grant, and without protest on the part of the United States, the State or the Seneca Nation. Defendant held title from Troup, Ogden and Rogers and their grantees, and at the beginning of this action was in possession, claiming under and by virtue thereof.

In 1827 the sum of $43,050 of the consideration set forth in the conveyance of August 31, 1846, was deposited in the Ontario Bank at Canandaigua, New York, and afterwards, and in the year 1855, that sum was, pursuant to section three of an act of Congress of June 27, 1846, c. 34, 9 Stat. 20, 35, paid into the Treasury of the United States. The interest thereon from 1827 has been annually paid to and received by plaintiff in error.

Plaintiff in error contended that no valid purchase was made by the treaty of August 31, 1826, because that treaty was not formally ratified by the Senate of the United States and proclaimed as such by the President of the United States; and, further, that the purchase was invalid because in contravention of the twelfth section of the act of Congress of March 30, 1802, c. 13, "to regulate trade and intercourse with the Indian tribes." 2 Stat. 139.

This action was brought by the Seneca Nation under an act of the State of New York of May 8, 1845, entitled "An act for the protection and improvement of the Seneca Indians residing on the Cattaraugus and Allegany reservations in this State." Laws New York, 1845, p. 146, c. 150; N. Y. Rev. Stat. (7th ed.) 295. The first section of this act reads as follows:

"§ 1. The Seneca Indians residing on the Allegany and Cattaraugus reservations in this State, shall be deemed to

hold and possess the said reservations as a distinct community, and in and by the name of 'The Seneca Nation of Indians,' may prosecute and maintain in all courts of law and equity in this State, any action, suit or proceeding which may be necessary or proper to protect the rights and interests of the said Indians and of the said nation, in and to the said reservations, and in and to the reservation called the 'oil spring reservation,' and every part thereof, and especially may maintain any action of ejectment to recover the possession of any part of the said reservations unlawfully withheld from them, and any action of trespass or on the case, for any injury to the soil of the said reservations, or for cutting down or removing, or converting any timber or wood growing or being thereon, or any action of replevin for any timber or wood removed therefrom, and may maintain any action or suit as aforesaid, for the recovery of any damage for any injury to the common property or rights of the said Indians, or for the recovery of any sum of money, property or effects, due or to become due, or belonging, or in any way appertaining to the said Indians in common, or to the said Seneca Nation; and where such injury has been heretofore sustained, or any such damages have heretofore been suffered by the Indians in common, or as a nation, actions therefor, and to recover damages for such wrongs may likewise be brought and maintained as herein provided, in the same manner and in the same time, as if brought by citizens of this State in relation to their private individual property and rights; and in every such suit, action or proceeding in relation to lands or real estate, situated within the said reservations, the said Seneca Nation may allege a seisin in fee, and every recovery in such action, shall be as and for, and in reference to a fee; but neither such recovery or anything herein contained shall enlarge or in any way affect the right, title or interest of the said Seneca Nation, or of the said Indians in and to the said reservations, as between them and the grantees or assignees of the preemption right of the said reservations under the grants of the State of Massachusetts. . . ."

The trial court directed a verdict for defendant and ren-

dered judgment thereon, and this judgment was affirmed by the general term on appeal. 49 Hun, 524. The case was carried to the Court of Appeals of New York and the judgment affirmed. 126 N. Y. 122, 147. This writ of error was then brought.

The Court of Appeals considered the case fully on the merits and was of opinion "that the grant of August 31, 1826, was a valid transaction and was not in contravention of the provisions of the Federal Constitution or of the Indian Intercourse Act of 1802, and vested in the purchasers a good title in fee simple absolute to the lands granted, free from any claim of the Seneca Nation;" and also that, conceding "the invalidity of the grant of August 31, 1826, under the Indian Intercourse Act of 1802, nevertheless the title was subsequently confirmed and made good by the act of Congress of 1846, authorizing the President to receive from the Ontario Bank, and deposit in the Treasury of the United States, the money and securities representing the purchase money of the lands, followed by the transfer of the fund to the United States in 1855." The court further held: "We are also of opinion that as the right of the plaintiff to sue was given by and is dependent upon the statute, chapter 150 of the laws of 1845, (see *Strong* v. *Waterman*, 11 Paige, 607,) the statute of limitations is a bar to the action. By the act of 1845, the actions thereby authorized are to be brought and maintained 'in the same time' as if brought by citizens of the State. The question is not whether an Indian title can be barred by adverse possession or by state statutes of limitation. The point is that the plaintiff cannot invoke a special remedy given by the statute without being bound by the conditions on which it is given."

In *Strong* v. *Waterman*, 11 Paige, 607, it was held by Chancellor Walworth that the Indians in New York had "an unquestionable right to the use, possession and occupancy of the lands of their respective reservations, which they have not voluntarily ceded to the State, nor granted to individuals by its permission; and the ultimate fee of such reservations is vested in the State, or in its grantees, subject to such right of use and occupancy, by the Indians, until they shall voluntarily

relinquish the same;" that the right of the Seneca Nation to the use and possession of the Cattaraugus reservation was in all the individuals composing the nation, residing on such reservation in their collective capacity, and that, they having no corporate name, no provision was made by law for bringing an ejectment suit to recover the possession of such lands for their benefit, nor could they maintain an action at law in the name of their tribe to recover damages sustained by them by reason of trespasses committed on their reservations, or to recover compensation for the use of their lands when unlawfully intruded upon, although a bill might be filed by one or more of them in behalf of themselves and other Indians interested to protect their rights and to obtain compensation. And see *Johnson* v. *McIntosh*, 8 Wheat. 573; *Mitchel* v. *United States*, 9 Pet. 711, 745; *Cayuga Nation* v. *New York*, 99 N. Y. 235.

This decision appears to have been rendered May 6, 1845, and on the 8th of May the act was passed, the first section of which has been quoted above.

The proper construction of this enabling act, and the time within which an action might be brought and maintained thereunder, it was the province of the state courts to determine. *DeSaussure* v. *Gaillard*, 127 U. S. 216; *Bausermann* v. *Blunt*, 147 U. S. 647.

The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the Court of Appeals, that it could only be brought and maintained "in the same manner and within the same time as if brought by citizens of this State in relation to their private individual property and rights." Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make Federal questions of the correct construction of the act and the bar of the statute of limitations.

As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on that subject and cannot be

maintained. *Eustis* v. *Bolles*, 150 U. S. 361; *Gillis* v. *Stinchfield*, 159 U. S. 658.

Writ of error dismissed.

MR. JUSTICE HARLAN and MR. JUSTICE BREWER did not hear the argument and took no part in the consideration and decision of this case.

DAVIS *v.* GEISSLER.

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

No. 185. Argued March 27, 1896.—Decided April 13, 1896.

The Circuit Court having made no certificate to this court of the question of its jurisdiction, the writ of error is dismissed on the authority of *Maynard* v. *Hecht*, 151 U. S. 324, and other cases cited.

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

Mr. E. A. McMath for the motion. *Mr. W. C. Oliver* was on his brief.

Mr. D. P. Stubbs opposing. *Mr. W. F. Rightmire* was on his brief.

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

This was an action brought by plaintiffs in error, citizens of the State of Illinois, against more than thirty defendants, alleged to be citizens of the State of Kansas, in the Circuit Court of the United States for the District of Kansas. The petition averred the execution by defendants of a certain contract annexed for the payment to plaintiffs of five thousand dollars for the construction, erection and putting in operation of a creamery at or near Oakley, Kansas, the contract being signed by defendants in the form of subscriptions to stock; performance by plaintiffs; and that they had received on

account the sum of one hundred dollars; and demanded judgment against defendants, jointly and severally, for $4900 and interest. Some of the defendants did not appear, but defendants in error did, and pleaded a modified general denial, and twelve other defences, setting up fraud in respect of the contract; non-performance; want of jurisdiction, in that one of the defendants, B. Mahanna, was a co-citizen of Illinois with plaintiffs; and that Mahanna's subscription to the contract was really a subscription by plaintiffs, made by him as their agent. Defendants claimed that the contract was several and not joint, and that each was bound only for the amount of his own subscription, which in no instance exceeded eight hundred and fifty dollars. The case was tried by a jury, but after the evidence was closed the court declined to submit it, and entered an order, November 28, 1891, that "it appearing to the court that this court has not jurisdiction of the subject-matter of this action, it is ordered that this case be and the same is hereby dismissed at the costs of plaintiffs." To review this judgment the pending writ of error was sued out October 13, 1892.

The Circuit Court made no certificate of the question of its jurisdiction to this court, and the case comes within *Maynard* v. *Hecht*, 151 U. S. 324; *Colvin* v. *Jacksonville*, 157 U. S. 368; *Van Wagenen* v. *Sewall*, 160 U. S. 369; *Chappell* v. *United States*, 160 U. S. 499, 507.

Writ of error dismissed.

WOODRUFF *v.* MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 13. Argued March 9, 10, 1896. — Decided April 13, 1896.

The levee board of Mississippi, being authorized by a statute of the State to borrow money and to issue their bonds therefor, to be negotiable as promissory notes or bills of exchange, issued and sold to the amount of $500,000, principal bonds of $1000 each, payable "in gold coin of the United States of America," with semi-annual interest coupons, payable

Statement of the Case.

"in currency of the United States." In a suit to enforce a trust and lien upon certain lands in the State created in favor of the bondholders by an act of the legislature of the State, the Supreme Court of the State construed the bonds as obligations payable in gold coin, and held that the power to borrow money conferred by the statute upon the levee board did not authorize it to borrow gold coin or issue bonds acknowledging the receipt thereof and agreeing to pay therefor in the same medium, and that the bonds were void for want of power in that respect. *Held*,

(1) That the inquiry as to the medium in which the bonds were payable, and, if in gold coin, the effect thereof, involved the right to enforce a contract according to the meaning of its terms as determined by the Constitution and laws of the United States, interpreted by the tribunal of last resort, and, therefore, raised questions of Federal right which justified the issue of the writ of error, and gave this court jurisdiction under it;

(2) That the bonds were legally solvable in the money of the United States, whatever its description, and not in any particular kind of that money, and that it was impossible to hold that they were void because of want of power to issue them;

(3) That as, by their terms these bonds were payable generally in money of the United States, the conclusion of the Supreme Court of Mississippi, that they were otherwise payable, was erroneous.

FIELD, J., concurring. No transaction of commerce or business, or obligation for the payment of money that is not immoral in its character and which is not, in its manifest purpose, detrimental to the peace, good order and general interest of society, can be declared or held to be invalid because enforced or made payable in gold coin or currency when that is established or recognized by the government; and any acts by state authority, impairing or lessening the validity or negotiability of obligations thus made payable in gold coin, are violative of the laws and Constitution of the United States.

PLAINTIFFS filed their bill in the chancery court of Hinds County, Mississippi, to enforce a trust and lien upon certain lands created in their favor as holders of bonds of the levee board of the State of Mississippi, district No. 1, by an act of the general assembly of Mississippi, approved March 17, 1871, under which the bonds were issued. The bill alleged that the obligation of the bonds and the security provided for their payment by the act of 1871, had been impaired in contravention of the Constitution of the United States by several subsequent acts of the legislature of Mississippi, which were set forth in the bill.

Defendants demurred to the bill upon the ground, among

others, that the bonds were invalid because the levee board had made them payable in gold coin, and that there was, therefore, no contract to be impaired. The demurrers were sustained by the chancery court on that ground solely and the bill was thereupon dismissed, and that decree was affirmed by the Supreme Court of the State on the same ground. 66 Mississippi, 298.

Thereupon a writ of error was taken out from this court.

Section 1 of the act of Mississippi of March 17, 1871, c. 1, Laws Miss. 1871, 37, created a body corporate, to be known as the levee board of the State of Mississippi, district No. 1, to consist of five members, to reside one each in the counties of Tunica, Coahoma, Tallahatchie, Panola and DeSoto, to be elected by the board of supervisors of their respective counties, with power to sue and be sued, to have a corporate seal and perpetual succession, to make such by-laws and regulations and alter and change the same as they might deem proper, and to do all acts and things, not inconsistent with the act and the laws of the State, that might be proper to effect the purposes and objects of the act.

Section 3 gave the board power and required them "to construct, repair and maintain a levee on or near the east bank of the Mississippi River, extending from the base of the hills on or next said bank of said river in the State of Tennessee . . . to the southern boundary of the county of Coahoma, . . . in order effectually to protect and reclaim the lands in the district hereinafter designated from overflow by waters of the Mississippi River," etc.

Section 7 declared that all the bottom lands, designating the boundaries, in the counties of DeSoto, Tunica, Coahoma, Tallahatchie and Pontotoc, and six townships in the county of Sunflower, "shall be, and constitute, as aforesaid, Mississippi levee district No. 1, which it is the purpose of this act to protect and reclaim as aforesaid, by the agency of said board of commissioners, and the lands embraced and included in said levee district, shall be and are hereby declared to be and are made chargeable and liable as hereinafter declared for all the costs, outlays, charges and expenses to be incurred or made

for the levees, works and improvements provided for and contemplated by this act, or in maintaining the same."

By section 8, for the purpose of building and maintaining levees and works and carrying the act into effect, a uniform charge and assessment of two per cent per annum on the value of every acre of the land in the district was levied, which it was provided should continue and be collected in each and every year for twelve successive years from the date of the act, and should be due and payable annually on or before the first day of September in each year for said period, and the value of every acre of unimproved land and of every acre of improved and cultivated land, and every acre of land improved and fenced, but not cultivated, was fixed, except the lands in Sunflower and Tallahatchie Counties.

Section 9 read as follows:

"That for the purposes aforesaid, and to enable them to carry out the purposes of this act, the said board of levee commissioners shall have power to borrow money, and to that end may issue the bonds of said board to the amount of one million of dollars, in such sums and denominations not less than one hundred dollars each, as the said board may prescribe; which bonds shall be signed by the president, and countersigned by the treasurer of said board, and be made payable to order or bearer, in not less than two nor more than ten years after the first day of January, 1871, and shall bear a rate of interest not exceeding eight per cent per annum, for which interest coupons may be attached, payable at such time and place as the board may contract. Said bonds shall be negotiable as promissory notes or bills of exchange, and may be sold and negotiated in any market in or out of the State, on the best terms that can be obtained for the same; but in no case shall any of them be negotiated or sold at a greater discount than ten per cent. Said board shall fix a place or places for the payment of the principal and interest of said bonds and coupons, and said bonds or coupons shall be receivable after maturity, at par, in payment of any charge or assessment, fixed, levied or made by this act. . . . All moneys borrowed by said board, or arising from negotiations or sale

of any of said bonds, shall be promptly paid into the treasury of said board, and shall constitute a levee fund, and be used and applied to carry into effect the objects and purposes of this act. . . ."

By section 10 it was provided that the charges and assessments levied by the act should constitute, as they were from time to time collected, a special fund and trust, to be used by the board, firstly, in payment of any bonds that might have been sold or used under the act, and of any money that might be borrowed under its provisions; and, secondly, in payment of any other debts or liabilities of said board; and that the "charges and assessments by this act fixed, levied and made as aforesaid on said lands shall not be subject to repeal, alteration or suspension during the time for which they are fixed and levied, as aforesaid, until all the bonds, obligations and liabilities of said board shall be first paid and discharged." Provision was also made in case of non-collection for application by the holders of any bond or obligation overdue to the circuit or chancery court of any district included for a mandamus to compel the board to collect and pay over, or for the appointment of commissioners to do so.

Subsequent sections provided for a tax collector of the board and for sale on delinquency, bidding in by the board, etc., etc.

By section 20, it was made the duty of the board "to invest and keep invested in public securities of the United States until required to pay any of the bonds or liabilities of said board, [and] all such part of the funds and moneys of said board as may not at any time be required for present use in paying the matured debts and liabilities of said board, or in carrying into effect the purposes of this act."

It was further provided that, in case the charges and assessments made by the act should be adjudged and held inoperative, the board should have power to proceed through commissioners to have just and legal rates, charges and assessments made on any lands in the levee district, sufficient in amount when collected year by year to pay all such bonds, loans, debts and liabilities, and enable the board to carry the act

into effect; and also that the collection of state and county taxes assessed upon any lands that might be purchased by or be vested in the levee board should be suspended so long as the lands were held as assets of the board.

Section 29 provided that all taxes levied and assessed under the act be and the same were declared to be a tax *in rem* against the lands embraced therein, which lands should be subject to sale without further assessment in each and every year, and that such sale should vest in the purchaser a good and valid title to the lands, against the claims of every person having claims or title thereto subject to redemption as provided.

The bill averred that the bonds and coupons held by complainants "were negotiated by said district No. 1, and in course of trade came into the hands of these complainants by delivery," and a list of the bonds and coupons held by each of complainants was filed with and made part of the bill. These bonds were in the following form, all being the same with the exception of the dates, numbers and amounts:

"No. 309. $1000.

Mississippi levee district No. 1.

United States of America, *State of Mississippi.*

Eight Per Cent Bond.

"One of a series of five hundred bonds of one thousand dollars each, numbered from one to five hundred consecutively, issued by the levee board of the State of Mississippi, district No. 1, in pursuance of and by the authority granted in an act of the legislature of the State of Mississippi, approved March 17, 1871, entitled 'An act to redeem and protect from overflow from the river Mississippi certain bottom lands herein described.'

"Know all men by these presents that the levee board of the State of Mississippi, district No. 1, under and by authority of the law mentioned in the caption hereof, hereby acknowledge themselves, for value received, indebted to the bearer in the sum of one thousand dollars in gold coin of the United States of America, which said sum the said levee board of the

Counsel for Plaintiffs in Error.

State of Mississippi, district No. 1, for themselves and their successors, do hereby bind themselves and engage well and truly to pay to the bearer on the first day of January, A.D. 1878, at the banking house of the National Park Bank, in the city of New York; and the said levee board of the State of Mississippi, district No. 1, for themselves and their successors, do hereby engage to pay an interest thereon of eight per centum per annum, payable semi-annually on the first days of January and July in each and every year ensuing the date hereof until the maturity and payment of this bond, at the place of payment mentioned in the coupons hereto annexed, upon the delivery of said coupons as they severally become due.

"In testimony whereof the president of the levee board of the State of Mississippi, district No. 1, has signed [SEAL.] and the treasurer of said board has countersigned these presents, and the president has caused the seal of the said board to be affixed hereto the first of January, in the year of our Lord one thousand eight hundred and seventy-two.

"(Signed) M. S. ALCORN, *President.*

"(Signed) A. R. HOWE, *Treasurer.*"

Upon each bond was printed as an indorsement sections 7, 8, 9, 10, 20 and 29 of the act of 1871.

Attached to the bonds were coupons, of which the following was the form, all being alike except in amounts, numbers and dates of maturity:

"The levee board of the State of Mississippi, district No. 1, will pay to the bearer on the first day of January, 1879, at the National Park Bank of New York, twenty ($20) dollars in currency of the United States, being the semi-annual interest on bond No. 52.

"(Signed) A. R. HOWE, *Treas.*"

Mr. Lawrence Maxwell, Jr. and *Mr. Calderon Carlisle* for plaintiffs in error. *Mr. Marcellas Green* and *Mr. S. S. Calhoun* filed briefs for the same.

Mr. Frank Johnston, Attorney General of the State of Mississippi and *Mr. J. Hubley Ashton* for defendants in error.

Mr. William G. Yerger and *Mr. W. P. Harris* filed briefs for the Louisville, New Orleans and Texas Railway Company, defendant in error.

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

The Supreme Court of Mississippi construed these bonds as obligations payable in gold coin, and held that the power to borrow money conferred on the levee board of Mississippi, district No. 1, did not authorize that corporation to borrow gold coin or issue bonds acknowledging the receipt thereof and agreeing to pay therefor in the same medium, and that the bonds were void for want of power in that particular. If by this adjudication a right possessed by plaintiffs in error, as holders of bonds, under the Constitution and laws of the United States was necessarily denied, then this court has jurisdiction to revise the judgment on writ of error. A definite and distinct issue was raised by the ground of demurrer, on which the decision of the court proceeded, and if that issue was an issue as to the possession of a right under the Constitution and laws of the United States, then the denial of that right gives jurisdiction. And it appears to us that such an issue was presented. Plaintiffs in error claimed that the bonds were payable in money of the United States. Defendants claimed they were payable in a particular kind of such money, and, because so payable, were invalid. The issue in either aspect involved the determination of rights of plaintiffs in error under the Constitution and laws of the United States, and was disposed of adversely to them.

In *Trebilcock* v. *Wilson*, 12 Wall. 687, where a note held by plaintiff in error was payable by its terms in specie, and he claimed that he was entitled to have it paid in gold or silver dollars of the United States, which the state court decided he was not, the writ of error was maintained on the ground of the denial of a right under the Constitution.

Opinion of the Court.

In *Maryland* v. *Railroad Company*, 22 Wall. 105, in which the State had made certain advances for the railroad company in gold and sought judgment accordingly and the state court held that it was only entitled to recovery in currency, no objection was raised to the jurisdiction of this court to review the judgment.

In the case at bar the inquiry as to the medium in which the bonds were payable, and, if in gold coin, the effect thereof, involved the right to enforce a contract according to the meaning of its terms as determined by the Constitution and laws of the United States, interpreted by the tribunal of last resort, and, therefore, raised questions of Federal right which justified the issue of the writ.

The levee board was created a body corporate and expressly authorized to borrow money and to issue negotiable instruments therefor. It was thus endowed in order to enable it to effectuate the objects and purposes of its creation. It issued bonds whereby it acknowledged that it was indebted in so many dollars in gold coin and promised to pay the specified sums at a designated date with interest.

The general rule is that those powers which are within the intent and purposes of the creation of a corporation, and essential to give effect to the powers expressly granted, may be exercised as necessarily incident thereto, and that a discretion exists in the choice of the means to accomplish the required result, unless restricted by the terms of the grant. The power to borrow money was expressly granted, unaccompanied by any definition of the word "money," which might operate as a restriction on the power, and, according to the general rule, if there were more than one kind of money, a discretion as to the particular kind would be necessarily incident to the execution of the power granted and might be exercised by the corporation. At the time these bonds were issued the money of the United States consisted, under the decisions of this court, of gold and silver coin and United States notes. Gold coin was in every respect unlimited in its legal tender capacity, but all were equally valid as money of the United States.

Although the Supreme Court of Mississippi conceded that gold coin was "money," it insisted that when the bonds were issued such coin was "of much greater value than the circulating medium, consisting of United States Treasury notes and national bank notes," as the court judicially knew; that "all debts payable in 'dollars' generally were, as now, solvable in legal tenders, but an obligation payable in gold coin can be discharged only according to its terms;" that in authorizing the issue of these bonds, "and in the use of the term 'money' the legislature must be supposed to have meant in the act cited that money which constituted the basis of the general business of the country and was a legal tender for the payment of debts;" and that, consequently, the bonds were void for want of power. Notwithstanding the disclaimer, this conclusion denied the exercise of any discretion by the corporation to borrow one kind of money of the United States on the ground that that particular kind had ceased in fact to be money and had become a commodity.

Doubtless the word "money" is often used as applicable to other media of exchange than coin. Bank notes lawfully issued and actually current at par in lieu of coin are treated as money, because flowing as such through the channels of trade and commerce without question. *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333; *Miller* v. *Race*, 1 Burrow, 452. And it would seem that it was in this sense that the Supreme Court regarded the use of the word, for though it assumed that the property of being legal tender was an essential attribute of money, yet it included national bank notes, which, though receivable at par in payment of government dues except duties, and payable by the government at par except for interest on the public debt and in redemption of the national currency, and also payable and receivable as between national banks themselves, Rev. Stat. §§ 5182, 5196, had not been declared legal tender "in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt," as United States Treasury notes had been, Rev. Stat. § 3588.

These bonds were contracts for the payment of dollars and

not for the delivery of bullion; nor were they made expressly payable in coin.

If the legislature had in terms authorized the corporation to borrow currency only, and to issue bonds payable in currency only, that would have presented a different question, but the language used embodied no such express limitation, and there could be no implication that the power was other than the power to borrow money of the United States. But it is said that, as it was held in *Judson* v. *City of Bessemer*, 87 Alabama, 241, that "express and general power to issue negotiable bonds, in the absence of legislative restriction, carries the implied or incidental power to make them payable generally, that is, in currency, which is constitutionally a legal tender, or payable in the particular coin which constitutes the legal and commercial standard by which the value of other kinds of currency is measured," and that although the act authorizing the city of Bessemer to issue bonds was silent on the subject, the city had power to make them payable in gold; and by the Court of Appeals of Kentucky, in *Farson* v. *Board of Commissioners*, 30 S. W. Rep. 17, that municipal bonds were not void, because the principal and interest was made payable in gold coin of the United States, when the act authorizing their issue and sale did not specify the medium in which they were to be made payable; so the Supreme Court of Mississippi was at liberty to hold the contrary in placing a construction on the law of that State. Conceding this to be so, the question of jurisdiction remains unaffected, for in the former cases the right of the holders of municipal obligations to demand under the Constitution and laws of the United States payment thereof in money of the United States was recognized, while in this case that right was in effect denied.

The Supreme Court of Mississippi was of opinion that the bonds evidenced an indebtedness created in gold coin, and that they were solvable in the same medium, and held that the legislature intended to limit the power to borrow and to promise to pay, to another kind of money of the United States. But this was to impose a limitation on the power, not expressed, but by implication, and that implication involved a Federal

question. For the power to borrow money, simply, meant the power to borrow whatever was money according to the Constitution of the United States and the laws passed in pursuance thereof, and the power to issue negotiable bonds therefor included the power to make them payable in such money. This the law presumed, and to proceed on an implication to the contrary was to deny to the holders of these bonds, subsequent to their purchase, a right arising under the Constitution and laws of the United States.

But it was only by deciding that these bonds were payable in a particular kind of money of the United States, and that this kind, though money in law, had ceased, as the court assumed, to be money in fact, that the state court was enabled to hold them void for want of power, and if that premise were incorrect, the conclusion, whether in itself right or wrong, would not follow.

Now these bonds were not expressly payable in gold coin. It is true that as they acknowledged an indebtedness in gold coin, and as the coupons were payable specifically "in currency," the argument is not unreasonable that the corporation intended the purchasers to expect payment in the money in which the indebtedness was stated to have been contracted; but the agreement to pay the designated sums did not specify any particular kind of money, and the obligation was to pay what the law recognized as money when the payment was to be made. The bonds were, therefore, legally solvable in the money of the United States, whatever its description, and not in any particular kind of that money, and it is impossible to hold that they were void because of want of power.

In *Bull* v. *Bank of Kasson*, 123 U. S. 105, 112, the question was raised whether certain bank checks for the payment of "five hundred dollars in current funds," were negotiable, and Mr. Justice Field, delivering the opinion of the court, said: "Undoubtedly it is the law that, to be negotiable, a bill, promissory note or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in

notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. *Irvine* v. *Lowry*, 14 Pet. 293; *Miller* v. *Austen*, 13 How. 218, 228. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current, and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words."

In *Maryland* v. *Railroad Company*, 22 Wall. 105, it was held that, although since the legal tender acts an undertaking to pay in gold might be implied under special circumstances and be as obligatory as if made in express words, yet that the implication must be found in the language of the contract, and could not be gathered from the mere expectations of the parties.

In this case the language of the contract as to payment created no such obligation, and no doubt as to its meaning was raised by the extraneous fact that gold was not everywhere in circulation when the bonds were issued.

Without pursuing the subject further it is enough that by their terms these bonds were payable generally in money of the United States, and that, this being so, the conclusion of the Supreme Court of Mississippi, that they were otherwise payable, was erroneous. The bonds, therefore, were not void on the ground stated, even assuming that ground to be tenable; and we think the decision as to the medium of payment reëxaminable here because amounting to a denial of the right of plaintiffs in error to be paid in money of the United States, by implying a limitation contrary to the controlling presumption arising under the Federal laws and decisions. Under those laws and decisions there was more than one description

of money of the United States, and hence the presumption was that where no one kind of money was specified the bonds were payable in any kind; but this, and the claim based thereon, was denied.

As the case was determined by the state Supreme Court on the single ground to which we have referred, we shall not discuss the effect and validity of the subsequent legislation brought under review by the bill, or any of the other questions suggested by counsel.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE FIELD concurring.

I have also some observations to make upon this litigation. The case comes before us on error to the Supreme Court of the State of Mississippi. The complainants below, the plaintiffs in error here, commenced a suit in the Chancery Court of Hinds County, in that State, to enforce a trust and a lien upon certain lands therein, as holders of bonds of the levee board of the State, district No. 1, by an act of the legislature of March 17, 1871, under which the bonds were issued. The bill of complaint alleged that Amos Woodruff, trustee, the German Bank of Memphis, Tennessee, and B. Richmond were owners and holders of a large number of bonds issued by the levee board of the State of Mississippi, district No. 1, and that the bonds were issued and negotiated by the board under the act entitled "An act to redeem and protect from overflow from the river Mississippi certain lands described, approved March 17, 1871." The language of the statute authorizing the issue of the bonds is as follows:

"SEC. 9. *Be it further enacted*, That for the purposes aforesaid, and to enable them to carry out the purposes of this act, the said board of levee commissioners shall have power to borrow money, and to that end may issue the bonds of said board to the amount of one million of dollars, in such sums and denominations, not less than one hundred dollars each, as the said board may prescribe; which bonds shall be signed by the

president and countersigned by the treasurer of said board, and be made payable to order or bearer, in not less than two nor more than ten years after the first day of January, 1871, and shall bear a rate of interest not exceeding eight per cent per annum, for which interest coupons may be attached, payable at such time and place as the board may contract. Said bonds shall be negotiated as promissory notes or bills of exchange, and may be sold and negotiated in any market in or out of the State, on the best terms that can be obtained for the same; but in no case shall any of them be negotiated or sold at a greater discount than ten per cent."

By the act, as stated in the bill, a special tax was levied upon all the lands in said district protected by the levees to be built by the board, and provision was made for its collection.

By section 10 of the act, as also stated in the bill, it was provided "that the charges and assessments, fixed, levied and made as aforesaid, by the act, should be, as they were from time to time collected, and they were thereby constituted a special fund and trust, to be used by said board; first, in the payment of any bonds that might be sold or used as before provided under the act, and of money that might be borrowed under its provisions; secondly, for the payment of any other debts or liabilities of said board, and when collected the same should be paid into the treasury of said board for the purposes aforesaid."

Under this statute the board of levee commissioners, as stated in the bill, was organized, and issued a large number of bonds, aggregating in amount six hundred thousand dollars, and payable to bearer. The bonds recited the act under which they were issued, and expressly stipulated that the interest coupons attached were payable in the currency of the United States, but the principal of the bonds was payable in gold coin.

The bill was exhibited by complainants as owners and holders of a large number of bonds thus issued and negotiated. It alleged that the act of the legislature referred to imposed a specific tax *in rem* on each acre of land (with few exceptions) lying in the levee district No. 1, in order to pay the

bonds and coupons; that a large amount of the lands were sold under the act for the delinquent taxes in the year 1872 and the succeeding years, until 1876, and in default of buyers, were struck off to the treasurer of the levee board and duly conveyed to him as such. That from 1876 to 1883 there were no sales to the treasurer, but all lands sold as delinquent were struck off for the state, county and district No. 1 levee taxes to the State of Mississippi, and conveyed to it by one deed. That the State of Mississippi, in 1876, abolished the levee board of district No. 1 as constituted, and made the state auditor and treasurer *ex officio* levee commissioners its successors, and vested the titles of all lands held by the levee board in them to be administered by them. The bill alleged further that all such lands were held by the State *in trust* for the bondholders under the act of March 17, 1871.

The bill asked that the trustees, who administered the trust and who had not yet accounted, should be required to discover the *status* of the trust estate, and how it was administered by them, and that upon such discovery relief be granted by enforcing the trust; that the sales and conveyances made by the trustees in violation of the trust be declared void, and that such purchasers be held to an account of the trust estate so far as it had come into their hands, and that the lands be subjected to the tax chargeable against them under the act of 1871, and the tax be held as a special fund to pay the bonds held by the complainants and others.

The defendants demurred to the bill upon the ground, among other reasons assigned, that the act of the levee board in making the bonds payable "in gold coin" was *ultra vires*, and the bonds therefor invalid.

The demurrer was sustained, and the complainants appealed.

I cannot concur in the decision of that court. In my judgment no transaction of commerce or business, or obligation for the payment of money that is not immoral in its character and which is not, in its manifest purpose, detrimental to the peace, good order and general interest of society, can be declared or held to be invalid because enforced or made payable in gold coin or currency when that is established or recognized

by the government. And any acts by state authority impairing or lessening the validity or negotiability of obligations thus made payable in gold coin are violative of the laws and Constitution of the United States.

Upon this subject I will presume to cite some of the expressions of Justices of this court, as to the effect of such obligations, used when questions respecting the currency of the country were under consideration in what are known as the legal tender cases.

In speaking of the views of the framers of the Constitution, on the subject of money, it was said that "at that time gold and silver moulded into forms convenient for use, and stamped with their value by public authority, constituted, with the exception of pieces of copper for small values, the money of the entire civilized world. It was added that these metals divided up and thus stamped always have constituted money with all people having any civilization, from the earliest periods in the history of the world down to the present time. It was with 'four hundred shekels of silver, current money with the merchant,' that Abraham bought the field of Machpelah, nearly four thousand years ago. This adoption of the precious metals as the subject of coinage, the material of money by all peoples in all ages of the world, as further stated, had not been the result of any vagaries of fancy, but was attributable to the fact that they of all metals alone possessed the properties which are essential to a circulating medium of uniform value."

"The circulating medium of a commercial community," said Mr. Webster, "must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that medium without loss. It must also be able not only to pass in payments and receipts among individuals of the same society and nation, but to adjust and discharge the balance of exchanges between different nations. It must be something which has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money, and whatever else is to perform the functions of money must be their representative and capa-

ble of being turned into them at will. So long as bank paper retains this quality it is a substitute for money. Divested of this nothing can give it that character." 3 Webster's Works, 41.

In accordance with the doctrine thus expressed, I am of opinion, as stated, that no commercial or money transaction, not immoral in its character or detrimental to the general interests of society, can be held or declared to be invalid because it is enforced or made payable in gold coin or currency established or recognized by the government; and, therefore, that the judgment of the Supreme Court of Mississippi, declaring that the bonds of the levee board made payable in gold coin were, for that reason, invalid, cannot be sustained, and that its judgment to that effect should be reversed.

MR. JUSTICE PECKHAM, with whom concurred MR. JUSTICE BREWER and MR. JUSTICE WHITE, dissenting.

I find myself unable to concur in the opinion of the court herein as to our power to review the judgment of the state court, and I must, therefore, dissent from the conclusion arrived at in this case.

The legislature of Mississippi gave certain authority to the levee commissioners to borrow money and to issue bonds therefor. They issued bonds by virtue and solely by virtue of that act. They so worded the bonds as to render it a matter of controversy whether the principal was, on the face of the bonds, payable only in gold coin or in any lawful money of the United States. The state court held that the legislature did not, in the statute passed by it, authorize the levee commissioners to issue bonds payable in gold coin, and that these bonds were so payable and were, therefore, void as unauthorized by the legislative enactment. This seems to me a matter of local law only, and I cannot see that its decision involves any Federal question. This court has held that parties may contract for the payment of an obligation in gold or in any other money or commodity, and it must then be paid in the medium contracted for. *Bronson* v. *Rodes*, 7 Wall. 229;

Trebilcock v. *Wilson*, 12 Wall. 687. This right applies to a State or municipality as well as to an individual.

If the legislature had in terms provided that the bonds should only be issued payable in legal tenders, there could, as it seems to me, be no pretence that such a provision would be illegal or involve a violation of any Federal right.

The corporation was the creature of the State and had only such functions as the State chose to confer on it. Although it be true that the State is absolutely without power to control the right of individuals to contract for such lawful money of the United States as may seem to them best, certainly no such want of authority obtained with reference to the right of a State in granting a charter to a corporation to affix such restrictions as it deemed best. As the individual could exercise his right to contract for any lawful money of the United States free from state control, so the State had the like freedom of action in making her own contracts. It follows that in delegating to one of its creatures the power to contract, the State could limit that power to such kind of lawful money as was considered wise. The exercise by the State of this unquestioned authority in creating her own corporation deprived no one of an existing right and interfered with no Federal authority. The mere decision of the state court that the corporation had misused or exceeded its powers under its charter was a purely state question. Had the state court given force to any subsequent law, which it was claimed impaired the obligations of the contract, a different view would control. But as it did not, as it solely held that the corporation had exceeded its authority under the state law, I am at a loss to see the slightest Federal question.

The Mississippi court construed the bonds as obligations payable in gold coin, and it also held that the levee commissioners were not authorized to issue bonds so payable. Whether the meaning of the contract was arrived at from the plain language of the bonds, or was an inference or implication to be drawn from all the language used therein, the decision was, in either case, nothing but a decision of a question of contract in regard to which the state court

had the right to finally decide, and we are bound by that decision.

It is said that if by this adjudication a right possessed by plaintiffs in error as holders of bonds, under the Constitution and laws of the United States, was necessarily denied, then this court has jurisdiction to review the judgment on writ of error. This may be admitted, but I deny that the case at bar presents any such feature. The argument that plaintiffs in error make is that they claimed the bonds were payable in money of the United States, while defendants claimed they were payable in a particular kind of money, and, because so payable, were invalid. The grounds of demurrer to the bill of plaintiffs in error were that the bonds were void as calling for payment in gold coin and that the levee board had no power to issue them in that form. The question was as to the power of the board to issue bonds payable in gold coin, which depended upon the statute of the State, and the question whether the bonds were so payable was one of construction of the language used in the bonds. Simply to claim that money due under a contract is payable in money of the United States, does not make a claim under the Constitution or laws of Congress. What kind of money the contract is payable in depends upon its language, and that raises no Federal question.

The case of *Trebilcock* v. *Wilson*, (*supra*,) does not aid the plaintiffs in error. In that case the defendant claimed a right under the Constitution to demand and receive payment of his note in specie according to the contract, and this was denied him, and a decree entered cancelling the mortgage given as collateral security for the note. This court reviewed the decision on the ground that a right claimed by the defendant under the Constitution was decided against him by the state court.

In *Maryland* v. *Railroad Co.*, 22 Wall. 105, the question of jurisdiction was not raised or noticed. The opinion puts the rights of the parties entirely upon the language of the contract, and there was no claim that the meaning of the contract was governed by any law of Congress or by any provision of the Constitution.

All the arguments as to the powers of corporations to borrow money or to give bonds, or as to the meaning of the state statute and the extent of the power it granted by the authority to borrow money, are arguments as to the construction of the state statute and the authority of this corporation, and are not in any particular, as it seems to me, of a Federal nature.

Again, it is said that the power to borrow money, simply, means the power to borrow whatever is money according to the Constitution of the United States and the laws passed in pursuance thereof; and the power to issue negotiable bonds therefor includes the power to make them payable in such money. This, it is urged, the law presumed, and to proceed on an implication to the contrary founded upon language contained in the bonds themselves, which it is said was indefinite, was to deny to the holders of these bonds, subsequent to their purchase, a right arising under the Constitution and laws of the United States. Whatever presumption the law may make, based upon the grant of a power to borrow money, as to the right to make the obligation given therefor payable in lawful money generally, the presumption is of no force in the face of a contract to pay only in some particular medium, and whether that contract is to be found expressed in so many words and in plain and perfectly unambiguous language, or is to be inferred or implied from all the language which is used in the contract, is unimportant and immaterial. That it may be implied has been held in *Maryland* v. *Railroad Co.*, 22 Wall. 105. Whether the implication does arise from the language used is not a Federal question, and the decision of the state court is final.

We may think the power given by the State of Mississippi to its corporation by the language it used was of a general nature, authorizing the corporation to make payment in any money, yet the state court decides that the language employed gave no authority to issue bonds payable in gold coin. There is no claim under an act of Congress or of the Constitution in such case and no claim under either was in any way denied.

We come back to the proposition, therefore, that when par-

ties make a contract on that subject it is for the court to say what the contract means, and it seems to me that is not a Federal question, although the court is only able to arrive at a conclusion as to what the contract means by an examination of its whole language, and by drawing inferences or implications therefrom as to what its true meaning is. The nature of the question does not change according as the contract upon which the right rests is plainly or ambiguously stated. Nor does the right to construe the state statute depend upon the condition that the state court shall construe it, as we think, correctly. It is the same kind of a question at all times, and that is, what do the statute and contract mean? What they mean is a question for the state court alone.

While under the laws of Congress there are several kinds of money, gold and silver coin and legal tender notes, yet the decision of the state court does not deny this or refuse to give effect to those laws. The decision is in entire harmony with them, and proceeds upon the assumption of their validity.

When it is said that the power to borrow money was expressly granted, unaccompanied by any definition of the word "money" which might operate as a restriction on the power, such statement is of course based upon the language used in the statute. It is not necessary that the definition of the word "money" need be given in so many words. Whether upon the whole language of the statute (if there were more than one kind of money) there was a discretion given to the commissioners to say as to which particular kind of money the bonds should be payable in, is a question as to what power the commissioners were granted by that statute, and that question is to be determined by the state court, which decides as to the meaning of the state law, and there is no question of any right dependent upon the Federal Constitution or upon any of the laws of Congress. The state court has denied no right derived from either. It has simply construed a statute of its own State. In holding that the implication to be derived from the act of the State was that the power was to borrow money of the United States, is it not plain that this court assumes to construe the meaning of the state statute and

Counsel for Plaintiff in Error.

in a manner differing from that given it by the state court? How would it be a different question if the legislature had in terms authorized the corporation to borrow currency only? In either case the question would simply be a construction of the state statute, in the one case from plain language used therein, and in the other from a reading of the whole act and a decision derived therefrom as to the actual meaning of the state law. In both cases the decision is entirely the same in its nature, and in both it is a decision of a local question into which there does not enter any feature of a Federal question. The decision of this court that the bonds were on their face solvable in money of the United States whatever its description, and were, therefore, valid, seems to me so plainly a decision as to the meaning of a contract in opposition to that taken by the state court, where the decision of the latter tribunal is conclusive upon us, that I cannot give assent to it.

I think the writ should be dismissed.

STEVENSON *v.* UNITED STATES.

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

No. 681. Argued March 9, 1896. — Decided April 13, 1896.

On the trial of a person indicted for murder, although the evidence may appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self defence, yet, so long as there is evidence relevant to the issue of manslaughter, its credibility and force are for the jury, and cannot be matter of law for the decision of the court.

A review of the evidence at the trial of the defendant (plaintiff in error) in the court below shows that there was error in the refusal of the court of the request of the defendant's counsel to submit the question of manslaughter to the jury.

THE case is stated in the opinion.

Mr. Fred Beall for plaintiff in error. *Mr. Joseph P. Mullen* filed a brief for same.

Mr. Assistant Attorney General Dickinson for defendants in error.

Mr. Justice Peckham delivered the opinion of the court.

The plaintiff in error was indicted in the United States Circuit Court for the Eastern District of Texas, at the term commencing on the 20th of November, 1893. The indictment charged the defendant with the crime of murder in killing one Joe Gaines on the 22d of August, 1893, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the Fifth Circuit, and annexed to and constituting a part of the Eastern District of Texas for judicial purposes. The defendant was tried at the Circuit Court held for the Eastern District of Texas in April, 1895, and was convicted by the jury of murder, as charged in the indictment, and sentenced to be hanged. He then sued out a writ of error from this court. It will be necessary to notice but one exception taken by counsel for the plaintiff in error upon the trial. After the evidence was in, he requested the court to submit to the jury a charge upon manslaughter, "but the court refused to submit that issue to the jury, to which action of the court in failing and refusing to submit to the jury such charge, the defendant at the time excepted."

The question is whether the court erred in refusing this request. The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder. It is difficult to think of a case of killing by shooting, where both men were armed and both in readiness to shoot, and where both did shoot, that the question would not arise for the jury to answer, whether

the killing was murder or manslaughter, or a pure act of self defence. The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self defence, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.

By section 1035 of the Revised Statutes of the United States it is enacted that " in all criminal causes the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged: *Provided*, That each attempt be itself a separate offence." Under this statute the defendant charged in the indictment with the crime of murder may be found guilty of the lower grade of crime, viz., manslaughter. There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect. *Sparf* v. *United States*, 156 U. S. 51.

The ruling of the learned judge was to the effect that, in this case, the killing was either murder, or else it was done in the course of self defence, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact, viz., whether under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased, not in self defence, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self defence, and yet this question of fact

is, under the evidence in the case, determined by the trial court as one of law and against the defendant.

A review of some of the evidence stated in the bill of exceptions is necessary in order to discover whether there was justification for this holding by the learned judge. It may be premised that we do not give very much of the evidence tending to show malice in the defendant and that which tended to show an intentional and deliberate murder of the deceased by him. We give only so much of the evidence as is necessary to permit an intelligent view of the transaction and of that portion of the evidence in addition which might be regarded as tending to show that the defendant was only guilty of manslaughter and not of murder. If there were some appreciable evidence upon that subject, its proper weight and credibility were for the jury.

There was evidence tending to show the following facts: The deceased was a deputy United States marshal. One B. D. Davidson was a lawyer by profession and a commissioner of the United States for one of the territorial courts. On the 22d of August, 1893, Davidson was at Paul's Valley in the Indian Territory. He knew the defendant, and he was also acquainted with Joe Gaines, the deceased. Davidson saw the defendant in the evening of that day at his (Davidson's) hotel. A man named George Mitchell had been bound over by Davidson, and had failed to give a proper bond, and Mitchell came to him and asked if he would take John Stevenson, the plaintiff in error, on the bond. Davidson told him he would if Stevenson could justify. Mitchell left, and soon thereafter brought Stevenson around, who told Davidson he had some personal property — he didn't know what it was exactly — but it did not amount to $500 above exemptions and liabilities. Davidson told him he would have to schedule other property, and plaintiff in error thought he ought to take a farm he had, and did not like Davidson's refusal, and went off. That same night, after supper and about 9 o'clock, while Davidson was talking with other persons, plaintiff in error came to the door and commenced cursing and abusing Davidson, saying, as Davidson testified, "everything he could put

his tongue to." Stevenson left, still cursing, and went south, and he could be heard as he went away cursing and swearing. Gaines, the deceased, soon thereafter came in the room in the hotel where Davidson was and asked what all "this racket or fuss was about." Davidson told him, and Gaines said, "I will go and arrest him and stop him;" he said he "would arrest him and hold him until morning," and went out for that purpose. Davidson heard some loud talking on the street soon after, and went out of his house and saw Gaines and Stevenson and a lady, whom he was told was Stevenson's wife, standing on the platform in front of the hotel talking, and Davidson passed by them and went on; he returned to the hotel soon after this, and in about a half hour he heard two shots fired, and Gaines, the deceased, got up and walked across to the north side of the room where he and Davidson were sitting, and picked up his pistol from a sewing machine, where he always kept it, and said he would go and "get him and fasten him, and keep him in charge and not release him any more." He then walked out of the house, and in about two minutes two shots were heard. Davidson then started to go, and some one prevented him; he soon afterwards saw Gaines, the deceased, when brought to the hotel dead; he had two wounds, one in his arm, the other in the breast; his coat sleeve had the appearance of being powder burned. This is the substance of Davidson's evidence.

Another witness says that soon after Gaines left Davidson's room for the purpose of arresting Stevenson, he (Gaines) and the plaintiff in error were seen together; it was about 9 o'clock, after dark; they were standing on the sidewalk back of Underwood's drug store; when the witness first heard Stevenson speak the latter said, "Don't draw that pistol; if you do I will cut you." Stevenson and the deceased were standing on the sidewalk then; the witness walked into the middle of the street and said to Stevenson, "John, put up your knife and go home and behave yourself." They then walked over to where the witness was, Stevenson holding with his left hand to Gaines' right arm; Stevenson was holding a knife in his right hand; after they came over to

where witness was, "Stevenson turned the officer loose, and as soon as he turned loose of Mr. Gaines and started off Gaines drew his pistol on him, and told Stevenson to drop his knife or he would kill him; he walked a step or two towards Gaines." Witness said: "John, for God's sake throw your knife down or he will kill you. Stevenson dropped his knife and Gaines told me (the witness) to take hold of him; I picked up the knife, and then took hold of him; Gaines and defendant kept quarrelling; Gaines said, 'John, I am determined to take you;' and Stevenson said, 'All right, I will go with you.'" They went along quietly, and witness went back to the drug store; he was there some ten or fifteen minutes, and saw Stevenson and his wife go back down the street from the direction of the hotel, and heard defendant say, "Smith, give me your gun." Smith told him he did not have any. Stevenson said, "I will go home and get my Winchester and come back and I will make the son of a bitch hide out." In about thirty minutes after this the witness heard two shots in quick succession at the billiard hall; he opened the barber shop door and saw Gaines lying in the street flat on his back; he gasped once after witness got to him and died. This witness says that at the time "Gaines threw his pistol down on Stevenson," at the interview had just before they separated and shortly before the killing, "Stevenson had turned and was walking off from Gaines, and while Stevenson had hold of the officer I heard him say to the officer, 'Don't draw that gun, or I will cut you.'"

Immediately after the first altercation had taken place between the parties, and they had separated, the plaintiff in error went into a saloon and called for cider, and wanted everybody to come up and drink; he made a general invitation. At that time he seemed, as the witness described it, "to be excited and mad." He had his gun in several positions, and just before the killing had it in his right hand. This was within a very few minutes after the first altercation took place. While the plaintiff in error was still in the saloon, and after he had given a general invitation to come up and

drink the cider, and while standing near the counter, the deceased, in the language of one witness, "approached the cider joint; he was coming very rapidly; as he ran up to the light he had his six shooter in both hands in shooting position; he ran right up to the door without saying a word, pushed the six shooter in, and fired; he fired instantly; he did not halt a moment; he did not say a word. Immediately after this I heard a report from the inside of the house; the two shots were far enough apart that I could distinguish between them; Gaines fired the first shot; I think the wound in Gaines' arm was made when he had the pistol in both hands; don't see how it could have been done otherwise."

Another witness testified, "The ball from Gaines' pistol imbedded in the counter, missing Stevenson five or six inches."

The testimony of another witness was as follows: "I was in Paul's Valley the night of the shooting; I saw the deceased at the Underwood drug store about half an hour before the killing; deceased said, 'I thought I would stay a few minutes and maybe Stevenson will come back;' he says, 'I ought to have killed the son of a bitch when he was here awhile ago, and if he comes back I am going to kill him.' I was at Bandy's saloon; saw the deceased as he approached; saw one shot fired; deceased came not in a run but in a kind of trot, with his pistol in both hands; as he approached the door in a trot he threw his pistol in and fired; he said nothing; I did not see where the defendant was standing at the time of the shooting; he had ordered cider just a moment before; I heard two shots close together; the first came from the pistol; after that another shot from the inside."

This is a portion of, but not all, the evidence given upon the trial tending to show the circumstances under which the killing was done. Was there enough, in any view that could be taken of such evidence, to require the submission of the question of manslaughter to a jury? We think there was, and the request of counsel for plaintiff in error to submit that issue to the jury should have been granted. We do not mean to intimate an opinion as to what the jury ought to find upon

such evidence, taken in connection with all the other evidence in the case, but it seems to us entirely clear that there was enough to ask the jury to decide whether the killing was, upon all the evidence in the case, murder or manslaughter. The jury should have been permitted to determine the credibility of the evidence, as above detailed, and, if true, whether the effect of the conduct of the deceased in shooting, as he did, into the saloon, and considering all the circumstances of the case, was such as naturally tended to and did excite in the mind of the plaintiff in error a sudden passion, either of rage or fear, and under the influence of which he fired the shot and killed the deceased wilfully and unlawfully, but at the same time without malice. If he thus fired the pistol, would not a jury have the right to say that the consequent killing was manslaughter instead of murder? Is it not clearly a question of fact for a jury to determine just what the mental condition of plaintiff in error was in regard to malice?

Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied. (Wharton's American Criminal Law, 8th ed. § 304.) Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, viz., the circumstances leading up to and surrounding the killing. The definition of the crime given by § 5341 of the Revised Statutes of the United States is substantially the same. The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter. As we have already said, there may be a case of killing by shooting where the

facts necessarily show malice, but, taking all the evidence in this case, we think it was one for the jury to determine upon the issue of manslaughter.

In *Brown* v. *United States*, 159 U. S. 100, Mr. Justice Harlan, when speaking of an affray in which the plaintiff in error was charged with having murdered a man, stated that "the verdict of guilty of manslaughter or murder should not have turned alone upon an inquiry as to the way in which the killing was done. The inquiry rather should have been, whether at the moment the defendant shot there were present such circumstances, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder." Who is to make the inquiry, the court or the jury under proper instructions from the court? There might be cases where the uncontradicted evidence was so clear and overwhelming of a deliberate purpose, involving malice, that a court might be justified in stating to the jury if they found the evidence to be true, they ought to infer malice; but this is not such a case.

In this case, the plaintiff in error was fresh from an altercation with the deceased, the one having a knife and the other a pistol, and each had threatened to use his weapon upon the other. The plaintiff in error, by reason of the previous circumstances, was laboring under great excitement at the saloon, and, as one of the witnesses says, "seemed to be mad." The deceased came up to the saloon door and at once shot his pistol into the room, and the bullet came within a few inches of the head of the plaintiff in error, who immediately fired his rifle in the direction of the deceased. The ruling of the trial judge in effect was to say that as matter of law there was nothing in all this evidence, if true, which would permit the jury to find that the plaintiff in error when he fired his rifle was so much under the influence of sudden passion, caused by these circumstances and by this assault upon him, as not to have been actuated by that malice which the law defines as a necessary ingredient in the crime of murder. Is it perfectly plain and clear, *as a conclusion of law*, that shooting at another under circumstances such as were detailed by

some of the witnesses in this case can have no tendency to raise within the mind of the person thus assaulted such a sudden passion of anger or terror as to deprive his subsequent act of that malice which is necessary to make it murder? If it is not to be so asserted as matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury. Whether the witnesses told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury.

It is objected that while the evidence above set forth was proper to be submitted to the jury upon the issue of self defence, it was not of that character to even raise an issue as to the grade of the crime, if the theory of self defence were not sustained. We do not see the force of the objection. The fact that the evidence might raise an issue as to whether any crime at all was committed is not in the least inconsistent with a claim that it also raised an issue as to whether or not the plaintiff in error was guilty of manslaughter instead of murder. It might be argued to the jury, under both aspects, as an act of self defence and also as one resulting from a sudden passion and without malice. The jury might reject the theory of self defence, as they might say the shot from the pistol of the deceased had already been fired and the plaintiff in error had not been harmed, and, therefore, firing back was unnecessary and was not an act of self defence. But why should the other issue be taken from the jury and they not be permitted to pass upon it as upon a question of fact?

It seems to us quite plain, that an assault upon another by means of firing a pistol at him, is naturally calculated to excite some kind of passion in the one upon whom such an assault is made. It might be one of anger or it might be terror. If either existed to a sufficient extent to render the mind of a person of ordinary temper incapable of cool reflection, it might be plausibly claimed that the act which followed such an assault was not accompanied by the malice necessary to constitute the killing murder. Whether such a state of mind existed in this case, and whether the plaintiff in error fired the

shot under the influence of passion and without malice, cannot be properly regarded as a question of law.

A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.

It is also objected that as all the testimony is not set forth in the bill of exceptions, it must be assumed there was some which was given on the trial that would show there was no issue of manslaughter in the case. The evidence which has been returned does, in our opinion, show the existence of such an issue, and if there were other and further evidence of a different nature, which is not in the bill of exceptions, the question as to which should be credited was for the jury, and should not have been taken from it by the court. The plaintiff in error may have been guilty of murder, there was certainly sufficient evidence on that issue to render it necessary to submit it to the jury. We have no power and no inclination to pass upon that question of fact. We only decide that the question as to the grade of the crime, whether murder or manslaughter, should have been submitted to the jury as well as the question of self defence.

For the error in refusing to do so, the judgment of conviction must be

Reversed, and the cause remanded to the court below with instructions to grant a new trial.

UNITED STATES *v.* JULIAN.

APPEAL FROM THE COURT OF CLAIMS.

No. 925. Submitted March 16, 1896. — Decided April 13, 1896.

The jurat attached to a deposition taken before a commissioner of a Circuit Court of the United States is not a certificate to the deposition in the ordinary sense of the term, but a certificate of the fact that the witness appeared before the commissioner, and was sworn to the truth of what he had stated; and the commissioner is entitled to a separate fee therefor.

THIS was a petition for fees, as commissioner of the Circuit Court for the Middle District of Tennessee.

The claim included a large number of items, but the only point in controversy before this court is, whether petitioner was entitled to fifteen cents for each jurat or certificate, appended to depositions taken by him as such commissioner. The total number of jurats so appended was 238, and the total charge therefor was $35.70.

The Court of Claims allowed this item, and the government appealed.

Mr. Assistant Attorney General Dodge for appellants.

Mr. George A. King for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

This case involves the construction of that paragraph of Rev. Stat., § 847, which allows to commissioners "for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services;" and the paragraphs of § 828, which allow to clerks "for taking and certifying depositions to file, twenty cents for each folio of one hundred words;" and "for making any record, *certificate*, return or report, for each folio, fifteen cents."

In the case of *United States* v. *Ewing*, 140 U. S. 142, 146, ¶ 4, and in *United States* v. *Barber*, 140 U. S. 164, 165, ¶ 1, we held a commissioner to be entitled to twenty cents per

folio for drawing complaints in criminal cases, as for "taking and certifying depositions to file," where the local practice required a magistrate to reduce the examination of the complaining witnesses to writing. In the latter case (p. 166) we also held that the petitioner should be allowed a fee of ten cents for each oath administered in connection with these complaints, and fifteen cents for each jurat, as for a certificate; and also, (p. 168, ¶ 7,) that the charge per folio for depositions taken on examinations of prisoners was allowable, upon the same principle upon which we allowed it for preparing complaints. It follows from this that the commissioner is also entitled to fifteen cents per folio for the jurat to each deposition.

The certificate referred to in the words "taking and *certifying* depositions to file," is that required by sections 863, 864, 865, 866 and 873, to be appended to depositions taken *de bene esse* in civil cases depending in the District or Circuit Court, which includes the circumstances with reference to the witness authorizing his deposition to be taken; the official character of the person taking it; the proof of reasonable notice to the opposite party; the fact that the witness was cautioned and sworn to testify to the whole truth, and other similar requirements. It was probably more particularly with reference to this class of depositions that the fee "for taking and certifying depositions" was inserted. The certificate referred to is always appended to depositions or a series of depositions taken *de bene esse*, is often of considerable length, and is required by repeated rulings of this and the Circuit Courts. *Bell* v. *Morrison*, 1 Pet. 351; *Cook* v. *Burnley*, 11 Wall. 659; *Harris* v. *Wall*, 7 How. 693; *Whitford* v. *Clark County*, 119 U. S. 522; *Tooker* v. *Thompson*, 3 McLean, 92; *Voce* v. *Lawrence*, 4 McLean, 203.

The jurat is not a certificate to a deposition in the ordinary sense of the term, but a certificate of the fact that the witness appeared before the commissioner, and was sworn to the truth of what he had stated. We think the design of the statute was to allow a separate fee therefor.

The judgment of the Court of Claims is, therefore,

Affirmed.

HOLLANDER *v.* FECHHEIMER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 146. Argued March 13, 16, 1896. — Decided April 13, 1896.

The jurisdiction of this court is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained by either party, through the probative effect of the decree, however direct its bearing upon such contingency.

A decree in favor of plaintiff, but remanding the case to the trial court for further proceedings to ascertain the amount of the indebtedness, is not a final decree from which appeal can be taken.

This was a bill in equity filed by the firm of Fechheimer, Goodkind & Co., against Justus Hollander, a judgment debtor, Samuel Bieber, his assignee, and a number of preferred creditors under such assignment, alleging that the assignment was fraudulent and void, and praying that Hollander might be required to disclose the amount of his indebtedness to each of his preferred creditors; the amount of goods purchased by him immediately prior to his failure, and the names of the persons from whom purchased; the amount of his indebtedness to each of his creditors before making such purchases; the amount and character of goods he had in stock prior to his last purchases, and sundry other particulars; the amount of property turned over to Bieber under the assignment; and also praying for the appointment of a receiver; the setting aside of the assignment; the payment of the plaintiffs' claim, and an injunction against the defendant Bieber from further proceeding under the assignment.

The bill set forth, as the basis of plaintiffs' right to sue, an indebtedness in the sum of $1000, by judgment recovered in the Supreme Court of the District of Columbia, upon which execution had been issued and returned *nulla bona* — a note for $1000, and goods purchased to the amount of $1846.50.

Demurrers were filed to this bill by Bieber and certain of the preferred creditors, which were sustained, and the bill

dismissed. Upon appeal to the general term the decree of the special term dismissing the bill was reversed, and the case remanded for further proceedings. Answers were subsequently filed by the several defendants, and testimony taken; and upon a hearing upon pleadings and proofs the bill was again dismissed, and an appeal taken to the general term, which again reversed the decree of the special term, declared the assignment to be fraudulent and void, and decreed that the complainants recover from the defendant Bieber the amount of their judgment set out in the bill of complaint, together with their costs, to be taxed by the clerk, and that the case be remanded to the special term for further proceedings. From this decree defendant appealed to this court.

Mr. Leon Tobriner for appellants. *Mr. A. S. Worthington* was on his brief.

Mr. James Francis Smith and *Mr. Henry E. Davis* for appellees.

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

It is clear that this appeal must be dismissed for the want of jurisdiction. The decree from which the appeal was taken declares the assignment from Hollander to the defendant Bieber to be fraudulent and void as against the complainants, and "that said complainants do have and recover from the said defendant Bieber the amount of their judgment set out in the bill of complaint, together with their costs in this cause, to be taxed by the clerk; and it is further ordered that this cause be remanded to the special term for further proceedings." The amount of the judgment referred to in the decree was $1000, with interest at 7 per cent from February 15, 1886, and costs, and the total amount due thereon at the time the decree was rendered was but $1454.11.

It is true that the bill alleged a further indebtedness upon a note for $1000 and an open account of $1846.50; and it is claimed that at the time the decree was rendered there was

due upon these two items the sum of $3778.16, which, added to the amount due upon the judgment, made the total amount due at the time of the decree $5232.27.

The whole basis of the decree, however, was the judgment for $1000, which was the amount for which the General Term directed a recovery. It is true that it also decreed the assignment to be void and remanded the case for further proceedings, that upon such further proceedings the court might direct an account to be taken and the property to be divided generally among the creditors, and that upon such accounting the plaintiffs might be admitted to prove the full amount of their claim. This amount, however, is not one directly involved in the decree, and the law is well settled that the jurisdiction is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained by either one of the parties through the probative effect of the decree, however direct its bearing upon such contingency. *New England Mortgage Co.* v. *Gay*, 145 U. S. 123. In that case, which was an action in assumpsit upon promissory notes, there had been a finding by a jury that the transaction was usurious. The amount involved in the particular suit was less than $5000, but the effect of the judgment under the laws of Georgia was to invalidate a mortgage given as security upon property worth over $20,000. It was held that, notwithstanding such indirect effect, this court had no jurisdiction, the amount directly in dispute being only the usurious sum. All the prior authorities upon the point are cited in this case.

But again: if the decree appealed from be a final decree at all, it is final only for the amount of the judgment. If it be regarded as a decree for the whole amount of the plaintiffs' claim against Hollander, then it is clearly not a final decree, since the case was remanded for further proceedings, and until those proceedings were had, the amount of such indebtedness could not be fixed in such manner as to give this court jurisdiction of an appeal, and was purely conjectural upon the court finding that amount to be due. *Union Mutual Life Insurance Co.* v. *Kirchoff*, 160 U. S. 374. This conclusion is not the less

irresistible from the fact that the note and open account were reduced to judgment after the bill was filed, since this judgment was not made the basis of the bill, and the finding in the decree is restricted to the amount of the first judgment of $1000.

The appeal must, therefore, be

Dismissed.

GREAT WESTERN TELEGRAPH COMPANY *v.* PURDY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 105. Argued December 6, 9, 1895. — Decided April 13, 1896.

Upon a bill in equity by subscribers for shares in a corporation to compel it to issue shares to them, and to set aside as fraudulent a contract by which it had agreed to transfer all its shares to another person, a decree was entered, setting aside that contract, and ordering shares to be issued to the plaintiffs, and a new board of directors to be chosen. Upon a bill by other stockholders, afterwards filed by leave of court in the same cause, and entitled a supplemental bill, alleging fraud and mismanagement of the new officers and insolvency of the company, and praying for the appointment of a receiver, the court, without notice to the plaintiffs in the original bill, appointed a receiver, and made an order for a call or assessment upon all stockholders of the company. *Held*, that this order, although conclusive evidence of the necessity of the assessment as against all stockholders, did not prevent a plaintiff in the original bill, when sued by the receiver, in the name of the corporation, for an assessment, from pleading the statute of limitations to his liability upon his subscription.

In an action brought in a state court, by a corporation against a subscriber for shares, to recover an assessment thereon under an order of assessment made by a court of another State upon all the stockholders, in a proceeding of which he had no notice, a judgment of the highest court of the State for the defendant, upon the ground that, by its construction of a general statute of limitations of the State, the cause of action accrued against him at the date of his contract of subscription, and not at the date of the order of assessment, involves no Federal question, and is not reviewable by this court on writ of error.

This was an action brought August 30, 1888, in the district court of Des Moines county in the State of Iowa, by the

Statement of the Case.

Great Western Telegraph Company, a corporation of Illinois, by its receiver, Elias R. Bowen, against Hiram Purdy, a citizen of Iowa, to recover the sum of $437.50, with interest from July 10, 1886, alleged to be due from him to the company under his subscription to its stock, and under a decree of the circuit court of Cook County in the State of Illinois of that date, which ordered an assessment upon the stockholders of the company, and which was alleged to have been made in a suit to which he was a party, and to be binding upon him. Trial by jury was waived, and the case tried by the court. The material facts appeared by the record to have been as follows:

The company was incorporated under the laws of the State of Illinois in 1867. On February 16, 1869, Purdy subscribed for fifty shares of the par value of $25 each, by signing and delivering to the company's agent at Burlington, in the State of Iowa, the following writing:

"Capital, $3,000,000; shares, $25; assessments not to exceed $10 on a share.

"Subscription List for the Capital Stock of the Great Western Telegraph Company.

"We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of the Great Western Telegraph Company placed opposite our respective names, and pay for the same in instalments, to wit, five per cent on amount paid in, and the balance as the directors from time to time may order; in consid ration thereof the Great Western Telegraph Company agree that when forty per cent of the par value of the shares shall have been paid under such orders, and the instalment receipts therefor surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full paid stock by the said company.

"T. C. Snow is appointed agent to solicit stock and receive only the first instalment of five per cent (fifty cents on a share) at the time of subscription.

"J. Snow, Secretary."

Statement of the Case.

Upon this subscription Purdy paid $275, before November, 1869.

On November 19, 1869, Jeremiah Terwilliger and others, including Purdy, subscribers to stock in the company, and who had paid money on their subscriptions, filed a bill in equity in the circuit court of Cook county, Illinois, against the company, its president and secretary, and Selah Reeve, to compel the issue of certificates of stock to the plaintiffs and other subscribers, and to set aside as fraudulent a contract between the company and Reeve, by which Reeve agreed to build its telegraph lines, and the company agreed to transfer to him its entire capital stock. On November 16, 1872, a decree was entered in that suit, setting aside the contract between Reeve and the company; ordering an accounting between them; ordering the company to issue to the subscribers certificates for as many shares as they were entitled to by the money paid; directing the president and secretary to call a meeting of the company to choose a new board of directors; reserving leave to the plaintiffs at any time to apply for such further order or decree as should be necessary to carry out this decree or be necessary in the cause; and ordering the individual defendants to pay the costs of the suit.

On January 7, 1873, those costs were paid; and on January 29, 1873, a meeting of the company was held and a new board of directors chosen, and a certificate for twenty-seven and a half shares was issued to Purdy.

The following proceedings were afterwards had in that cause: On September 19, 1874, other stockholders, by leave of the court, intervened, and filed a "supplemental bill" against the company and its officers, alleging mismanagement and fraud on the part of the new officers, and the insolvency of the company, and praying for the appointment of a receiver. On October 7, 1874, upon the motion of the plaintiffs in the supplemental bill, and after notice to and with the consent of all the parties to that bill, the court appointed Oliver H. Horton receiver of the property of the company. Bowen was afterwards appointed receiver in place of Horton; and upon his petition, and upon the report of a

master appointed to inquire into the amount of the debts and assets of the company, and the percentage of the par value of the shares necessary to be paid by the stockholders to satisfy those debts, the court, on July 10, 1886, adjudged that the company was insolvent, and had no means for paying its debts, except the sums remaining unpaid upon subscriptions for stock, and that there were more than two thousand stockholders widely scattered through twelve States and Territories, and it was impracticable to make all of them parties to the suit; and entered an order and decree "that a call or assessment be, and the same is hereby, made upon the stock and stockholders of the said company, (excepting those who have paid in full,) their legal heirs, representatives and assigns, of thirty-five per centum of the par value of the shares of said stock subscribed for or held by them, being eight dollars and seventy-five cents on each and every share thereof; and that the stockholders of said company and each and every one of them (excepting those who have paid twenty-five dollars on each and every share subscribed for or held by them) and their heirs, legal representatives and assigns be, and they hereby are, severally ordered and required to pay to the receiver of said company, the said Elias R. Bowen, the several amounts by this decree called for and assessed and required to be paid, namely, eight dollars and seventy-five cents on each and every share subscribed for or held by them respectively, and that the same be paid upon the demand of said receiver or his agent;" and "that said receiver shall at once proceed to collect the said sums so ordered to be paid by this decree, and shall make all necessary demands for such payments, shall employ such assistance and counsel, take such action, and institute such suits and proceedings, in the name of the said company, and in such jurisdictions as he shall be advised or deem expedient and proper, and for the purpose of enforcing the payment of the sums hereby ordered paid."

On August 29, 1888, the receiver accordingly demanded of Purdy the payment of the sum of $8.75 upon each share of his stock, amounting to $437.50; and on the next day brought this action.

Argument for Plaintiff in Error.

The inferior court of Iowa, in which this action was brought, gave judgment for the defendant. The plaintiff appealed to the Supreme Court of Iowa, which affirmed the judgment, upon the ground that the action was barred by the statute of limitations. 83 Iowa, 430.

The plaintiff sued out this writ of error; and assigned for error that the Supreme Court of Iowa did not give full faith and credit to the decree of assessment of the court of Illinois, as required by art. 4, sect. 1, of the Constitution, and section 709 of the Revised Statutes of the United States.

Mr. Thomas J. Sutherland, (with whom was *Mr. William P. Black* on the brief,) for plaintiff in error.

I. The question of full faith and credit was fairly set out, and involved in the pleadings and decision of the Supreme Court, as well as in the district court of Iowa. *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Powell* v. *Brunswick County*, 150 U. S. 433; *Sayward* v. *Denny*, 158 U. S. 180; *Maxwell* v. *Newbold*, 18 How. 516; *Murdock* v. *Memphis*, 20 Wall. 590; *Bolling* v. *Lersner*, 91 U. S. 595; *Crowell* v. *Randell*, 10 Pet. 368; *Texas & Pacific Railway* v. *Southern Pacific Co.*, 137 U. S. 48; *Kaukauna Co.* v. *Green Bay & Canal Co.*, 142 U. S. 254.

II. The Federal question was erroneously decided, and the decision of the Supreme Court of Iowa rests upon no ground broad enough to sustain its judgment independent of its decision of the Federal question.

There is but really *one* point in the whole opinion. The Iowa court gave judgment against the plaintiff, and applied the statute of limitations of Iowa, of ten years, as a bar to the plaintiff's action, because the board of directors — the defendant's own agents — had not made a valid call or commenced an action against the defendant, for ten years before this action was begun. This is the sole ground of the decision, and the court could only have arrived at such a decision by holding that the decree of assessment of the Illinois court coupled with the demand of the receiver for payment, made

in pursuance of the decree, could not, and did not, create a cause of action. It was clearly only colorable, and no proper ground on which to defeat the plaintiff and ignore the Federal question, or decide it adversely to the claim of the plaintiff.

The decree of the Illinois court which had jurisdiction of the subject-matter and of the parties, was, and is, conclusive upon the merits of the controversies, determined by that judgment between the parties and their privies, in every court in the United States, and can not be collaterally questioned. *Christmas* v. *Russell*, 5 Wall. 290; *Maxwell* v. *Stewart*, 22 Wall. 77; *Anderson* v. *Anderson*, 8 Ohio, 108; *Mason* v. *Messenger*, 17 Iowa, 261; *Smith* v. *Smith*, 22 Iowa, 516; *Burlington & Missouri Railway* v. *Hall*, 37 Iowa, 620.

Mr. S. L. Glasgow for defendant in error.

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

By art. 4, sect. 1, of the Constitution of the United States, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." In the exercise of the power so conferred, Congress, besides providing the manner in which the records and judicial proceedings of the courts of any State shall be authenticated, has enacted that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, that they have by law or usage in the courts of the State from which they were taken." Act of May 26, 1790, c. 11; 1 Stat. 122; Rev. Stat. § 905.

The plaintiff relied on the order of assessment, made by a court of the State of Illinois, as a judgment of that court, entitled to the effect of being conclusive evidence of the plaintiff's right to maintain this action against the defendant. The Supreme Court of the State of Iowa denied it that effect.

The question whether that court thereby declined to give full faith and credit to a judicial proceeding of a court of another State, as required by the Constitution and laws of the United States, was necessarily involved in the decision.

This court therefore has jurisdiction of the case, but must judge for itself of the true nature and effect of the order relied on. *Armstrong* v. *Treasurer of Athens County*, 16 Pet. 281, 285; *Texas & Pacific Railway* v. *Southern Pacific Co.*, 137 U. S. 48; *Grover & Baker Co.* v. *Radcliffe*, 137 U. S. 287; *Carpenter* v. *Strange*, 141 U. S. 87; *Huntington* v. *Attrill*, 146 U. S. 657, 666, 683–686, and cases cited.

By the original contract between the parties, made in the State of Iowa on February 16, 1869, Purdy, the present defendant, agreed to take fifty shares, of the par value of $25, in the plaintiff company, and to pay five per cent (which he did) and "the balance as the directors from time to time may order;" and the company agreed to issue the shares to him as soon as forty per cent had been paid.

On November 19, 1869, Purdy and other subscribers for shares filed in a court of the State of Illinois a bill in equity to compel the company to issue shares to them, and to set aside as fraudulent a contract by which the company had agreed to transfer all its capital stock to one Reeve; and upon that bill, on November 16, 1872, obtained a decree, setting aside that contract, and ordering shares to be issued to the subscribers as prayed for, and a new board of directors to be chosen. By that decree, all the objects of the suit were accomplished, so far as Purdy was concerned; and he does not appear to have had any notice of, or part in, any further proceedings. That bill did not ask for the appointment of a receiver, or for any order of assessment upon stockholders.

The subsequent proceeding, begun September 19, 1874, alleging mismanagement and fraud of the new officers and the insolvency of the company, was by other stockholders, and although entitled a "supplemental bill," and permitted by the court to be filed in the former cause, was a distinct proceeding, in which Purdy had and took no interest. The orders of the court upon this proceeding, appointing on October

7, 1874, a receiver, and on July 10, 1886, making a "call or assessment" upon the stockholders of the company, were entered without any notice to him, or consent on his part. He was not personally a party to this proceeding, nor named therein. The receiver was appointed almost two years, and the assessment ordered more than thirteen years, after Purdy had ceased to have any connection with the litigation.

There can be no doubt that, as heretofore declared by this court, "after a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process, or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject-matter of the original litigation, by merely giving the new proceedings the title of the original cause. If his bill begins a new litigation, the parties against whom he seeks relief are entitled to notice thereof, and without it they will not be bound." *Smith* v. *Woolfolk*, 115 U. S. 143, 148.

The question therefore is of the effect, as against Purdy, of the order for an assessment, made by the Illinois court in a proceeding to which the corporation was a party, but to which he personally was not.

The order of that court was in effect, as it was in terms, simply a "call or assessment" upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed the charge of the assets and affairs of the corporation, took the place and exercised the office of the directors. *Scovill* v. *Thayer*, 105 U. S. 143, 155; *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Lamb* v. *Lamb*, 6 Bissell, 420, 424; *Glenn* v. *Saxton*, 68 California, 353; *Great Western Tel. Co.* v. *Gray*, 122 Illinois, 630, 636, 640; *Great Western Tel. Co.* v. *Loewenthal*, 154 Illinois, 261.

The order of assessment, whether made by the directors as provided in the contract of subscription, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial

proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him. *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Liggett*, 135 U. S. 533; *Glenn* v. *Marbury*, 145 U. S. 499.

But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defence which he might have to an action upon that contract.

In this action, therefore, brought by the receiver, in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defence, going to show that he was not liable upon his contract of subscription.

In each of the three cases last cited above, the defence of the statute of limitations was entertained and passed upon. *Hawkins* v. *Glenn*, 131 U. S. 332; *Glenn* v. *Liggett*, 135 U. S. 547; *Glenn* v. *Marbury*, 145 U. S. 506.

The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder was liable for anything, the Iowa court, by sustaining the defence of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled.

The statute of limitations of the State of Iowa provides that "the following actions may be brought within the times herein limited respectively after their causes accrue, and not afterwards, except when otherwise specially declared."

"4. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud

in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.

"5. Those founded on written contracts, on judgments of any courts, except those courts provided for in the next subdivision, and those brought for the recovery of real property, within ten years.

"6. Those founded on a judgment of a court of record whether of this or of any other of the United States, or of the Federal courts of the United States, within twenty years." Iowa Code of 1873, § 2529.

This action was not brought on a judgment, for there had been no judgment. But it was brought on the defendant's written contract of subscription, and was therefore, by the terms of the Iowa statute, barred in ten years after the cause of action accrued. The action was brought more than ten years after the contract, but within ten years after the order of assessment.

In many jurisdictions, the cause of action, within the meaning of a statute of limitations, would be held to have accrued at the time of the order for an assessment, and not before. It has been so held by the Supreme Court of the State of Illinois, where this company was incorporated and the order of assessment made, as well as by this court in cases coming up from Circuit Courts of the United States and unaffected by decisions of the highest court of the State in which those courts were held. *Great Western Tel. Co.* v. *Gray; Hawkins* v. *Glenn; Glenn* v. *Liggett;* and *Glenn* v. *Marbury*, above cited.

But the Supreme Court of Iowa in the present case held that, as it rested with the directors of the corporation to make that order, the delay in making it could not suspend the operation of the statute of limitations; and that the case was within the rule, established by a series of decisions of that court, that when a plaintiff could at any time, by making a demand, or giving a notice, acquire a right to recover against the defendant, the statute of limitations began to run when he might have done so. *Great Western Tel. Co.* v. *Purdy*, 83 Iowa, 430, 433, and cases cited.

Syllabus.

The limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. *McElmoyle* v. *Cohen*, 13 Pet. 312; *Bauserman* v. *Blunt*, 147 U. S. 647; *Metcalf* v. *Watertown*, 153 U. S. 671; *Balkam* v. *Woodstock Iron Co.*, 154 U. S. 177.

Neither the statutes nor the decisions of the State of Iowa upon this subject have made any discrimination against the citizens, the contracts or the judgments of other States, or against any right asserted under the Constitution or laws of the United States. The case is thus distinguished from *Christmas* v. *Russell*, 5 Wall. 290, cited at the bar.

The question at what time the cause of action accrued in this case, within the meaning of the statute of limitations of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the State cannot be reviewed by this court.

Judgment affirmed.

GREAT WESTERN TELEGRAPH COMPANY *v.* BURNHAM.

ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

No. 159. Argued and submitted March 19, 20, 1896. — Decided April 13, 1896.

When the highest court of a State, upon a first appeal, decides a Federal question against the appellant, and remands the case for further proceedings according to law, and upon further hearing the inferior court of the State renders final judgment against him, he cannot have that judgment reviewed by this court by writ of error, without first appealing from it to the highest court of the State; although that court declines upon a second appeal to reconsider any question of law decided upon the first appeal.

Statement of the Case.

THIS was an action similar to that of *Great Western Telegraph Company* v. *Purdy*, *ante*, 329, and was brought October 8, 1888, in the circuit court of Milwaukee county in the State of Wisconsin, by the same plaintiff against George Burnham, and prosecuted against his executors, to recover the amount of an assessment alleged to be due under a contract of subscription in the same form as in that case, and under the decree of the circuit court of Cook County in the State of Illinois, therein stated.

The complaint did not state the law of Illinois, nor set forth the decree of assessment in full; but alleged, among other things, that by that decree an assessment of thirty-five per cent a share was laid upon all stockholders who had not paid in full; and that some stockholders, including the defendant, had paid ten dollars or forty per cent on each share, and many stockholders had never paid more than fifty cents or two per cent on a share.

A demurrer to the complaint, upon the ground, among others, that it did not state facts sufficient to constitute a cause of action, was filed by the defendant, and overruled by the court.

Upon appeal by the defendant from the order overruling the demurrer, the Supreme Court of the State, as the record shows, adjudged that the order be reversed, and the cause "remanded to the said circuit court for such further proceedings therein as may be according to law;" and, in its opinion, after deciding that the assessment was unequal and unjust, added: "We do not intend to express any definite opinion as to the real effect of the decree of the Illinois court, or as to how far it concludes the rights of shareholders who were not parties to that proceeding. Those questions are not now necessarily before us, and may be postponed until they arise. We confine our decision to the objection that the complaint shows an unlawful and illegal call or assessment upon Mr. Burnham which should not be enforced." 79 Wisconsin, 47, 52, 53.

The cause was accordingly remanded to the inferior court. The plaintiff refused to amend the complaint, and insisted

that it stated a sufficient cause of action; and relied upon the decree of assessment as a judgment of a court of the State of Illinois, entitled, under the Constitution and laws of the United States, to full faith and credit in the State of Wisconsin. The inferior court sustained the demurrer, upon the ground "that the complaint does not state facts sufficient to constitute a cause of action, because it does not appear upon the face of the said complaint that a valid or legal assessment was made upon the stockholders, and that the said assessment appears by the said complaint to be unequal and unjust;" and entered final judgment for the defendant, with costs. The plaintiff thereupon sued out this writ of error.

Mr. Thomas J. Sutherland for plaintiff in error. *Mr. William P. Black* and *Mr. Charles E. Shepard* were on his brief.

Mr. Reese H. Voorhees, *Mr. Charles Quarles* and *Mr. George Lines*, for defendants in error, submitted on their brief.

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

This court has no jurisdiction, upon writ of error, to review a judgment of a state court, unless it was a final judgment, by the highest court of the State in which a decision in the suit could be had, and against a right set up under the Constitution or laws of the United States. Rev. Stat, § 709.

The order of the inferior court of Wisconsin, overruling the defendant's demurrer, with leave to answer over, was clearly not a final judgment, under the Judiciary Act of the United States, although it was reviewable on appeal in the Supreme Court of Wisconsin, under the statutes and practice of the State.

The judgment which was rendered by the Supreme Court of Wisconsin upon such an appeal cannot be reviewed by this court; because, although it was a judgment of the highest court of the State, and against the plaintiff in error, it was

not a final judgment, disposing of the whole case, but only reversed the order of the inferior court overruling the demurrer, and remanded the case to that court for further proceedings.

The subsequent judgment of the inferior court, sustaining the demurrer and dismissing the action, cannot be reviewed by this court; because, although that was a final judgment against the plaintiff in error, setting up a right under the Constitution and laws of the United States, it was not a final judgment in the highest court of the State in which a decision in the suit could be had.

The case is singularly like *McComb* v. *Knox County Commissioners*, 91 U. S. 1, in which an order of a court of common pleas, overruling a demurrer to an answer, was reversed by the Supreme Court of Ohio, and the case remanded for further proceedings according to law; the court of common pleas, in accordance with that decision, sustained the demurrer to the answer, and the defendant not moving to amend, but electing to stand by his answer, gave judgment against him; and a writ of error to review that judgment was dismissed by this court, Chief Justice Waite saying: "The Court of Common Pleas is not the highest court of the State; but the judgment we are called upon to reëxamine is the judgment of that court alone. The judgment of the Supreme Court is one of reversal only. As such, it was not a final judgment. *Parcels* v. *Johnson*, 20 Wall. 653; *Moore* v. *Robbins*, 18 Wall. 588; *St. Clair* v. *Lovingston*, 18 Wall. 628. The Common Pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution, but to proceed with the case according to law. The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the Common Pleas to permit the parties to make a new case by amendment." "The final judgment is, therefore, the judgment of the Court of Common Pleas, and not of the Supreme Court. It may have been the necessary result of the decision by the Supreme Court of the questions presented for its determination; but it is none

the less, on that account, the act of the Common Pleas. As such, it was, when rendered, open to review by the Supreme Court, and for that reason is not the final judgment of the highest court in the State in which a decision in the suit could be had. Rev. Stat. § 709. The writ is dismissed." See also *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Rice* v. *Sanger*, 144 U. S. 197; *Rutland Railroad* v. *Central Vermont Railroad*, 159 U. S. 630, 638; *Sanford Co., petitioner*, 160 U. S. 247.

In the case at bar, it was argued in support of the jurisdiction of this court that, if an appeal had been taken from the final judgment of the inferior court to the Supreme Court of Wisconsin, that court, according to its uniform course of decisions, would have affirmed the judgment, upon the ground that its decision upon the first appeal was conclusive; that this court, according to the decision in *Northern Pacific Railroad* v. *Ellis*, 144 U. S. 458, would not take jurisdiction of a writ of error to review a judgment based upon that ground only; and consequently that a writ of error from this court to the inferior court was the only way in which the decision of that court, refusing full faith and credit to the judicial proceeding in Illinois, could be reviewed by this court.

If all this were so, there would be strong ground for sustaining the present writ of error. *Wheeling & Belmont Bridge* v. *Wheeling Bridge*, 138 U. S. 287, 290; *Luxton* v. *North River Bridge*, 147 U. S. 337, 342. But the argument is based upon a misconception of the decisions supposed to support it.

It is true that the Supreme Court of Wisconsin, upon a second appeal from an inferior court, has always declined to reconsider any question of law decided upon the first appeal. *Downer* v. *Cross*, 2 Wisconsin, 371, 381; *Noonan* v. *Orton*, 27 Wisconsin, 300; *Du Pont* v. *Davis*, 35 Wisconsin, 631; *Lathrop* v. *Knapp*, 37 Wisconsin, 307; *Oshkosh Fire Department* v. *Tuttle*, 50 Wisconsin, 552. It does not, however, as appears by the two cases last cited, when that question is the only one presented by the second appeal, dismiss that appeal for want of jurisdiction; but it entertains jurisdiction, and affirms the judgment. In so doing, that court has done no more than this court has always done, or than is necessary to

enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal. *Washington Bridge* v. *Stewart*, 3 How. 413, 425; *Roberts* v. *Cooper*, 20 How. 467, 481; *Clark* v. *Keith*, 106 U. S. 464; *Chaffin* v. *Taylor*, 116 U. S. 567; *Sanford Co., petitioner*, 160 U. S. 247, 259.

The case of *Northern Pacific Railroad* v. *Ellis* was very peculiar in its circumstances, and was as follows: Ellis brought an action against the Northern Pacific Railroad Company, in an inferior court of the State of Wisconsin, to quiet title to land; and in his complaint set forth not only his own title, but also the title of the railroad company under a conveyance by way of donation from a county. The railroad company demurred to the complaint, the demurrer was overruled, and the company appealed to the Supreme Court of Wisconsin, which held the conveyance to be void for want of power in the county under the constitution of the state, and therefore, without any Federal question being presented or considered, affirmed the order overruling the demurrer, and remanded the case to the inferior court for further proceedings. 77 Wisconsin, 114. The railroad company then filed an answer, reasserting its title under the deed from the county; and afterwards applied for leave to file a supplemental answer, setting up a decree which, since the decision of the Supreme Court of the State, had been rendered by the Circuit Court of the United States in a suit commenced, after the former order of the inferior court, by the railroad company against Ellis and others, by which judgment the title of the railroad company in other lands held under the same conveyance was adjudged to be valid. The inferior court of the State denied leave to file the supplemental answer, and, upon a hearing, rendered final judgment against the railroad company. The company again appealed to the Supreme Court of the State, which affirmed the judgment, upon the ground that its own decision upon the demurrer as to the validity of the title of the railroad company was *res adjudicata*, and could not, accord-

ing to the settled law of the State, be reviewed by the inferior court, or even by the Supreme Court of the State, save upon motion for rehearing. 80 Wisconsin, 459, 465. The only right under the laws of the United States, suggested or considered at any stage of the proceedings in the courts of the State, was the claim that the decree of the Circuit Court of the United States, rendered after the decision of the Supreme Court of the State upon the first appeal, estopped Ellis to deny the validity of the conveyance from the county to the railroad company. The only decision made by the Supreme Court of the State upon that claim was that the invalidity of that conveyance had been finally adjudged, for the purposes of the suit, by its former decision, and therefore the decree of the Circuit Court of the United States should not be permitted to be pleaded by supplemental answer, in the nature of a plea *puis darrein continuance.* This court, in dismissing the writ of error to the Supreme Court of the State, dealt with no other question; 144 U. S. 458; and never considered the right of the railroad company, merely by virtue of its charter from the United States, to take land by such a conveyance, until that subject was brought into judgment upon the subsequent appeal from the decree of the Circuit Court of the United States. *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 25, 27.

There is nothing in the decisions above cited, or in any other decision of this court, which countenances the position that in Wisconsin, or in any other State, when the highest court of the State, upon a first appeal, decides a Federal question against the appellant, and remands the case to the inferior court, not merely to carry the judgment into execution, but for further proceedings according to law, and upon further hearing the inferior court renders final judgment against him, he can have that judgment reviewed by this court by writ of error, without first appealing from it to the highest court of the State, or at least, where such is the practice, presenting a petition to that court for leave to appeal. *Fisher* v. *Perkins*, 122 U. S. 522.

In the case at bar, as in *McComb* v. *Knox County Commis-*

sioners, above cited, the final judgment of the inferior court of the State may have been the necessary result of the previous decision by the Supreme Court of the questions presented for its determination; but it was none the less, on that account, a judgment of the inferior court. As such, it was, when rendered, open to review by the Supreme Court upon a new appeal; and, for that reason, was not the final judgment of the highest court of the State in which a decision in the suit could be had.

Writ of error dismissed for want of jurisdiction.

NORTHERN PACIFIC RAILROAD COMPANY *v.* PETERSON.

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

No. 153. Argued and submitted March 18, 1896. — Decided April 13, 1896.

H. was foreman of an extra gang of laborers for plaintiff in error on its road, and as such had charge of and superintended the gang in putting in ties and assisting in keeping in repair three sections of the road. He had power to hire and discharge the hands, (13 in number,) in the gang, and had exclusive charge of their direction and management in all matters connected with their employment. The defendant in error was one of that gang, hired by H., and subject, as a laborer, while on duty with the gang, to his authority. While on such duty the defendant in error suffered serious injury through the alleged negligence of H., acting as foreman in the course of his employment, and sued the railroad company to recover damages for those injuries. *Held*, that H. was not such a superintendent of a separate department, nor in control of such a distinct branch of the work of the company, as would be necessary to render it liable to a co-employé for his neglect; but that he was a fellow-workman, in fact as well as in law, whose negligence entailed no such liability on the company as was sought to be enforced in this action.

The duties of a railroad company, as master, towards its employés, as servants, defined; and it is held that if the master, instead of personally performing these obligations, engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow-servant, but of the master.

The previous cases in this court on this subject examined, and found to deter-

Statement of the Case.

mine the following points, as to the liability of a railroad company for injuries to an employé alleged to have been caused by the negligence of another employé, while the injured person was in the performance of his ordinary duties:

(1) That the mere superiority of the negligent employé in position and in the power to give orders to subordinates is not a ground for such liability;

(2) That in order to form an exception to the general law of non liability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not of a mere separate piece of work in one of the branches of service in a department;

(3) That when the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments, and given control therein, may be considered, with reference to employés under them, vice-principals and representatives of the master as fully as if the entire business of the master were placed by him under one superintendent.

There is no proof of a separate contract of hiring, by which the railroad company assumed obligations towards the defendant in error in excess of those ordinarily assumed by a company towards those employed by it as laborers.

This action was commenced by the plaintiff below (defendant in error) in the United States Circuit Court for the District of Minnesota, Fourth Division, to recover damages against the defendant alleged to have been sustained on account of its negligence. The plaintiff was in the service of the corporation when the injury was sustained.

The defendant denied any negligence, and set up that whatever injury plaintiff below sustained was caused by his own neglect and carelessness.

The case came to trial and evidence tending to show the following facts was given: The plaintiff was a day laborer, and he and several others in July, 1890, were at a place called Old Superior, a station on the line of the defendant's road. They had been working on the road at that point, but work becoming scarce they had applied to one Mongavin, who was a roadmaster of the defendant and at that time stationed at Old Superior, for employment. Mongavin told them he had no more work for them there, but he would send them up to

Poplar, and they could go to work there if they wanted to; that they could go up there and go on an extra gang that Holverson was running. He furnished them with passes to Poplar, and the men went up and were placed at work by Holverson on his extra gang. The work which was to be done was repairing the road and roadbed, putting in new ties where necessary, and work of that general nature.

After the plaintiff and his companions were employed by Holverson on the extra gang it then amounted in numbers to 13 men, with Holverson as foreman. The extra gang had duties precisely of the same kind as those pertaining to the regular section gang, which was employed on each section of the road to keep the same in repair. The road was divided into sections of about six miles in length, and the purpose of the extra gang was to help out the other gangs when the work on their sections became too much for the regular gang to do. Each section had a section foreman or boss under whom the section gang worked. The extra gang over which Holverson had charge, and into which plaintiff and his associates entered, instead of confining its assistance to one section, worked, where necessary, over a distance of three sections. Holverson had power to employ men and also to discharge them. The tools used by the men in repairing the road were furnished by the company. They were sent to Holverson, who gave them to the men as they required them. The men were stationed at Poplar, and were taken each morning on hand cars to the place where they were to work during the day, and when the work was finished were brought back. The members of the gang themselves worked the hand cars, Holverson generally occupying a place on the front hand car and taking care of the brakes, and applying them when thought necessary. He always went with the gang, superintended their work, even if taking no part in the actual manual labor, and came home with them at the end of the day's labor.

About a month after plaintiff had been working in this extra gang, and on the 19th of August, 1890, while returning on the hand car with the rest of the gang from the day's work,

the accident out of which this suit arises occurred. Holverson occupied his accustomed place on the front hand car at the brakes. The plaintiff and several of his associates were on the same car. The second car was occupied by the remainder of the gang. While proceeding around a curve on the track, Holverson thought he saw some object in front of him, and he applied his brakes, as was said, very suddenly, in consequence of which the car was abruptly stopped. He gave no warning of his intention, and the rear car was following so closely that it had no chance to stop before running into the car ahead, the result of which was that the first car was thrown from the track, throwing plaintiff off the car, and injuring his leg by having the rear car run over it.

It was alleged that the brakes on the rear car were defective, and that on that account the rear car could not be stopped as readily as it would otherwise have been. This issue was not insisted upon, and was not in fact submitted to the jury. There was also evidence that the hand cars were being run at the unusual rate of speed of from 12 to 15 miles an hour. Other evidence was given in regard to the nature of the wound and the alleged neglect of Holverson, and the injuries sustained by plaintiff below.

The court, among other things, charged the jury as follows:

"The plaintiff claims his injuries resulted from the negligent act of Holverson, who was the defendant's foreman of an 'extra gang of laborers,' of whom the plaintiff was one, working on the defendant's road.

"The defendant claims they resulted from the negligence of the plaintiff's fellow-servants, and also claims that Holverson was a fellow-servant of plaintiff. Whether he was so or not depends on the relation he sustained to the defendant company, and the court instructs you that if you find from the evidence that Holverson was a 'foreman on extra gang' for the defendant company, and that as such foreman he had the charge and superintendency of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about thirteen in number, to do this work for the company, and had the exclusive charge and

direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow-servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman.

"If you find Holverson was not a fellow-servant of the plaintiff, but representing the company, then, as was well observed by counsel for defendant, the question under the evidence in the case for your determination is, was the injury the result of the negligent act of Holverson, the defendant's agent, who was riding on and had charge of the front hand car, or was it the negligence of the hands who were on and operating the hind car? If the negligence of the men on the hind car occasioned the accident the defendant is not liable; but if the accident resulted from the negligent act of Holverson the defendant is liable.

"You have heard the evidence relating to the functions and duty of Holverson and the hands at work under him, and upon a full and fair consideration of all that evidence, you will determine whose negligent act occasioned this accident."

Counsel for the defendant below asked the court to charge the jury on the question of defective brakes, but after some conversation between counsel and the court, the court stated:

"You do not want a charge further than the issues in the case. There is nothing about the brake in the case; it all reduces itself to this: If you find under my charge that Holverson was not a fellow-servant of the plaintiff, then the question is, through whose negligent act did this injury occur? Was it the act of Holverson, the foreman, who was on the front car, or was it the negligent act of plaintiff's fellow-servants on the hind car? If it was the act of Holverson, then the plaintiff is entitled to the agreed amount; if it was the

act of the men on the hind car, then plaintiff cannot recover, and your verdict must be for the defendant."

Exceptions were duly taken to the refusal to charge as requested by counsel for the defendant below and to the charge as above given.

The jury returned a verdict in favor of plaintiff. Upon writ of error the United States Circuit Court of Appeals for the Eighth Circuit affirmed the judgment, 4 U. S. App. 574, and the defendant below sued out this writ of error.

Mr. William J. Curtis and *Mr. C. W. Bunn*, for plaintiff in error, submitted on their briefs.

Mr. Henry J. Gjertsen for defendant in error.

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

The sole question for our determination is, whether Holverson occupied the position of fellow-servant with the plaintiff below. If he did, then this judgment is wrong and must be reversed.

By the verdict of the jury, under the charge of the court, we must take the fact to be that Holverson was foreman of the extra gang for the defendant company, and that he had charge of and superintended the gang in the putting in of the ties and assisting in keeping in repair the portion of the road included within the three sections; that he had power to hire (and discharge) the hands in his gang, then amounting to 13 in number, and had exclusive charge of the direction and management of the gang in all matters connected with their employment; that the plaintiff below was one of the gang of hands so hired by Holverson and was subject to the authority of Holverson in all matters relating to his duties as laborer. Upon these facts the courts below have held that the plaintiff and Holverson were not fellow-servants in such a sense as to preclude plaintiff recovering from the railroad company damages for the injuries he sustained through the negligence of

Holverson, acting in the course of his employment as such foreman.

In the course of the review of the judgment by the United States Circuit Court of Appeals, that court held that the distinction applicable to the determination of the question of a co-employé was not "whether the person has charge of an important department of the master's service, but whether his duties are exclusively those of supervision, direction and control over a work undertaken by the master, and over subordinate employés engaged in such work, whose duty it is to obey, and whether he has been vested by the common master with such power of supervision and management." Continuing, the court said that "the other view that has been taken is that whether a person is a vice-principal is to be determined solely by the magnitude or importance of the work that may have been committed to his charge, and that view is open to the objection that it furnishes no practical or certain test by which to determine in a given case whether an employé has been vested with such departmental control, or has been 'so lifted up in the grade and extent of his duties' as to constitute him the personal representative of the master. That this would frequently be a difficult and embarrassing question to decide, and that courts would differ widely in their views, if the doctrine of departmental control were adopted, is well illustrated by the case of *Borgman* v. *Omaha & St. Louis Railway*, 41 Fed. Rep. 667, 669. We are of the opinion, therefore, that the nature and character of the respective duties devolved upon and performed by persons in the same common employment, should in each instance determine whether they are or are not fellow-servants, and that such relation should not be deemed to exist between two employés where the function of one is to exercise supervision and control over some work undertaken by the master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management." 4 U. S. App. 574, 578. The court thereupon affirmed the judgment.

It seems quite plain that Holverson was not the chief or

superintendent of a separate and distinct department or branch of the business of the company, as such term is used in those cases where a liability is placed upon the company for the negligence of such an officer. We also think that the ground of liability laid down by the courts below is untenable.

The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow-servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many States that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employés, and if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such.

In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some courts a further liability for the negligence of one of his servants in charge of a separate department or branch of business whereby another of his employés has been injured, even though the neglect was not of that character which the master owed in

his capacity as master to the servant who was injured. In such case it has been held that the neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the co-employé, and hence that the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances. It has been already said that Holverson sustained no such relation to the company in this case as would uphold a liability for his acts based upon the ground that he was a superintendent of a separate and distinct branch or department of the master's business. It is proper, therefore, to inquire what is meant to be included by the use of such a phrase.

A leading case on this subject in this court is that of *Chicago, Milwaukee & St. Paul Railway* v. *Ross*, 112 U. S. 377. In that case a railroad corporation was held responsible to a locomotive engineer in the employment of the company for damages received in a collision which was caused by the negligence of the conductor of the train drawn by the engine upon which plaintiff was engineer. This court held the action was maintainable, on the ground that the conductor upon the occasion in question was an agent of the corporation, clothed with the control and management of a distinct department, in which his duty was entirely that of direction and superintendence; that he had the entire control and management of the train, and that he occupied a very different position from the brakemen, porters and other subordinates employed on it; that he was in fact and should be treated as a personal representative of the corporation for whose negligence the corporation was responsible to subordinate servants. The engineer was permitted to recover on that theory. These facts give some indication of the meaning of the phrase.

In the above case the instruction given by the court at the trial, to which exception was taken, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employés under the control and direction of another, that then the two are not fellow-servants, engaged in the same common employment within the meaning of the rule of law of which I am speaking." That instruction thus broadly

given was not, however, approved by this court in the *Ross case.* Such ground of liability, mere superiority in position and the power to give orders to subordinates, was denied. What was approved in that case, and the foundation upon which the approval was given, is very clearly stated by Mr. Justice Brewer in the course of the opinion delivered in the case of *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, at 380 and the following pages. In the *Baugh case* it is also made plain that the master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over and a superior position to that occupied by the servant who was injured by his negligence. The rule is that in order to form an exception to the general law of non-liability the person whose neglect caused the injury must be "one who was clothed with the control and management of a distinct department, *and not a mere separate piece of work in one of the branches of service in a department.*" This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employés under them, vice-principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent. Thus Mr. Justice Brewer in the *Baugh case* illustrates the meaning of the phrase "different branches or departments of service," by suggesting that "between the law department of a railway corporation and the operating department there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating de-

partment; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master."

The subject is further elaborated in the case of *Howard* v. *Denver & Rio Grande Railroad*, 26 Fed. Rep. 837, in an opinion by Mr. Justice Brewer, then Circuit Judge of the Eighth Circuit. The other view is stated very distinctly in the cases of *Borgman* v. *Omaha & St. Louis Railroad Co.*, 41 Fed. Rep. 667, and *Woods* v. *Lindvall*, 48 Fed. Rep. 62. This last case is much stronger for the plaintiff than the one at bar. The foreman in this case bore no resemblance in the importance and scope of his authority to that possessed by Murdock in the *Woods case* (*supra*). These cases which have been cited serve to illustrate what was in the minds of the courts when the various distinctions as to departments and separate branches of service were suggested. In the *Baugh case*, the engineer and fireman of a locomotive engine, running alone on the railroad and without any train attached, were held to be fellow-servants of the company so as to preclude the fireman from recovering from the company for injuries caused by the negligence of the engineer.

The meaning of the expression "departmental control" was again and very lately discussed in *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349, where it was held, as stated in the headnote, that a common day laborer in the employ of a railroad company, who, while working for the company under the orders and direction of a section boss or foreman on a culvert on the line of the company's road, receives an injury through the neglect of a conductor and an engineer in moving a particular passenger train upon the company's road, is a fellow-servant of such engineer and of such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted.

The subject is again treated in *Central Railroad* v. *Keegan*, 160 U. S. 259, decided at this term, where the men engaged

in the service of the railroad company were employed in uncoupling from the rear of trains cars which were to be sent elsewhere and in attaching other cars in their place, and they were held to be fellow-servants, although the force, consisting of five men, was under the orders of a "boss" who directed the men which cars to uncouple and what cars to couple, and the neglect was alleged to have been the neglect of the "boss" by which the injury resulted to one of the men. This court held that they were fellow-servants, and the mere fact that one was under the orders of the other constituted no distinction, and that the general rule of non-liability applied.

These last cases exclude by their facts and reasoning the case of a section foreman from the position of a superintendent of a separate and distinct department. They also prove that mere superiority of position is no ground for liability.

This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master as would be necessary to render the master liable to a co-employé for his neglect. He was in fact, as well as in law, a fellow-workman; he went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow-workmen.

If in approaching the line of separation between a fellow-workman and a superintendent of a particular and separate department there may be embarrassment in determining the question, this case presents no such difficulty. It is clearly

one of fellow-servants. The neglect for which the plaintiff has recovered in this case was the neglect of Holverson in not taking proper care at the time when he applied the brake to the front car. It was not a neglect of that character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes as master to his servant when he enters his employment.

It is urged, however, in this case that this judgment may be sustained upon another and distinct proposition. The counsel for the defendant in error says that it is alleged in the amended complaint, "that as a part of the contract of hiring, the defendant engaged to carry the plaintiff to and from his work upon the defendant's road as occasion should require, in a safe and proper manner." He then argues that the defendant having as a part of its contract of hiring assumed the obligation to carry safely, it was bound to exercise the same degree of care in its discharge as in any positive duty recognized or imposed by law, and that, therefore, the negligence of Holverson in the performance of his duty, whether it be from the relation of master and servant or one specially assumed under the contract of hiring, was a neglect of the master.

Although this allegation is contained in the complaint, it is denied in the answer, and there is no proof of any contract on the part of the defendant below to carry the plaintiff safely, further than is to be inferred from the fact that the company furnished hand cars which were worked by the gang and upon which they rode to and from the place of labor. If, under these circumstances, the servant be injured through the neglect of a fellow-servant, such as appears in this case, the master is not liable.

The charge of the court to the jury in the matter complained of was erroneous, and the judgment must, therefore, be

Reversed, and the case remanded with directions to grant a new trial.

The Chief Justice and Mr. Justice Field and Mr. Justice Harlan dissented.

NORTHERN PACIFIC RAILROAD COMPANY *v.* CHARLESS.

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

No. 184. Argued March 26, 27, 1896. — Decided April 13, 1896.

The general principles of the law of master and servant, as set forth in the opinion in *Northern Pacific Railroad* v. *Peterson*, *ante*, 346, are applicable to the facts in this case, and govern it.

The plaintiff below was a day laborer, in the employ of the Northern Pacific Railroad. With the rest of his gang he started on a hand car under a foreman to go over a part of a section to inspect the road. While running rapidly round a curve they came in contact with a freight train, and he was seriously injured. The brake of the hand car was defective. The freight train gave no signals of its approach. He sued the company to recover damages for his injuries. *Held*,

(1) That the railroad company was not liable for negligence of its servants on the freight train to give signals of its approach, as such negligence, if it existed, was the negligence of a co-servant of the plaintiff;

(2) That any supposed negligence of the foreman in running the hand car at too high a rate of speed, was negligence of a co-employé of the company, and not of their common employer;

(3) That if it should be assumed that the injury might have been avoided if the brake had not been defective, the jury should have been properly instructed on that point.

THE case is stated in the opinion.

Mr. C. W. Bunn for plaintiff in error.

Mr. Reese H. Voorhees for defendant in error. *Mr. A. K. McBroom* and *Mr. L. H. Prather* were on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff below was an ordinary day laborer employed under a section boss or foreman to keep a certain portion of the roadbed of the defendant in repair. The foreman had power to employ and discharge men, and to superintend their

work, and was himself a workman. He employed the plaintiff, who, with the rest of the men employed in the gang — some four, five or six — was carried to and from his work daily on a hand car worked by the men themselves.

In August, 1886, on the 28th of the month, an accident occurred as the men were on their way to their work. They were using a hand car with what is alleged to have been a defective brake. The foreman had complained of it to the yardmaster a short time before, who had promised a better one. In the meantime and as a temporary makeshift, the foreman had provided the car with a brake which consisted of a bit of wood, 4 x 4, fastened on the side of the car with a bolt, and the long arm acted as a lever and pressed the shorter portion of the timber against the wheel. In that way the car had been run for a day or two before the morning of the accident. On that day, the plaintiff with the rest of the men in the gang and the foreman started on the hand car to go over a certain portion of the section to inspect the condition of the road. They were running the car very rapidly under the direction and supervision of the foreman and had arrived at a narrow cut in the road around a curve, when they were suddenly confronted with a freight train coming through the cut in the opposite direction. There had been no warning or signal of any kind given by any of the employés on the freight train of its approach, and plaintiff below knew nothing of the fact that any freight train was expected. Efforts were made to stop the hand car, and as the speed did not seem to be slackened in time, plaintiff became frightened and undertook to jump from the front end of the car, when he stumbled over some tools that were on the car and fell between the rails in front of it. As the hand car approached him he put his foot up against it in order to prevent its running over him, but the impetus of the car was too great, and it ran over and doubled him up and wrenched his spine, causing him great internal injuries. The other hands jumped off the car, removed it from the track and took the plaintiff out of danger before the freight train passed by.

The injuries of the plaintiff were of a very serious nature, and

his legs became paralyzed, and he was rendered a cripple for life. He commenced this action against the defendant below to recover damages on account of the negligence of the agents and servants of the defendant. The negligence claimed consisted in:

1. The defective break on the car, which it is alleged was an appliance for the prosecution of the work on the defendant's road and necessary to be used to enable the employés to perform their duties, and that as such appliance it was the duty of the defendant to see that it was reasonably safe and fit for the purpose intended.

2. The negligence of the foreman in charge of the gang, who directed the speed of the hand car and ran it at a hazardous rate of speed, when he knew that a train coming towards him was expected, while the other members of the gang were ignorant of that fact.

3. The negligence of the train hands on the approaching train in giving no signals of their approach around the curve and through the cut, although they were near a public crossing and some signals were necessary on that account.

Upon the trial evidence was given tending to prove the above facts, and, among other things, the judge charged the jury as follows:

"I think that the case, when stripped of all the side issues and the incidental questions surrounding it, resolves itself into just this question for this jury to determine: Whether the injury to the plaintiff resulted directly from the negligence of the defendant in needlessly exposing him to the danger of being hurt by a collision between the hand car and the extra freight train at the place where it occurred; or, whether the injury was a mere accident, which was the result of one of the ordinary hazards of the employment in which he was engaged; whether it was an ordinary risk of his employment, or whether an extraordinary danger caused by the negligence on the part of the defendant; whether that negligence was a negligence of the foreman in running the hand car too fast up to a point which he knew to be dangerous, and which he did not warn the other men working on the hand car of, so that

it was impossible for them, without extreme hazard to their lives, to avoid a collision; or, whether the negligence was on the part of the officers in charge of the freight train in approaching a curve in the cut, which obstructed the train from view, or passing a public crossing without giving warning by sounding the whistle or engine bell.

"If, in any of these respects, there was actual neglect on the part of defendant which placed the plaintiff in a situation of extraordinary danger, something clearly beyond the ordinary risks of his employment, and his injury was not in any degree owing to his own negligence at the time, the defendant would be liable to damages."

The defendant below excepted to each of the above propositions, as laid down by the learned judge in his charge, and the jury rendered a verdict in favor of the plaintiff, which was affirmed by the Circuit Court of Appeals for the Ninth Circuit, and the defendant below sued out a writ of error from this court to review the judgment.

Many of the facts surrounding the happening of this accident are similar in their nature to those existing in the case of the *Northern Pacific Railroad Co.* v. *Peterson*, *ante*, 346, just decided. The employment of the plaintiff below, the nature of the work and the powers of the section boss under whom he worked are substantially the same as those existing in the other case. We may refer to the general principles of the law of master and servant applicable to these facts which are set forth in the opinion of this court in that case, and which we think govern the case at bar upon those facts.

In regard to the particular allegations of negligence above set forth, it is not necessary, in the view we take of this case, to express any opinion whether the alleged defect in the brake on the hand car rendered it a defective appliance within the meaning of the law rendering the master liable for a failure to provide a reasonably safe and proper appliance for the work to be done by his employés.

There were two other propositions submitted to the jury by the learned judge, each of which was, as we think, of a material nature and also clearly erroneous.

First. We think it was error to submit to the jury the question of the negligence of the employés on the extra freight train in failing to give the signals of its approach. This failure, assuming that it constituted negligence, was nothing more than the negligence of co-servants of the plaintiff below in performing the duty devolving upon them. The principle which covers the facts of this case was laid down in *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, and that case has never been overruled or questioned. The *Ross case*, 112 U. S. 377, is a different case, and was decided upon its own peculiar facts. See *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, 380. Among the latest expressions of opinion of this court in regard to views similar to those stated in the case in 109 U. S., (*supra*,) is the case of the *Northern Pacific Railroad Company* v. *Hambly*, 154 U. S. 349. It seems to us that the *Randall* and the *Hambly cases* are conclusive, and necessitate a reversal of this judgment. In the *Hambly case* it was held that a common day laborer in the employ of a railroad company, who, while working for the company, under the orders and direction of a section boss or foreman on a culvert on the line of the company's road, received an injury through the negligence of a conductor and of an engineer in moving a particular passenger train upon the company's road, was a fellow-servant with such engineer and with such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted. We are unable to distinguish any difference in principle arising from the facts in these two cases.

The question of the negligence of the hands upon the extra freight train should not have been submitted to the jury as constituting any right to a recovery against the corporation on the ground of such negligence.

Second. We also regard it as erroneous to have submitted to the jury the general question whether Kirk, the section foreman, was negligent in running his hand car at too high a speed just prior to the accident. Kirk and the plaintiff below were co-employés of the company, and the neglect of Kirk, if it existed, in driving his hand car too fast (assuming it was

in proper condition) was not such negligence as would render the company responsible to Kirk's co-employé. It was not the neglect of any duty which the company as master was bound itself to perform. This we have held in the *Peterson case*, and for the reasons there stated. While it may be assumed that the master would have been liable if a defective brake had been the cause of the accident, yet, the defendant below is, under the charge of the judge, permitted to be made liable by proof of the speed of the hand car, if the jury found that Kirk the foreman knew it to be dangerous and that the accident happened because of that speed, even though it would have happened if the brake had been the regular kind and in good order. The language of the court does not separate the question of general negligence in running a hand car which was in good order too fast from that which might be negligence with reference to running a hand car with a defective brake at the same rate of speed. For using in a negligent manner a defective appliance furnished by the master, the latter might be liable if a co-employé were thereby and in consequence thereof injured. As the master furnished the defective appliance, it would be no answer to say that it was negligently used. But, on the other hand, the master would not be responsible for the negligent use of a proper appliance. From the language used by the court the company might have been held liable if Kirk were running the hand car at a dangerous rate of speed, although the jury found the brake actually used to have been sufficient. A dangerous rate of speed was, therefore, held to be negligence, for which the company would be liable. But it is said that the fact of a dangerous rate of speed is necessarily so mingled and intimately connected with the fact of a defective brake that it is impossible to regard the speed separate and distinct from the defect, so that when the question of excessive speed was submitted to the jury as a possible foundation for the finding of negligence, it was in substance and effect a submission to the jury of the question of excessive speed in the particular case of a hand car supplied with a defective brake. We think this is not an answer to the objection, and that there was error in submitting

the question of excessive speed to the jury in the manner in which it was done in this case. From the evidence set forth in the record it is clear that the jury might have taken the view that the temporary brake was, while it lasted, as adequate for the purpose as any other, but that the hand car, assuming it was in good order, was negligently run at a dangerous rate of speed so that it could not have been stopped in time, even if it had been supplied with a regular brake. In that event, under the judge's charge, the jury might have held the company responsible for the mere negligence of the foreman Kirk in running a hand car adequately supplied at a dangerous rate of speed. That neglect, we hold, the company was not responsible for.

Upon the other question of the negligence of the employés on the freight train, the error in the charge is not rendered harmless by any explanation given by the learned judge. The difficulty remains uncured. The jury might have found from the evidence that this hand car while going at the rate of speed stated could have been stopped with the extemporized brake, in time to prevent any danger of a collision, in case the proper signals had been given by the hands on the freight train, but that the accident resulted from their failure to give those signals, and that such failure was negligence on their part. The verdict may have been based upon such negligence. We hold the company was not liable for the negligence of the hands on the freight train in failing to give proper signals.

These two important and material errors on the part of the learned judge who tried the cause, in his charge to the jury, having never been remedied or in any manner cured, we are compelled to sustain the exceptions taken to such charge.

The judgment entered upon the verdict of the jury must be

Reversed, and the cause remanded with instructions to grant a new trial.

The Chief Justice and Mr. Justice Field and Mr. Justice Harlan dissented.

NORTHERN PACIFIC RAILROAD COMPANY *v.* LEWIS.

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

No. 166. Argued March 24, 1896. — Decided April 13, 1896.

A person who, without authority, cuts wood from public lands of the United States, not mineral, or purchases such wood so cut, and leaves it, when cut or purchased, upon such public lands near a railroad, has no right of possession of, or title to, or ownership in it, and cannot maintain an action against the corporation owning such railroad for its destruction by fire caused by sparks from locomotives of the company.

This action was brought by the defendants in error against the railroad company to recover damages for the destruction of some 10,000 cords of wood by fire communicated to the wood by sparks from the engines of the company.

It was alleged in the amended complaint that the railroad company neglected and failed, for a long time prior to the happening of the fire, and while using and operating their railroad, to keep each side of the railroad track free from dead grass, weeds, brush and other dangerous and combustible material, as by law they were required to do, and that the company used locomotives which threw from their smoke-stacks large amounts of live cinders and sparks, and that the company carelessly and negligently operated and used its road, and by reason thereof, and on the 5th day of August, 1890, in Jefferson County, Montana, set fire to the grass, weeds and other combustible and dangerous material, which the defendant had negligently and carelessly allowed to remain by the side of the track, and the fire spread rapidly and consumed and destroyed the cord wood belonging to the plaintiffs, as partners, then being in Jefferson County, Montana, and along and near the railroad track, of the amount of 9400 cords, and of the value of $25,350.

The defendant by its answer denied all negligence, and denied "that on or about the date aforesaid, or on any other

day or date, the defendant set any fire which consumed or destroyed any cord wood belonging to the plaintiffs or any or either of them." The defendant also put in issue the value of the cord wood, and alleged that whatever was lost was lost through the contributory negligence of the plaintiffs.

The case came on for trial at the Circuit Court of the United States for the Ninth Circuit, for the District of Montana, held in December, 1891, and January, 1892, and resulted in a verdict for the plaintiffs for the sum of $21,487.83. The company sued out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and that court affirmed the judgment. 7 U. S. App. 254. The company then sued out a writ of error from this court.

Upon the trial of the action the plaintiffs to maintain the issues on their part introduced evidence tending to show that in the month of April, in the year 1889, they entered upon a portion of the unsurveyed public domain of the United States, lying on the easterly slope of the Rocky Mountains, in the county of Jefferson, State of Montana, and there chopped and caused to be chopped about 10,000 cords of wood from the timber then standing and growing upon such public lands; that the wood was cut over an area of country of about three miles, north and south, and about two by two and a half miles, east and west; that the wood so cut was white pine, and much of it was made of trees of less diameter than eight inches. The plaintiffs also gave evidence that they were citizens of the United States, and that the plaintiff, George S. Lewis, at the date of the cutting of said wood, was a resident of Butte, Montana, and that the other plaintiffs resided at White Sulphur Springs in the State of Montana. It was further shown that after the wood was cut it was drawn to a point near the railroad and there piled. That the place where the wood was so piled was on the unsurveyed public lands of the United States and about 200 yards south of the railroad operated by the defendant.

Plaintiffs also gave evidence tending to show that they had purchased from various parties during the summer of 1890 about 5000 cords of white pine cord wood, which had also

been cut on the public unsurveyed lands of the United States, some of it on the tract of country from which plaintiffs had cut, and the remainder was cut on the north side of the railroad track above mentioned, and over a strip or area of country about two miles in length. Further evidence was given on the part of plaintiffs tending to show negligence on the part of the defendant either in the construction or in the management of its engines, and tending to show that the fire which destroyed the wood in question was communicated to it as alleged in the amended complaint.

Evidence was given on the part of the defendant tending to show that it was not guilty of any negligence in the premises, and that it was not liable for the results of any fire which may have destroyed the wood in question.

At the conclusion of all the evidence, the defendant moved the court to instruct the jury to return a verdict for it upon the grounds:

"1. That the title or ownership of the wood is directly in issue, and the testimony does not show that the plaintiffs had either a general or special property in the said cord wood or any thereof.

"2. The testimony shows that at the time said cord wood was destroyed the same was the property of the United States, and that in and about the cutting and removal thereof from the public unsurveyed lands of the United States the said plaintiffs were trespassers and wrongdoers.

"3. The testimony does not show that the lands whereon the cord wood was cut were distinctly mineral in character, or were more valuable for the mineral therein contained than for agricultural purposes or for the timber growing thereon.

"4. The testimony does not show that such cord wood was cut under the license granted by the act of Congress of June 3, 1878, or in compliance with the rules and regulations established thereunder by the Secretary of the Interior, but, on the contrary, the evidence clearly shows that the said cord wood, and the whole thereof, was cut in utter disregard of said act of Congress and the said rules and regulations of the Secretary of the Interior.

Statement of the Case.

"5. Because the testimony shows that said cord wood was the property of the United States, and that plaintiffs have neither right nor title thereto nor the possession thereof."

Other grounds were stated not material to be now considered.

The court denied the motion and refused to so instruct the jury, and the defendant duly excepted.

The defendant then among other requests asked the court to charge the jury that "it being shown conclusively by the testimony in this case that plaintiffs cut said cord wood on lands belonging to the United States; that such cord wood was so cut without license or authority of the United States, and was not removed from such lands at the date it was consumed, the plaintiffs did not have either the actual or constructive possession of such wood at the date of its destruction, and are therefore not entitled to recover." This request was refused, and defendant duly excepted.

The court was further asked to charge that: "If you should find from the testimony that plaintiffs purchased some of this wood from other parties who had cut it from trees growing in that vicinity, this will make no difference so far as their right to, or ownership of, such wood is concerned. The region of country where this cutting was done being public unsurveyed lands of the United States, the plaintiffs were bound at their peril to take notice of the fact that the timber growing thereon was the property of the United States, and could only lawfully be severed therefrom under the provisions of the act of Congress of June 3, 1878, and in compliance with the rules and regulations established thereunder. In order to prove their title to so much of the wood as was purchased, it is not enough to show that they bought it of a certain named person, but plaintiffs must go further and show that the person had acquired title to it by compliance with the act of Congress and rules and regulations prescribed by the Secretary of the Interior. If the person cutting such wood was himself a trespasser, he acquired no title to the wood cut, and could convey none to plaintiffs. The rightful owner of such wood could follow it and reclaim it, no matter where, or in whose possession it might be found, so long as he could identify it."

Argument for Defendants in Error

This request the court refused, and the defendant duly excepted to such refusal.

Among many other assignments of error made by the defendant is the following: "The court also erred in refusing to give the instruction requested by the defendant in the following words, to wit: 'It being shown conclusively by the testimony in this case that plaintiffs cut said cord wood on lands belonging to the United States, that such cord wood was so cut without license or authority of the United States, and was not removed from such lands at the date when it was consumed, the plaintiffs did not have either the actual or constructive possession of such wood at the date of its destruction, and are, therefore, not entitled to recover.'"

Mr. William J. Curtis for plaintiff in error.

Mr. Thomas C. Bach, (with whom was *Mr. William Wallace, Jr.*, on the brief,) for defendants in error.

I. Plaintiffs can maintain this action. The action is one of trespass — or trespass on the case. It was brought against a wrongdoer for its negligent destruction of the cord wood. Plaintiffs were in possession of the property when it was so destroyed, and the defendant did not seek to connect itself with the title. Under such a state of facts, the plaintiffs, by proof of their possession, also proved their title against the wrongdoing defendant. While in replevin and ejectment the rule is different, it is because right to possession is involved; and plaintiff in such cases must recover on the strength of his own title. *Lambert* v. *Strother*, Willes, 218; *Graham* v. *Peat*, 1 East, 244; *Kissam* v. *Roberts*, 6 Bosworth, (N. Y. Super.) 154; *Hoyt* v. *Gelaton*, 13 Johns. 141; *Cook* v. *Howard*, 13 Johns. 276; *Aikin* v. *Buck*, 1 Wend. 466; *Demick* v. *Chapman*, 11 Johns. 132; *Squire* v. *Hollenbeck*, 9 Pick. 551; *Hammer* v. *Wilsey*, 17 Wend. 91; *Parker* v. *Hotchkiss*, 25 Connecticut, 321; *Todd* v. *Jackson*, 2 Dutcher, N. J. 525; *Whittington* v. *Boxall*, 5 Q. B. 139; *Wustland* v. *Potterfield*, 9 W. Va. 438; *Craig* v. *Gilbreth*, 47 Maine, 416; *Gilson* v. *Wood*, 20 Illinois, 37; *Gardiner* v. *Thibodeau*, 14 La. Ann. 732; *Boston* v. *Neat*,

12 Missouri, 125; *Crawford* v. *Bynum*, 7 Yerg. 381; *Fuller* v. *Bean*, 30 N. H. 181; *Kemp* v. *Seely*, 47 Wisconsin, 687.

In the latter case, Orton, Judge, says: "There was no question of title in the case, nor is title necessary to maintain trespass against a stranger to the title."

The rule is the same in trover. "But a lower degree of interest will sometimes suffice against a stranger, for a mere wrongdoer is not permitted to question the title of a person in the actual possession and custody of the goods whose possession he has wrongfully invaded." Greenleaf on Ev. § 639.

See also to same effect, as to action of trover: *Ward* v. *Carson R. Wood & Co.*, 13 Nevada, 44; *Jeffries* v. *Great Western Railway Co.*, 34 Eng. L. and Eq. 122; *Bartlett* v. *Hoyt*, 29 N. H. 317; *Burke* v. *Savage*, 13 Allen, 408; *Shaw* v. *Kaler*, 106 Mass. 448; *First Parish in Shrewsbury* v. *Smith*, 14 Pick. 297, 302; *Sutton* v. *Buck*, 2 Taunt. 302; *Duncan* v. *Spear*, 11 Wend. 54, 57; *Wincher* v. *Shrewsbury*, 2 Scammon (Ill.) 283.

Were right of recovery denied the possessor for injury to his possession, the law of "might" alone would be applicable to personal property after it had tortiously passed out of the hands of the true owner. If ores extracted by the miner from a claim defectively located, or not located at all, were seized by a stranger, the miner would be remediless save by an appeal to force. The railroad could receive our wood, collect freight in advance, haul it to market, and then refuse to deliver it upon the plea that it would be answerable to the United States.

In *Parish* v. *Smith*, 14 Pick. 302, Chief Justice Shaw says: "It is very clear that a mere stranger cannot question the right of one in possession, or put him on the proof or disclosure of his title. . . . And there seems to be no reason why a stranger should be placed in a better situation, by taking the matter into his own hands, ploughing land, taking crops or otherwise interfering with the right of the party in possession. . . . If a lawful owner, in whom the legal title remains, chooses to interfere and set up his legal claims, the law, in consistency with its own rules in regard to the transmission of title, may be compelled to admit his claim. But if such owner, upon consideration of propriety, equity and conscience, chooses

to acquiesce and permit the party in possession to retain that possession, notwithstanding any defect of title, by what rule of law, of equity or sound policy, can a mere stranger be allowed to interfere and by his own act violate the actual and peaceable possession of another, and thereby compel him to disclose a title, in the validity or invalidity of which such stranger has no interest?"

See also *Gulf, C. & S. F. Railway* v. *Johnson*, 54 Fed. Rep. 474, a case which involves the same kind of trespass, the same question of ownership, the same question of illegality, as found in this case.

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

The cases cited by the defendants in error show the doctrine to be quite clearly established that an action of trespass *de bonis asportatis* does not technically involve the question of title. It relates to the possession only of personal property, and it is brought to recover for the injury to that possession. In such action it is held that an allegation of the ownership of the property is not material and that it need not be made, or if made that it need not be proved. Proof of possession simply is sufficient upon the theory that possession is *prima facie* evidence of some kind of rightful ownership or title. Therefore, it is held that proof of title to property in a stranger with whom the defendant does not connect himself in any way is no defence to the action as the injury is to the possession. Trespass *de bonis asportatis* assumes a taking of the property by the defendant out of the possession of the plaintiff, and if the title be in a stranger with which the defendant does not connect himself, that fact is no answer to the cause of action. The possession of the plaintiff is enough under such circumstances against a wrongdoer. If the defendant cannot connect himself with the title in the third person, he is as to the plaintiff a wrongdoer, having no right to disturb the possession of the plaintiff. *Aikin* v. *Buck*, 1 Wend. 466; *Hammer* v. *Wilsey*, 17 Wend. 91; *Kissam* v. *Roberts*, 6 Bosworth, [Superior Court

N. Y.,] 154. Many other cases are to the same effect. The rule is said to be different in trover and replevin on the theory that those actions are not actions grounded on the mere possession, but founded upon a right or title in the plaintiff upon the strength of which he must recover, and that hence title in a third party may be a defence, even though the defendant is not in any way connected with it.

But this action is not an action of trespass *de bonis asportatis.* There has been no asportation, and that fact must be proved, in such an action. The cause of action here alleged and proved was a negligent act on the part of the defendant, committed on the defendant's own land, and causing in its results the burning up and destruction of the wood in question. The action is, therefore, more accurately and properly described as an action of trespass on the case instead of trespass *de bonis asportatis.*

The ground of the plaintiffs' right of action is the damage which has been caused them by the negligent act of the defendant, and unless they are able to prove some damage, consequent upon such negligent act, the plaintiffs are not entitled to recover. This is not an action where they would be entitled to nominal damages if no damages whatever were in fact sustained or proved. They must prove the nature and extent of the damage, and if the property destroyed were not owned by them, and if they had no special property therein, and did not have possession thereof, it is entirely plain that no cause of action was proved. The plaintiffs claim that, so far as the defendant is concerned, they did prove property in the wood, and that such proof was made by showing that they were in possession thereof at the time of its destruction, and as simple possession is *prima facie* evidence of right and title sufficient to support this action, the plaintiffs made out their case. It may be assumed that possession alone is sufficient, even in an action of this nature, in the absence of any evidence explaining that possession or showing that plaintiffs had no title to the property. In this case the plaintiffs, in the course of making out their cause of action, showed the facts which proved that they had neither the title nor the possession.

The bill of exceptions states that the wood was cut upon the unsurveyed public lands of the United States. The lands were owned by the United States, and the trees growing thereon were its absolute property as much so as any other article of property possessed by the government. Entering upon those lands by the plaintiffs for the purpose of cutting trees was a plain act of trespass, illegal in its nature, and unjustified by any fact appearing in this case. The plaintiffs in cutting down trees committed an illegal act, and while the title to the standing timber was in the United States, the plaintiffs by severing the trees from the freehold acquired no right, title or interest in them by reason of such severance.

In *Schulenberg* v. *Harriman*, 21 Wall. 44, 64, it was held, that where title to land upon which the lumber was cut was in the State, severing the timber from the realty did not change the title. Its character was changed from realty to personalty, but its title was not affected. It continued as previously the property of the owner of the land and could be pursued wherever it was carried. All the remedies were open to the owner which the law afforded in other cases of the wrongful removal or conversion of personal property. See also *Turley* v. *Tucker*, 6 Missouri, 583. It is plain, therefore, that the plaintiffs obtained no right or title to the trees by cutting them on the lands owned by the United States under circumstances such as are set forth in this bill of exceptions.

It is urged, however, that under the act of June 3, 1878, c. 150, 20 Stat. 88, (1 Supp. Rev. Stat. 1874–1881, 327,) where no evidence is given upon the subject, the presumption is that the plaintiffs had complied with the provisions of that act, and that the cutting was therefore legal, and the timber was their own property.

The first section of that act reads as follows:

"SEC. 1. *Be it enacted, etc.*, That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove,

for building, agricultural, mining or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States, except for mineral entry, in either of said States, Territories or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

The third section of that act reads as follows:

"SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules or regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months."

There was no evidence tending to show that the lands where the wood was cut were mineral, or that in cutting, handling or removing the wood the plaintiffs had complied or attempted to comply with the provisions of the above act or with the rules or regulations prescribed by the Secretary of the Interior.

The plaintiffs claim that in the absence of any evidence to the contrary, the presumption is that when they cut the timber they complied with and came under the conditions provided for in the above cited act, and that the burden rested upon the defendant to show that the conditions mentioned in the act had not been complied with by them. If the plaintiffs are right in this contention, then it must be presumed that the cutting of the timber was lawful and the plaintiffs thereby acquired title to it. If, however, they are in error in their claim, then it appears that the timber never belonged to them, and that fact would have a most material bearing upon the question whether they had, in fact or in law, any possession of the timber at the time of its destruction.

The absolute ownership of these lands being at the time in the United States, it had as owner the same right and dominion over them as any owner would have. No one had the right to enter upon the lands; no one had the right to cut a stick of timber thereon without its consent. Any one so going upon the lands and cutting timber would be guilty of the commission of an act of trespass. The government, however, chose to make some exceptions in favor of certain classes of people to whom were given the right to cut timber for certain purposes: 1st. They were to be citizens of the United States. 2d. *Bona fide* residents of the State or Territory mentioned in the act. 3d. They were to be permitted to fell and remove any timber or trees growing or being on the public lands, provided they were mineral, and not subject to entry under existing laws of the United States; and they were authorized and permitted to fell and remove such timber only for building, agricultural, mining or other domestic purposes. The cutting and removing were to be done under rules and regulations prescribed by the Secretary of the Interior. Outside of these exceptions, there was no right in any person to cut a particle of timber on these public lands of the government.

The right to cut is exceptional and quite narrow, and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal. *United States* v. *Cook*, 19 Wall. 591.

In the case last cited it was held that the timber upon the lands occupied by the Indians could not be cut by them for purposes of sale alone, but that it could be cut for the purpose of improving the land and the better adapting it to convenient occupation, and that when the timber had been cut incidentally for the improvement of the land, and not for the purpose of cutting and selling it, there was no restriction on the sale of it. The Indians having only the right of occupancy in the lands, and, therefore, presumptively no right to cut timber for the purpose of selling, it was further held that if they cut

timber in the process of improving the land, that fact must be shown; the presumption was against the authority to cut and sell the timber. Every purchaser from them, it was held, was charged with notice of this presumption, and that to maintain his title it was incumbent on the purchaser to show that the timber was rightfully severed from the land. So here. As the government was the sole and absolute owner of these lands and of the timber growing thereon, the presumption would be against the right of any third person to cut the timber, and if he claimed the right by virtue of any authority or license given him by the owner, that is, the government, he would be compelled to show it. There was no evidence given on this subject by either party, and hence the plaintiffs did not satisfy the burden of proof which rested upon them in this behalf.

Again, the consent to cut timber granted by the act of 1878 being upon the conditions and for the purposes therein specified and to the classes of persons therein described, whether the plaintiffs, who did this cutting, had complied with those conditions and had cut timber for the purposes mentioned, and were within the class of persons described in the statute, were facts which rested peculiarly within their own knowledge, the burden of showing which would naturally and rightfully be cast upon them. As the plaintiffs failed to show that they came within the conditions and exceptions specified in the act of 1878, the presumption that they cut the timber illegally became conclusive. Nor did the plaintiffs obtain any rights under section 8 of the laws of Congress, approved March 3, 1891, c. 561, entitled "An act to repeal timber culture law and for other purposes." 26 Stat. 1095. That section was amended by the act approved on the same day, March 3, 1891, c. 559, Ibid. 1093. Neither section grants any relief to one situated like the plaintiffs. The section in either act looks to a criminal prosecution or civil action by the United States for trespass upon public timber lands to recover for the timber and lumber cut thereon, and it is provided that it should be a defence if the defendant should show that the timber was so cut or removed by a resident of the

State or Territory for agricultural, mining, manufacturing or domestic purposes, and had not been transported out of the same. If the plaintiffs had shown these facts they would have proved enough to sustain their case on this point. They showed nothing upon the subject. It is not a case of condonation. It is simply a question whether the plaintiffs have brought themselves within any of the exceptions provided for in the statute of 1878, and we hold that the burden was upon them to show the facts which constituted the exception if they existed.

We have then an act of pure trespass, committed by the plaintiffs in entering upon the lands of the government and cutting down trees belonging to the owner of such lands. We find that the title to the timber was in the government before it was cut, and that the title remained in the government subsequently to the cutting. The plaintiffs still being trespassers, still being utterly without title to the wood thus cut, changed its situs from one part of the land belonging to the government to another part of the land belonging to the same owner. The plaintiffs in going or being upon the land at all for the purpose of illegally cutting or removing timber are trespassers; they neither own it nor claim to own it, nor have they the slightest title to or interest in it, nor any ownership of or title to the timber which they have illegally cut. They have carried property which did not belong to them, which they acquired and took by means of this trespass, from one part of the owner's domain to another part thereof. Can they be said under such circumstances to be in possession of such property? Can they be in possession of property to which they have not the slightest title, while that property remains upon the land of the owner, from which land the trees were cut, and upon which land the plaintiffs could not (for the purpose of illegally cutting or removing timber) enter or remain for one moment without the commission of a trespass? These facts being proved, is there any such possession as is *prima facie* evidence of title, right or ownership in the plaintiffs such as will enable them to maintain an action against a wrongdoer for the negligent destruction of this

property? We think not. It is not a case for the application of the principle that mere possession is sufficient in order to maintain an action against a wrongdoer. There is no possession in this case. The plaintiffs in the course of their evidence show that they have no title to the wood, and at the same time they show that they were not in possession of it. As the wood in question belonged to the United States at the time of its destruction, and at that time was piled on its own lands, we fail to see why the government could not now commence an action against the company to recover the value of the wood, and if negligence were proved succeed in its suit. If plaintiffs' action could be sustained, the judgment herein would be no bar to the maintenance of an action by the government, and the company would find itself subject to the payment of damages twice over. It seems to us quite clear that the plaintiffs have shown no such possession as would be necessary to sustain this action, even if the defendant were not permitted to show title in a third person without connecting itself with the stranger. It is unnecessary to say whether the plaintiffs would have proved a good cause of action by proof of possession merely, if the facts in regard to the illegal character of the cutting had also been proved.

A reference to a few cases in the state courts will not be out of place.

In the case of *Turley* v. *Tucker*, 6 Missouri, 583, it appeared that the plaintiffs were owners of a saw mill and cut down trees on the public lands, and marked them, in convenient lengths, for their purposes. While the logs remained where felled a portion of them was taken by Tucker to his mill, and the plaintiff sued the defendant in an action of trover, for the value of the logs thus taken. The defendants requested the court to charge that if the jury found that the plaintiff cut the timber taken by the defendant, without a *bona fide* view to its use, and did not use the same, the timber being and appertaining to the public domain and lying at the place where felled, then the plaintiff was a trespasser against the United States, and could not recover against the defendant for using a part of said timber. This was refused, and on the

contrary the court instructed the jury that "although the logs might have been cut by plaintiff, on the public ground for their own use, yet they acquired such property in the logs as would enable them to maintain an action of trover for the logs against a wrongdoer." The instruction actually given was held to be erroneous. It is true the action is described as one of trover, but the principle laid down in the opinion is quite pertinent here. The court says: "The authorities are very clear that mere possession is only *prima facie* evidence of property to maintain this action against a wrongdoer." The question was, whether the plaintiff, by cutting timber on the land of the United States, acquired such possession. There was evidence which alone and unexplained tended to establish the fact of possession, but there were other facts connected with the possession which at the same time proved it to have arisen out of a tort, and that kind of possession was held to be insufficient, because the evidence, while tending to establish possession, at the same time and thereby proved an absolute property in another. In other words, the tortious possession was held to be no possession in that case. In the case at bar the title to the property was at the time of its destruction in the government; the property was then on land owned by the government; the plaintiffs had no right or title to that land, and made no claim of title to or interest in it; and on these facts the plaintiffs cannot be held to have been in possession of the property.

In *Ohio & Mississippi Railroad* v. *Jones*, 27 Illinois, 41, it was held that to authorize one to recover for an injury to property he must show that he is the absolute or qualified owner thereof. It was stated in that case that there was no evidence that the plaintiff was the owner of the property or that he had possession of it, and that although possession might be evidence of ownership, there must be some evidence of possession. As there was none, the court reversed the judgment for the plaintiff.

In *Murphy* v. *Railroad Co.*, 55 Iowa, 473, it was held that one who, without authority, cuts and stacks hay on unenclosed prairie owned by others, acquires no property in such hay, and

having neither ownership nor possession, cannot maintain an action for its destruction. The plaintiff brought his action to recover for an alleged negligent setting fire to the prairie and permitting it to escape, thereby burning 168 tons of hay, of which the plaintiff alleged he was the owner. The answer denied that the plaintiff was the owner of the hay alleged to have been burned. The trial was by jury and resulted in a verdict for the plaintiff for the value of the hay. Respecting his ownership, the plaintiff testified that the hay was on unenclosed prairie. "The land upon which I cut this grass and stacked the hay was not mine. I had gone onto the land and cut the grass and stacked it. My claim to be owner of the hay is based on this. I cut it and put it up; that is all the claim I have. I had no license to cut or stack hay there." The defendant asked the court to instruct the jury that if it found "from the testimony that the plaintiff had cut and stacked the hay, for the burning of which he seeks to recover in this action, upon land which he did not own, and if you further find that the plaintiff had no license or permission to cut the grass upon said land, and stack the hay therefrom thereon, the title to said hay so cut and stacked was not in the plaintiff, and he cannot maintain an action to recover for the destruction thereof by fire which burned over the prairie upon which the same was stacked." This was refused. The court did instruct the jury that "in the absence of some title or right of defendant in the land upon which the grass was stacked, and from which it was grown and cut, the ownership of the hay in plaintiff, as against the defendant, is not disproved by showing that the said land from which the grass was grown and cut, and upon which it was stacked, was not the property of plaintiff, nor can the ownership of plaintiff be disproved as against defendant by showing that the plaintiff had no license or permit from the owner of the land to cut the grass, or stack the same upon the land where it was burned." The court held that upon authority as well as upon principle, as the plaintiff entered upon the land of another without license and cut grass therefrom and made hay, he acquired no property therein, and that, "as he did not own the

land upon which the hay was stacked, he had no constructive possession of it; having neither title nor possession, it seems to be a necessary consequence that he cannot recover."

This seems to be very much such a case as the one at bar. In the one case the hay was cut from land not owned by the plaintiff, and was stacked by him thereon and was destroyed by fire alleged to have been the negligent act of the defendant. In the other the wood is cut from land not owned by plaintiffs and is piled upon land not owned by them, and while thus piled is destroyed by the negligent act of the defendant; and yet it was held in the Iowa case that the plaintiff had no sufficient possession of the property destroyed to maintain the action. We see no reason why the same rule should not be applied to this case.

In *Missouri Pac. Railway* v. *Cullers*, 81 Texas, 382, the Supreme Court of Texas laid down the proposition, "that if it is established that the plaintiff was not the owner of the property and had no other interest therein than the bare possession thereof, then, where the measure of damage relied upon is the value of the property injured, destroyed or converted, in such case the defendant would not be legally liable to compensate the plaintiff for the value of property which he did not own, and ought to be permitted to prove title in a third party, not only for the purpose of disproving the plaintiff's right, or rather claim, for damages without an injury to himself, but also to avoid being compelled to respond in double damages for the same injury to the property. Until such outstanding title or a title in the defendant is established, however, the possessory right of the plaintiff is sufficient to justify a full recovery. Hence it is correctly said that the actual possession of property is *prima facie* proof of the ownership thereof, but it amounts to no more than this."

There is no actual possession in such a case as this where the property belongs to a third person, and is still on the premises of that third person, to go upon which is an act of trespass on the part of the individual claiming to be in possession of the property. Neither can any constructive possession be based upon these facts. Hence it would appear that plaintiffs had

failed to maintain their action for the wood cut by themselves.

They do not occupy any more advantageous position in regard to the wood purchased by them from those who had with their knowledge cut it from the lands of the United States. Plaintiffs had the same rights only as the persons from whom they purchased, and could maintain no action which they could not maintain. *Wooden Ware Co.* v. *United States*, 106 U. S. 432, 435.

The persons from whom the plaintiffs purchased cut the timber under the same circumstances as the plaintiffs cut that which they claim, and such persons had the same rights that the plaintiffs had, and no more.

The court should have charged the jury as requested, both in regard to the rights of the plaintiffs at the time of the fire in and to the wood cut by them, and also as to their rights in and to the wood purchased by them from others.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is

Reversed, and the cause remanded with instructions to grant a new trial.

McINTIRE *v.* McINTIRE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 142. Argued March 13, 1896. — Decided April 13, 1896.

On the trial of this case in the Supreme Court of the District of Columbia, that court, after examination of the facts, held that: "(1) Where a will relates only to personalty, and is in the handwriting of the testator and signed by him, no other formality is required to render it valid" in the District; and that "(2) Immaterial alterations in a will, though made after the testator's death by one of the beneficiaries under it, will not invalidate it" in the courts of the District, "when not fraudulently made." This court, after passing upon the facts in detail, arrives at substantially the same conclusions touching them as did the Supreme Court of the District, and affirms its judgment.

The facts and the case are stated in the opinion of the court.

Mr. William G. Johnson and *Mr. Calderon Carlisle* for plaintiff in error. *Mr. Jeremiah M. Wilson* was on their brief.

Mr. Enoch Totten for defendants in error.

Mr. Justice White delivered the opinion of the court.

The question for our determination is whether the Supreme Court of the District of Columbia, at a general term thereof, erred in affirming the action of a special term of the court, sitting as a Circuit Court, in peremptorily instructing a jury to find certain issues in a will contest favorably to the defendants. The contest in question was begun by Charles McIntire in the probate branch of the court, for the purpose of annulling the probate of a certain alleged last will and testament of his elder brother, David McIntire. The original contestant having died intestate pending the action, he was succeeded, as a party plaintiff, by his son, his duly qualified administrator, who was also, in his individual capacity, a legatee under the probated will.

Issues were framed in the probate branch and certified to the Circuit Court to be determined by a jury. The opinion of the general term is reported in 19 Dist. Col. 482.

The following facts were established, and are necessary to be stated for a proper understanding of the case:

David McIntire resided in Washington from above 1866 until his death, at the age of seventy-two years, on April 1, 1884. He never married, and left an estate consisting of personal property exceeding fifty thousand dollars in value, and the following collateral kindred: Charles McIntire, a younger brother, and his son Charles McIntire, Jr.; Edwin A. McIntire, Martha McIntire, Elizabeth M. Test, Emma T. McIntire and Adaline McIntire, children of a predeceased elder brother Edwin T. McIntire; and also the following grandnieces and

grandnephews: Annie Laura McIntire, wife of William T. Galliher, Emma V., William E. and Henry N. McIntire, children of Henry McIntire, a deceased son of the testator's elder brother Edwin T. McIntire. For several years immediately prior to his death David McIntire lived at the home of William T. Galliher, husband of his grandniece Annie Laura.

Four or five hours after the death of David McIntire an examination was made by his nephew, Edwin A. McIntire, and by Mr. Galliher and his wife, and her sister Emma V. McIntire, of a chest which had belonged to decedent, and in a tin case therein were found two separate writings, which were read and examined by each one present. On April 8, 1884, these documents, pasted together, were proved, in the probate branch of the Supreme Court of the District, as the last will and testament of Mr. McIntire, by the joint affidavit of the four persons above named, who, as above stated, first inspected the writings after the death of the testator. The documents were admitted to probate on April 12, 1884, and letters of administration issued to E. A. McIntire. As probated, the writing read as follows:

"January 7th, 1880.

"This my last will and Testament. I David McIntire, Tin Plate Worker, of this city (of) Do will Bequeath or Devise to my Nephews and Nieces That is to say, From July the first 1st eighteen hundred and fifty-four (1854) To the opening of, or reading of this Paper, One thousand three hundred and fifty dollars and sixty-four cents (1350.64) is to be calculated at Six 6 per cent interest That amount whatever it may be is to be given to each of my Brother Edwin's children. The remainder if any, is to be equally divided Between my Brothers Edwin and Charles children.

"DAVID McINTIRE. (Seal.)"

(Endorsed on back:)

"The Judges of the Courts, lay it down as a rule in law, that, what a person leaves in his, handwriting, with his name attached, is his, Will, and it is the law. The law, requires no

particular formality in action, or words to constitute a valid will or request. DAVID MCINTIRE."

"January 1, 1880.

"At my death, or after i wish my body to be taken to Philadelphia, and deposited in the 'Macphelah Cemetery' Vault with the cover unscrued and remain in that condition until friends or relatives are satisfied, and then deposited in the lot with the other graves. And providing 'Macphelah Cemetery' should be sold and a disposition of those made in the family lot, by the family, then the instruction as stated above is to follow that disposition.

"DAVID MCINTYRE OR TIRE."

"To provide for the demise when it should come, to the great proprietor of all. My clothing is to go to those that they fit. If there is more than one, a rough estimate is to be made and divided so recipients may have a word and be satisfied nephews first, — I do not leave them as a legacy they must take them as their own. To avoid trouble, i. e. not of any account whatever, To those that i appoint to settle see that those things are carried out. D. MCINT."

"You must act understandingly there will be no money in bank.

"If the articles are worth having. To give satisfaction to all interested. Provided the surroundings should be disturbed. That is the names i have written down with the articles attached to them. It is my intention that they take them as their own. DAVID MCINTIRE."

"To Lizzy M'Intire Test as she is raising more boys. Hence my Chest with all my clothing or wearing apparel, coat vest, pants, shirts, drawers, socks etc. The large double shawl the vegtable studs goes with the shirts. The sewing apparatus. The 5 glass stopper vials.

"To Emma V. the writing desk with all the writing apparatus pens ink, paper, envelopes, pencils. The cotton mufler, red silk handkerchief and gold studs.

"To Chas. M'Intire Jr. The telescope-gun and one pocket knife, Webster's Dictionary and Pocket-Book.

"The linen Pocket handkerchief to Normy

"The sachel & strap, Martha, addyline, Emma."

It will subserve clearness of statement to mention here that the sum specifically given, by the writing dated January 7, 1880, to the children of testator's brother Edwin equalled an indebtedness owing to the testator by his younger brother Charles.

In February, 1885, a suit was filed on the equity side of the Supreme Court of the District of Columbia, on behalf of Charles McIntire, Jr., and Mrs. Galliher and her sisters and brothers, all claiming as legatees under the probated will, seeking the appointment of a receiver to take possession of the estate in question until the appointment of a new administrator, it being alleged that Edwin A. McIntire had been guilty of fraudulent and deceptive practices, that his bond was insufficient, and that the estate was not safe in his hands. An amicable settlement of this suit was had.

Shortly after the adjustment of this suit, on June 5, 1885, these contest proceedings, heretofore referred to as begun by Charles McIntire, were instituted in the probate branch.

The amended petition of Charles McIntire contained the following allegation with reference to the alleged invalidity of the will in question:

"Petitioner further says, upon information and belief, that the said paper-writing, bearing date January 7, 1880, was not executed by the said David McIntire, or, if so executed, that he was not at that time of sound mind nor conscious of the contents of the same, nor that he executed the same freely and voluntarily, nor that the same is his final and complete last will; and he is advised and believes that the said paper-writings purporting to be the last will and testament of the said David McIntire have been fraudulently altered by the said Edwin A. McIntire with the intent and effect thereby to cheat and defraud the next of kin of said decedent."

Answers were filed on behalf of Edwin A. McIntire, his

sisters, and their mother, (as assignee of her daughter Adaline, who died in July, 1885,) and the issues certified to the circuit court branch to be determined by a jury were as follows:

"1. Was the paper-writing, as now probated and now bearing date January 7, 1880, purporting to be the last will and testament of said David McIntire, deceased, executed by said David McIntire in due form as required by law?

"2. Was the said David McIntire at the time of the alleged execution of the said paper-writing, as now probated and now bearing date January 7, 1880, of sound and disposing mind and capable of making a valid deed or contract?

"3. Were the contents of the said paper-writing, as now probated and now bearing date January 7, 1880, read to or by the said David McIntire or otherwise made known to him at or before the execution thereof?

"4. Was the said paper-writing, as now probated and now bearing date January 7, 1880, executed by the said David McIntire under the undue influence or by the fraud of any person or persons?

"5. Is the said paper-writing, as now probated and now bearing date January 7, 1880, the complete and final last will and testament of the said David McIntire?

"6. Has the said paper-writing, purporting to be the last will and testament of the said David McIntire, deceased, probated on the 8th day of April, 1884, or any part thereof, been fraudulently altered since the death of the said David McIntire, and before the probate thereof, by any person or persons to the prejudice of any of the next of kin or heirs-at-law of said David McIntire?

"7. Has the said instrument purporting to be the last will and testament of said David McIntire, deceased, been in any respect altered since the death of said David McIntire, and, if any such alterations have been made, what were the said alterations and how were they made? Were such alterations made by any party interested under said will or with the privity of any party interested under said will?

"8. Has the said instrument purporting to be the last will and testament of said David McIntire, deceased, or any part thereof been revoked?"

Two trials of these issues were had. On the first the findings of the jury were set aside. On the second trial (June, 1889) the court instructed the jury to find all the issues favorably to the defendants, which was done, and the general term overruled a motion for a new trial.

With this preliminary statement, we come to the consideration of the question whether the trial court rightly instructed the jury to return a verdict in favor of the defendants. In the proceedings before the jury no attempt was made to establish that the testator had ever been of unsound mind, or that the execution of the testamentary writings in question were the result of the exercise upon him of any undue influence: hence the second and fourth issues were properly determined. So, also, the evidence all tended to show that the writings in question were the same documents which were found in the tin case belonging to the deceased, and that the contents were in his handwriting, except in so far as the questions of alteration or suppression are concerned, which we shall hereafter consider.

To the extent, therefore, of these facts the instructions given by the trial court were also undoubtedly correct.

The real controversy is, whether there was proof supporting the claim that material alterations had been made in the will after the death of the testator and before its probate, and also whether there was proof sustaining the charge that a material part thereof had been suppressed. The conflicting contentions of the parties on this subject are as follows: The contestant asserts that evidence was introduced tending to show that the will proper, when it was first taken by Edwin A. McIntire into his possession, was dated January 1, 1880, whereas as probated it reads January 7, 1880; that the date of the second paper or codicil had been altered from January 1, 1884, so as to read January 1, 1880; that the words "of the city of" in the will proper had been altered by Edwin A. McIntire, or by his procurement, so as to read "of this city;" that the second writing or codicil which disposed of the wearing apparel, was originally a full, double sheet of legal cap paper, but that one of the folds, that is, one fourth of a half

sheet, which had upon it matter written by the testator, had been torn off after it had been taken into E. A. McIntire's possession and before the writing was probated; that the proof showed that this was done with the connivance of the defendants. The defendants, on the other hand, assert that the clear preponderance of proof established that the will as probated was in the condition in which it was found after the death of the testator. Both parties, besides the direct evidence by them offered, introduced much indirect testimony to sustain their respective positions. Thus the contestant sought to corroborate his theory that the will had been materially altered by testimony going to show that subsequent to January 1, 1880, the testator had become unfriendly to the contestees who are named in the alleged writing, and had presumably altered the will which he had previously written in their favor. On the other hand, the defendants assert that their contention is fortified by evidence tending to show that prior and subsequent to the 1st of January, 1880, the testator was greatly incensed at his brother Charles because of the existence of a long outstanding indebtedness due him by Charles, which has been heretofore referred to, and therefore had reason not to make a will in his favor. In addition, the contestant, in order to sustain the alleged proof of material alterations and suppression, offered much evidence, which was excluded, which, it was claimed, if it had been admitted, would have tended to show that Edwin A. McIntire, with the approval of the other defendants, made false representations to the probate judge in procuring the grant of letters of administration and in fixing the amount of the bond to be by him given in that capacity; that deceptive practices were resorted to to prevent the testator's brother Charles, who resided in Pennsylvania, from seeking to qualify as administrator, and that untruthful and fraudulent statements were also made by E. A. McIntire to the legatee, Charles McIntire, Jr., to his attorneys and to others as to the amount of the estate and its assets, and also that E. A. McIntire concealed the possession of a large amount of assets and made a false inventory. It is manifest that the correctness of the ruling

of the lower court in instructing a verdict, as well as the question whether prejudicial error resulted from the action of the court in excluding the testimony as to McIntire's misconduct in relation to the inventory and his misrepresentations and fraudulent action as to other matters, (apart from the alleged alterations or suppression of the will,) must depend primarily on whether the direct testimony as to alterations and suppression left it uncertain whether such alterations or suppression were of a vital character. If there was not only no adequate proof to have supported a verdict resting on the fact that there had been material alterations and suppression, but, on the contrary, if there was a clear preponderance of proof the other way, it is obvious that it becomes immaterial for the purpose of ascertaining the validity of the will to determine whether or not, in other respects, McIntire was guilty of fraud and wrongdoing.

In examining the testimony for the purpose of ascertaining whether there is any proof of material alteration and suppression, the question to be determined is, whether there was any proof of such alteration or suppression as would have sustained an affirmative answer by the jury to the eighth issue. The mere fact that the proof may have established that after the death of the testator alterations were made which did not materially change the will, and which were not of such a nature as to justify the presumption that the testator had revoked the will, in whole or in part, would not have authorized a verdict, the result of which would have been to set aside the probate of the will.

We come now to determine whether there was evidence that there had been such material alterations or suppression as would have supported a verdict setting aside the will. The only witnesses testifying on this subject on behalf of the contestant were Mr. and Mrs. Galliher and Emma V. McIntire. Before examining the testimony of these three witnesses it must be borne in mind, as already stated, that they all three read the contents of the documents in question after the death of David McIntire, when they were first taken from the receptacle in which they were found. These witnesses were pecul-

iarly interested in the provisions of the writings, as they naturally anticipated that the deceased would give, at least, a portion of his estate to the children of his dead nephew, with whom he had been for many years in direct contact under the same roof. Seven days following this careful reading and inspection of the papers, they stated under oath, in an affidavit, intended to be the basis for the admission of the writings to probate, that "these papers were discovered in a tin case in a chest late the property of the decedent; that they are now and have been for years past well acquainted with the handwriting of the deceased, and they believe the entire writing and signatures are in his handwriting." After the will had been admitted to probate and the administrator appointed, in February, 1885, in the petition filed in the equity suit, supported by the affidavits of these witnesses, they treated the writings in question as a valid will of David McIntire, and asserted rights under it. The testimony given by these witnesses as to the alterations in the will is as follows:

Mrs. Galliher testified that she read over the papers when they were found, and that the one dated January 1, 1880, originally bore the date January 1, 1884, while the one now dated January 7, 1880, originally read January 1, 1880, and the latter paper had on it the words "of the city of," instead of the words, as now, "of this city;" that the document was written on a new, full length sheet of paper, one eighth of which is now missing, and "looked as if it had been just written, folded and put in the chest." The two papers were disjoined. The next she saw of the papers, after Edwin A. McIntire retained possession of them, was in the probate court, on April 8, 1884, when she deposed to their genuineness. She said she then noticed the change in the date, and the alteration of the words "of the city of," and called the attention of her uncle (E. A. McIntire) thereto, who replied that he thought it better to have them both one date, and that he altered the will to read "of this city," "because otherwise he would have to take it to Philadelphia to probate it, and he could not give bond there." Mrs. Galliher further testified that she did not think she noticed at that time that a part of the will had been

torn off. She was asked the question, "At the time of signing this affidavit did you know that those papers had been altered and mutilated?" and answered, "Yes, sir; but, as I said, Mr. McIntire told me that that made no difference. I had perfect confidence in him; he was a lawyer, and I knew nothing about it; he was my uncle, and I thought I could trust him."

The witness also testified that she remembered particularly that upon the paper originally dated 1884 there was contained a bequest of the testator's glasses to those who would take them or have them. She was asked, "Did you know whether there was any other writing on the papers?" and answered, "That I don't remember."

On cross-examination, in answer to the question how she came to make the examination of the papers which resulted in discovering that a portion of one paper had been torn off, the witness answered that it was indirectly caused by receiving an intimation from her uncle Edwin A. McIntire that her brothers, sister and herself would not be beneficiaries under the will, and that on such second examination she discovered that there had been slight alterations in two letters "of" that she had not noticed on the day the will was probated, and she also then noticed that a fold of the second paper was torn off, because she missed the provision about the glasses. The witness claimed that the bequest of the glasses was impressed upon her memory because of the oddity of the expression concerning them. She also testified that she had the paper sufficiently in her mind to miss anything that was taken out of it that had been impressed upon her memory. She was then asked, "Now, would you say to the jury that there was no other writing on that fold that you say was torn off?" and answered, "That I do not remember; I can't say that there was or was not." The witness also testified that she was prejudiced against her aunts and their brother on account of an alleged conspiracy on their part to hurt her husband's good name; that the contestant came to see her about the will in February or March, 1885, at a time when she was dissatisfied, because she was not a beneficiary under

it. She further testified that she thought the will as probated was all right, and should stand as the last will of David McIntire, until she discovered that she was not to be benefited by it.

Mr. Galliher testified that he read and examined the papers found in the tin case; that he thought the paper now dated January 7, 1880, was the same paper except as to the alterations already referred to; that the paper now dated January 1, 1880, was originally dated January 1, 1884, and that he made a copy of it on April 1, 1884, and that he made a memorandum of the items on the other, which memorandum, however, was not exhibited. He said that at the time he signed the affidavit for probate of the writings he probably read the affidavit which he signed, but did not notice the alterations, and first learned of them from his wife upon leaving the court-room. He did not then return to examine the will, but some time after went back and looked at the papers and then discovered the changes of date and the alterations of the word "the" to "this" and the erasure of the word "of," but did not think he then noticed that a part of one sheet was gone. Subsequently, on his attention being called to the absence of the provision in reference to the glasses, he again examined the papers, and thought it was then he discovered that a portion had been torn off. He was asked, "Did you know of any other writing on those papers besides the expression about the glasses, to which you have referred, that is not there now?" and answered, "I do not, sir." On cross-examination, the witness testified that he had a distinct and clear recollection that the codicil was a complete sheet at the time it was taken from the chest, and that it was probably within a month after the probate of the will that he had discovered that it had been mutilated. He could not, however, assign any reason why, after being informed by his wife of the alterations on leaving the court-house immediately after the probate of the will, he did not at once return, and if the fact was as claimed call the attention of the court to the matter. The witness further testified that for a good while after the probate he thought his wife was a legatee

under the will. He made the second examination of the will at the court-house before the intimation from Mr. McIntire that his wife would have no interest under the will, "so as to know of my [his] own knowledge that these corrections had been made." When asked how he happened to discover that a part of one paper was torn off, he answered, "Because it was a whole sheet at the time I turned it over to E. A. McIntire, and this bequest was on there in regard to the glasses; that portion of the sheet had disappeared and that bequest was not on there." Despite the discovery of the alleged alterations and mutilations referred to, the witness said he did not go to see Mr. McIntire or demand from him an explanation, and did not call the attention of anybody to the subject until some six or eight months afterwards, when he spoke of it in the office of certain attorneys, on being interrogated in regard to the alterations. Prior to that, after hearing from Mr. McIntire that his wife would not share in the estate, witness consulted an intimate friend, a lawyer, but the witness said he did not think he told him that the will had been mutilated and altered.

Emma V. McIntire testified that on her inspection of the writings when they were taken from the chest on April 1, 1884, there was no paper dated January 7, 1880, but that the paper now bearing such date was one of the papers found, except as to the date; also that the words "of the city of" in said paper had been altered to read "of this city." This witness also testified that she thought the second paper, now dated January 1, 1880, was one of the papers found in the chest, except that the date was January 1, 1884, when she first saw it, and that a remark to the effect that the paper was written the January previous to the death of testator was made at the time the papers were examined on April 1, 1884. She also testified that she thought the second paper was "originally a complete sheet; just the length of the other one." She remembered having heard the paper read, and that there was some remark in it about glasses. She further testified that both papers were read aloud, and that then each one took them and read them severally, and that they all

supposed that she and her sister and brothers were entitled to the share in their Uncle David's estate which would have come to their father had he lived. The witness also swore that she did not discover the alterations when she verified the affidavit in the probate court, wherein she averred the authenticity of the documents, though she read the papers carefully at the time she made the affidavit, which latter statement, however, was subsequently qualified on cross-examination by the statement that perhaps she had not read them as carefully as she ought to have done. She further stated that she did not notice the alterations until her sister called her attention to them.

The foregoing condensed summary is substantially all the testimony given by Mr. and Mrs. Galliher and Emma V. McIntire, bearing upon the question of the alleged material alterations and suppression of the documents constituting the probated will. As already stated, these witnesses were the only ones who testified on this subject on behalf of contestant, and upon their testimony the case necessarily depends. If we leave entirely out of view the evidence of the defendants to the effect that the papers constituting the will as probated were precisely in the condition they were when taken from the tin case, we do not think a jury could have properly inferred from this testimony that in the alleged missing portion of the will there existed provisions so in conflict or inconsistent with the probated will as to have operated to materially alter or revoke it. That the actual alterations to which the witnesses testify in no way materially modified or abrogated the will, is too clear for discussion. The whole case, hence, depends upon the assertion that there was sufficient evidence to have authorized the jury to find that there was a material mutilation or suppression. But none of the three witnesses testified — granting their testimony as to the mutilation to have been true — that the part torn off contained anything but the reference to the glasses of the testator. It is urged, however, that whilst they recollected that the torn off part had in it the memoranda as to the glasses, they did not remember whether it embraced anything else, and, therefore,

non constat, that it might not have contained other things, and thus would have justified the jury in drawing the presumption of a fraudulent suppression of provisions which, if known, might have revoked or modified the will. But this contention entirely obscures the difference between the failure of a witness to recollect a fact, which from the nature and extent of his knowledge he must necessarily have recalled if it existed, hence giving rise to the implication that, where it is not remembered it did not exist, and the contrary case, where from the position and means of knowledge of a witness his failure to remember justifies no such deduction. The failure of these witnesses to remember comes clearly under the first of these categories. They were willing and friendly witnesses for the contestant, manifestly desirous of stating everything favorable to his claims. They examined the will immediately after the death; they then not only heard it read aloud, but also read it themselves; they then thought that they were interested in it as legatees. If any provision had existed revoking the will, or materially changing its provisions, such fact would in the very nature of things have been impressed upon their minds above and beyond everything else. When, therefore, after swearing to the validity and completeness of the will for the purpose of probate, after asserting rights under it in the equity suit filed against the administrator, they subsequently declared that they did not recollect whether there had been any material alteration or suppression, their want of memory necessarily negatives the presumption which might otherwise result from their testimony, if their sources of information and relation to the will had not been of the kind just mentioned. This is particularly the case as to the testimony of Mr. Galliher. He not only examined and read the will after the death, not only testified as to its completeness when it was probated, but actually made a complete copy of the will proper, and a memorandum of the items on the other paper or codicil at the time when it was examined and before it was turned over to E. A. McIntire to be probated. The context of his testimony indicates that, before he testified at the trial, he refreshed his memory by reference

to the contemporaneous copy and memoranda. It follows, therefore, when in answer to the point blank question, "Did you know of any other writing on those papers besides the expression about the glasses to which you have referred that is not there now?" he said, "I do not know, sir," that he negatived the possibility of there having been such material alterations, because his means of knowledge were such that he must necessarily have known of the fact had it existed. Indeed, we can see no reason to doubt that if the issue presented had been probate *vel non* that the testimony introduced by the contestant here would have justified the admission of the documents to probate, that is, after eliminating the immaterial alterations which the testimony of the contestant asserts to have been made. This being true, it follows that the testimony which would have been adequate to probate the will cannot, at the same time, be sufficient to destroy the probate and annul the will.

The case of *Jones* v. *Murphy*, 8 Watts & Serg. 275, relied upon by the plaintiff in error, is not in point. In that case the existence of a second will was proved, which the evidence tended to show had been destroyed by interested parties, but there was an absence of direct evidence of the contents of the missing paper. Evidence was introduced, however, justifying the inference that the testator might have designed an alteration of the provisions of the earlier will in favor of a daughter, from whom he was estranged when the first will was executed, but who subsequently became reconciled to her father. The court held that where a fraudulent suppression was proved and in addition, other circumstances, such as a motive for a material change in a former will, the jury, in the absence of evidence as to the contents of the later testamentary writing, might presume that it contained a clause revoking the prior will. Here, however, we have two documents, the will proper, evidently deliberately and carefully written, and another instrument having the effect of a codicil, both being sedulously preserved by the testator. It is an asserted change or suppression in the latter instrument which, it is contended, would have justified the jury in finding the will to have been revoked,

although the testimony affirmatively established that even if the suppression asserted existed, it contained no provision revoking the will. The necessary effect of the action of the trial judge in directing findings favorable to the contestees was to hold that the contestant was not entitled to relief. In this conclusion we concur, although the negative answers given to the fifth and seventh questions are not literally accurate, in the light of the evidence as to the immaterial alterations offered on behalf of the contestants. The judgment is, therefore,

Affirmed.

PALMER *v.* BARRETT.

ERROR TO THE CITY COURT OF BROOKLYN, NEW YORK.

No. 194. Submitted March 31, 1896. — Decided April 13, 1896.

In view of the reservation of jurisdiction made by the State of New York in the act of June 17, 1853, c. 355, ceding to the United States jurisdiction over certain lands adjacent to the navy yard and hospital in Brooklyn, the exclusive authority of the United States over the land covered by the lease, the ouster from possession under which is the subject of controversy in this action, was suspended while the lease remained in force.

This was a writ of error to the city court of Brooklyn, an inferior court of the State of New York. The action was brought to recover damages for an alleged unlawful ouster of the plaintiff from the possession of two market stands in the Wallabout market in the city of Brooklyn, and to recover damages for the conversion of certain described personal property which was a part of said stands. Defendant Palmer answered by a general denial, while the defendant Droste, in addition to specific denials, alleged in substance that he lawfully acquired the premises in controversy by a lease from Palmer, his co-defendant, and a lessee of the city of Brooklyn.

It appeared from the proof that the stands in question were erected upon ground, part of lands acquired by the govern-

ment of the United States for the purposes of a navy yard and naval hospital, and that by chapter 355 of an act of the legislature of the State of New York, passed June 17, 1853, that State ceded to the United States jurisdiction over the lands acquired for the purposes stated. The statute of the State of New York making the cession provided as follows:

"1. The jurisdiction of this State over all lands in and adjacent to the city of Brooklyn, belonging to the United States, and used and occupied as a navy yard and naval hospital, and which has not heretofore been ceded to the United States, is hereby ceded to the United States for the uses and purposes of a navy yard and naval hospital, on the condition contained in this act, and according to the plan furnished by the Navy Department, and bounded as follows: . . .

"2. Such jurisdiction is ceded as aforesaid on the condition that the United States shall pay, or cause to be paid to the city of Brooklyn the sum of eleven thousand three hundred and eighty-three dollars and seventy-three cents, with interest from the first day of February, eighteen hundred and fifty-two, until paid, being the balance of an assessment now due on a part of said lands for grading and paving Flushing avenue. . . ."

"4. The United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded, and no longer. . . . Nor shall the jurisdiction so ceded to the United States impede or prevent the service or execution of any legal process, civil or criminal, under the authority of this State.

"5. Nothing in this act contained shall be construed so as to allow the common council of the city of Brooklyn hereafter to tax or assess any of the lands of the United States for any purpose whatsoever."

In October, 1884, an agreement was entered into between the commandant of the Brooklyn navy yard, representing the Navy Department, and a commissioner of the department of city works of the city of Brooklyn, which agreement recited that permission was granted to the city of Brooklyn to occupy certain described portions of "vacant" government

land, situated on Washington and Flushing avenues, in the city of Brooklyn, "to be used only as a stand for the market wagons bringing produce into the city from the adjacent country and those with whom they trade; that the city of Brooklyn will patrol and efficiently police the said premises from the hospital wall on the east to the navy yard fence on the westerly side of Washington avenue; that no permanent buildings or structures be erected on the lands, there being no objection to the erection of wooden booths, sheds or other temporary buildings for the sale of groceries, farm produce, horse feed and other goods, for restaurant purposes, and for the purpose of shelter from the weather; and that during the occupancy of said premises by the city of Brooklyn the water tax for water consumed by the navy yard be reduced to the same rate as that charged to manufacturing establishments in the city of Brooklyn." The agreement further provided that the permit in question might be terminated at any time on thirty days' notice from the Secretary of the Navy, when the city should be entitled to remove all property thereon not belonging to the United States.

At the close of the testimony counsel for defendant moved the court to dismiss the complaint, because of a want of jurisdiction over the subject-matter of the action. This want of jurisdiction was based on the contention that the land upon which the stands were erected was to all intents and purposes territory of the United States, and that as the action was local in its character the courts of another sovereignty could not entertain jurisdiction.

The motion to dismiss being denied the cause was submitted to the jury, who found for the plaintiff. Judgment having been entered on the verdict the cause was appealed to the general term of the court, where the judgment was affirmed. This judgment of affirmance was subsequently affirmed by the Court of Appeals of the State, 135 N. Y. 336, and after the filing of the mandate in the clerk's office of the city court of Brooklyn, a writ of error was allowed by a justice of this court.

Mr. H. E. Tremain and *Mr. M. L. Towns* for plaintiffs in error.

Mr. Hugo Hirsh and *Mr. Henry S. Rasquin* for defendant in error.

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

Beyond the fact that the government was the owner of the land known as the Wallabout market at the time of the passage by the legislature of the State of New York of the act of June 17, 1853, the record does not disclose when or how the government acquired title to the land. Counsel for plaintiffs in error, however, say that the following act of Congress, approved March 3, 1853, c. 102, 10 Stat. 220, 224, relates to this land:

"For the purpose of paying the lien existing on the lands recently purchased as an addition to the navy yard at Brooklyn, twelve thousand two hundred and forty-seven dollars and five cents, to be paid by the Secretary of the Navy, if upon examination he shall find the same to be due as a lien on the purchase of the said land: and the Secretary of the Navy is hereby empowered and directed to sell and convey to any purchaser all that part of the navy yard lands at Brooklyn between the west side of Vanderbilt avenue and the hospital grounds, containing about twenty-six and a half acres, including Vanderbilt and Clinton avenues: *Provided*, That said lands shall not be sold at less price than they cost the government, including interest with all assessments and charges: *And provided further*, That prior to the sale of said lands exclusive jurisdiction shall be ceded to the United States of all the remaining lands connected with the said navy yard, belonging to the United States."

This act rather tends to make certain what would be inferable from the New York statute, that the land in question had been purchased by the United States without the consent of the State being given at the time the purchase was made. If, therefore, we assume that the lands were acquired by the

government by purchase, still section 8 of article 1 of the Constitution of the United States, conferring upon Congress authority to exercise exclusive legislation over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings, has no application. *Fort Leavenworth Railroad* v. *Lowe*, 114 U. S. 525. The question therefore depends upon the provisions of the act of the legislature of the State of New York, already referred to, by which jurisdiction was ceded to the United States. Looking at that act, we find that it was "for the uses and purposes of a navy yard and naval hospital," and that it was therein expressly provided "that the United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded, and no longer. . . . Nor shall the jurisdiction so ceded to the United States impede or prevent the service or execution of any legal process, civil or criminal, under the authority of this State." The power of the State to impose this condition is clear. In speaking of a condition placed by the State of Kansas on a cession of jurisdiction made by that State to the United States over land held by the United States for the purposes of a military reservation, this court said in *Fort Leavenworth Railroad* v. *Lowe*, (p. 539,) *supra:* "It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex, not inconsistent with the free and effective use of the fort as a military post."

Now, the land in question here was clearly not used by the United States and occupied by it for a navy yard or naval hospital. On the contrary, it composed a part of the vacant land adjoining the navy yard, which had been leased by the United States to the city of Brooklyn for market purposes. The lease contained a specific proviso that the grounds should be patrolled and policed by the city authorities. Moreover, a direct consideration was received by the United States for the lease, since it provided that a supply of water for all the

purposes of the navy yard at reduced rates should be furnished by the city to the United States during the use by the former of the land covered by the lease. In the absence of any proof to the contrary, it is to be considered that the lease was valid, and that both parties to it received the benefits stipulated in the contract. This being true, the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the governmental purposes of the United States therein specified. Assuming, without deciding, that, if the cession of jurisdiction to the United States had been free from condition or limitation, the land should be treated and considered as within the sole jurisdiction of the United States, it is clear that under the circumstances here existing, in view of the reservation made by the State of New York in the act ceding jurisdiction, the exclusive authority of the United States over the land covered by the lease was at least suspended whilst the lease remained in force.

These views dispose of the only Federal question which the case presents, and the judgment below is, therefore,

Affirmed.

KELSEY *v.* CROWTHER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 74. Submitted November 19, 1895. — Decided April 13, 1896.

In a bill to compel specific performance of a contract for the sale and purchase of a tract of land, it is absolutely necessary for the plaintiff to tender performance and payment of the purchase money on his part; and this rule is still more stringent when applied to the case of an optional sale.

Lewis P. Kelsey and James K. Gillespie filed their second amended complaint in this case in the district court of the Third District of the Territory of Utah, December 13, 1888, against William J. Crowther, John T. Lynch and William Glasmann, alleging that on or about September 12, 1887,

the defendant Crowther was seized in fee simple of a certain tract of land containing 40 acres, situate in the county of Salt Lake, Territory of Utah; that on that date the plaintiffs and Crowther entered into an unwritten agreement whereby the plaintiffs agreed to buy and Crowther agreed to sell to them the said tract for the sum of $3250, it being agreed, as alleged, that a portion of the tract, containing 10 acres, was to be conveyed at once, and $500 of the said sum to be paid upon the conveying thereof, and that the remaining portion, containing 30 acres, was to be conveyed at the time, in the manner, and for the amount set out in a certain written contract, which, as alleged, was prepared solely in pursuance of the said unwritten agreement. It was alleged that the 10 acre portion of the tract was not worth $500, and that such sum was agreed by them and Crowther to be received by him not only in payment for the 10 acres, but also as part consideration for the remaining 30 acres. The said written agreement was as follows:

"SALT LAKE CITY, UTAH, *September* 13, 1887.

"Received of Lewis P. Kelsey and J. K. Gillespie the sum of fifty dollars, being part consideration of the purchase price, to wit, $2750, at which the undersigned agrees and contracts to sell, and by good and sufficient warranty deed convey, free of all liens, to said Kelsey and Gillespie the following described lot of ground, to wit: The east thirty (30) acres of the south half of the southwest quarter of section three (3), township one (1) south, of range one (1) west, Salt Lake meridian.

"Said purchasers to have after this date thirty (30) days for the examination of the title of said premises, and in case said title is adversely reported on by the attorneys of said purchasers, then said part consideration hereby receipted shall be at once returned to said purchasers; but if said title is approved, I hereby contract and agree to and with said Kelsey and Gillespie that I will at once, on payment of said balance of the agreed purchase money, to wit, $2700, duly execute, sign and acknowledge and deliver a full and perfect warranty deed, conveying to said purchasers the entire title

to said premises, and I agree to at once furnish an abstract of title to said premises and other needful papers.

"WM. J. CROWTHER. [SEAL.]"

The plaintiffs alleged that Crowther failed to furnish them an abstract of title to the land, and that by reason of such failure they were unable to examine the title within thirty days; that notwithstanding the fact that the abstract was not furnished as agreed, they tendered to Crowther on October 14, 1887, (being the next day after the said period of thirty days had expired,) the sum of $2700, and demanded a conveyance of the property, which Crowther refused to execute to them. They further stated that, as they were informed and believed, the defendants Lynch and Glasmann claimed to have obtained from Crowther some interest in the said 30 acres, but that such pretended interest was acquired by the said defendants subsequently to the making of the said contract, and with full knowledge of the existence thereof, and was therefore subject and subordinate to the rights of the plaintiffs.

The plaintiffs stated that they were ready and willing to pay the said sum of $2700 to Crowther, and asked the court to decree that Crowther execute to them a warranty deed, conveying to them the said 30 acres of land, free of all liens; that Lynch and Glasmann be required to set forth the nature of their respective claims to the land; that such claims were subject and subordinate to the plaintiffs' rights therein, and wholly invalid, and that Lynch and Glasmann be perpetually enjoined from asserting any claims whatever to the property adverse to the rights of the plaintiffs.

The defendants demurred to the said complaint, and their demurrer having been overruled, they filed their answer on December 13, 1888, wherein they denied that the written contract was executed in pursuance of the alleged unwritten agreement, or that such unwritten agreement was ever made; denied that the 10 acre portion of the tract was not worth $500, or that that amount was any part of the alleged agreed consideration for the 30 acres; and denied that the plaintiffs tendered to Crowther, on October 14, or at any other time,

the sum of $2700, or any sum. It was stated in the answer that the defendants Lynch and Glasmann had purchased the said 30 acres from Crowther subsequently to November 4, 1887, and that such purchase was made and the entire consideration therefor paid by them without any knowledge or notice on their part of any contract in favor of the plaintiffs, or of any of their alleged rights in the property.

On January 30, 1889, the court, having theretofore heard the testimony and argument, found the facts to be as follows:

"First. That the written contract set forth in the complaint was executed by the defendant, W. J. Crowther, and delivered to the defendants. [Meaning, doubtless, to the plaintiffs.]

"Second. That at no time during the thirty days therein specified did the said plaintiffs tender or offer to pay the said defendants the $2700, purchase price of the said land; that at no time during the said period did the said plaintiffs signify their intention to accept the terms of said contract and to purchase the said land.

"Third. That on the 14th day of October, 1887, plaintiffs and defendant Crowther had further conversation on the subject of this purchase, but that on that day the plaintiffs or either of them did not tender $2700, or any part thereof, or any other sum, as per said agreement, for the said ground to defendant Crowther, and the said plaintiffs were not ready or willing to pay the balance of the purchase money for the said property to the defendants."

Upon these facts the court found, as its conclusion of law, that the defendants were entitled to judgment, and, on January 30, 1888, judgment for the defendants was duly entered. An appeal was taken by the plaintiffs to the Supreme Court of the Territory (7 Utah, 519) of Utah, and there, on September 12, 1891, the judgment was affirmed; whereupon the plaintiffs appealed to this court.

Mr. Parley L. Williams and *Mr. Orlando W. Powers* for appellants.

Mr. Arthur Brown for appellees.

Opinion of the Court.

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

Upon the facts contained in the previous statement, there is no room to doubt that the judgment of the trial court dismissing the complaint, and the judgment of the Supreme Court of the Territory of Utah affirming that judgment, were correct, unless there was material error in the action of the district court in failing to find whether the appellee Crowther tendered the abstract of title called for in the contract.

The appellants contend that the question of the tender of the abstract was in issue and was material; that, under the system of pleading prevailing in the courts of the Territory of Utah, full findings are required upon every material issue; and that if any material issue is left unfound, it is ground for reversal of the judgment.

But, even if it be conceded that Crowther did not tender the abstract, the finding of that fact would not have rendered a different judgment necessary; and hence the supposed fact was really immaterial.

The action was in the nature of a bill for specific performance of a contract for the sale and purchase of a tract of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defence to an action for damages brought by Crowther. But if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance. To entitle themselves to a decree for a specific performance of a contract to sell land it has always been held necessary that the purchasers should tender the purchase money. This is the rule in the ordinary case of a mutual contract for the sale and purchase of land. And the rule is still more stringently applied in the case of an optional sale, like the present one, where time is of the essence of the contract, and where Crowther could not have enforced

specific performance. In such a case, if the vendee wish to compel the other to fulfil the contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal. *Bank of Columbia* v. *Hagner*, 1 Pet. 455, 464; *Marble Co.* v. *Ripley*, 10 Wall. 339, 359.

The second and third findings were expressly to the effect that at no time during the thirty days specified in the contract did the plaintiffs tender or offer to pay the defendants the purchase money, nor signify their intention to accept the terms of the contract, and that said plaintiffs were not ready or willing to pay the balance of the purchase money. Those were the findings of the trial court, and the Supreme Court reached the same conclusions upon a review of the testimony which was all in the record; and its conclusions upon this as a question of fact are not reviewable by this court. *Hawes* v. *Victoria Mining Co.*, 160 U. S. 303.

The bill and answer disclose an issue as to the claim of Lynch and Glasmann that they were *bona fide* purchasers for value, without notice, of the tract of land specified in the contract between the plaintiffs and Crowther; and as the answers were fully responsive to the allegations of the complaint, and as no evidence was adduced by the plaintiffs to sustain the bill in that particular, there would seem to be no reason why the complaint should not have been dismissed on that issue. As, however, neither the trial court nor the Supreme Court adverted to that phase of the case, and as there may have been reasons not disclosed to us by the record why that ground of defence was not put forward, we shall not consider it.

The Supreme Court of the Territory also expressed the opinion that, upon the facts disclosed by the record, the complainants had a full and complete remedy at law for all the damages they may have suffered by reason of any and all breaches of the contract, if any were committed, by the defendant Crowther. No errors, however, have been assigned to this ruling.

We think the appellants have failed to sustain their specifications of error, and the decree of the Supreme Court of the Territory is accordingly *Affirmed.*

MONTGOMERY *v.* UNITED STATES.

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

No. 186. Submitted March 27, 1896. — Decided April 13, 1896.

Goode v. *United States*, 159 U. S. 663, followed in holding that in the trial of an indictment against a letter carrier, charged with secreting, embezzling or destroying a letter containing money in United States currency, the fact that the letter was a decoy is no defence.

The carrier's duties are the same, whether the letters are genuine or decoys.

THE case is stated in the opinion.

Mr. Lewis Shepherd and *Mr. Creed F. Bates* for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

Thomas M. Montgomery, the plaintiff in error, was indicted in the Circuit Court of the United States for the Eastern District of Tennessee, for the crime of embezzling and stealing, on March 8 and 9, 1890, certain letters containing money in United States currency, which had come into his possession as a railway postal clerk or route agent, on the railway mail route between Chattanooga, Tennessee, and Bristol, Tennessee. The defendant was tried, convicted and sentenced to be confined at hard labor for the term of two years in the penitentiary at Columbus, Ohio.

At the trial it appeared that the letters taken had been mailed for the purpose of detecting the defendant; in other words, were "decoy" letters; and thereupon the defendant asked the court to instruct the jury that, as the letters taken were mailed for the purpose of entrapping defendant into the commission of a crime, there could be no conviction of the defendant for the taking of said letters.

The refusal of the court to so charge is the subject of the first assignment of error.

Syllabus.

To dispose of this assignment it is sufficient to cite the case of *Goode* v. *United States*, 159 U. S. 663, where it was held that, in an indictment against a letter carrier charged with secreting, embezzling or destroying a letter containing postage stamps, the fact that the letter was a decoy is no defence.

Error was likewise assigned to the refusal of the court to charge that there was a fatal variance between the indictment and proof in respect to the description of the letters, for the stealing or embezzling of which the defendant was indicted.

In the indictment it was averred that the letters in question had come into the defendant's possession as a railway postal clerk, to be conveyed by mail and to be delivered to the persons addressed. It was disclosed by the evidence that the letters and money thus mailed belonged to the inspectors who mailed them, and were to be intercepted and withdrawn from the mails by them before they reached the persons to whom they were addressed.

There is no merit in this assignment. The letters put in evidence corresponded, in address and contents, to the letters described in the indictment, and it made no difference, with respect to the duty of the carrier, whether the letters were genuine or decoys with a fictitious address. Substantially this question was ruled in the case of *Goode* v. *United States*, above cited.

The judgment of the court below is

Affirmed.

BRYAN v. KALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 198. Submitted December 19, 1895. — Decided April 13, 1896.

When a mortgagee is in possession of the mortgaged real estate, claiming under a foreclosure sale, one claiming under the mortgagor cannot, by setting up that the foreclosure proceedings were invalid, maintain ejectment to recover the premises, without first offering to redeem and tendering payment of the mortgage debt.

Statement of the Case.

THIS was an action of ejectment brought August 12, 1887, in the district court of the Second Judicial District of the Territory of Arizona, county of Maricopa, by T. J. Bryan against M. W. Kales, to recover possession of a tract of land in that county containing 160 acres. The case was tried by the court, a jury having been waived, and on December 6, 1890, judgment was entered for the defendant, whereupon the plaintiff appealed to the Supreme Court of the Territory of Arizona. In that court the case was heard upon an agreed statement of facts, and the judgment of the district court was affirmed. The plaintiff then appealed to this court.

The facts, as they appear in the agreed statement, are substantially as follows:

On May 26, 1882, one Jonathan M. Bryan, who then owned the S. E. $\frac{1}{4}$ of section 2, T. 1 N., R. 3 E., Gila and Salt River meridian, being the land in controversy in this action, executed to the said M. W. Kales his promissory note for the sum of $5615, payable May 26, 1883, with interest at the rate of one and one half per cent a month, and, to secure the same, on the said date he and his wife, Vina Bryan, executed and delivered to Kales a mortgage of all the said land.

On August 29, 1883, Jonathan M. Bryan died intestate, leaving Vina Bryan, who was his wife at the time he acquired the said property, his widow and sole heir. On September 13, 1883, the said M. W. Kales filed his application for letters of administration in the probate court of the said county wherein Jonathan M. Bryan resided at the time of his death, and in which the said land was situate, and such proceedings were had thereon that Kales was duly appointed administrator of Bryan's estate on September 24, 1883. He proceeded in the administration of the estate until December 6, 1884, when the administration was closed, and he was discharged from his trust. In such proceedings the said property was not distributed.

Kales, while he was so acting as administrator, and while he was the owner of the note and mortgage, brought an action in the district court of the Territory of Arizona, by a complaint filed October 3, 1883, in which he, M. W. Kales, as

Statement of the Case.

plaintiff, sued himself, M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, as defendant, asking for judgment upon the note and foreclosure of the mortgage, and for a sale of the land to satisfy the judgment. To that suit Vina Bryan was made a party defendant. On the same day a *lis pendens* was duly filed in the office of the county recorder of the said county. On October 3, 1883, a summons was duly issued out of the said court, and duly served upon M. W. Kales, administrator, the defendant named in the action; and on the same day a summons was duly issued and served upon the said Vina Bryan. M. W. Kales, administrator, as defendant, made answer on the same day, and admitted each and every allegation of the complaint, and consented that a judgment and decree might be entered in accordance with the prayer thereof; and Vina Bryan, answering the complaint, denied any individual liability on her part to the plaintiff, admitted each and every material allegation in the complaint, in so far as the same did not imply a personal liability on her part; disclaimed all right, title and interest in the said property in any way conflicting with the mortgage; and prayed to be dismissed.

Upon a day of the regular term of the said court, October 16, 1883, the said cause came on for trial, and the same having been tried and duly submitted, the court on that date rendered judgment against M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, defendant, in favor of M. W. Kales, plaintiff, for the sum of $5330.80, entered a decree to foreclose the said mortgage, and ordered that the said property be sold to satisfy the judgment, and that the defendants be barred and foreclosed of all equity of redemption of, in and to the said property from and after the delivery of the sheriff's deed to the same. On November 10, 1883, an order for the sale of the property was issued out of the court on the judgment and delivered to the sheriff of Maricopa County for execution, and on December 15, 1883, the sheriff, having advertised the land for sale under the judgment for the time prescribed by law, offered the same for sale to the highest bidder, for cash, and sold the same to the said M. W.

Kales for the sum of $4500, that being the highest price bid, and subsequently executed and delivered to Kales a deed therefor, dated June 19, 1884.

Afterwards Vina Bryan, the widow of Jonathan M. Bryan, married one R. D. Brown, and thereafter, namely, on June 29, 1887, she conveyed, by quitclaim deed, in the name of Vina Brown, to T. J. Bryan, the plaintiff in the present action, such interest as she then had in the said land.

It further appears by the agreed statement of facts in this case that Kales paid the said amount for the property, and that such amount was the market value of the same; that from the date of sale to the time of the commencement of this action, Kales paid $434.88 in taxes and $3048.37 for improvements upon the property; that M. W. Kales, the plaintiff in the said suit, was the same person as M. W. Kales, administrator, the defendant therein; that at the time of the commencement of the present suit the defendant was in possession of the property; that no part of the property was sold by the said administrator in the course of his administration, and that the note and mortgage executed to Kales were not paid or satisfied in any way, unless by the said sale.

Mr. William A. McKenney, *Mr. Webster Street* and *Mr. B. Goodrich* for appellant.

Mr. A. C. Baker, *Mr. A. H. Garland* and *Mr. R. C. Garland* for appellee.

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

Whether the judgment in the case of *Kales* v. *Kales, Administrator of the estate of Jonathan M. Bryan*, was void, because of the alleged fact that the plaintiff, suing as a creditor of the estate to foreclose a mortgage, was the same person who, as defendant, represented the estate; whether the judgment was open to attack collaterally; and whether Mrs. Vina Brown, who was the widow and sole heir of Jonathan M. Bryan, was estopped from assailing the judgment, by reason

of having appeared and answered in the foreclosure suit, acknowledging the debt and consenting to the sale, are questions which we deem it unnecessary to determine. There was another ground of defence, so conclusive and free from difficulty that we prefer to place upon it our judgment affirming that of the court below.

It is admitted that the defendant below was a mortgagee in possession, with his debt past due and unpaid. The plaintiff was not offering to redeem, and had not tendered payment of the debt, but stood on the bare legal title, subject, if the foreclosure proceeding were void, to the lien of the unpaid mortgage and to the right of the mortgagee to retain possession until his debt was paid. This is the English doctrine, and it prevails generally in the United States. *Birch* v. *Wright*, 1 T. R. 378; *Simpson* v. *Ammons*, 1 Binney, 175; *Hill* v. *Payson*, 3 Mass. 559; *Parsons* v. *Welles*, 17 Mass. 419; *Brobst* v. *Brock*, 10 Wall. 519. And such, as we learn from the opinion of the Supreme Court of the Territory of Arizona in the present case, is the law of that Territory.

The judgment of the Supreme Court of the Territory of Arizona is accordingly

Affirmed.

BRYAN *v.* BRASIUS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 200. Submitted December 19, 1895. — Decided April 13, 1896.

A mortgagor of land cannot recover in ejectment against the mortgagee in possession, after breach of condition, or against persons holding under the mortgagee.

An irregular judicial sale, made at the suit of a mortgagee, even though no bar to the equity of redemption, passes all the mortgagee's rights to the purchaser.

In his lifetime one Jonathan M. Bryan, who was the owner of the 160 acres of land in controversy in this action, being the

N. E. ¼ of section 5, T. 1 N., R. 3 E., Gila and Salt River meridian, executed and delivered his promissory note to M. W. Kales, February 23, 1883, for the sum of $2500, payable February 23, 1884, with interest at the rate of one and one half per cent a month. To secure the payment of the note, on the same day he executed and delivered to Kales a mortgage of all the said land. At that time, and also at the time he acquired the said property, Jonathan M. Bryan was a married man, his wife being Vina Bryan. On August 29, 1883, Jonathan M. Bryan died intestate, leaving Vina Bryan his widow and sole heir; and on September 24, 1883, the said M. W. Kales was duly appointed administrator of his estate by the probate court of Maricopa County, Territory of Arizona, wherein the said land was situate, and continued in such office until the administration was closed, December 6, 1884. In the administration of the estate the said property was not distributed.

On September 28, 1883, Kales brought an action in the district court of the Territory of Arizona, county of Maricopa, in which he, M. W. Kales, as plaintiff, sued himself, M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, as defendant, and in which he asked for judgment upon the note and foreclosure of the mortgage, and for a sale of the mortgaged premises to satisfy the judgment. A summons was duly issued out of the said court on October 5, 1883, and on the same day was duly served on M. W. Kales, administrator, the defendant named in the action, who, on the day following, made answer, and admitted each and every allegation of the complaint filed, and consented that judgment or decree might be entered in accordance with the prayer thereof.

On the 9th day of October, 1883, being a day of the regular term of the said court, the said cause came on for trial, and the same having been tried and duly submitted, the court, on October 16, 1883, rendered judgment against M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, defendant, in favor of M. W. Kales, plaintiff, for the sum of $2670, entered a decree to foreclose the mortgage, and ordered that the property be sold to satisfy the judgment; and on

Statement of the Case.

November 8, 1883, an order for the sale of the premises was issued out of the said court on the judgment, and delivered to the sheriff of Maricopa County for execution.

On December 15, 1883, the sheriff, having advertised the property for sale under the judgment for the time prescribed by law, offered the same for sale to the highest bidder, for cash, and sold the same to the said M. W. Kales for the sum of $2975, that being the highest price bid, and issued to Kales a certificate of sale therefor, which certificate, on June 13, 1884, was sold and assigned by him to one J. T. Sims for the sum of $3500. On June 16, 1884, the sheriff executed and delivered to J. T. Sims, the assignee of the certificate of sale, a deed for the property, and on February 28, 1887, Sims conveyed the property to George T. Brasius.

In the meantime, Vina Bryan married one R. D. Brown, and on June 28, 1887, she conveyed said property, by quitclaim deed, in the name of Vina Brown, to T. J. Bryan.

By the agreed statement of facts upon which the present case was heard in the court below, and in which the matters stated above are to be found mentioned, it further appears that M. W. Kales, the plaintiff in the said suit, was the same person as M. W. Kales, administrator, the defendant therein; that at the time the present cause of action arose the defendants were in possession of the said property; that no part of the property was sold by the administrator of Jonathan M. Bryan's estate in the course of administration; that the said note and mortgage were never paid or satisfied, unless by the sale under the said foreclosure proceedings; that at the said sale made by the sheriff the property sold for its market value; that immediately after the purchase of the property by J. T. Sims, he entered into possession thereof, and that he and those claiming under him were still in possession of the same when the statement of facts in this case was prepared; that Sims and those claiming under him have, since June 16, 1884, paid taxes upon the property, and that after that date he and they made valuable improvements upon the premises, which remain thereon, without any notice of the claim of the plaintiff in this action or his grantor, except such notice as may have been

imparted by the record in the said suit; and that at the time when Sims bought the property and paid the purchase money therefor he did not know and had no notice that M. W. Kales, from whom he obtained the assignment of the said certificate of sale, was the same person who was the administrator of the estate of Jonathan M. Bryan, deceased, except such notice as may have been imparted by the record aforesaid.

The present action, which was an action of ejectment to recover possession of the said property, was brought July 11, 1887, by T. J. Bryan, the grantee, as aforesaid, of Vina Bryan, against George T. Brasius and others, in the district court of the Second Judicial District of the Territory of Arizona in and for the county of Maricopa. At the trial a jury was waived, and the case was tried by the court. On December 2, 1890, a judgment was entered in favor of the defendant, and the plaintiff thereupon appealed to the Supreme Court of the Territory of Arizona, where the judgment of the said district court was affirmed. The plaintiff then appealed to this court.

Mr. William A. McKenney, *Mr. Webster Street* and *Mr. B. Goodrich* for appellant.

Mr. A. C. Baker, *Mr. A. H. Garland* and *Mr. R. C. Garland* for appellees.

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

This case differs from the case of *Bryan* v. *Kales* just decided, in the particular that the mortgagee, Kales, is not himself the defendant, but the defendants in possession are his alienees. The question thus presented is precisely the one that was ruled in the case of *Brobst* v. *Brock*, 10 Wall. 519, where this court held that a mortgagor of land cannot recover in ejectment against the mortgagee in possession, after breach of the condition, or against persons holding possession under the mortgagee; and also held that an irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights

of the mortgagee as such. *Gilbert* v. *Cooley*, Walker's Chancery, 494, and *Jackson* v. *Bowen and Neff*, 7 Cowen, 13.

So in *Jackson* v. *Minkler*, 10 Johnson, 479, it was held that the assignee of a mortgage, in possession of the premises, is protected by the mortgage, though no foreclosure of it was shown, against an action of ejectment by a mortgagor.

The judgment of the court below, *Bryan* v. *Brasius*, 31 Pac. Rep. 519, was placed on this ground, and it is accordingly

Affirmed.

BRYAN *v.* PINNEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 199. Submitted December 19, 1895. — Decided April 13, 1896.

Bryan v. *Brasius, ante* 415, followed.

The case is stated in the opinion.

Mr. William A. McKenney, *Mr. Webster Street* and *Mr. B. Goodrich* for appellant.

Mr. A. C. Baker, *Mr. A. H. Garland* and *Mr. R. C. Garland* for appellees.

Mr. Justice Shiras delivered the opinion of the court.

This was an action of ejectment brought by T. J. Bryan in the district court of the Second Judicial District of the Territory of Arizona, against D. H. Pinney, Mary E. Pinney, M. H. Sherman, George H. Mitchell, George W. Maull and the Bank of Napa, to recover possession of block 98 in the town of Phœnix, county of Maricopa. The facts of this case, so far as they present questions for our consideration, are similar to those of the case of *Bryan* v. *Brasius*, just decided, and for the reasons there given, and on the authorities there cited, the judgment of the Supreme Court of Arizona is

Affirmed.

ANDREWS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 532. Submitted January 23, 1896. — Decided April 13, 1896.

On the trial of a person indicted for a violation of the provisions of Rev. Stat. § 3893, touching the mailing of obscene, lewd or lascivious books, pamphlets, pictures, etc., it is competent for a detective officer of the Post Office Department, as a witness, to testify that correspondence was carried on with the accused by him through the mails for the sole purpose of obtaining evidence from him upon which to base the prosecution.

The mailing of a private sealed letter containing obscene matter in an envelope on which nothing appears but the name and address is an offence within that statute.

As the inspector testified that the signature was fictitious, and that the letter had been written in an assumed name, the opening by him of the sealed answer bearing the fictitious address was not an offence against that provision of the statute which forbids a person from opening any letter or sealed matter of the first class not addressed to himself.

When the record does not contain the instructions given by the trial court, it is to be presumed that they covered defendant's requests, so far as those requests stated the laws correctly.

This case is here upon a writ of error sued out of the District Court of the United States for the Southern District of California, wherein the plaintiff in error was indicted, tried, convicted and sentenced for violation of Rev. Stat. § 3893, as amended by the act of Congress of September 26, 1888, c. 1093, § 2, 25 Stat. 496. The indictment contained two counts, each of which alleged that in the year 1893, at the city of Los Angeles, county of Los Angeles, the plaintiff in error "did knowingly, wilfully and unlawfully deposit and cause to be deposited in the United States post office at the said city of Los Angeles, county and district aforesaid, for delivery a certain obscene, lewd and lascivious letter addressed to 'Mrs. Susan Budlong, box 661, Los Angeles, Cal.;'" and that the said letter was then and there unmailable matter by reason of the indecent character of its contents. The two counts

differed merely in that they described two different letters, alleged to have been dated respectively November 1 and November 3, 1893, and to have been respectively deposited in the said post office November 2 and November 3, 1893.

Section 3893, Revised Statutes, as amended by the act of September 26, 1888, is as follows:

"SEC. 3893. Every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception, or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, pamphlet, book, 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, whether sealed as first class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails 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, aiding in the circulation or disposition of the same, shall, for each and every offence, be fined upon conviction thereof not more than five thousand dollars, or imprisonment at hard labor not more than five years, or both, at the discretion of the court; and all offences committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself."

The defendant demurred to the indictment on the ground that the facts stated therein did not constitute an offence against the laws of the United States. The demurrer was overruled, and the defendant then pleaded not guilty.

Statement of the Case.

The evidence adduced at the trial tended to prove that one M. H. Flint, a United States post office inspector, having seen in the *Los Angeles Herald* a certain advertisement bearing the address, "Spero, box 60, this office," mailed to that address a letter referring to the subject of the advertisement, signed "Susan H. Budlong, P. O. box 661, Los Angeles, Cal.," and received in answer thereto, through the post office at Los Angeles, a letter signed "Spero," being the letter described in the first count of the indictment; that Flint then sent another letter, signed as above, and, having received an answer thereto signed "Spero," wrote a third time, and afterwards received out of the said post office a letter signed "A. D. A. 313 N. Broadway," being the letter described in the second count of the indictment. All the letters so received by Flint were enclosed in plain sealed envelopes, neither of which bore any writing save the address. Evidence was also introduced tending to connect the defendant with the mailing of the letters.

The said letters of Flint, and the testimony concerning the same, were introduced against the objections of the defendant, and to the introduction thereof he duly excepted.

At the conclusion of the evidence for the government, the defendant moved the court to instruct the jury to acquit him on the ground that if any offence had been committed it had been done at the request of Flint, a government officer, and on the ground that the evidence was insufficient to connect the defendant with the alleged offence. The motion was denied by the court, to which ruling the defendant excepted. The defendant then put in testimony tending to prove his good character, and to countervail the government's evidence to the effect that the said letters were mailed by him.

At the close of all the testimony the defendant requested the court to give the jury certain instructions, which request was refused. Other instructions were given instead, which do not appear in the record. To the court's refusal to give the instructions proposed by the defendant, and to the giving of other instructions, the defendant excepted.

Opinion of the Court.

Mr. J. Marion Brooks and *Mr. M. D. Brainard* 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.

Error is attributed to the court below in permitting the witness Flint to testify in the case, for the reason that he was an officer of the United States, and that correspondence was carried on, through the mails, for the sole purpose of obtaining evidence from the defendant upon which to base the prosecution. A similar contention was disposed of by this court in the case of *Grimm* v. *United States*, 156 U. S. 604, where it was said: "It does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that the writer was a government official — a detective, he may be called — do not of themselves constitute a defence to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defence that he would not have violated the law if inquiry had not been made of him by the government official." *Goode* v. *United States*, 159 U. S. 663, though under a different statute, is to the like effect.

The evidence showed that the letters in question were private sealed letters, enclosed in envelopes upon which there was nothing but the name and address of the person to whom they were sent, and it is contended that the depositing of such letters in the mail is not an offence within the meaning of section 3893 of the Revised Statutes, even as amended in

1888. By that amendment the word "letter" was inserted in the statute. In the case of *United States* v. *Chase*, 135 U. S. 255, which was the case of an indictment for an offence committed before the amendment, Mr. Justice Lamar, who delivered the opinion of the court, expressly refrained from deciding "whether the term 'letter,' introduced by the amendment of 1888, could be held to include a strictly private sealed letter."

Owing, perhaps, to the doubt thus suggested, it was held in several of the lower courts that the word "letter," thus introduced into the statute, must, in the light of the other words used, be deemed to be some sort of a publication, and not merely private sealed letters. *United States* v. *Wilson*, 58 Fed. Rep. 768; *United States* v. *Warner*, 59 Fed. Rep. 355; and *United States* v. *Jarvis*, 59 Fed. Rep. 357. The contrary view was taken in *United States* v. *Andrews*, 58 Fed. Rep. 861 — the present case — in *United States* v. *Nathan*, 61 Fed. Rep. 936; and in *United States* v. *Ling*, 61 Fed. Rep. 1001.

However, any doubt there may have been as to the proper meaning to be given to the word has been removed by the case above cited, of *Grimm* v. *United States*, where mailing a private sealed letter, in an envelope on which nothing appeared but the name and address, but containing obscene matter, was held to be an offence within the statute.

It is likewise argued that, because of the provision of the law that "nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself," 25 Stat. 496, the act of the inspector in opening the letters addressed to "Susan H. Budlong" was itself an offence against the law, which would vitiate the evidence thus produced against the defendant. The inspector, however, testified that he and Susan H. Budlong were the same person, or, in other words, that the address was fictitious.

Complaint is made because the court failed to give defendant's requests for instructions; but the instructions actually given by the court are not disclosed by the record, and we may presume that such instructions covered the defendant's requests so far as they stated the law correctly. This we are

the more ready to do in the present case, as no specific exceptions were taken to the action of the court in refusing or in giving instructions. *Reagan* v. *Aiken*, 138 U. S. 109.

There were other assignments of error, but we think they do not merit special notice.

The judgment of the court below is

Affirmed.

DASHIELL *v.* GROSVENOR.

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

No. 569. Argued January 9, 10, 1896. — Decided April 13, 1896.

The first claim in letters patent No. 425,584, issued April 15, 1890, to Samuel Seabury for an improvement in breech-loading cannon, viz.: for "The combination, with a breech-loading cannon and a breech-block for the same, which is withdrawn in a rearward direction, of a breech-block carrier hinged to the breech, and a breech-block retractor hinged to the breech separate from said carrier to move independently of said carrier to draw the breech-block thereinto and push it therefrom, but capable of moving the said carrier while the breech-block is therein, substantially as set forth;" must, in view of the state of the art at the time of the invention, be limited to the precise mechanism employed: and, being thus limited, it is not infringed by the device patented to Robert B. Dashiell by letters patent No. 468,331, dated February 9, 1892.

THIS was a bill in equity by the appellees against Dashiell for the infringement of letters-patent No. 425,584, issued April 15, 1890, to Samuel Seabury, a lieutenant in the United States Navy, for an improvement in breech-loading cannon. In his specification the patentee made the following statement of his invention:

"This improvement relates to breech-loading cannon in which a screw breech-block, which is withdrawn in a rearward direction, is employed, with a swing carrier or receiver hinged to one side of the breech of the gun, and into which the breech-block is withdrawn, and which serves as a guide for

directing the breech-block into and from its seat in the breech and as a support for the breech-block while out of the gun. In such a gun there are three movements necessary to open the breech — namely, first, the turning of the breech-block to unlock it; second, the withdrawal of the breech-block backward into the receiver; and, third, the swing aside of the receiver with the breech-block in it. These three movements have hitherto been separately performed by hand, the breech-block having been first turned to unlock it by hand and then pulled by hand back into the receiver, and the receiver having been then swung aside by hand with the breech-block in it to open the breech.

"The object of this improvement is to provide for the more rapid working, loading and firing of such breech-loading cannon by effecting all these movements in succession by a continuous movement of a single lever."

The plaintiff relied only upon the first claim of the patent, which reads as follows:

"1. The combination, with a breech-loading cannon and a breech-block for the same, which is withdrawn in a rearward direction, of a breech-block carrier hinged to the breech, and a breech-block retractor hinged to the breech separate from said carrier to move independently of said carrier to draw the breech-block thereinto and push it therefrom, but capable of moving the said carrier while the breech-block is therein, substantially as set forth."

The plaintiffs were Seabury, the patentee, and certain others, who were assignees of interests under the patent. The defendant was, when the suit was begun, an ensign in the United States Navy, and the infringing acts were admitted to have been done under his authority and procurement, under a contract between himself and the Navy Department, through which he was to be paid a stipulated sum for each gun manufactured, embodying the infringing device. For this device letters patent No. 468,331 had been issued to him February 9, 1892.

Upon a hearing, upon pleadings and proofs, the Circuit Court was of the opinion that the Seabury patent was valid, and the Dashiell patent an infringement thereon, and it entered a decree to that effect. 62 Fed. Rep. 584.

On appeal to the Court of Appeals, that court was of opinion that an injunction would prohibit the officers in charge of the navy yard from manufacturing guns for use upon the war vessels of the United States, and for that reason ought not to be granted. The bill of complaint also relied upon certain allegations of fraud which the court held were material to be proved, and were not sustained; and for those reasons it reversed the decree of the court below and dismissed the bill. 25 U. S. App. 227.

Application was thereon made to this court for a writ of certiorari, which was granted.

Mr. William H. Singleton for appellant.

Mr. Samuel F. Phillips for the United States. *Mr. F. D. McKenney* was on his brief.

Mr. William A. Jenner and *Mr. William G. Wilson* for appellees.

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

The question of infringement in this case turns largely upon the construction to be given to the first claim of the Seabury patent. If, as set forth in his specification, he is entitled to claim broadly, by the continuous operation of a single lever, the performance of the three movements necessary to open the breech of a breech-loading gun, viz., unlocking the breech-block, pulling it back into the receiver, and swinging it to one side, the Dashiell patent, which effects the same movements in substantially the same way, would probably be an infringement. It is claimed that, prior to the Seabury patent, those three movements were separately made by hand, and that the novelty of his invention consists in their successive performance by the single sweep of a lever.

To ascertain whether he is entitled to this broad claim, it is necessary to consider somewhat at length the state of the art at the time the Seabury patent was issued. In modern war-

fare breech-loading guns have largely supplanted the old muzzle-loading patterns, and the skill of the inventor has been applied to perfecting the mechanism, whereby the breech may be effectually closed, to prevent the escape of gas, and at the same time rapidly and easily opened and thrown back for the reception of another cartridge. Various forms of breech-block are used, but the patent in suit relates to what is known as the mutilated or slotted screw form, which consists of a circular plug of metal, with equal parts of its threads cut away. The interior surface of the breech or bore is also fitted with a corresponding screw, equal parts of which are also cut away. When the block is in the gun in position for firing, the screw of the breech-block is interlocked with the corresponding threads in the interior of the gun, so that the breech-block is held so firmly to the gun itself as to be substantially a solid body of metal. After firing, the breech-block is turned partly around, so that the threads of the screw are released and brought opposite the smooth portion of the bore. This admits of the breech-block being withdrawn from the gun, where it rests upon what is known as the carrier, which is hinged to the breech and swung to one side, to leave the bore free for the reception of another cartridge. Formerly the three movements of turning the block, withdrawing it from the chamber, and swinging it to one side, had been separately performed by hand. Was Seabury the first to effect these three movements by the single and continuous operation of a lever?

John P. Schenkl purported to do this in the patent issued to him August 16, 1853, performing the movements "through the intervention of appropriate cams, catches and springs, by the motion of a single lever, worked by the hand of a gunner." The movement of the lever was not continuous, and the gun was of a different class, opening in the middle of its length, tipping up its breech and receiving the cartridge at the muzzle of its rear section, like the ordinary muzzle loader. The lever is necessarily given a backward and forward motion to support the two portions of the gun, and turn the breech portion upward, and the same lever is also given another backward and

forward motion, to again connect the two portions of the gun together. Obviously it is not an anticipation.

The patent to Cochran, of November, 1859, throws no light upon the question in this case. The same may be said of the patent to Goodwin of May, 1864. While the patent to Driggs and Schroeder of April 5, 1887, shows a decided advance in the method of breech loading, there is nothing in the invention to indicate that the patentee had in mind the peculiar features claimed for the Seabury patent. The English patent to Farcot, a French engineer, issued the same day as the Driggs and Schroeder patent, relates to an apparatus so arranged that, by the rotation of a single axis, the successive movements necessary for introducing or withdrawing the breech-block are performed with ease, rapidity and exactness. Mechanical means are utilized to operate the breech-block in all three of its movements, for opening as well as closing, and all of them are performed through a crank handle. Its appearance marks a step in advance in the development of the breech mechanism, and the accomplishment of the three motions in one.

British patent No. 9813 to Albert Sauvée, issued May 4, 1888, also exhibits mechanical gearing for operating a slotted screw breech-block, by a continuous movement in a given direction. In this patent the rotation of the breech-screw, its extraction and the rotation of the carrier succeed each other, while the hand-crank is being turned in the same direction. The breech is closed by working the handle in the opposite direction.

The British patent to Sauvée of July 4, 1887, No. 9453, also discloses a breech mechanism for operating a slotted screw-breech block, giving all the three necessary movements of rotation, retraction and swinging aside, by the continuous movement of a simple hand lever. The breech-block in this patent is of conical form and not cylindrical, as in the other patents. The general arrangement shows a lever attached to the breech-block near its middle, and connecting with the carrier by means of a fulcrum, so that power applied to the end of the lever will cause the breech-block to move

forward and backward in the carrier, and into and out of the gun. Besides this, the necessary gear-wheels are fitted to provide necessary rotation to the block at the proper time. When the block is fully withdrawn upon the carrier, the latter is swung to one side by the continued motion of the same lever.

British patent No. 7435, granted February 12, 1889, to Canet, also described, in the first claim, "an improved construction, whereby the opening of the breech of guns can be effected completely by a rotary movement always in the same direction, the rotation of the breech-screw being effected by the action of a rack mounted upon an endless screw, upon a toothed sector on the breech-block; the longitudinal movement of the breech-screw being effected by the direct action of a pinion upon the threads of the breech-screw; and the pivoting of the bracket being effected by the direct action of the operating shaft upon the endless vertical screw."

Still another system, in which the three motions required of the breech-block are accomplished by a single movement of a lever, is found in the British patent No. 7195 to Nordenfeldt, May 17, 1887. In its general principle of effecting these movements, it bears a closer resemblance to the Seabury patent than any other exhibit. "The invention," says the patentee, "relates to breech-loading guns in which the breech is closed by a block entering the breech opening, and having spaced screw-threads upon it engaging corresponding spaced screw-threads, within the breech of the gun. In such guns I give all the necessary movements to the breech-block by means of a lever handle and axis rotating through the arc of a circle. The same movement also actuates an extractor and gives the necessary movement to it for withdrawing the cartridge case from the chamber of the gun."

The patentee Nordenfeldt thus describes the operation of his device:

"In opening the breech, as soon as the lever handle is moved sufficiently far to disengage the screw-threads, a shoulder upon or moving with the lever handle comes against another shoulder upon the withdrawing arm, and this then commences

to turn with the hand lever moving rearwards from the breech of the gun. In this movement it draws back the breech-block out of the gun, the breech-block being engaged with the disengaging arm in the manner already described. In this way the breech-block is landed upon the tray or support, and, as soon as this is the case, the tray or support also commences to move round with the lever handle carrying the breech-block to the rear, and at the same time conveying it to one side so as to leave the breech opening unobstructed. In closing the breech the same movements take place in reversed order. First, all the parts move together, whilst the breech-block is brought back into position to enter the breech opening, then the tray or support remains stationary whilst the breech-block is thrust from off it by the withdrawing arm, and finally this arm remains at rest during the last part of the movement of the lever handle, whilst the rotary movement is imparted to the breech-block requisite to cause the engagement of the screw-threads."

The lever in that patent is entirely separate from the carrier, and moves independently of it, except when the breech-block is fully supported by the carrier, at which time it moves with the latter. The breech-block is rotated by a rack sliding on the face on the breech of the gun, connecting with an arm or projection on the driving shaft. A large model of the breech mechanism of this patent, made from the drawings at the Navy Department, was put in evidence, with written directions for working it.

It is claimed by the plaintiffs in this connection that the model of the Nordenfeldt patent, so made and exhibited, is inoperative, and hence cannot be said to be an anticipation of the first claim of the Seabury patent; and such seems to have been the view of the learned judge who delivered the opinion of the Circuit Court. It does not clearly appear, however, whether this inoperativeness is due to a fault in the original construction of the machine, or to a slight defect in the model made from the drawings in the Navy Department. This model was constructed largely of wood, and might very possibly have become so worn by experimental use, as to fail to

perform perfectly all its functions. It does not seem probable that the patentee would have taken out a patent for a wholly inoperative combination, especially in view of the fact that there were at least half a dozen operative devices already in existence upon which his was claimed to be an improvement. Inoperative devices are frequently set up as anticipations, but they are usually such as have proven to be so far failures that the inventor has not taken out patents for them, and are resuscitated for the purpose of showing that other machines similar to the one patented have been invented before. The very fact that a machine is patented, is some evidence of its operativeness, as well as of its utility, and where a model is constructed after the design shown in a patent which is not perfectly operative, but can be made so by a slight alteration, the inference is, that there was an error in working out the drawings, and not that the patentee deliberately took out a patent for an inoperative device.

But, however this may be, it is clear that the model in question could be made operative by a very trifling alteration, increasing the friction between the bolt and the guideway in the withdrawing arm. Either the filling piece was made a little too small or else it had become worn by constant use of the model. That this was simply a question of friction was readily demonstrated by slipping a thin piece of paper between the filling piece and the bottom of the guideway, when the device appeared to be fully operative. The conclusion is irresistible that the alleged inoperativeness was not one due to any inherent defect in the mechanism described in the patent, but to a want of exactness in the model, due either to imperfect construction, or to the employment of another material than was contemplated in the patent.

As several of the patents above described show that, at the date of the Seabury invention, it was no longer a novelty to perform the three movements necessary to open and close the breech by the continuous movement of a single lever, it follows that the first claim of this patent cannot receive the broad construction claimed, but must be limited to the precise mechanism described. This is for a combination, 1. Of a

breech-loading cannon and a breech-block capable of being withdrawn in a rearward direction from the gun. 2. A breech-block carrier hinged to the breech. 3. A breech-block retractor hinged to the breech separate from its carrier. 4. That the retractor shall move independently of the carrier, to withdraw the breech-block thereinto and push it therefrom. 5. And that it shall be capable of moving with the carrier, while the breech-block is therein.

It may be doubtful whether, in view of the Nordenfeldt patent, there is any novelty even in the exact combination described in this claim, since in both cases there is a vertical axial bolt or pivot hinged to the breech of the gun; a crank arm secured to this bolt and operating the rack; a retractor arm permanently secured to the breech-block and hinged to the breech separate from the carrier, and moved independently of it; a carrier hinged to the breech-block, the carrier and retractor being capable of moving together, while the breech-block is on the carrier; the movement being transmitted from the retractor to the carrier through the breech-block. But whether the Nordenfeldt device be an exact anticipation or not, the Dashiell device differs from the Seabury patent much more than the latter differs from the Nordenfeldt machine, since the retractor of the Dashiell device is not hinged to the breech at all, but is hinged to the carrier; and is not separate from the carrier, but is a part of it, and when the carrier moves, the retractor also moves. In the Seabury device the carrier and retractor move independently of each other; but as the claim says, they are separate from each other, whereas in the Dashiell device they are so intimately connected that when the carrier moves, the retractor moves with it. It is true that the retractor, though hinged to the carrier when turning on its pivot, acts as it would if it were hinged to the breech; yet, Seabury having restricted himself to a retractor hinged to the breech separate from the carrier, in view of the state of the art, which appears to have been much more advanced than the plaintiffs are willing to concede, we think such difference is material. As before observed, in the Dashiell device the retractor is not hinged to

the breech, but to the carrier, and it is not worked independently of it, but in connection with it.

The truth is that, at the time the Seabury patent was taken out, the scope for invention was much more limited than Seabury apparently supposed. The mutilated form of screw-block, apparently a French device, had been in use for many years. Of course the use of this block implied some method of withdrawing it from the gun, swinging it to one side and returning it to the bore. To accomplish this several devices were invented, most of them employing a swinging lever, a carrier and a retractor. In some cases, as in the Canet patent, a toothed rack was used to rotate the breech-block, and in others a cam, and in two or three of these patents these movements were accomplished by the continued operation of a lever. Nothing, in fact, was left to the ingenuity of the inventor but to devise new variations upon this combination, and, in our opinion, Dashiell's device is as great a departure from Seabury's as the latter is from the devices which preceded it.

We are, therefore, of opinion that, under the construction we are compelled to give the first claim of the Seabury patent, the Dashiell device is not an infringement.

This conclusion also renders it unnecessary for us to consider the questions discussed by the Court of Appeals in its opinion, in respect to one of which see *Belknap* v. *Schild*, 161 U. S. 10; but for the reasons stated, its decree, dismissing the bill, is

Affirmed

GRAVER *v.* FAUROT.

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

No. 779. Submitted February 4, 1896. — Decided April 13, 1896.

A Circuit Court of Appeals has no power under the Judiciary Act of 1891 to certify the whole case to this court; but can only certify distinct points or propositions of law, unmixed with questions of fact or of mixed law and fact.

The question propounded in this case amounts to no more than an inquiry whether, in the opinion of this court, there is an irreconcilable conflict between two of its previous judgments, and a request, if that is held to be so, that an end be put to that conflict; and this is not a question or a proposition of law in a particular case, on which this court is required to give instructions.

This case coming on to be heard on appeal from the Circuit Court of the United States for the Northern District of Illinois, in the United States Circuit Court of Appeals for the Seventh Circuit, that court ordered that a statement of facts and a question be certified to this court for its opinion and instruction.

It appears from the statement of facts that William Graver filed a bill in the Superior Court of the county of Cook in the State of Illinois to impeach for fraud a decree in equity rendered by that court, July 6, 1889, in a certain suit therein depending, wherein William Graver was complainant and Benjamin C. Faurot and A. O. Bailey were defendants, by which decree complainant's bill was dismissed for want of equity; and that the suit was duly and properly removed into the Circuit Court of the United States for the Northern District of Illinois.

The bill thus filed was set forth *in haec verba*, together with a demurrer thereto; the decree of the Circuit Court sustaining the demurrer and dismissing the bill; and the opinion rendered by the Circuit Court on entering that decree.

The certificate then proceeded thus: "In view of the deci-

sions of the Supreme Court of the United States in the cases of *The United States* v. *Throckmorton*, 98 U. S. 61, and *Marshall* v. *Holmes*, 141 U. S. 589, this court is in doubt touching the case in hand, and desires advice and instruction upon the following question: Whether (assuming the bill of complaint to be in other respects sufficient) the alleged false swearing and perjury in the respective answers of defendants in the original suit in the Superior Court of the county of Cook, State of Illinois, are, in the law, available in this suit as ground for a decree setting aside and declaring void the decree so rendered in the Superior Court of the county of Cook?"

Mr. Robert Rae and *Mr. Henry S. Monroe* for appellant.

Mr. Frank L. Wean and *Mr. Frank O. Lowden* for appellee.

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

It appears from the opinion of the Circuit Court, sent up as part of the certificate and reported in 64 Fed. Rep. 241, that that court was impressed with the conviction that the complainant had been defrauded, but that the court could see no way to accord relief under the decision in *United States* v. *Throckmorton*, 98 U. S. 61, although the result might be different if the decision in *Marshall* v. *Holmes*, 141 U. S. 589, were followed. In other words, the Circuit Court indicated that it could have proceeded without difficulty on the principles expounded in either case if the other were out of the way. Finding it impossible to reconcile these cases, or to make a definitive choice between them, because *United States* v. *Throckmorton* was cited without disapproval in *Marshall* v. *Holmes*, the Circuit Court sustained the demurrer *pro forma*, and the case was transferred to the Circuit Court of Appeals. But when this had been accomplished the Court of Appeals apparently found itself in a similar quandary, and this resulted in the certificate under consideration.

Doubtless the determination of contested questions in cases properly brought before us involves the resolution of doubts,

if any are entertained, in respect of the scope of particular decisions, but we cannot approve of the mode adopted in this case of ascertaining the precise bearing of former judgments.

In civil cases the intention of Congress as to the certification provided for in sections five and six of the act of March 3, 1891, 26 Stat. 826, c. 517, is to be arrived at in the light of the rules prevailing prior to that date in relation to certificates of division of opinion under sections 650, 652 and 693 of the Revised Statutes. *Maynard* v. *Hecht*, 151 U. S. 324. It was well settled as to them that each question had to be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to other issues of law in the case; that each question must be a question of law only and not of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the cause; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it were split up in the form of questions. *Jewell* v. *Knight*, 123 U. S. 426, 432; *Fire Ins. Association* v. *Wickham*, 128 U. S. 426.

By the sixth section of the Judiciary Act, the Circuit Court of Appeals is not permitted to certify the whole case to us, though we may require that to be done when questions are certified, or may bring up by certiorari any case in which the decision of that court would otherwise be final. But here the entire record is transmitted as part of the certificate, and the answer to the question propounded contemplates an examination of the whole case. It is true that the Court of Appeals asks us to assume the bill of complaint to be "in other respects sufficient," that is, sufficient to entitle complainant to relief, if the fraud alleged were available. But if we should find that the bill was insufficient when tested by principles accepted in both the cases referred to, we should be indisposed to return an answer not required for the disposition of the case. In any view we should be compelled, in answering, to analyze the facts charged, in order to determine whether in legal effect they raise the question involved in *Marshall* v. *Holmes* or that involved in *United States* v. *Throckmorton*, assuming that the

legal effect of the facts in those two cases was not the same; or, if it were, to determine whether the facts set up here fall within the same category, and direct which decision should govern.

This practically requires us to pass upon the whole case as it stands, and to decide whether the demurrer was properly sustained or not.

But the whole case is not before us for decision, and the certificate discloses that the doubt of the courts below is based on the assumption that this court has applied well-settled general principles of law differently in two different cases upon the same state of facts. While some hesitation in decision may temporarily result until it is finally determined whether that assumption is justified, and, if justified, the anomaly is corrected, we think such determination ought not to be attempted save where the point must be disposed of on a record after final decree.

In the absence of power to deal with the whole case, the question amounts to no more than an inquiry as to whether in our opinion there is an irreconcilable conflict between two of our previous judgments, and a request, if we hold that to be so, that we put an end to that conflict. We do not regard these as questions or propositions of law in a particular case on which we are required to give instruction.

Certificate dismissed.

BLAGGE *v.* BALCH.

BROOKS *v.* CODMAN.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FOOTE *v.* WOMEN'S BOARD OF MISSIONS.

ERROR TO THE SUPERIOR COURT OF THE COUNTY OF NEW HAVEN, STATE OF CONNECTICUT.

Nos. 177, 284, 207. Argued and submitted March 24, 25, 1896. — Decided April 13, 1896.

The proviso in the act of March 3, 1891, c. 540, 26 Stat. 908, "That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representative on whose behalf the award is made represents the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards," purposely brought the payments thus prescribed within the category of payments by way of gratuity and grace, and not as of right as against the government.

Congress intended the next of kin to be beneficiaries in every case; and the express limitation to this effect excludes creditors, legatees, assignees and all strangers to the blood.

The words "next of kin," as used in the proviso, mean next of kin living at the date of the act, to be determined according to the statutes of distribution of the respective States of the domicil of the original sufferers.

The said act of March 3, 1891, c. 540, 26 Stat. 908, clearly indicates the judgment of Congress that the next of kin, for the purposes of succession, should be the beneficiaries, as most in accord with the theory of the appropriations.

THESE are writs of error to review judgments of the Supreme Judicial Court of Massachusetts in Nos. 177 and 284, and a judgment of the Superior Court of the county of New Haven, Connecticut, in No. 207.

Plaintiffs in error in No. 177 are administrators *de bonis non*

with the will annexed of the estate of Crowell Hatch, deceased, late of Roxbury, Massachusetts, and defendant in error is administrator *de bonis non* with the will annexed of the estate of Henry Hatch, deceased.

Crowell Hatch died in the year 1805, leaving three daughters and one son, Henry Hatch. By his will, all his property was given in equal shares to the four children. Of each of the three daughters there are descendants now living. The son died leaving a widow but no issue, and left by his will the residue of his estate to his widow, who did not afterwards marry. Crowell Hatch was never bankrupt and his estate and the estates of his four children have always been and are solvent. Plaintiffs in error as administrators of the estate of Crowell Hatch have received from the United States certain moneys for the loss of the brig Mary, being one of the claims on account of the spoliations committed by the French government prior to July 31, 1801, which were reported to Congress by the Court of Claims pursuant to the statute of the United States of January 20, 1885, 23 Stat. 283, c. 25, and for the payment of which Congress made appropriation by the statute of March 3, 1891, 26 Stat. 862, c. 540. By the statutes of Massachusetts in force when Crowell Hatch died, his estate, after the payment of debts and the expenses of administration, would have been distributed, if intestate, equally among his children. Laws of Massachusetts, Stat. 1789, c. 2, v. 2, p. 30; Stat. 1805, c. 90, §§ 1 and 2, v. 4, p. 337.

The probate court in and for the county of Norfolk, in which proceedings were pending, ordered a partial distribution of the fund of nine sixteenths among the descendants of the three daughters and of three sixteenths to the administrator of Henry Hatch, the son. From this order an appeal was taken to the Supreme Judicial Court, and the case reserved for the full court, by which the decree appealed from was affirmed. 157 Mass. 144.

In No. 284, William Gray, as administrator *de bonis non*, with the will annexed of the estate of William Gray, who was a sufferer from the French spoliations, filed his bill in equity in the Supreme Judicial Court of Massachusetts for instruc-

tions as to the disposition of a fund which had been paid to him under the act of Congress of March 3, 1891. On his death, pending the cause, Robert Codman succeeded to the administration and was substituted as complainant. All the living legatees and next of kin and the representatives of such as were deceased were made parties defendant. The case was heard by a single judge of the Supreme Judicial Court of Massachusetts and reported by him to the full court, which entered a final decree that the funds in the hands of the complainant should be "paid over as assets of the estate of William Gray, the elder, and as passing under his will to the residuary legatees named therein." 159 Mass. 477.

William Gray died November, 1825, leaving five sons, William R., Henry, Francis C., John C. and Horace, and one daughter, Lucia G. Swett. He left a will by which, after a specific legacy to the daughter and a conditional legacy to each son, he gave the residue to his five sons, excluding the daughter. The fund in question, if it falls to the estate at all, is part of the residue. William R. died in 1831, intestate, leaving four children him surviving, one of whom died in 1880 leaving five children. In 1829 Henry assigned his interest in his father's estate to his four brothers, and died in 1854 leaving ten children. Francis C. died in 1856 and John C. in 1881, testate, but without issue. Horace died in 1873, intestate, leaving five children. In 1847 he assigned all his property under the insolvent laws of Massachusetts to Hooper, Bullard and Coffin, as assignees for creditors, and of these assignees two survive and are parties. Mrs. Swett died in 1844. She had had four children, of whom William G. died in 1843, leaving a daughter surviving; John B. died in 1867, leaving a daughter surviving; Samuel B. died in 1890, leaving five children; and one child, Mrs. Alexander, still survives.

The representatives of the three brothers, William R., Francis C. and John C., and the assignees of Horace, contended that the fund passed by the will of William Gray, and should be paid to them in equal proportions as representing four of the five residuary legatees, and as being assignees of the fifth son, Henry. The individual descendants of the brothers, except

those of Henry, made no contrary claim, and by their answers either took the same position or admitted the allegations of the bill and submitted the questions to the court.

The representatives and descendants of Henry Gray insisted that the fund did not pass under the will, but was a new and subsequent gift in favor of the next of kin of William Gray; that it should go to the nineteen grandchildren of William Gray, excluding the great grandchildren, namely, the three children of William R., who survived at the date of the act of Congress, the ten children of Henry, the five children of Horace, and Mrs. Alexander, the one surviving child of Mrs. Swett; and that they were entitled to ten nineteenths of the fund distributed per capita among the grandchildren.

The representatives and descendants of Lucia G. Swett also contended that the fund did not pass under the will and was a subsequent gift in favor of the next of kin of William Gray, but they insisted that in the distribution among the next of kin of William Gray, to be ascertained at the date of the passage of the act, the issue of the deceased children should take by right of representation the shares of their parents according to the statute of distributions, or that the fund should be distributed among the representatives of the next of kin to be ascertained at the death of William Gray, the elder. Distributed *per stirpes*, they claimed for the children and grandchildren of Mrs. Swett one fourth of the fund, one sixteenth to Mrs. Alexander, one sixteenth to the daughter of William G., one sixteenth to the daughter of John B. and one eightieth to each of the five children of Samuel B., making another sixteenth; or that, taking the distribution as of the date of the death of William Gray, the administrator of the estate of Mrs. Swett was entitled to one sixth part of the fund as the representative of one of the six children of William Gray, surviving him.

In No. 207 the facts appeared to be these: In 1797 the firm of Leffingwell and Pierrepont owned a ship and cargo which were seized by a French privateer in June of that year and became the subject of a French spoliation claim. William Leffingwell, the senior partner, lived in New Haven, Connecti-

cut, and died testate in 1834. His estate was finally settled in 1844, and no mention of his interest in this claim was made in his will or in the distribution of his estate. The surviving partner lived in New York and died testate in 1878. His executor presented the claim to the Court of Claims in 1886, and a favorable decision was secured in 1888, and an appropriation made by the act of March 3, 1891. In 1886, administration *de bonis non* on the estate of William Leffingwell was taken out by Oliver S. White in the probate court for the district of New Haven, Connecticut, and the administrator has received from the representatives of the surviving partner half the net proceeds of the award. The probate court, in settling the question of the administration *de bonis non*, treated the fund as part of the residuary estate of the testator, and ordered its distribution to the residuary legatees under his will and their representatives or successors. An appeal was taken to the Superior Court, which, in conformity to the advice of the Supreme Court of Errors, 62 Connecticut, 347, affirmed the decree of the court of probate.

William Leffingwell left as his next of kin him surviving the four children named in his will, Mrs. Street, Mrs. Williams, Lucius W., Edward H., and the children of his deceased son William C. Mrs. Street died testate and solvent in 1878; Mrs. Williams and Edward H. died testate and without issue; and the next of kin of William Leffingwell living on March 3, 1891, were, as was agreed, according to the statute of distributions of Connecticut, (1) plaintiffs in error, the grandchildren of Mrs. Street; (2) six children of Lucius W., a grandson of Lucius W., and the widow of a deceased son of Lucius W.; (3) a son of William C. and three grandchildren of said William C. The probate decree ordered the fund distributed among the five residuary legatees named in the will of William, "one fifth thereof to the executors or administrators of Caroline Street, a daughter of said deceased." If this one fifth were considered as general assets of Mrs. Street's estate, it went to the residuary legatee under her will, the Women's Board of Missions, otherwise it belonged to plaintiffs in error as through her the next of kin of William Leffingwell on one line of

descent. Plaintiffs in error claimed that on March 3, 1891, when the act of Congress was passed, they were entitled to their due shares *per stirpes* of the fund, to wit, one third thereof, there being only three of the five children of William Leffingwell who survived him, whose descendants were living at that date.

This court, before argument began, ordered that three hours be allowed counsel for the plaintiffs in error in the argument of these cases, and that three counsel be heard on each side. As it is manifestly impossible to find room for all these arguments in the report of the case, the reporter confines himself to reporting the arguments in the first case in order on the docket, and only upon the points on which the decision of it turned.

Mr. George A. King (of Boston) for plaintiffs in error in *Blagge* v. *Balch*, No. 177.

Is the fund received by the plaintiffs in error, in their capacity of administrators, to be treated (*a*) as a part of the estate of Crowell Hatch; or (*b*) as an appropriation made for the direct benefit of the next of kin of the said decedent?

The Supreme Court of the District of Columbia has determined that the grant is not to the estate of the decedent but to the next of kin. *Gardner* v. *Clarke*, 20 Dist. Col. 261. The Supreme Court of Pennsylvania has also so decided. *In re Clement's Estate*, 150 Penn. St. 85; *Appeal of Bailey*, 160 Penn. St. 391.

The Supreme Court of Massachusetts cannot be cited in favor of either proposition. The dissenting opinion in *Codman* v. *Brooks*, 159 Mass. 477, written by the Chief Justice, takes the ground that the creditors of the original sufferer are to be excluded from receiving the money. If this be so, it would seem to follow, necessarily, that the fund is no part of the estate of the original sufferer, but a gift to his next of kin.

The Supreme Court of Connecticut stands alone in the opinion that the fund is to all intents and purposes a part of

the estate of the original decedent. *Leffingwell's Appeal*, 62 Connecticut, 347.

We are of opinion that the fund goes to the next of kin living at the passage of the act, for the following reasons, in addition to those given in the above cited cases.

I. If the awards are to the next of kin, there seems to be no escape from the conclusion that they are to be paid to such next of kin as are represented by the administrators. This representation is to be established by evidence sufficient to enable the Court of Claims to grant its certificate. It is not that representation which inheres in the office of administrator, for such representation only applies to the decedent. Inasmuch as it is a fact to be proved by evidence it is not a representation that grows out of the nature of the office. In this case, the administrators of Crowell Hatch do not now and never did represent Henry Hatch in law or fact. Having died long since, he cannot be represented by these administrators.

The only next of kin who can be represented, who can authorize anybody to represent them, are the *living next of kin.*

The next of kin of the original sufferer are frequently widely scattered. The practice in the Court of Claims has uniformly been, as it necessarily must be, to require proof that all these persons concur in appointing the administrator as their representative. That was done in this case. The living next of kin are, therefore, the persons represented by the administrators, and are, therefore, the persons entitled to the fund.

II. It may be suggested, also, that it is hardly reasonable to suppose that Congress meant that one set of men should elaborately provide for this representation in order that they might be excluded from the fund for the benefit of other persons.

III. The purpose of the act being to discharge an equitable obligation and make an award to the living persons descended from those who lost their property for the benefit of the government, the purpose of the proviso was plainly to prevent any payment where there were no representatives of the original sufferer to receive the fund.

There are a number of cases where there are appropriations in this act and where no money has been or ever can be obtained because the family of the loser has become extinct, and there are no living persons to make proof of representation and get a certificate from the Court of Claims.

IV. Of the four children of Crowell Hatch, there are living descendants of three, and they are the only next of kin. It was wholly by representing these that the administrators were able to obtain the money awarded. Henry Hatch, the petitioner's decedent, left no issue. It would have been impossible to obtain from the government one dollar on his account.

Mr. Francis V. Balch and *Mr. Felix Rackemann*, for defendant in error in No. 177, submitted on their brief.

In seeking for the key note of the proviso, it is plain that Congress was dealing with the settlement of claims nearly one hundred years old, and that numbers of the original sufferers had become bankrupt (many driven into bankruptcy by these very spoliations), and no single survivor of the original sufferers remained.

Congress had had the "Alabama Claims" distribution as an object lesson, where the disputes with assignees in bankruptcy, and the practical difficulties of proper distribution among creditors in insolvency after the lapse of years, stood prominent as danger signals. If creditors in bankruptcy of "Alabama" claimants were difficult to ascertain and reach, how would it be with the bankruptcy files of 1800, and where would the labor and the litigation end?

The proviso only applies to cases where the original sufferer was bankrupt. No part of it is intended to operate in any other case. All other cases stand on the word "pay" and the designation of the payees in the schedule.

Assume for the moment that the proviso applies to the present and not to future appropriations.

The proviso is one sentence, broken only by commas. It begins, "provided that in all cases where the original sufferers

were adjudicated bankrupts." Here is a distinct and technical description of a particular catastrophe well known to every one — lawyer or layman. Beginning in this way, with special emphasis placed upon this particular event, the whole proviso would be expected to relate to and be applicable to this event unless some other is distinctly introduced. If a new class of events were to be dealt with in the rest of the sentence it should naturally be clearly demarked, as if, for instance, it said, "and in cases where the original sufferer was not adjudged bankrupt," such and such shall be the rule. The sentence, however, goes on, "and the awards in the cases of individual claimants shall not be paid until," etc. There is no sensible construction which can be given to "individual claimants" which will make it distinct and marked off from cases where the original sufferer was adjudicated bankrupt.

Would not assignees of bankrupts be individual claimants? Would not the next of kin on whose behalf the award is to be made in cases of bankruptcy be individual claimants?

We submit that the words "and in the cases of individual claimants" mean simply this, in the case of "*the* individual claimants," or in the case "of *each* individual claimant" who was so adjudicated, *i.e.*, that in each case where there was bankruptcy of the original sufferer or claimant, there shall be an investigation, to make sure that the party prosecuting the claim is acting for the next of kin, and not for the creditors. This is further shown by the word "*respectively*." This makes the whole consistent and clear, and is made further apparent by the differences in the operative words in the two parts of the sentence. In the leading part of the sentence the words are, the "awards shall be *made*," but in the second part of the sentence the language is "and . . . the awards shall not be *paid*." This is natural if the latter part of the sentence provides merely an additional precaution affecting the cases spoken of in the earlier part; but it would be nothing short of extraordinary if the sentence should provide for the few cases of bankruptcy by mandatory words, "The awards shall be made," and should then proceed to dispose of the immeasurably larger and more important class of non-

bankrupts, not by saying in such cases, too, the awards "shall be made on behalf of next of kin," but by a merely negative administrative provision as to their payment when made. The reason for such a precaution in case of bankruptcy becomes apparent when it is remembered that the administrator or executor of the assignee might claim to receive the award on behalf of the next of kin, not being expressly excluded as the assignee himself is, *Richards* v. *Maryland Insurance Co.*, 8 Cranch, 84. Such administrator or executor might well be hostile to the next of kin, and even if the award were to the executor or administrator of the bankrupt sufferer he might be under the dominance of the creditors.

Another consideration leads irresistibly to the same conclusion. Had it been the intention in all cases to make the "payment" as a gratuity to the next of kin, it would have been the simplest thing possible to have said so. How strange, if such was the intent, to begin by laying special stress upon the peculiar case of original sufferers who were adjudicated bankrupts. Such a case would be the exception, not the general rule. As well might the law say that every man who carries a concealed *revolver* shall be subject to a fine of five dollars, and every man who carries a concealed *weapon* shall be subject to a fine of five dollars.

Legal propositions do not ordinarily have the certainty of mathematical conclusions, but it seems almost a mathematical certainty that the latter part of this proviso could not have been intended to cover all cases of claimants. If not, what class was it intended not to cover?

It will be said it was intended to cover all but the "corporate" claimants, and that as a corporation could not have been adjudicated bankrupt, this construction leaves the bankrupt original sufferers to make one class, the solvent individual sufferers another class, and the corporate sufferers a third class, the provisions of the latter part of the proviso embracing all the bankrupts and all the individual non-bankrupts, it being in the case of bankrupts an additional precaution, and in the case of the non-bankrupts the sole precaution.

This is a possible construction, but it gives no explanation

of the emphasis laid on the case of bankruptcy, or of the resulting inanity of providing clearly for the few, and ambiguously and imperfectly for the many, or of the improbability of any effort to produce in this cumbrous and dubious way an effect which only needed a word or two. Surely, to make an executor of a will take on behalf of next of kin (and there were many cases of executors among the claims appropriated for, our own being a case of administration with will annexed), it needs as strong language as to make an administrator of a bankrupt or of his assignee take on behalf of next of kin.

The marginal note to the proviso, though of no great weight, shows that the proviso was understood merely to cover cases of bankruptcy.

If it is considered forced to read "individual claimants" as "*the* individual claimants," thus making the proviso to require a certificate in each individual case of a bankrupt sufferer, which we submit is the most natural and must have been the real meaning, we may read it as applying to all cases where the administrators or executors, who are to take the bankrupt claim on behalf of next of kin are "individuals," it not being considered necessary to require a certificate in the case of corporate administrators or executors, as corporations would only be admitted to such trusts where clearly responsible. There are three such cases, at least, among those for which appropriations are made: The Safe Deposit and Trust Company, Baltimore, the Penn Company and the Union Trust Company, New York. Or "individual claimants" may be intended to designate the "next of kin" who are substituted for creditors by the first part of the sentence, and in a certain loose sense may be considered as "individual" claimants as contradistinguished from an assignee claiming not for himself but others. In this sense again "individual claimants" would cover the cases of bankruptcy and no more.

But the proviso is not applicable at all to the present appropriations.

This appears from its use of the word "awards," from the evident belief on the part of the framers of the law that they

had weeded out all cases of bankruptcy from the present appropriations, and by the use of the future tense.

This was so held in a well considered case in the Court of Claims. *Henry* v. *United States*, 27 C. Cl. 142.

If for the sake of argument the case at bar be conceded to be one intended to be covered by the words "individual claimants," still the question recurs, What does the proviso provide in such case?

It provides a partial protection against creditors but does not attempt to protect against them absolutely. It does not attempt to fix the class who are to take absolutely.

The shield is applied to a broader class, it extends to cases where the original sufferer was not bankrupt; but the shield is not itself changed.

That protection is intended against creditors generally may, for the argument, be granted, but how thorough protection?

Where the original sufferer was bankrupt, and his assignee claimed, the award, we have seen, was to be changed so as to go to the executor or administrator.

Here no change is attempted in the award, but certain partial and preliminary precautions are to be taken before paying the award.

It is to appear, in substance, that debts are out of the way, that the heirs or legatees moved in getting the administration, and that the administrator is under suitable bonds.

If the proviso does operate as though it said the awards are to be on behalf of next of kin in all cases except those of corporate original sufferers, it uses "next of kin" in a loose sense, to cover all claimants under a solvent original sufferer.

The statute is wholly colorless as to any intent to set off next of kin against legatees. Can it be supposed for a moment that an executor could not be a claimant? Where there was a will there could be no administrator except with will annexed. The case at bar is such. Does the statute say that in all such cases the award shall be changed and made to an agent of the kin? Certainly not. What the statute does, upon the present assumption, is to set off kin as representing

both heirs and legatees against creditors, the most conspicuous class, "next of kin," being put forward for the whole.

If it be said that the words "next of kin" cannot be so broadened, how narrow shall they be made? As narrow as in *Swazey* v. *Jaques*, 144 Mass. 135, cutting off nephews if there was a brother? Surely not. And does not the impossibility of this show that the words were used in a loose and general sense, not the technical one? Why infringe farther than necessary upon the doctrine of ownership by original sufferers?

But suppose for a moment this statute uses "next of kin" as opposed both to legatees and creditors, all it requires is that there should be next of kin and that the administrator should represent them.

The statute in that case does indeed say that the administrator must represent next of kin, but it does not say he must represent *living* next of kin, nor if it could be so construed does it say he must represent such exclusively. It may well be that Congress intended that if there were no living kin there should be no payment of a claim likely to prove escheated.

In the case at bar, the administrators could truly say they represented living next of kin, but they could not truly say they represented living next of kin exclusively. They represented those claiming under Henry Hatch, as well. How and when did they cease to represent us? They could truly say they represented next of kin exclusively, if, as is here contended, those living at the death of Crowell Hatch were the next of kin intended by the statute. It was a fraud on the Court of Claims if they stated they represented *living* next of kin exclusively.

But whatever the password was, it has been given. The Court of Claims has lifted the gate and we are through. Now the law must have its course, our law, the Massachusetts law, the law which these administrators have given bonds to follow, and which bonds they were obliged to certify to the Court of Claims in order to get this very money.

But if "next of kin" means kin strictly, and that such kin

alone are to take, then it means kin living at the decease of the original sufferer.

The period of decease is always, in the absence of clear intent to the contrary, the period at which heirs or next of kin are determined. Jarman on Wills, 5th Amer. ed. 670.

The mind of the draftsman was turned to the past, to the original sufferer; did it at once turn to the present on the mention of next of kin?

It will be said that a gratuity cannot be given to a dead person. In the first place it is not a case of gratuity; and in the second place, even if it were a gratuity, the beneficial donees who, it is admitted, must, in such case be living, may be as well designated "those now entitled had it formed part of the sufferer's estate" (which is equivalent to next of kin at death of the sufferer) as "those now entitled had the sufferer died in the state of his domicil possessed of the property, intestate, and without surviving husband or wife." There is no word in the whole proviso which implies that *now living, next of kin*, were meant.

Granting, then, that if Crowell Hatch had willed away his property from his kin, the kin and not legatees would have taken, yet here he willed to his kin, his four children, of whom Henry was one, and whose administrator must take a share in either aspect.

Suppose it is a gratuity, — why infringe farther than is necessary upon the rights of the original sufferers to have the funds treated as part of their estates?

Even if the court should believe that in some vague and general way the next of kin living at the date of the act were intended to take, the intent is not so expressed that it can so take effect.

The meaning of this statute cannot be guessed at.

Suppose it were a will where, if ever, *intent* is the polar star of construction. First comes a clear grant to pay a debt which has passed into judgment, then comes this ambiguous proviso. It could not operate to cut down a clear grant.

There is certainly nothing within the four corners of this instrument which shows such intent in any clear form; quite

a contrary intent is shown. Beyond and outside the instrument, the surroundings and motives of the actors are more than ever convincing that no such intent existed. If there were an intent to pay to an administrator under bonds in our courts a fund which he was not to treat as assets, and which yet was to be secured by his bond, this was an inconsistent and impossible intent.

It is not denied that an executor in Massachusetts may, under the operation of the statute law, collect, in certain cases, rents for which he will be held liable on his bond, though not strictly assets, nor that he may not collect life insurance moneys belonging to the widow *where the contract was with the deceased*, nor that he may not be empowered by statute to collect compensation for death for the benefit of next of kin. But it cannot plausibly be claimed that these administrators would be liable on their bonds, or that the probate court would have jurisdiction in respect to these amounts unless they were assets. Special legislation would have been requisite in Massachusetts (and probably in every other State where any original sufferer was domiciled), to carry out the intent of gratuity to living next of kin collected by executors and administrators of the original sufferers. Surely, plain terms would have been employed if such an unusual purpose had been entertained.

Mr. William Warner Hoppin for plaintiffs in error in *Foote* v. *Women's Board of Missions*, No. 207, submitted on his brief.

Mr. James H. Webb and *Mr. John W. Alling* for defendants in error in No. 207.

Mr. Jabez Fox, (with whom was *Mr. W. G. Russell* on the brief,) *Mr. William Gray Brooks* and *Mr. Harvey D. Hadlock* for plaintiffs in error in *Brooks* v. *Codman*, No. 284.

Mr. Joseph B. Warner for defendants in error in No. 284.

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

The French spoliation claims arose from the depredations of French cruisers upon our commerce and from the judgments of French prize courts, and could have been enforced against France only by our government, either by diplomacy or by war. In the negotiations leading up to the treaty of September 30, 1800, 8 Stat. 178, these claims of individuals were presented by our commissioners to France, who in turn asserted claims as a nation against this government for failure to comply with treaty guaranties and action in contravention of treaty. The sufferers from the French spoliations have constantly contended that, by that treaty as finally agreed on and ratified, all claims for indemnity were mutually renounced, and that, therefore, an obligation to indemnify them rested upon our government.

January 20, 1885, an act of Congress was approved, 23 Stat. c. 25, 283, providing that "such citizens of the United States, or their legal representatives, as had valid claims to indemnity upon the French government arising out of illegal captures, detentions, seizures, condemnations and confiscations prior to the ratification of the convention between the United States and the French Republic concluded on the thirtieth day of September, eighteen hundred, the ratifications of which were exchanged on the thirty-first day of July following," might apply to the Court of Claims within two years from the passage of the act, and "that the court shall examine and determine the validity and amount of all the claims included within the description above mentioned, together with their present ownership, and, if by assignee, the date of the assignment, with the consideration paid therefor," and "they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor," and that "such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimants or Congress; and all claims not finally presented to said court within the period of two years limited by this

act shall be forever barred; and nothing in this act shall be construed as committing the United States to the payment of any such claim."

Proceeding to advise under this act, the Court of Claims, in many cases, found with regard to claims therein presented that the original sufferers had valid claims to indemnity upon the French government prior to the convention of 1800; that these claims were relinquished to France by the United States government by that treaty in part consideration of the relinquishment of certain national claims of France against the United States; and that this use of the claims raised an obligation under the Constitution to compensate the individual sufferers for their losses. *Gray* v. *United States*, 21 C. Cl. 340; *Holbrook* v. *United States*, 21 C. Cl. 434; *Cushing* v. *United States*, 22 C. Cl. 721.

As to the present ownership of the claims the court in *Buchanan* v. *United States*, 24 C. Cl. 74, 81, said:

"What it has endeavored to do is to ascertain the person in whom the legal title and custody exist; that is to say, the legal representative who in an ordinary suit at law or proceeding in equity would be deemed the proper party to maintain an action for the recovery of similar assets of the original claimants. In the cases of individual owners or underwriters the court has required a present claimant to file his letters of administration and prove to the satisfaction of the court that the decedent whose estate he has administered was the same person who suffered loss through the capture of a vessel. . . .

"In cases of partnership the court has required evidence of survivorship, and has allowed only the administrator of the survivor to prosecute the claim.

"In cases of bankruptcy, it has held, under the decisions of the Supreme Court, that the claim passed to the assignee, and that on his death it passed to his administrator. . . .

"And where the evidence has shown the bankrupt estate to be still unsettled, the court has held the legal title to be still vested in the assignee.

"In cases of incorporated companies no longer in existence,

the court has required only the decree of a court of competent jurisdiction transferring their rights of action to the hands of a receiver. . . .

"In none of these cases has the court assumed to determine who were the next of kin of a deceased claimant; nor whether there are any; nor in what proportion were the several interests of partnership owners; nor whether creditors or descendants have the superior equity, nor whether the children of a bankrupt are entitled to a residue of his estate; nor whether the receiver of a defunct corporation represents creditors or stockholders. In other words, the court has not assumed to determine what persons are legally or equitably entitled to receive the money which Congress may hereafter appropriate for the discharge of these claims.

"When the validity of a claim against France and the relinquishment thereof by the United States under the second article of the treaty of 1800, and the amount in which the original claimant suffered loss, have been determined and reported, Congress will be in possession of all the facts which this court under its present restricted jurisdiction can possibly furnish. It will then be within the legislative discretion —

"(1) To ascertain through the proper committees who are the persons who should receive the money; or

"(2) To provide for the ascertainment of that fact by additional legislation; or

"(3) To confide the money to the administrators and receivers who, with the exception of a few still existing corporations, constitute the present claimants, trusting that they and the courts of which they are the officers and agents will distribute the funds among the creditors or next of kin of the original claimants.

"The decisions in these spoliation cases are not judgments which judicially fix the rights of any person; and the obligations of the government are so far moral and political that they cannot be gauged by the fixed rules of municipal law for the measures of legal damages."

These advisory conclusions having been reported to Congress, the act of March 3, 1891, 26 Stat. 862, 897, 908, c. 540,

was passed making appropriations to pay certain enumerated claims with the following proviso:

"*Provided*, That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

The cases in hand turn upon the construction of this proviso, and while it is not denied that Congress had the power to enact that the next of kin should take irrespective of the legal title to the assets of the estate of the original sufferers, it is important, in arriving at a conclusion as to whether and to what extent that was done, to refer to the view taken by Congress in respect of the ground of the appropriations as indicated by its action.

Notwithstanding repeated attempts at legislation, acts in two instances being defeated by the interposition of a veto, no bill had become a law, during more than eighty years, which recognized an obligation to indemnify, arising from the treaty of 1800, and the history of the controversy shows that there was a difference of opinion as to the effect of that treaty. 2 Whart. Int. Law, § 248, p. 714; Davis, J., *Gray* v. *United States*, *supra*. Under the act of January 20, 1885, the claims were allowed to be brought before the Court of Claims, but that court was not permitted to go to judgment. The legislative department reserved the final determination in regard to them to itself, and carefully guarded against any committal of the United States to their payment. And by the act of March 3, 1891, payment was only to be made according to the proviso. We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.

In *Comegys* v. *Vasse*, 1 Pet. 193, the United States had

stipulated with Spain that they would assume and pay certain claims of their citizens against Spain, and an award was made in favor of Vasse, one of the claimants, by a commission appointed as stipulated to examine and adjudicate the claims. Vasse had in the meantime become bankrupt, and the assignment in bankruptcy was held to carry the claim with it.

In *Heard* v. *Williams*, 140 U. S. 529, *Comegys* v. *Vasse* was followed, and applied to the awards of the Alabama Claims Commission. The United States had demanded and received indemnity for losses sustained by their citizens, and had recognized as valid the class of claims to which the particular claim belonged, and had created a court to adjudicate thereon. It was held that the claim passed to the assignee in bankruptcy, and that payment of awards so made could not be regarded as a mere gratuity.

In *Emerson's Heirs* v. *Hall*, 13 Pet. 409, 413, Chew, the collector, Emerson, the surveyor, and Lorraine, the naval officer, of the port of New Orleans, prosecuted a vessel to condemnation for violation of the laws of the United States prohibiting the slave trade, and the District Court allowed their claim to a portion of the proceeds of the sale of the property, but this decree was afterwards reversed, and the whole proceeds adjudged to the United States. 10 Wheat. 312. Emerson and Lorraine afterwards died, and March 3, 1831, 6 Stat. 464, Congress passed an act "for the relief of Beverly Chew, the heirs of William Emerson, deceased, and the heirs of Edwin Lorraine, deceased," which directed the portion of the proceeds claimed to be paid over to Chew, "and the legal representatives of the said William Emerson and Edwin Lorraine, respectively;" and under authority of which the sums which had been adjudged to these officers were paid to them as provided. One of the creditors of Emerson claimed the sum so paid to his legal representatives as assets for the payment of his debts, but it was held that the payment to the heirs was rightfully made, and that the sum could not be considered in their hands as assets for the payment of the debts of their father. Mr. Justice McLean, delivering the opinion of the court, said: "A claim having no foundation in

law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government from motives of public policy, or any other considerations, should think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation. A donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government."

Manifestly the claims involved in these cases do not come within the rule laid down in *Comegys* v. *Vasse* and *Heard* v. *Williams*, and, without intimating any opinion on their merits, the legislation seems to us plainly to place them within that applied in *Emerson's Heirs* v. *Hall*, though the circumstances are not the same.

The first clause of the proviso relates to cases where the original sufferers were adjudicated bankrupts, and specifically requires the awards to be "made on behalf of the next of kin instead of the assignees in bankruptcy." As we have seen, the Court of Claims had informed Congress that their view was that the action of the United States came within the constitutional provision as to the taking of private property for public use, and hence that Congress was bound to pay the claimants what was due them by reason of such taking, and further that they had accordingly made awards in favor of assignees in bankruptcy. But Congress declined to accept the views of the Court of Claims and to treat these claims as property of the original claimants, transferable and transmissible like other property of the nature of choses in action, and expressly provided that the awards should be made to the next of kin instead of the assignees in bankruptcy.

In *Henry* v. *United States*, 27 C. Cl. 142, 145, decided after the act of March 3, 1891, was passed, the court makes a particular explanation as to this part of the proviso, saying:

"Among the claimants were several assignees, or representatives of assignees, of original sufferers who had been declared bankrupts, and the court reported in those cases that the as-

signees, or representatives of the assignees, were entitled to receive from the United States the sum found to be the amount of the losses.

"In Congress an appropriation bill was drawn and printed containing appropriations for all the persons named in the reports of the Court of Claims. From that bill were stricken out all appropriations to assignees in bankruptcy so far as their representative character appeared in the language of the act. This is a decided indication that Congress did not intend to pay assignees in bankruptcy."

It was held that the language used in the first clause was intended to apply to future reports, Congress having disapproved the recommendations in favor of assignees made up to the date of the act. That disapproval practically illustrates the difference of view between Congress and the Court of Claims as to the basis on which the allowances were made.

The second clause provides, "that the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives in whose behalf the award is made, represent the next of kin." Reading the first clause in the light of the second, the meaning is that in case of bankruptcy the award should be made as it would be, if the original sufferer had not been declared bankrupt, namely, "on behalf of the next of kin." And the occasion of the introduction of the first clause obviously was to prevent repetition of the action which had proved fatal to some of the recommendations.

The second clause is not limited to the cases named in the first clause, although in a certain sense it may be said to include them by way of anticipation, for it applies to all cases of individual claimants, as contradistinguished from corporations, and requires the certificate as a prerequisite to their payment, "that the personal representatives on whose behalf the award is made represent the next of kin."

It appears to us that Congress intended that the next of kin should be the beneficiaries in every case; that the limitation is express; and that creditors, legatees and assignees, all strangers to the blood, are excluded.

Opinion of the Court.

No reason is suggested for cutting off creditors where the original sufferer became bankrupt, and not cutting them off, where, not having gone into bankruptcy, the estate was insolvent; nor for the payment of awards to the original sufferer's next of kin if he were bankrupt, and not, if he were not. The general rule is that so long as the debts of a decedent remain unpaid the assets which come into his estate are to be applied in payment, and these moneys, if they could be treated as assets at all, (being paid over, not as in liquidation of preëxisting claims thereby acknowledged, but as concessions made on equitable considerations,) would partake of the nature of subsequently discovered assets, and be liable to be subjected to the payment of debts. But this cannot be so, for the awards are explicitly required to be made on behalf of the next of kin, and to be paid only to personal representatives representing the next of kin.

The certificate must be that the personal representative does in fact represent the next of kin, and so receives the payment on their behalf. This certificate is as much required with respect of an administrator with the will annexed as of an administrator in case of intestacy, and yet administrators with the will annexed hold adversely to the next of kin and do not represent them, if the fund is to be distributed according to the will as assets of the estate. Congress well understood this in requiring that next of kin must be represented notwithstanding many of the items of appropriation were in favor of administrators with the will annexed. In *Buchanan* v. *United States*, *supra*, the Court of Claims called the attention of Congress to the fact that, notwithstanding its own recommendations, it remained for Congress to determine, "first, the measure of the indemnity for which the United States should be held responsible; second, the persons who are equitably entitled to receive it." And Congress thereupon determined the next of kin to be the persons "equitably entitled to receive;" and while in the interpretation of wills "next of kin" is sometimes construed to mean other persons than those of the blood or under the statute of distributions, as for instance, legatees,

we see no reason to construe this statute as having that operation.

In *Milligan's case*, as appears from the opinion of the Court of Claims in *Durkee* v. *United States*, 28 C. Cl. 326, a certificate was refused because there were no blood relations of the original sufferer, and the administrator had really prosecuted the claim for the benefit of the widow's next of kin. Congress then passed the act of August 23, 1894, 28 Stat. 487, sec. 5, providing that "in the event the court shall find there were no next of kin, and that there was a widow, then that said sum be paid to the executor, personal representative or next of kin of such widow." This made a new disposition of the fund upon the theory that it did not belong to the general assets of the original sufferer's estate, and that where there were no next of kin, in the ordinary signification of the word, new legislation was required.

The events which had given rise to these claims had occurred nearly a century before, and there was nothing unreasonable in the determination of Congress that only the immediate family of the original sufferers should participate in these awards. These sufferers had been in their graves for sixty years. The reasons which might have influenced them in making particular testamentary dispositions had disappeared with time. The claims of creditors had long been outlawed. Equities had become too complicated to be traced. It was enough if the fund passed to persons of the blood of the original sufferers, or who might be entitled under the statutes of distributions, which had been provided in each State, by general legislation, as to the devolution of property in case of intestacy. After all, it would then go as the original claimants might have desired if no special reasons operated to the contrary, and as, in frequent instances, it would have finally gone when those reasons, if once existing, had ceased to operate.

And this conclusion is in harmony with the legislation considered in *Emerson's Heirs* v. *Hall*, *supra*; with section 1981 of the Revised Statutes in reference to recovery of damages by the legal representatives of persons killed by wrongful act in

violation of the civil rights act of 1871; the act of Congress of February 17, 1885, c. 126, 23 Stat. 307, providing for actions in the District of Columbia for the death of persons caused by wrongful acts of others; and generally with the statutes of the States giving a right of action for injuries resulting in death. Tiffany on death by wrongful act, App. 281, 344.

The third clause provided that the awards should not be paid until "the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards." It is argued that this implies that the money received by them was to be administered as assets belonging to the estate, but we do not think so. It often happens that administrators receive money which is not to be administered as part of the general assets, but is to be distributed in a particular way. Whether upon his general bond an administrator could be held for the performance of such special duty might depend upon the local statutes of each State, and Congress was not obliged to consider whether the ordinary bond would cover the case, or whether a new bond would be required, or whether additional state legislation would be necessary. At all events, the express language of the act cannot be overcome by the difficulty suggested, if it be such, and the intention of Congress in favor of the next of kin thereby rendered liable to be defeated.

From these considerations and by necessary construction of the language employed, it results that "next of kin" as used in the proviso means next of kin living at the date of the act. The Court of Claims must certify that the personal representatives "represent the next of kin," and that court has properly held that before there can be a certificate of that fact it must appear that some next of kin are now in existence. *Hooper* v. *United States*, 28 C. Cl. 480; *Durkee* v. *United States*, 28 C. Cl. 326. This construction is sustained by the legislation of Congress referred to in *Durkee* v. *United States*, where two instances are mentioned of special acts giving the fund to other than blood relations of the original sufferers. The exceptions prove the rule.

And we are of opinion that Congress, in order to reach the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective States of the domicil of the original sufferers. In all the States real estate descends equally to the children of the decedent, and to the issue of deceased children taking *per stirpes*, and in most of them personal estate is distributed in the same manner, the variations being immaterial here. 1 Stimson's American Statute Law, §§ 3101, 3102, 3103, pp. 390, 391. The object of Congress was that the blood of the original sufferers should take at the date of the passage of the act, and the statutes of distribution are uniformly framed to secure that result as nearly as possible, the right of representation being recognized. To hold that the meaning is nearest of blood on March 3, 1891, might cut off many of the blood, who would otherwise take by descent from those nearest at the ancestors' deaths, and an intention to do this contrary to the general rule cannot be imputed. So that in ascertaining who are to take, the fund, though not part of the estates of the original sufferers, may be treated as if it were, for the purposes of identification merely.

In the construction of wills and settlements, after considerable conflict of opinion, the established rule of interpretation in England is that the phrase "next of kin," when found in ulterior limitations, must be understood to mean nearest of kin without regard to the statutes of distribution. 2 Jarman on Wills, (5th ed.) *108, *109. This rule was followed in *Swasey* v. *Jaques*, 144 Mass. 135, where Field, J., speaking for the court, said: "It is certainly difficult to distinguish between the expressions 'next of kin,' 'nearest of kin,' 'nearest kindred,' and 'nearest blood relations,' and primarily the words indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than in any other. What little recent authority there is beyond that of the English courts supports the English view; and on the whole we are inclined to adopt it. *Redmond* v. *Burroughs*,

63 N. C. 242; *Davenport* v. *Hassel*, Busb. Eq. 29; *Wright* v. *Methodist Episcopal Church*, Hoff. Chan. 202, 213." But the rule does not appear to have been approved in New York and New Hampshire. *Tillman* v. *Davis*, 95 N. Y. 17, 24; *Pinkham* v. *Blair*, 57 N. H. 226.

Moreover, it is settled in Massachusetts as well as elsewhere that "where a clause is fairly susceptible of two constructions also, that certainly is to be preferred which inclines to the inheritance of the children of a deceased child," *Bowker* v. *Bowker*, 148 Mass. 198, 203; *Jackson* v. *Jackson*, 153 Mass. 374; and in Connecticut that, "when the terms of a will leave the intention of the testator in doubt the courts generally incline to adopt that construction which conforms more nearly to the statute of distributions," *Geery* v. *Skelding*, 62 Conn. 499, 501; *Conklin* v. *Davis*, 63 Conn. 377. As put by Rapallo, J., in *Low* v. *Harmony*, 72 N. Y. 408, 414: "When the language of a limitation is capable of two constructions, one of which would operate to disinherit a lineal descendant of the testator, while the other will not produce that effect, the latter should be preferred. An intention to disinherit an heir, even a lineal descendant, when expressed in plain and unambiguous language, must be carried out; but it will not be imputed to a testator by implication, when he uses language capable of construction which will not so operate."

We are not, however, dealing with wills or settlements, but with the words "next of kin," as used in a statute, passed, in acknowledgment of losses incurred by the ancestors, under circumstances rendering conjecture futile as to what their action, if exercising a volition in the matter, might be, and where the act clearly indicates the judgment of Congress that the next of kin for the purposes of succession generally should be the beneficiaries as most in accord with the theory of the appropriations.

The Supreme Court of the District of Columbia, *Gardner* v. *Clarke*, 20 Dist. Col. 261; the Supreme Court of Pennsylvania, *Clements' Estate*, 160 Penn. St. 391, and the Circuit Court of Baltimore County, Maryland, *Leffingwell's Estate*, 49

Phil. Leg. Int. 147, have expressed similar views to the foregoing.

The judgments are, severally, reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE GRAY did not sit in these cases or take any part in their decision.

WALLACE *v.* UNITED STATES.

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

No. 731. Submitted March 2, 1896. — Decided April 20, 1896.

W. lived on a tract of land next to one owned and occupied by his father in law Z., concerning the boundary between which there was a dispute between them. While W. was ploughing his land, Z., being then under the influence of liquor, entered upon the disputed tract and brought a quantity of posts there, for the purpose of erecting a fence on the line which he claimed. W. ordered him off, and continued his ploughing. He did not leave, and W. after reaching his boundary with the plough, unhitched his horses and put them in the barn. In about half an hour he returned with a gun, and an altercation ensued, in the course of which W. was stabbed by a son of Z. and Z. was killed by a shot from W.'s gun. W. was indicted for murder. On the trial evidence was offered in defence, and excluded, of threats of Z. to kill W.; and W. himself was put upon the stand and, after stating that he did not feel safe without some protection against Z., and that Z. had made a hostile demonstration against him, was asked, from that demonstration what he believed Z. was about to do? This question was ruled out. *Held*, that if W. believed and had reasonable ground for the belief that he was in imminent danger of death or great bodily harm from Z. at the moment he fired, and would not have fired but for such belief, and if that belief, founded on reasonable ground, might in any view the jury could properly take of the circumstances surrounding the killing, have excused his act or reduced the crime from murder to manslaughter, then the evidence in respect of Z.'s threats was relevant and it was error to exclude it; and it was also error to refuse to allow the question to be put to W. as to his belief based on the demonstration on Z.'s part to which he testified.

Statement of the Case.

Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defence; but where the accused embarks in a quarrel with no felonious intent, or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder.

JERRY Wallace was convicted, at the May term, 1895, of the District Court of the United States for the District of Kansas, of the murder of Alexander Zane, on March 7, 1895, at the Wyandotte Indian reservation, and sentenced to be hanged.

The evidence tended to show that Wallace had lived on that reservation, for four years, on a piece of land owned by his wife, Jane, a daughter of Alexander Zane, to whom he was married in 1891. Ill feeling had for a long time existed between Zane and Wallace, growing out of a dispute between them as to the true boundary line of the land owned or claimed by Jane Wallace, and on which she resided, and the land of Julia, a minor daughter of Alexander Zane. Surveys had been made and patents had issued, but the true boundary line, if established by the surveys, had not been accepted by the parties. March 7, 1895, about seven o'clock in the morning, Alexander Zane, accompanied by his son, Noah, who was about fifteen years of age, and three other parties, proceeded with two wagons loaded with posts from his farm to the land on which Wallace resided, and entered the field occupied by Wallace, which he was at that moment engaged in ploughing, through a gap in the fence made by Alexander Zane, and went across it to the fence on the eastern side, and there began to unload the posts and to plant or drive them into the ground along the fence line which they proposed to establish. Wallace and one Denmark were engaged in ploughing the field, being in different parts and moving in opposite directions. As Zane and his party entered the field and were crossing it, Wallace was ploughing towards its eastern side, which he had reached, and was returning when Zane and his party passed about fifty or sixty yards from him, moving in a southeasterly course. Wallace had impaired eyesight and did not see Zane until just before he passed, and then called to him saying,

Statement of the Case.

"Alexander Zane, if that is you, take your force and get out of this field," or, as it was put by one or more of the witnesses, "Alexander Zane, I want you to take your mob and get off these premises." There was evidence tending to show that Zane and those who were with him had been drinking, and that they were boisterous, singing and hallooing. Defendant testified: "They were noisy, hollering and singing, and acting as if they were drunk to me, and I guess no doubt was." Zane appears to have made no reply to Wallace, but went on his way. Wallace continued on with his plough until he had reached a ravine that ran north and south through the field, where he halted, unhitched his horses from the plough and took them up to the barn. In about half an hour he returned with a double barrelled shotgun in his hands, passed within a few feet of a group of persons consisting of Denmark, his daughter, one Lewis, and Wallace's wife, and in passing said to his wife, "Now Janie, I want you to order these gentlemen out of here." Mrs. Wallace then ordered Alexander Zane and those who were with him to leave, but they paid no attention to her. Thereupon Wallace ordered Zane to leave and said to him, "Are you going?" Zane was standing with his right hand on a post he had driven in the ground and his left arm hanging by his side.

Wallace testified: "I asked of him whether he was going or not, and about this time I was struck in the back, and Mr. Zane made a grab like this (indicating), and he was standing with his right hand on the post; about the time I was struck in the back he made this motion (indicating), and says, 'Damn you, I will kill you;' and then my wife hollers or least she says, 'Look out, Jerry!' and I fired this gun."

Lafayette Lewis, another witness, testified: "His wife ordered them out, and Jerry also, and he asked Zane if he was going to go, but I never heard Zane say a word, and then he told him the second time, and he looked up towards him, with his left hand on the post, and threw his hand up this way (indicating) and said, 'Damn you, I am going to kill you!' . . . When Jerry ordered him the second time, he turned and kind of looked at him and threw his hand up this

way to his bosom and said, 'Damn you, I will kill you!' and at that moment the boy struck Jerry with the knife and Jerry shot him."

Several other witnesses did not see or hear any word or gesture proceed from Zane, but testified that when Wallace said to Zane, "Are you going?" he immediately raised his gun, aimed it at Zane and fired, shooting Zane in the left breast; that Zane walked off about thirty feet and fell, and when those nearest him reached him he was dead; that when Wallace fired his gun at Zane, Noah Zane ran up and stabbed him in the shoulder with a pocket knife, whereupon Wallace turned and pointed his gun at Noah and the gun snapped. When Zane fell, Noah went to him and took from his person a tomahawk or small hatchet, which was the only thing in the way of a weapon found on him.

There was evidence to the effect that the wound thus inflicted on Wallace penetrated about half an inch, bled considerably, was much swollen, and that his stomach was black and blue as though he had been hit with something, as he testified that he was.

Evidence was also adduced that Zane was in the habit of carrying a butcher knife with him in his belt; that he was quarrelsome; and that Wallace had the reputation of being a peaceable and quiet man. In reference to the survey under which Zane claimed, testimony was given tending to show, as was contended, that Zane caused the disputed line to be so run by the chainmen as to gain four feet, and that Zane said "when he got through with the land he wouldn't leave Jerry Wallace a garden spot; that he could haul it away in a wagon box."

Defendant offered to prove by R. C. Patterson that the day before the shooting occurred he had a conversation with Zane, "in which Zane said to him that he was going down there to build a fence across this property of Wallace's the next day, and if Jerry Wallace fooled with him he would kill the blind son of a bitch." This was objected to, the objection sustained and defendant excepted. Also, that in the same conversation Zane stated that he had got some whiskey "for the purpose of

bracing himself up for the purpose of building this fence across the land of this defendant, Jerry Wallace." Plaintiff objected, the court sustained the objection and defendant excepted.

Defendant further offered to prove by Charles Luke that he had a conversation with Zane the day before the killing, and "Alex. Zane said to this witness that he was going down to build a fence across Wallace's land, and that if Jerry Wallace interfered with him he would kill him, or shoot the blind son of a bitch," and that all these threats were communicated to Wallace. Plaintiff objected, the objection was sustained and defendant excepted.

Defendant offered to prove by Mrs. Alice Sargent that somewhere near the middle of February, 1895, she had a conversation with Zane, on which occasion "Alex. Zane said to this woman and threatened that he would kill Jerry Wallace, and that he had a knife that he was carrying at that time for that purpose, and that these threats were communicated to Jerry Wallace by this witness afterwards." This was objected to, the objection sustained and defendant excepted. A similar offer of proof by one Taylor was made and a similar exception taken. Defendant also offered to prove by Samuel Collins "that at a time shortly before the 7th of March last he met Alexander Zane and had a conversation with Alexander Zane about Jerry Wallace, and that in that conversation he threatened to kill Jerry Wallace, and that he said to this witness that he at one time made him look down the muzzle of a double barrelled shotgun and he wished he had killed him at that time, and that these threats were communicated to the defendant." An offer to prove similar threats prior to the homicide by Mary Crow was made, excluded and exception taken.

When the defendant was on the stand he testified that he took the gun into the field because he was afraid of the party, and especially of Alexander Zane, and did not feel safe without some protection. The following questions were put and ruling made: "Q. You may state, Mr. Wallace, what Zane did at that time, just before you fired the shot. A. He just

took his hand something like this (indicating) saying, 'Damn you, I will kill you.' Q. You may state to the jury from that demonstration what you believed Zane was about to do." To this question plaintiff objected, the objection was sustained and defendant excepted.

Various errors were assigned in respect of the jurisdiction of the court; the sufficiency of the indictment; the want of due service of the list of jurors; and instructions given and refused.

Mr. John D. Hill and *Mr. James H. Pratt* for plaintiff in error.

Mr. Solicitor General for defendants in error.

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

If Jerry Wallace believed and had reasonable ground for the belief that he was in imminent danger of death or great bodily harm from Zane at the moment he fired, and would not have fired but for such belief, and if that belief, founded on reasonable ground, might in any view the jury could properly take of the circumstances surrounding the killing, have excused his act or reduced the crime from murder to manslaughter, then the evidence in respect of Zane's threats was relevant and it was error to exclude it; and it was also error to refuse to allow the question to be put to Wallace as to his belief based on the demonstration on Zane's part to which he testified.

Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defence; but where the accused embarks in a quarrel with no felonious intent, or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder. Whart. Hom. § 197; 2 Bish. Cr. L. §§ 702, 715; 4 Am. and Eng. Ency. Law, 675; *State* v. *Part-*

low, 90 Missouri 608; *Adams* v. *People*, 47 Illinois, 376; *State* v. *Hays*, 23 Missouri, 287; *State* v. *McDonnell*, 32 Vermont, 491; *Reed* v. *State*, 11 Tex. App. 509.

In *Adams* v. *People*, it was ruled by the Supreme Court of Illinois, speaking through Mr. Chief Justice Breese, that where the accused sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him, in pursuance of his malicious intention, he would be guilty of murder, but if the jury found that the accused voluntarily got into the difficulty or fight with the deceased, not intending to kill at the time, but not declining further fighting before the mortal blow was struck by him, and finally drew his knife and with it killed the deceased, the accused would be guilty of manslaughter, although the cutting and killing were done in order to prevent an assault upon him by the deceased or to prevent the deceased from getting the advantage in the fight.

In *Reed* v. *State*, the Court of Appeals of Texas, in treating of the subject of self defence, said: "It may be divided into two general classes, to wit, perfect and imperfect right of self defence. A perfect right of self defence can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong — if he was himself violating or in the act of violating the law — and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself, which was superinduced or created by his own wrong, then the law justly limits his right of self defence, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self defence. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences, to the extent that they may and should be considered in determining the grade of offence, which

but for such acts would never have been occasioned. . . . How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defence and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slays his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self defence from any assault made upon him, would be manslaughter under the law."

After quoting from these and other cases, Sherwood, J., delivering the opinion of the Supreme Court of Missouri in *State* v. *Partlow*, remarked: "Indeed, the assertion of the doctrine that one who begins a quarrel or brings on a difficulty with the felonious purpose to kill the person assaulted, and accomplishing such purpose, is guilty of murder, and cannot avail himself of the doctrine of self defence, carries with it, in its very bosom, the inevitable corollary, that if the quarrel be begun without a felonious purpose, then the homicidal act will not be murder. To deny this obvious deduction is equivalent to the anomalous assertion that there can be a felony without a felonious intent; that the act done characterizes the intent, and not the intent the act."

In this case it is evident that Wallace was bent as far as practicable on defending his possession against what he regarded and the evidence on his behalf tended to show was an unwarrantable invasion. But a person cannot repel a mere trespass on his land by the taking of life, or proceed beyond what necessity requires. When he uses in the defence of such property a weapon which is not deadly, and

death accidentally ensues, the killing will not exceed manslaughter, but when a deadly weapon is employed it may be murder or manslaughter, according to the circumstances. 1 Hale P. C. 473; 1 Hawk. P. C. c. 31, §§ 34, *et seq.*; Foster, 291; *Davison* v. *People*, 90 Illinois, 221; *People* v. *Payne*, 8 California, 341; *Carroll* v. *State*, 23 Alabama, 28; 1 Whart. C. L. § 462, and cases cited.

Whether the killing with a deadly weapon may be reduced in any case to manslaughter when it is the result of passion excited by a trespass with force to property, we need not consider, as the question, perhaps in view of the interval of time during which Wallace was seeking his gun, does not seem to have been raised. Conceding, though without intimating any opinion on the facts disclosed, that Jerry Wallace committed a crime, still the inquiry arose as to the grade of the offence, and, in respect of that, the threats offered to be proven had an important, and it might be decisive bearing, nor was the mere fact that Wallace procured the gun as stated in itself sufficient ground for their exclusion.

In *Gourko* v. *United States*, 153 U. S. 183, this court held that it was error to instruct a jury that preparation by arming, although for self defence only, could not be followed, in any case, by manslaughter, if the killing after such arming was not, in fact, necessarily in self defence; and that if, under the circumstances on the occasion of the killing, the crime were that of manslaughter, it was not converted into murder by reason of the accused having previously armed himself.

In *Beard* v. *United States*, 158 U. S. 550, 563, it was said: "In our opinion, the court below erred in holding that the accused, while on his premises, outside of his dwelling-house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused. The de-

fendant was where he had a right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

In *Allison* v. *United States*, 160 U. S. 203, it was held that in charging the jury on a capital trial in respect of the possession of a deadly weapon by the accused, it was error to ignore evidence indicating that such possession was for an innocent purpose. The subject of threats was there somewhat considered and authorities cited.

Necessarily it must frequently happen that particular circumstances qualify the character of the offence, and it is thoroughly settled that it is for the jury to determine what effect shall be given to circumstances having that tendency whenever made to appear in the evidence.

In *Stevenson* v. *United States*, 162 U. S. 313, we said:

"The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder. . . . The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder and not manslaughter, or an act performed in self defence, and yet, so long as there was some evidence relevant to the issue of manslaughter, the

credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.

"By section 1035 of the Revised Statutes of the United States it is enacted that 'in all criminal causes the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged: *Provided*, That each attempt be itself a separate offence.' Under this statute a defendant charged in the indictment with the crime of murder may be found guilty of a lower grade of crime, viz., manslaughter. There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect. *Sparf* v. *United States*, 156 U. S. 51. . . . Manslaughter at common law was defined to be the unlawful and felonious killing of another without any malice, either express or implied. Whart. Am. Cr. L. (8th ed.) sec. 304. Whether there be what is termed express malice or only implied malice, the proof to show either is of the same nature, viz., the circumstances leading up to and surrounding the killing. The definition of the crime given by section 5341 of the Revised Statutes of the United States is substantially the same. The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts, and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter."

Treating the excluded evidence as admitted, and assuming that Wallace would have testified that he believed from Zane's

demonstration that Zane intended to kill him, the evidence on defendant's behalf tended to establish bad feeling between Zane and Wallace in reference to the line between Mrs. Wallace's land and that of Julia Zane; an attempt on Zane's part to include a part of Mrs. Wallace's land in the Zane parcel; declarations by Zane the day before the homicide that he was going the next day to run a fence across what Wallace claimed to be his land, and threats that, if Wallace interfered with him in so doing, Zane would kill him, all communicated to Wallace before the homicide; previous threats also communicated that he would kill Wallace; forcible entrance by Zane, accompanied by several others, into the field claimed by Wallace, in which he was ploughing, and fencing off part of it commenced; boisterous and disorderly manifestations on their part and refusals by Zane to leave when ordered to go; such demonstrations by Zane at the moment as induced Wallace to believe that he was in imminent danger, and action based on that belief. Granting that the jury would have been justified in finding that Wallace's intention in going for the gun and returning with it as he did was to inflict bodily harm on Zane if he did not leave, still the presumption was not an irrebuttable one, and it was for the jury to say whether Wallace's statement that he procured the gun only for self protection was or was not true. And if they believed from the evidence that this was true, and that the killing was under reasonable apprehension of imminent peril, then it was for the jury to determine under all the facts and circumstances whether Wallace had committed the offence of manslaughter, rather than that of murder, if he could not be excused altogether.

We think that the threats were admissible in evidence, and, this being so, that the question as to Wallace's belief should not have been excluded. It has been often decided that where the intent is a material question, the accused may testify in his own behalf as to what his intent was in doing the act. *People* v. *Baker*, 96 N. Y. 340; *State* v. *Banks*, 73 Missouri, 592; *Thurston* v. *Cornell*, 38 N. Y. 281; *Over* v. *Schiffling*, 102 Indiana, 191; *People* v. *Quick*, 51 Michigan,

547; *Fenwick* v. *Maryland*, 63 Maryland, 239. In the latter case it was held that a person on trial for an assault with intent to commit murder is competent to testify as to the purpose for which he procured the instrument with which he committed the assault.

This rule is not controverted, but it is contended that Wallace's belief was immaterial. For the reasons given we cannot concur in that view and are of opinion that the witness should have been allowed to answer.

It is unnecessary to pass upon any of the other points raised on behalf of plaintiff in error.

Judgment reversed and cause remanded with a direction to set aside the verdict and grant a new trial.

CAMPBELL *v.* PORTER.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 137. Argued March 10, 11, 1896. — Decided April 20, 1896.

A writ of error is the proper form of bringing up to this court an order of the Supreme Court of the District of Columbia admitting a will to probate.

Since the act of July 9, 1888, c. 597, as before that act, the Supreme Court of the District of Columbia has no power to admit a will or codicil to probate as a devise of real estate.

This was a petition by the executors of the will of the late Admiral David D. Porter, who died February 13, 1891, to the special term of the Supreme Court of the District of Columbia, sitting as an orphans' court, for the admission to probate of his will and of a codicil thereto.

Upon citation to the next of kin, Elena Porter, a daughter of the testator, having become by marriage Elena Campbell, appeared and demanded full proof of the execution of the will and codicil.

The will and the codicil each bore the signature of the testator, and those of the same three persons as witnesses.

At the hearing in special term, it was shown by the examination of the witnesses, that the will was duly executed by the testator, and attested by all three witnesses; and that the codicil was signed by the testator, and attested by two of the witnesses; and the only controverted question was whether the testator did or did not make or acknowledge his signature to the codicil in the presence of the third witness.

Upon the whole evidence (which was set forth in the record, but is unnecessary to the understanding of the points decided by this court) the judge holding the special term ordered the will to be admitted to probate as to both real and personal property, and the codicil to be admitted to probate in respect of personal property; and certified to the general term, for hearing in the first instance, the question of the sufficiency of the codicil to devise or dispose of real estate.

At the hearing in general term, it was ordered and adjudged, for reasons stated in the opinion reported in 9 Mackey, (20 D. C.) 493, that the codicil was duly executed by the testator, and subscribed and attested by three witnesses, as required by law, and should be admitted to probate as a devise of real estate. A bill of exceptions to this ruling and order was tendered by Mrs. Campbell, and allowed by the court, which certified that the value of the real estate devised to her in the codicil was less than that devised to her in the will by more than the sum of $5000, a sufficient amount to sustain the appellate jurisdiction of this court, under the act of March 3, 1885, c. 355. 23 Stat. 443. And Mrs. Campbell, on June 22, 1892, sued out this writ of error.

Mr. W. D. Davidge, (with whom was *Mr. W. D. Davidge, Jr.*, on the brief,) for plaintiff in error, as to the point on which the case turned in this court:

It is said on the other side that the court below in special term had no power to admit to probate a will or codicil *as a devise of real estate.*

Argument for Defendant in Error.

Such was the law prior to the act of Congress of July 9, 1888, c. 597, 25 Stat. 246; *Robertson* v. *Pickrell*, 109 U. S. 608, 610; *Barbour* v. *Moore*, 4 App. Cas. D. C. 535, 544.

But the above act enacted as follows: "The record of any will or codicil heretofore or hereafter recorded in the office of the register of wills of the District of Columbia, which shall have been admitted to probate by the Supreme Court of the District of Columbia, or by the late orphans' court of said District, or the record of the transcript of the record and probate of any will or codicil elsewhere, or of any certified copy thereof, heretofore or hereafter filed in the office of said register of wills shall be *prima facie* evidence of the contents and due execution of such wills and codicils: *Provided*, that this act shall not apply in any cause now pending in any of the courts of the District of Columbia."

Whatever may be said as to the retroactive operation of that law, there can be no doubt that the record of wills of real estate, admitted to probate since its passage, is *prima facie* evidence as to two matters — contents and due execution. *Barbour* v. *Moore*, 4 App. Cas. 535.

Mr. Chapin Brown for defendant in error.

This case is not properly before this court for review. It should have been brought here by appeal, and not by writ of error. The proceedings under which the case was tried below, are provided for in the Maryland act of 1798. *Ormsby* v. *Webb*, 134 U. S. 47, does not apply to the case at bar.

But in the present case all of the testimony was taken under the law by depositions in writing and tried and determined by the General Term of the Supreme Court of the District of Columbia, sitting as an orphans' court, without a jury trial. There is no provision of law or of practice for framing a bill of exceptions in this case (*Stewart* v. *Pattison's Excr.* 8 Gill, pp. 46, 54), and the law relating to trial and appeal, where the facts are tried by the court on depositions in writing, is different from that relating to trial by jury.

But it is clear that the orphans' court had no jurisdiction

to try any question relating to a *devise of real estate*, and was without jurisdiction to pass the order admitting the codicil to probate *as a devise of real estate.*

The court in General Term of the Supreme Court of the District of Columbia was sitting as an orphans' court when it passed this order, and had only the powers and jurisdiction of the orphans' court.

When the court ordered that the codicil *be admitted to probate* in respect of *personal property*, the powers and jurisdiction of the orphan's court were exhausted and final, and there was no appeal from this order, or exception taken to the order in this respect.

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

It was contended, in behalf of the defendants in error, that the case should have been brought to this court by appeal, and not by writ of error. But we consider this point as settled by the decision made six years ago in *Ormsby* v. *Webb*, 134 U. S. 47, 64, 65, in which a motion to dismiss, for the same reason, a writ of error to review a judgment of the Supreme Court of the District of Columbia, admitting a will to probate, was denied by this court, not merely because in that case a trial by jury had been actually had, but upon the more general ground that a proceeding for the probate of a will in the District of Columbia was not a suit in equity, and was a case in which the parties had the right to claim a trial by jury, and in which there might be adversary parties, and a final judgment affecting rights of property. See *Price* v. *Taylor*, 21 Maryland, 356, 363. The decision in *Ormsby* v. *Webb* has since been understood as governing the practice in the District, and evidently guided the course of the plaintiff in error in the present case. Under these circumstances, the question whether the form of bringing up a probate case shall be by writ of error or by appeal does not appear to us to be so important in its consequences that it should now be reconsidered.

A more serious question of jurisdiction, presented by this record, is whether the Supreme Court of the District of Columbia had power to admit a will or codicil to probate as a devise of real estate. Curiously enough, it is the plaintiff in error who contends that it had, and the defendants in error who insist that it had not. But it is immaterial by which party the question is made, for, being a question of jurisdiction, it would be the duty of this court of its own motion to take notice of it.

This question depends upon the act of Congress of July 9, 1888, c. 597, entitled "An act relating to the record of wills in the District of Columbia," and the whole of the rest of which is as follows: "The record of any will or codicil, heretofore or hereafter recorded in the office of the register of wills of the District of Columbia, which shall have been admitted to probate by the Supreme Court of the District of Columbia, or by the late orphans' court of said district, or the record of the transcript of the record and probate of any will or codicil elsewhere, or of any certified copy thereof, heretofore or hereafter filed in the office of said register of wills, shall be *prima facie* evidence of the contents and due execution of such wills and codicils: Provided, that this act shall not apply in any cause now pending in any of the courts of the District of Columbia." 25 Stat. 246.

In order to determine the scope and effect of this act, it is necessary to consider what the law upon the subject was in the District of Columbia before its passage.

The law of wills and of probate, as existing in Maryland on February 27, 1801, is the law of the District of Columbia, except as since altered by Congress; and the Supreme Court of the District of Columbia, in special and general term respectively, has, by virtue of successive acts of Congress, the probate jurisdiction formerly exercised by the orphans' court and the Court of Chancery of the State of Maryland, and by the orphans' court and the Circuit Court of the United States for the District of Columbia; with authority, also, at a special term, to order any matter to be heard in the first instance at a general term. Acts of February 27, 1801, c. 15, §§ 1, 12; 2

Stat. 103, 107; March 3, 1863, c. 91, §§ 3, 5, 16; 12 Stat. 763, 764; June 21, 1870, c. 141, §§ 4, 5; 16 Stat. 161; Rev. Stat. D. C. §§ 772, 800, 930.

The older laws of the State of Maryland concerning wills, executors and guardians, were amended and codified by the statute of 1798, chapter 101, drawn up by Chancellor Hanson, and published in 2 Kilty's Laws, and containing the following provisions:

By sub-chapter 1, § 4, (following the English Statute of Frauds of 29 Car. 2, c. 3, § 5,) it was enacted that "all devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect."

Sub-chapter 2, in §§ 1–3, made various provisions for securing the prompt delivery of "a will or codicil," after the death of the testator, to the register of wills for safekeeping until probate; and in § 4, enacted that "an attested copy, under the seal of office, of any will, testament or codicil, recorded in any office authorized to record the same, shall be admitted as evidence in any court of law or equity: Provided, that the execution of the original will or codicil be subject to be contested until a probate hath been had according to this act."

That statute did not authorize the probate of wills of real estate. But in sub-chapter 2, §§ 5–13, and sub-chapter 15, §§ 16–18, it made full and minute provisions for the probate in the orphans' court of "any will or codicil, containing any disposition relative to goods, chattels or personal estate;" by which such a will might, if uncontested, be admitted to probate at once; or, if contested, be dealt with "according to the testimony produced on both sides," and be admitted to probate "on such proof as shall be sufficient to give efficacy to a will or codicil for passing personal property;" or, at the request of either party, by a plenary proceeding, upon bill or petition, answer under oath, and depositions, and, it might be,

the findings of a jury upon issues sent to a court of law for trial; with a right of appeal from the orphans' court to the Court of Chancery or General Court.

By the law of Maryland, and consequently of the District of Columbia, in accordance with what was the law of England until the statute of 1 Vict. c. 26, a will of personal property need not be attested by subscribing witnesses, but might be established, when offered for probate, by the testimony of any two witnesses, or by equivalent proof. 1 Williams on Executors, (7th ed.) 85, 343; Dorsey's Testamentary Law, 57; *McIntire* v. *McIntire*, *ante*, 383, and 8 Mackey, (19 D. C.) 482, 489. A will of personal property, until admitted to probate, was not competent evidence in another suit. *Armstrong* v. *Lear*, 12 Wheat. 169, 176. And in Maryland, under the statute of 1798, an order granting or refusing probate of a will, as to personalty, has been considered not merely *prima facie*, but conclusive evidence in a subsequent suit. *Warford* v. *Colvin*, 14 Maryland, 532, 554; *Johns* v. *Hodges*, 62 Maryland, 525, 534.

In *Darby* v. *Mayer*, (1825) this court recognized that by a probate under that statute the will was conclusively established as to personalty; but decided that the clause of subchapter 2, § 4, above quoted, by which "an attested copy, under the seal of office, of any will, testament or codicil, recorded in any office authorized to record the same, shall be admitted as evidence in any court of law or equity," did not make such a copy of the recorded probate of a will evidence of title to real estate; and the reasons of the court were stated by Mr. Justice Johnson as follows:

"It is true that the generality of the terms in the first lines of this clause is such as would, if unrestricted by the context, embrace wills of lands. It is also true that the previous chapter in the same article prescribes the formalities necessary to give validity to devises of real estate; it is further true that the previous sections of the second chapter indicate the means, and impose the duty of delivering up wills of all descriptions to the register of the court of probates, for safekeeping, after the death of the testator, and until they shall

be demanded by some person authorized to demand them for the purpose of proving them.

"But it is equally true that the act does not authorize the registering of any will without probate. Nor does it, in any one of its provisions, relate to the probate of any wills, except wills of goods and chattels.

"The clause recited makes evidence of such wills only, as are recorded in the offices of courts authorized to record them. But when the power of taking probate is expressly limited to the probate of wills of goods and chattels, we see not with what propriety the meaning of the clause in question can be extended to wills of any other description. The orphans' court may take probates of wills, though they affect lands, provided they also affect goods and chattels; but the will, nevertheless, is conclusively established only as to the personalty.

"Unless the words be explicit and imperative to the contrary, the construction must necessarily conform to the existing laws of the State on the subject of wills of real estate. And when the power of taking probates is confined to wills of personalty, we think the construction of the clause recited must be limited by the context.

"We are, therefore, of opinion that there was nothing in the law of Maryland which could, under the Constitution, make the document offered to prove this will *per se* evidence in a land cause." 10 Wheat. 465, 471, 472.

In *Robertson* v. *Pickrell*, (1883) this court held that an exemplified copy of the probate of a will of real estate in a court of Virginia, authorized by the law of that State to take probate of wills, as well of real estate as of personal property, was incompetent evidence, in the courts of the District of Columbia, of title to real estate in the District; and, speaking by Mr. Justice Field, said: "In most of the States in the Union, a will of real property must be admitted to probate in some one of their courts, before it can be received elsewhere as a conveyance of such property. But by the law of Maryland, which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such pro-

bate. The common law rule prevails on that subject. The orphans' court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also; but the probate is evidence of the validity of the will, only so far as the personal property is concerned. As an instrument conveying real property, the probate is not evidence of its execution. That must be shown by a production of the instrument itself, and proof by the subscribing witnesses; or, if they be not living, by proof of their handwriting." 109 U. S. 608, 610.

In the State of Maryland, the statute of 1798 continued to be in force until the legislature of Maryland, by the supplemental statute of 1831, c. 315, § 1, authorized the orphans' courts to take the probate of "any will, testament or codicil, whether the same has relation to real or personal estate, or to both real and personal estate," in the same manner as, under the original statute, they might of wills disposing of personal estate; "which said probate, as concerns real estate, shall be deemed and taken only as *prima facie* evidence of such will, testament or codicil;" and, in § 16, provided that any will admitted to probate should be kept in the register's office, except that it might, at the trial of an issue of *devisavit vel non*, "be adduced in evidence under care of such register, or of any person in that behalf by him deputed, under a *subpœna duces tecum*, issued on special order of the court holding such trial."

The statute of Maryland of 1854, c. 140, authorized copies of wills and probates made in other States to be filed and recorded in the office of the register of wills in any county in Maryland; and provided that a copy of the record, under the hand of the register and the seal of his office, should "be evidence in all suits or actions, at law and in equity, in any court in this State, wherein the title of any property, real or personal, thereby devised or given, shall be in question, with the same force and effect as if the original will had been admitted to probate in this State, according to the laws thereof." Before that statute, the record of a probate in another State was inadmissible in evidence in the courts of Maryland. *Budd* v. *Brooke*, 3 Gill, 198, 232; *Beatty* v. *Mason*, 30 Maryland, 409, 412.

Opinion of the Court.

Congress never legislated upon the subject mentioned in either of the last two statutes of Maryland, until it passed the act of July 9, 1888, c. 597, now in question, entitled "An act relating to the record of wills in the District of Columbia," and the whole enacting part of which is so brief, that it may well be quoted once more, as follows: "The record of any will or codicil, heretofore or hereafter recorded in the office of the register of wills of the District of Columbia, which shall have been admitted to probate by the Supreme Court of the District of Columbia, or by the late orphans' court of said district, or the record of the transcript or the record and probate of any will or codicil elsewhere, or of any certified copy thereof, heretofore or hereafter filed in the office of said register of wills, shall be *prima facie* evidence of the contents and due execution of such wills and codicils: Provided, that this act shall not apply in any cause now pending in any of the courts of the District of Columbia."

Before the passage of this act, as has been seen, neither the Supreme Court of the District of Columbia, nor its predecessor, the orphans' court, had any jurisdiction to admit to probate a will of real estate only; and, consequently, no record, in any court of the District, of a probate of a will would be any evidence whatever of title to real estate; but, as to personal property, the probate of a will would seem to have been regarded as conclusive evidence; and there was no statute law in the District concerning the record or the proof of wills made and probated elsewhere.

The act of 1888 is a statute of evidence, and not of jurisdiction. It does not purport to confer any jurisdiction whatever. Its title describes it as "relating to the record of wills." The body of it is, in terms, a simple declaration that records of probates of wills or codicils in the District of Columbia "shall be *prima facie* evidence of the contents and due execution of such wills and codicils." And the concluding proviso, that it shall not apply to pending causes, treats it as a mere rule of evidence.

The records thus made evidence include those of wills and codicils admitted to probate by the courts of the District,

whether before or after the passage of the act, and also records of probates made elsewhere, and filed in the register's office here. The act assumes the probates to have been lawfully made; and it no more undertakes to define or to regulate the jurisdiction of the courts of probate of the District for the future, than it does the jurisdiction of those courts in the past, or the jurisdiction of the courts elsewhere whose proceedings filed here are equally made evidence.

The act gives no greater weight to future, than it does to past probates and records. But if it made the record of a will, admitted to probate in the District of Columbia before the act, evidence of title to real estate, it would not only give the probate an effect which could not have been in the mind of the court which granted it; but it would, in many cases, make a will effective to pass real estate, which had never been attested as required by law to constitute a valid will for that purpose.

For example, take the case now before the court, supposing it to have arisen before the passage of the act. The codicil disposed of both real and personal property, and bore the names of three witnesses. To prove it as a testamentary disposition of personal property, two witnesses were ample. Therefore, if the court of probate was satisfied that two only of the witnesses whose names were on the paper saw the testator sign or acknowledge it, the court would be bound to admit it to probate, although, for want of a third witness, there was no sufficient attestation or proof to make it a good will of real estate; and yet the record of the probate would be evidence of title to real estate under the devise therein contained.

The act not only does not (as did the statute of Maryland of 1831, above cited) contain an express grant of jurisdiction to take probate of wills of real estate; but it does not mention such wills at all. The leading words, "The record of any will or codicil," in the first line of this act, are no more general than the corresponding words, "An attested copy of any will, testament or codicil," in the similar provision of the statute of Maryland of 1798, which was held by this court, in *Darby* v. *Mayer*, before cited, not to embrace wills of real estate, which

the courts had no authority to admit to probate, although that statute in other clauses (as this act does not) applied by necessary implication, and even by express words, to such wills.

Congress, when framing the act of 1888, cannot be supposed to have been ignorant of the provision relating to evidence in the statute of 1798, which had been part of the law of the District of Columbia for nearly ninety years; nor of the construction which this court had given to that provision; nor yet of the want of any statute concerning records of wills admitted to probate elsewhere.

There may be some difficulty in ascertaining the motive of Congress in passing the act of 1888. But difficulty in ascertaining the motive of Congress is but a slight foundation for attributing to it an intention, unexpressed, to confer upon the courts of probate within the District of Columbia an authority over wills of real estate which they never had before since the District was first organized.

We regret to be compelled to differ in opinion from the Court of Appeals of the District of Columbia, which, since the decision below in the present case, has held that the record of a will admitted to probate in the District before the passage of the act of 1888 was competent evidence of the title to real estate in an action brought since its passage. But the question appears by the report not to have been argued by counsel, or much discussed by the court. *Barbour* v. *Moore*, 4 D. C. App. 535, 543, 544.

The result is that the Supreme Court of the District of Columbia, upon the application for probate of the codicil in question, had no authority to determine upon its sufficiency to pass real estate; and that its order in this respect must be modified.

That the codicil was sufficiently proved to pass personal property was not controverted at the bar.

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

Mr. Chief Justice Fuller took no part in the consideration and decision of this case.

OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY *v.* SKOTTOWE.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 147. Argued March 17, 1896. — Decided April 20, 1896.

This case comes within the established rule that on an application for removal from a state to a Federal court, the Federal question or the Federal character of the defendant company must appear from the complaint in the action, in order to justify a removal; and such Federal question or character does not appear in this case.

THIS was an action brought in the circuit court of the State of Oregon for Wasco county by Jane Skottowe, against the Oregon Short Line and Utah Northern Railway Company, for personal injuries alleged to have been caused by the negligence of the defendant company. The complaint was filed on October 31, 1890, and on November 10, 1890, the defendant filed a petition for the removal of the cause from the state court into the Circuit Court of the United States. This petition was denied; to which ruling the defendant excepted.

The case was proceeded in, and trial on the merits in the state court resulted in a verdict and judgment in favor of the plaintiff in the sum of $10,000. To this judgment a writ of error was sued out to the Supreme Court of the State of Oregon, assigning as error, among others, the action of the trial court in denying the defendant's petition for the removal of the cause into the Circuit Court of the United States.

The Supreme Court of the State affirmed the judgment of the trial court, and a writ of error was allowed to this court.

Mr. John M. Thurston for plaintiff in error. *Mr. John F. Dillon* was on his brief.

The complaint alleges "that the defendant is a corporation duly organized, existing and doing business in the State of Oregon, and as such corporation is and was, at all the times

and dates hereinafter mentioned, and long prior thereto, in the operation of a line of railroad running from Portland, Oregon, to The Dalles and Pendleton, Oregon, and other places far east, generally known as the Oregon Railway and Navigation Company's line of road, and in connection therewith and incident thereto has been for such time and now is in the possession of and operating a line of boats running from The Dalles, Oregon, to Portland, Oregon, together with all the bridges, wharf boats, ways, etc., used in getting to and from the landings of the aforesaid line of boats, and had been and was and still is carrying passengers thereon as a common carrier for hire."

It will be noticed that the character of the incorporation is not specifically stated, nor is any reference made to its articles or place of incorporation; and it will doubtless be contended that the plaintiff in her complaint did not allege or tender the corporate character or charter powers of the Oregon Short Line and Utah Northern Railway Company. We insist, however, that a bill of complaint which alleges that the defendant is an incorporated company, tenders, without any further or additional allegation, the charter or articles of incorporation of the corporation, including all those statutes and grants of power under and by virtue of which it acquired the right to become a corporation and to exercise corporate powers and privileges.

It must be held that the complaint alleges all those facts which it would be necessary for the plaintiff to prove were each and every allegation of the complaint denied by answer. For the purposes of determining as to whether or not the defendant could remove on the ground that the suit was one arising under the Constitution and laws of the United States (as the petition for removal must be filed on or before the answer day), it must be assumed that the cause of action upon which suit is brought arises upon all the facts which it would be necessary for the plaintiff to prove to maintain her cause of action, and among the most important of those facts are the corporate existence, the corporate character, and the corporate powers of the defendant.

Argument for Plaintiff in Error.

The corporate existence of the defendant can only be shown by its charter or articles of incorporation and by reference to the statute or statutes authorizing it to become a corporation. A corporation cannot exist as such except by authority of law To prove a corporation is to prove the law of its creation, and an allegation of corporate existence and capacity is an allegation of its charter and the law of its charter. No cause of action can be proven against an alleged corporation until the corporate existence, the corporate powers and the corporate duties are first proven; and therefore in every petition or complaint filed against an alleged incorporated company, its articles of incorporation and the law of its existence are necessarily tendered as a part of the issue, and whatever cause of action is set up against the defendant is a cause of action arising under whatever law authorized the formation of the corporation, defined its powers, and prescribed its obligations. All this is important, because it will be contended upon the other side that the complaint filed in the state court does not disclose a cause of action arising under any law of the United States, and therefore under the decision of this court in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, and in *Chappell* v. *Waterworth*, 155 U. S. 102, the cause was not removable under the act of August 13, 1888.

It seems to us that the case at bar is clearly distinguishable from those above cited. It is well settled that the Circuit Court of the United States has jurisdiction of a suit against a corporation created by or exercising powers and franchises derived from the statutes of the United States, and therefore the plaintiff can invoke the jurisdiction of the Federal court by alleging that the defendant is a corporation created under a law of the United States; as no liability can be established against such a corporation without involving a consideration and determination as to the powers conferred and corresponding obligations and duties imposed by the Federal act. An alleged cause of action which would entitle the plaintiff to bring his suit in the Circuit Court of the United States would be such a one as the defendant could remove to the Circuit Court of the United States. Can it be contended that a plain-

tiff may bring a cause of action and establish a liability against an alleged corporation, defendant, without submitting to the court a consideration of the charter powers and duties of such defendant? If so, then it is optional with the plaintiff, not only to choose for himself a tribunal, national or state, but to choose also for the corporation, defendant. If every cause of action against a corporation created under Federal enactment involves the consideration of its Federal powers, is it possible that the plaintiff's cause of action against it does not arise under the laws of the United States, because the plaintiff elects to allege that the defendant is an incorporation, without alleging the character of such incorporation, or the laws under which it acquired the right to be a corporation?

Mr. Alfred S. Bennett for defendant in error.

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

In the complaint the defendant was described as "a corporation duly organized, existing and doing business in the State of Oregon." The accident which caused plaintiff's injuries was alleged to have taken place at The Dalles on the Columbia River, and within the State of Oregon.

In the removal petition the defendant was alleged to be a consolidated company, composed of several railway corporations severally organized and created under the laws of the Territories of Utah and Wyoming and of the State of Nevada, and under an act of Congress, approved August 2, 1882, c. 372, 22 Stat. 185, entitled "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho and Wyoming, and for other purposes," and an act of Congress, approved June 20, 1878, c. 352, 20 Stat. 241, making the Utah and Northern Railway Company, a railway corporation in the Territories of Utah, Idaho and Montana.

It was not claimed, either in the petition for removal or in the answer subsequently filed, that the defendant company had any special defence arising under the acts of Congress, which

constituted a Federal question over which the courts of the United States had exclusive jurisdiction; but the contention is that if any of the corporate powers of a railroad company depend upon the legislation of Congress, the right of removal exists.

Congress has frequently conferred upon railway companies, existing under territorial or state laws, additional corporate franchises, rights and privileges, and its right to do so cannot be doubted. Thus it was held, in *California* v. *Pacific Railroad Company*, 127 U. S. 1, 39, that Congress possessed and validly exercised the power to create a system of railroads connecting the East with the Pacific coast, traversing States as well as Territories, and to employ the agency of state as well as Federal corporations.

And it must also be conceded that it was decided in the *Pacific Railroad Removal cases*, 115 U. S. 1, that where corporations created by acts of Congress have become consolidated with state corporations, and where "the whole being, capacities, authority and obligations of companies so consolidated are so based upon, permeated by and enveloped in the acts of Congress that it is impracticable, so far as the operations and transactions of the companies are concerned, to disentangle their qualities and capacities which have their source and foundation in these acts from those which are derived from state or territorial authority," that suits by and against such corporations are "suits arising under the laws of the United States," and removable as such from state courts into Circuit Courts of the United States.

Even if the acts of Congress of June 20, 1878, and August 2, 1882, so far conferred substantial rights and privileges upon the territorial and state corporations, consolidated as the Oregon Short Line and Utah Northern Railway Company, as to bring that company within the doctrine of the *Pacific Railroad Removal cases*, yet we think that the present case comes within the rule that the Federal question, or the Federal character of the defendant company, must appear from the complaint in the action in order to justify a removal, and that such Federal question or character does not so appear.

There is no propriety in further considering that rule, because the reasons of it were fully set forth in the case of *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, and again in the very recent cases of *Chappell* v. *Waterworth*, 155 U. S. 102; *East Lake Land Co.* v. *Brown*, 155 U. S. 488; and *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482.

The conclusion reached in those cases may be briefly stated thus: Under the acts of March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433, a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

The counsel for the plaintiff in error do not seek, as we understand them, to obtain a reconsideration of this question, but they advance an ingenious argument to distinguish the present from those cases. It is claimed that when a bill of complaint or declaration alleges that the defendant is an incorporated company it thereby tenders, or implicitly alleges, the charter or articles of incorporation of the corporation, including all these statutes and grants of power under and by virtue of which it acquired the right to become a corporation and to exercise corporate powers and privileges. In the words of the plaintiff's brief: "It must be held that the complaint alleges all these facts which it would be necessary for the plaintiff to prove were each and every allegation of the complaint denied by answer. For the purposes of determining as to whether or not the defendant could remove on the ground that the suit was one arising under the Constitution and laws of the United States (as the petition for removal must be filed on or before the answer day), it must be assumed that the cause of action upon which the suit is brought arises upon all the facts which it would be necessary for the plaintiff to prove to maintain his cause of action, and among the most

important of those facts are the corporate existence, the corporate character, and the corporate powers of the defendant company."

Applying these propositions to the case in hand, it is contended that, when the plaintiff alleged in her complaint that "the defendant is a corporation duly organized, existing and doing business in the State of Oregon, and as such corporation is and was, at all the times and dates hereinafter mentioned and long prior thereto, in the operation of a railroad running from Portland, Oregon, to The Dalles and Pendleton, Oregon, and other places further east, generally known as the Oregon Railway and Navigation Company's line of road, and in connection therewith and incident thereto has been for such time and now is in the possession of and operating a line of boats running from The Dalles, Oregon, to Portland, Oregon, together with all the bridges, wharf boats, ways, etc., used in getting to and from the landings of the aforesaid line of boats, and had been and was and still is carrying passengers for hire thereon as a common carrier for hire," she must be deemed to have thus alleged, and brought to the knowledge of the court, the entire legal history of the defendant company, its various component parts, with their several acts of incorporation, and particularly the two acts of Congress before referred to, and that, with this information thus spread before it, the court was obliged to perceive that the defendant company was within the rule laid down in the *Pacific Removal cases*, and entitled to remove the case into the Circuit Court of the United States.

We think the unsoundness of the proposition relied on by the plaintiff in error may be sufficiently shown by the very test which its counsel suggest, namely, what facts would it be necessary for the plaintiff to prove to maintain her action? Suppose the complaint in the present case to have been traversed by a plea of the general issue, would it have been necessary for the plaintiff to prove any other facts than those alleged? Evidence tending to show that a company, styled the Oregon Short Line and Utah Northern Railway Company was operating and conducting a line of railroad between Port-

land, Oregon, and The Dalles, Oregon, as a common carrier for hire; that the plaintiff, as a passenger for hire, was injured while in the lawful use of such railroad; that the injuries were caused by the defendant's negligence, and the nature and extent of the injuries, thus caused, would, if believed by the jury, have clearly sustained the material allegations of the complaint. To justify a recovery in such a case it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendant's corporate powers. The defendant's liability did not arise out of its grants of rights and privileges from the several Territories or from the United States. It grew out of its negligence and misconduct in the management of a railroad in the State of Oregon, into which State, it is not pretended, that it entered by reason of anything contained in any act of Congress.

It is urged that, as the plaintiff alleged that the defendant was "a corporation duly organized, existing and doing business in the State of Oregon," there would have been a fatal failure in the proof if no evidence was adduced to show the nature and character of the plaintiff's charter. We do not think so. As already said, those allegations were sufficiently sustained by evidence of the defendant's actual operation and management of the railroad. Whether the defendant was a corporation *de jure* or *de facto* was, in a case like the present, of no importance. If the plaintiff had actually undertaken to show the true character and extent of the defendant's corporate powers as a lawfully organized company and had failed to show such an organization, such failure would not have defeated her recovery if her other allegations had been made good.

But even if the court was obliged, under the allegations of the plaintiff's complaint, to take judicial notice of the defendant company's charter, no act of Congress was pointed out under which it was acting when operating the railroad in the State of Oregon. So far as appears, the defendant company existed and was doing business in the State of Oregon solely under the authority of that State, whether express or permissive. The two acts of Congress referred to do not disclose any in-

Counsel for Parties.

tention on the part of Congress to confer powers or right to be exercised outside of the Territories named therein.

The Supreme Court of Oregon committed no error in affirming the action of the trial court, denying the petition for removal, and its judgment is

Affirmed.

OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY *v.* MULLAN. Error to the Supreme Court of the State of Oregon. No. 148. Argued with No. 147.

MR. JUSTICE SHIRAS: The facts of this case are similar to those of the case of *The Oregon Short Line and Northern Railway Company* v. *Jane Skottowe*, just decided, and for the reasons there given the judgment of the Supreme Court of Oregon is

Affirmed.

Mr. John M. Thurston for plaintiff in error. *Mr. John F. Dillon* was on his brief.

Mr. Alfred S. Bennett for defendant in error.

OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY *v.* CONLIN.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 229. Argued March 17, 1896. — Decided April 20, 1896.

Oregon Short Line and Utah Northern Railway Company v. *Skottowe*, 162 U. S. 492, affirmed and followed.

THE case is stated in the opinion.

Mr. John M. Thurston, (with whom was *Mr. John F. Dillon* on the brief,) for plaintiff in error.

Mr. Alfred S. Bennett for defendant in error.

Syllabus.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Oregon, alleging error in the judgment of that court in affirming a judgment of the circuit court of Washington County in that State, wherein Francis Conlin, the defendant in error in this court, recovered damages for personal injuries alleged to have been caused by the negligence of the Oregon Short Line and Northern Railway Company, plaintiff in error.

The only question presented for our consideration is, whether there was error in denying the petition of the defendant company for removal of the cause into the Circuit Court of the United States. The record discloses a similar state of facts and allegations to that considered in the case, just decided, of *The Oregon Short Line and Northern Railway Company* v. *Jane Skottowe.* For the reasons there given, we find no error in the judgment of the Supreme Court of the State of Oregon, and it is accordingly

Affirmed.

ALBERTY *v.* UNITED STATES.

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

No. 853. Submitted March 4, 1896. — Decided April 20, 1896.

Alberty, the accused, was a negro born in slavery, who became a citizen of the Cherokee Nation under the ninth article of the treaty of 1866. Duncan, the deceased, and alleged to have been murdered, was the illegitimate child of a Choctaw Indian, by a negro woman who was not his wife, but a slave in the Cherokee Nation. *Held*, that, for purposes of jurisdiction, Alberty must be treated as a member of the Cherokee Nation, but not an Indian, and Duncan as a colored citizen of the United States, and that, for the purposes of this case, the court below had jurisdiction.

A man who finds another, trying to obtain access to his wife's room in the night time, by opening a window, may not only remonstrate with him, but may employ such force as may be necessary to prevent his doing so; and if the other threatens to kill him, and makes a motion as if so to do,

and puts him in fear of his life, or of great bodily harm, he is not bound to retreat, but may use such force as is necessary to repel the assault.

The weight which a jury is entitled to give to the flight of a prisoner, immediately after the commission of a homicide, was carefully considered in *Hickory* v. *United States*, 160 U. S. 408; and, without repeating what was there said, it was especially misleading for the court in this case to charge the jury that, from the fact of absconding they might infer the fact of guilt, and that flight is a silent admission by the defendant that he is unable to face the case against him.

Defendant, a Cherokee negro, who was known both by his father's name of Burns and that of his former master, Alberty, was convicted of the murder of one Phil Duncan, at the Cherokee Nation, in the Indian Territory. The indictment alleged the crime to have been committed May 15, 1879, but it appeared by the evidence to have been committed in 1880.

Upon judgment of death being pronounced, defendant sued out a writ of error from this court, assigning a want of jurisdiction in the court below and various errors in the charge to the jury connected with the law of homicide, and the inference to be drawn from the flight of the accused.

Mr. William M. Cravens for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

1. The question of jurisdiction in this case demands a primary consideration. Although the prisoner Alberty was not a native Indian, but a negro born in slavery, it was not disputed that he became a citizen of the Cherokee Nation under the ninth article of the treaty of 1866, 14 Stat. 799, 801, by which the Cherokee Nation agreed to abolish slavery, and further agreed "that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein or who may return within six months, and their descendants, shall have all the rights of native Cherokees." While this article of the

treaty gave him the rights of a native Cherokee, it did not, standing alone, make him an Indian within the meaning of Rev. Stat. § 2146, or absolve him from responsibility to the criminal laws of the United States, as was held in *United States* v. *Rogers*, 4 How. 567, 573, and *Westmoreland* v. *United States*, 155 U. S. 545.

Duncan, the deceased, was the illegitimate child of a Choctaw Indian, by a colored woman, who was not his wife, but a slave in the Cherokee Nation. As his mother was a negro slave, under the rule *partus sequitur ventrem*, he must be treated as a negro by birth, and not as a Choctaw Indian. There is an additional reason for this in the fact that he was an illegitimate child, and took the *status* of his mother. *Williamson* v. *Daniel*, 12 Wheat. 568; *Fowler* v. *Merrill*, 11 How. 375.

He came, however, to the Cherokee Nation when he was about seventeen years of age, and married a freed woman, and a citizen of that Nation. It would seem, however, from such information as we have been able to obtain of the Cherokee laws, that such marriage would not confer upon him the rights and privileges of Cherokee citizenship, beyond that of residing and holding personal property in the Nation; that the courts of the Nation do not claim jurisdiction over such persons, either in criminal or civil suits, and they are not permitted to vote at any elections.

For the purposes of jurisdiction, then, Alberty must be treated as a member of the Cherokee Nation, but not an Indian; and Duncan as a colored citizen of the United States.

By Revised Statutes, § 2145, except as to certain crimes, "the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country;" and by § 2146, "the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe; or to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian

tribes respectively." Obviously this case is not within the first class, because the crime was not committed by one Indian against the person of another Indian; nor within the second class, because there was no evidence that Alberty had been punished by the local law of the tribe; and the only remaining question is whether, by treaty stipulations, the exclusive jurisdiction over this offence has been secured to the Cherokee tribe.

By article 13 of the Cherokee treaty of July 19, 1866, 14 Stat. 799–803, the establishment of a court of the United States in the Cherokee territory is provided for, "with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation, by nativity or adoption, shall be the *only parties*, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." It is admitted that the present case is not within the last exception.

By the act of May 2, 1890, c. 182, to provide a temporary government for the Territory of Oklahoma and to enlarge the jurisdiction of the United States court in the Indian Territory, 26 Stat. 81, it is provided, § 30, "that the judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the Nation, by nativity or by adoption, shall be the *only parties;*" and by § 31, that "nothing in this act shall be so construed as to deprive any of the courts of the civilized Nations of exclusive jurisdiction over all cases arising wherein members of said Nations, whether by treaty, blood or adoption, are the *sole parties;* nor so as to interfere with the right and power of said civilized Nations to punish said parties for violation of the statutes and laws enacted by their national councils, where such laws are not contrary to the treaties and laws of the United States."

It will be observed that while this act follows the treaty so far as recognizing the jurisdiction of the Cherokee Nation as to all cases arising in the country, in which members of the

Nation, by nativity or by adoption, are the sole or only parties, it omits that portion of the thirteenth article of the treaty, wherein is reserved to the judicial tribunals of the Nation exclusive jurisdiction "where the cause of action shall arise in the Cherokee Nation," and to that extent apparently supersedes the treaty.

The real question as respects the jurisdiction in this case is as to the meaning of the words "sole" or only "parties." These words are obviously susceptible of two interpretations. They may mean a class of actions as to which there is but one party; but as these actions, if they exist at all, are very rare, it can hardly be supposed that Congress intended to legislate with respect to them to the exclusion of the much more numerous actions to which there are two parties. They may mean actions to which members of the Nations are the sole or only parties, to the exclusion of white men, or persons other than members of the Nation; and as respects civil cases at least, this seems the more probable construction.

But the difficulty is with regard to criminal cases, to which the defendant may be said to be the only party; and, if not, as to who is the other party, the sovereignty in whose name the prosecution is conducted — in this case, the United States, or the prosecuting witness, or, in a homicide case, the person who was killed. Some light is thrown upon this by the seventh article of the same treaty, wherein a special provision is made for the jurisdiction of the United States court to be created in the Indian Territory; and until such court was created therein, the United States District Court, nearest to the Cherokee Nation, was given "exclusive original jurisdiction of all cases, civil and criminal, wherein an inhabitant of the district hereinbefore described" (meaning the Canadian district of the Cherokee Nation) "shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case." It is true that the homicide in this case was not committed within the Canadian district, and, therefore, that this seventh article has no direct application, but it has an indirect bear-

ing upon the thirteenth section as indicating an intention on the part of Congress to treat the prosecutor in a criminal case as the other party to the cause, and so long as the party injured is alive, it may be proper to speak of him as such; and this we understand to have been the construction generally given. While it is impossible to speak of the deceased in a murder case as a party, in any proper sense, to a criminal prosecution against his assailant, it can scarcely have been the intention of Congress to vest jurisdiction in the Federal courts of cases in which the accused, an Indian, was guilty of a felonious assault upon a white man, not resulting in death, and deny it in case of a fatal termination, upon the ground that the accused is the only party to the cause.

In construing these statutes in their application to criminal cases, and in connection with the treaty, there are but three alternative courses.

(1) To treat the defendant as the *sole* party; in which case the Indian courts would have jurisdiction, whether the victim of the crime were an Indian or a white man. In the *Case of Mayfield*, 141 U. S. 107, which was a case of adultery, in which the name of the prosecuting witness did not appear, we held that as there was no adverse party, the woman being a consenting party, the defendant was to be regarded as the sole party to the proceeding.

(2) To treat the United States as the *other* party to the cause; in which case the Federal courts would have jurisdiction of all criminal cases, except as they might be limited by the clause of Rev. Stat. § 2146, providing that such jurisdiction "shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian."

(3) To treat the victim of the crime, whose person or property has been invaded, as the *other* party; in which case the Federal courts would have jurisdiction in all cases in which the victim was a white man, or other than an Indian. Under this construction the word "parties" would really mean parties to the crime and not simply to the prosecution of the crime.

The last proposition harmonizes better with what seems

to have been the intention of Congress, as evinced in that clause of Rev. Stat. § 2146 which reserves to the courts of the Nation jurisdiction of "crimes committed by one Indian against the person or property of another Indian," and at the same time avoids the anomaly of holding a murdered man to be a party to the prosecution of his slayer. Upon the whole we think it affords the most reasonable solution of the problem. For the purposes of this case, therefore, we hold the court below had jurisdiction.

There were a number of exceptions taken to the charge of the court, only two of which it will be necessary to discuss.

2. The eighth assignment of error is to the following instruction:

"When he" (the defendant) "is in that condition, if he was in that condition in this case, and was then attacked by Duncan, the deceased, in such a way as to denote an intention upon the part of the deceased to take away his, the defendant's, life, or to do him some enormous bodily injury, he could kill Duncan — when? — provided he use all the means in his power otherwise to save his own life from the attack of Duncan, or preventing the intending harm, such as retreating as far as he could, or disabling his adversary without killing him. That is still a duty."

In the case of *Beard* v. *United States*, 158 U. S. 550, the doctrine of the necessity of retreating was considered by this court at very considerable length, and it was held, upon a review of the authorities upon the subject, that a man assailed upon his own premises, without provocation, by a person armed with a deadly weapon, and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control; and so long as there is no intent on his part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his own life, is not guilty of murder or manslaughter if death result to his antagonist from the blow given him under such circumstances. In delivering the opinion it was said, p. 559:

"But we cannot agree that the accused was under any greater obligation, when on his own premises, near his dwell-

ing-house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling-house. The accused being where he had a right to be, on his own premises, constituting a part of his residence and home, at the time the deceased approached him in a threatening manner, and not having by language or by conduct provoked the deceased to assault him, the question for the jury was whether, without fleeing from his adversary, he had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did, namely, strike the deceased with his gun, and thus prevent his further advance upon him."

In the case under consideration it appeared that Duncan, the deceased, had been paying such attentions to the defendant's wife that it had caused them to separate, the wife living at a Mr. Lipe's, where the killing occurred, and defendant making his home with some colored people by the name of Graves. Defendant himself worked during the day at Lipe's, was frequently with his wife, and upon the evening in question had been to church with her and taken her home to Lipe's after the service. She went into the house and defendant went back into the lot, where the stock was, as it was a part of his duty to look after the stock. His version of the facts was that while he was in the lot he saw a window in the house, which opened into his wife's room, raised, walked out into the yard and found the deceased at the window, and said to him: "Who is that?" To which the deceased replied, with an oath: "You will find out who it is;" "and then made at me at that time. That is the first time I had seen him there. And then I knew his voice, and he made at me as if he had something and was going to kill me, and I had this little pistol in my pocket and I run backwards toward the front yard and told him to stand off, . . . and I called Mr. Lipe, who got up and came to the door and asked what was the matter;" to which defendant replied: "This man here was trying to get up in your window where my wife sleeps . . . and then I moved away — I started to move and this fellow says

to me, he says, 'I will kill you, God damn you,' and made for me. He was between me and the house and I was next to the gate, and I broke for the gate to try to get out of his way, and as I broke for the gate he was coming at me, seemed like he was going to cut me with something; I couldn't tell what it was and I threw myself around that way (illustrating) and fired."

It was in this connection that the court gave the charge covered by the eighth assignment, adding thereto:

"If a man attacks us wrongfully, if he is seeking then and there to make an attack upon us in such a way as to jeopardize life, and we can turn aside that attack without destroying his life, it is our duty to do it. It is our duty, in the first place, to get out of the way of the attack, and that is a duty springing from our own self interest, because if a man can avoid a deadly result with due regard to his own safety, is it not better for him to do it, than to rush rashly into a conflict where he may lose his life? He is doing it in the interest of his own life. And then, aside from that, in the interest of the life of the party who attacks him, he is required to do it. Then, under this proposition, to give the defendant the benefit of it, he must have been doing what he had a right to do at the time, and while so situated he must have been attacked by Phil Duncan, the deceased, in such a way as to indicate, from the nature of that attack, and the way he was executing it, a purpose upon the part of Duncan then and there by that conduct to take his life, or to inflict upon him some great violence: and he must have been so situated, so surrounded by danger, that he could not get out of the way of it, or he could not turn it aside by an act of less violence than what he did do. He must have exercised reasonable means, in other words, to avoid the dreadful necessity of taking human life, because the law says that he could kill, provided he use all the means in his power otherwise to save his own life."

We think the charge of the court in this connection is open to the same objection that was made to the charge in the case of *Beard* v. *United States*. The only difference suggested is that in that case the attack was made with firearms, and in

this case it would appear that the defendant supposed that the deceased was about to attack him with a knife. Defendant, however, was working at Lipe's, where his wife was staying, and if, as he claims, he saw a man in the act of raising a window which led to his wife's room, it was perfectly natural that he should wish to investigate, and to ascertain for what purpose the man was there. It appears to have been so dark at the time that defendant did not recognize deceased except by his voice; that the deceased threatened, with an oath, to kill him, and as he says, "made for him" with a knife. Under such circumstances we think that a charge to the jury that he was bound to retreat as far as he could, or disable his adversary without killing him, was misleading. We think that a man who finds another trying to obtain access to his wife's room in the night time, by opening a window, may not only remonstrate with him, but may employ such force as may be necessary to prevent his doing so; and if the other threatens to kill him, and makes a motion as if to do so, and puts him in fear of his life, or of great bodily harm, he is not bound to retreat, but may use such force as is necessary to repel the assault. Of course it is not intended to intimate that these were the facts, but what the facts were was a question for the jury, who had a right to believe the defendant's version, if it seemed probable to them. Upon the assumption that the jury did believe him, we think the charge imposed upon the defendant a responsibility and duty which he could not justly be called upon to bear.

3. The fourteenth assignment of error was to the following instructions upon the subject of the flight of the accused after the homicide:

"You take into consideration, in other words, the facts and circumstances which led up to the killing, the facts and circumstances that transpired at the time of the killing, and you do not stop there, but you take into consideration the facts and circumstances as affecting the defendant subsequently to the killing. For instance, you take into consideration the defendant's flight from the country — his going into another part of the country — as evidence; and you are to pass upon the ques-

tion as to whether or not he has sufficiently explained away the presumption which the law says arises from flight when a man has taken human life. It is a principle of human nature — and every man is conscious of it, I apprehend — that if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right and proper. The truth is — and it is an old scriptural adage — 'that the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury of their country, because that jury will protect them; it will shield them, and the more light there is let in upon their case the better it is for them. We are all conscious of that condition, and it is therefore a proposition of the law that, when a man flees, the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his guilt.

"A man accused of crime hides himself, and then absconds. From this fact of absconding we may infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact."

Again upon that subject:

. . . "flight by a defendant is always relevant evidence when offered by the prosecution; and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong as the case may be, a confession; and it comes in with the other incidents, the *corpus delicti* being proved from which guilt may be cumulatively inferred."

"Now, that is the figure that flight cuts in a case. It is a question in this case whether this defendant has sufficiently explained it here to take away the effect of the presumption arising from flight."

In this connection the evidence tended to show that a day or two after the crime the defendant fled from the jurisdiction of the court, went to St. Louis, and there resumed his father's

name instead of that of his master, which he had previously borne. Defendant gave his reason for fleeing as follows: "My heart was broke, and I just did not care to stay; I thought I would just go away from the country where I would never hear from my people any more, because my heart was broke, and my children was all young and they had just commenced to love me, and my heart was broke at that time, and that was the reason I went away."

The weight which the jury is entitled to give to the flight of a prisoner immediately after the commission of a homicide was carefully considered by this court in the case of *Hickory* v. *United States*, 160 U. S. 408, in which a charge, substantially in the language of the instruction assigned as erroneous in this case, was held to be tantamount to saying to the jury that flight created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as axiomatic truth, and as such that it was error.

We do not find it necessary to repeat the argument that was made in that case, but we think it was especially misleading for the court to charge the jury that, from the fact of absconding, they might infer the fact of guilt, and that flight "is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong as the case may be, a confession; and it comes in with the other incidents, the *corpus delicti* being proved from which guilt may be cumulatively inferred." While undoubtedly the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt; at the same time, as was observed in *Ryan* v. *The People*, 79 N. Y. 593, "there are so many reasons for such conduct consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances."

While there is no objection to that part of the charge which permits the jury to take into consideration the defendant's flight from the country as evidence bearing upon the question of his

guilt, it is not universally true that a man, who is conscious that he has done a wrong, "will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;" since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion." Innocent men sometimes hesitate to confront a jury — not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves. The criticism to be made upon this charge is, that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt. It certainly would not be contended as a universal rule that the fact that a person, who chanced to be present on the scene of a murder, shortly thereafter left the city, would, in the absence of all other testimony, be sufficient in itself to justify his conviction of the murder.

We have found it impossible to reconcile these instructions with the rulings of this court in the two cases above cited, and are therefore compelled to

Reverse the judgment of the court below, and remand the case with instructions to grant a new trial.

CENTRAL PACIFIC RAILROAD COMPANY *v.* NEVADA.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

Nos. 170, 171. Argued March 20, 1896. — Decided April 20, 1896.

Since the passage of the act of July 10, 1886, c. 764, 24 Stat. 143, surveyed but unpatented lands, on which the costs of survey have not been paid, included within a railroad land grant, are subject to taxation by the State in which they are situated.

The nature of the taxable interest of a railroad company on such lands so subjected to taxation, with the assent of Congress, does not present a Federal question.

The possessory claim of the railroad company to such lands is taxable under the laws of Nevada without reference to the fact that they may be hereafter determined to be mineral lands, and so be excluded from the operation of the grant.

THIS case (No. 170) was an action originally begun in the district court of Lander county by the State of Nevada against the Central Pacific Railroad Company and its property within such county, as well as the county's proportion of its rolling stock, to recover a state tax of $5545.92, and a county tax of $17,870.19, levied upon such road and its property for the year 1888. The petition prayed for judgment against the road for the amount of the tax and penalties for non-payment, and attorney's fees, and "for such other judgment as to justice belongs."

The suit was both *in rem* and *in personam*, a statute of Nevada providing for bringing a suit against the person to whom the property is alleged to belong, and also against the property itself, and that the judgment rendered shall be against both, and be a lien upon the property.

The railroad company answered the complaint; denied that it owned or possessed any land subject to taxation by the State, and disclaimed any interest in the lands described in the complaint, other than that derived by and through the

statutes of the United States of 1862 and 1864, granting lands to the Pacific Railroads; and by an amendment to its answer alleged that the costs of surveying, selecting and patenting said lands had never been paid to the United States, and that the same were due and unpaid.

The suit was tried upon a stipulation as to the facts in the following language:

"It is hereby stipulated and agreed that of the land described in the amended complaint on file herein 131,386 acres are surveyed, but unpatented, and the same were assessed for the year 1888 at fifty cents per acre by the assessor of said county.

"That the patented lands embraced in said complaint amounted to 24,123 acres, and the same were assessed at $1.25 per acre for the said year by the said assessor.

"That of the lands described in said complaint 195,200 acres are unsurveyed, 2080 acres were sold and conveyed by defendant, and 960 acres were beyond the limits of the grants to said defendant and were not its property, and the said lands were assessed for said year by said assessor at fifty cents per acre.

"That the tax levy for said year was $3.80 on each $100.

"That the costs of surveying, selecting and conveying 122,824 acres of said surveyed unpatented lands above mentioned have not been paid.

"That said defendant has heretofore mortgaged said lands described in the said complaint, and has at divers times leased various portions thereof.

"That said defendant has never had any other possession of any part of said lands than such as may be inferred from executing said mortgages and leases and by virtue of the land grants to it of 1862 and 1864."

The district court held that the State was entitled to recover for the taxes levied upon the patented lands, also for the taxes levied upon the unpatented but surveyed lands, on which the cost of surveying had not been paid; but that it was not entitled to recover for the taxes levied upon unsurveyed lands.

To that judgment the defendant excepted, stating as one of its reasons for such exception that the decision and judgment

showed that the same were based upon the taxability of 131,386 acres of surveyed but unpatented lands, at an assessed valuation of fifty cents per acre; while the evidence, as contained in the agreed statement of facts, showed that said 131,386 acres of surveyed unpatented lands contained and were made up in part of 122,824 acres of land upon which the costs due to the government of the United States for surveying, selecting and patenting the same had never been paid.

Both parties appealed to the Supreme Court of the State from the judgment of the district court, upon the hearing of which appeals the judgment was affirmed. 21 Nevada, 247. From that judgment of affirmance the railroad company sued out a writ of error from this court, assigning for error that the Supreme Court awarded judgment to the plaintiff below for the taxes assessed upon 122,384 acres of surveyed unpatented lands, upon which the costs of surveying, selecting and conveying had not, at the time of such assignment, or since, been paid, and of which the plaintiff in error had never been in possession.

The State being bound by the decision of its Supreme Court that the 195,200 acres of unsurveyed lands were not taxable, was not entitled, and did not attempt to sue out a writ of error.

Another action (No. 171) in all respects similar to the first, except in the amounts claimed, was subsequently begun to recover the taxes upon the same property for the year 1889, and was carried to a similar conclusion.

Mr. Wheeler H. Peckham for plaintiff in error.

I. It is essential, on the threshold of the discussion, to clearly apprehend what is the action of the State of Nevada, of which the plaintiff in error complains.

The statutes of Nevada, under which this action was taken, provide as follows:

"1079. Sec. 3. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, . . . and shall not be satisfied or removed until all the taxes are paid or the property has absolutely vested in a purchaser under a sale for taxes."

Argument for Plaintiff in Error.

"1080. SEC. 4. All property of every kind and nature whatsoever within this State shall be subject to taxation except: *First.* All lands and other property owned by the State or by the United States, or by any county, etc., etc. *Second.* Mines and mining claims; provided that nothing in this section shall be so construed as to exempt from taxation possessory claims to the public lands of the United States or of this State, or the proceeds of the mines, and provided further, that nothing herein shall be so construed as to interfere with the primary title to the lands belonging to the United States."

"1081. SEC. 5. The term 'real estate' when used in this act shall be deemed and taken to mean and include, and it is hereby declared to mean and include . . . the ownership of or claim to or possession of or right of possession to any lands within the State, and the claim by or the possession of any person, firm or corporation, association or company to any land, and the same shall be listed under the head of real estate."

"1088. SEC. 12. It is the duty of the assessor to prepare a tax list or assessment roll, in which shall be stated, among other things, 'all real estate, including the ownership or claim to, or possession of, or right of possession to, any land and improvements . . . described by metes and bounds, or by common designation or name.'

"A form is given as follows:

Taxpayer's name_____
Description of Property_____
Real Estate, Number of Acres_____
Possessory Claim, Number of Acres_____
Section_____
Number of Lot_____
Number of Block_____

	Dollars.	Cents.
Value of Real Estate or Possessory Claim and Improvements_____		
Value of Improvements on Real Estate or Possessory Claim Assessed to persons other than the owners of said real estate or possessory claim_____		

The tax statutes of the State of Nevada thus provide for the taxing of the two separate interests in real estate, viz.: (*a*) The whole estate as described on the tax list or assessment roll under the title "Real Estate, Number of Acres;" and (*b*) A less estate, but involving possession described on the tax list or assessment roll under the title, "Possessory Claim, Number of Acres."

This action was brought by the State of Nevada on the ground that the defendant below had a "possessory claim" to certain lands which the proper officials of the State had assessed for taxes and on which the defendant below had not paid the taxes.

The answer of defendant below (after dealing with certain allegations of the complaint as to assessment and non-payment of taxes on its roadbed, etc., and raising questions as to the same, which were satisfactorily determined by the court below, and which are not before this court) denied that it had any possessory claim in or to said lands, and alleged that the only interest of defendant below in said lands was that derived from the acts of Congress of 1862 and 1864, making certain grants to the Pacific Railroad companies, and that as to such lands a portion were unsurveyed and unpatented — a portion surveyed but unpatented and costs of survey unpaid, and but a small portion patented.

The pleadings thus presented a direct issue as to whether the defendant below had a "possessory claim" in these lands which could be taxed or assessed by the State of Nevada.

On that issue the only evidence is the stipulation found in the record.

It is that the defendant *never had any other* possession of any part of said lands than such as may *be inferred* from executing the mortgages and leases and by virtue of the land grants.

The court below in construing the tax statute of Nevada above recited in this case held that the terms "possessory claims," "claim to possession or right to possession," to any lands do not mean such right or claim when not accompanied by actual possession.

The court says: "But such possession, to be of any validity, must be actual and substantial. It must be an actual occupation, a complete subjugation, to the will, and control *a pedis possessio.* The mere assertion of title, the casual or occasional doing of some act upon the premises, have never been held sufficient.

This construction of the meaning of the words "possessory claim," etc., in the Nevada statute by the highest court of that State, it is well settled, is binding on and will be followed by this court; and it is *the judgment* in this case. *Nesmith* v. *Sheldon*, 7 How. 812; *Fairfield* v. *Gallatin County*, 100 U. S. 47, and cases cited on page 52; *Suydam* v. *Williamson*, 24 How. 427; *Ridings* v. *Johnson*, 128 U. S. 212, 224, and cases cited.

In *People* v. *Weaver*, 100 U. S. 539, the rule is applied to a state tax statute.

This construction of the terms "possessory claims," etc., of course, applies to the assessment on surveyed unpatented lands equally with unsurveyed unpatented.

The stipulation is the same as to both classes, and it is "that defendant below never had any other possession of any part of said lands," referring to the whole 195,200 acres, "than such as may be inferred from executing said mortgages," etc.

It must follow in the language of the court below that "there is nothing to tax" unless "the *title* is subject to taxation." Now this court has held in repeated adjudications that *the title* to surveyed unpatented lands on which the costs of survey have not been paid is not subject to taxation. *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600; *Ankeny* v. *Clark*, 148 U. S. 345.

II. It appearing, then, that the State of Nevada has taxed lands which, but for the act of Congress of 1886, are not taxable, we submit that such act of Congress has not made such lands taxable under the Nevada statutes.

The act of Congress referred to is in these words: "That no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories

and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting and conveying the same, or because no patent has been issued therefor, but this provision shall not apply to lands unsurveyed: *Provided*, That any such land sold for taxes shall be taken by the purchaser, subject to the lien for costs of surveying, selecting and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide, and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands: *Provided, further*, that this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads and in organized counties: *Provided, further*, that at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto." Act of July 10, 1886, § 1, c. 764, 24 Stat. 143.

The opinion of the court below devotes some space to an attempt to show that this act of Congress was accepted by the State of Nevada, or that the act of Congress, together with the state law, formed a sort of composite tax law under which these lands could be taxed and sold.

It is not a question of acceptance or non-acceptance. It is a question whether the State has power to tax what it *has* taxed. In the series of decisions on the validity of state laws taxing shares in national banks this court has definitely settled the rule as to what is required to make valid state tax laws taxing property subject to taxation only by act of Congress. *Bank of Commerce* v. *New York*, 2 Black, 620; *Bank Tax case*, 2 Wall. 200; *Van Allen* v. *Assessors*, 3 Wall. 573; *People* v. *Weaver*, 100 U. S. 539. In these cases we see how emphatic has been the view of this court that the state law itself must contain the affirmative provisions which shall make it conformable to the act of Congress, and that the act of Congress cannot be relied upon to modify the state law or to coördinate itself with the state law.

That this state tax law does not tax these lands and that the state authorities have not taxed them in pursuance of the act of Congress seems clear.

III. No lands granted to the Central Pacific Railroad Company can be taxed by a State prior to the issue of a patent.

The grant to the Central Pacific Railroad excludes or reserves mineral lands — not merely the minerals, but mineral lands. The right and power to ascertain which of the lands, included within the territorial limits of the grant as fixed by the definite location of the line of the road, are mineral and which non-mineral is vested exclusively in the United States administrative officers, and is conclusively proved only by the issue of a patent.

Argument on this proposition seems unnecessary after the decision of this court in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288. In the case at bar the grant of the unpatented lands is, and remains, a float until a patent issues; for, until then, no one can say whether any particular acre of land passes or not.

Mr. John C. Chaney for defendant in error.

Mr. Robert M. Beatty, attorney general of the State of Nevada, and *Mr. Henry Mayenbaum* filed a brief for defendant in error.

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

There appear to be within the county of Lander four classes of lands embraced within the Pacific land grants of 1862 and 1864.

(1.) Patented lands to the amount of 24,123 acres, assessed at $1.25 per acre, concerning the taxability of which there is no dispute. *Railway Co.* v. *McShane*, 22 Wall. 444.

(2.) Unsurveyed lands to the amount of 195,200 acres, assessed at 50 cents per acre, and held, both by the district court and by the Supreme Court of the State, not to be sub-

ject to taxation. See also act of July 10, 1886, c. 764, § 1, 24 Stat. 143. No question is made with regard to the propriety of this ruling.

(3.) Surveyed but unpatented lands, upon which the costs of survey have been paid ; 8562 acres. These would, of course, be subject to taxation if the following class was adjudged to be so subject.

(4.) Surveyed but unpatented lands, upon which the costs of survey have not been paid; 122,824 acres.

1. The principal dispute is with regard to the fourth class, that is, unpatented lands which have been surveyed, but the costs of which survey have not been paid. As to lands of this class it was held by this court in *Railway Co.* v. *Prescott*, 16 Wall. 603, that, although lands sold by the United States may be taxed before the government has parted with the legal title by issuing the patent, this principle was to be understood as applicable only to cases where the right to the patent is complete, and the equitable title fully vested, without anything more to be paid, or any act done going to the foundation of the right; and hence, where there had been a large grant to a railroad company, if prepayment by the grantee of the cost of surveying the lands granted be required by the statute making the grant, before any of the lands shall be conveyed, no title vested in the grantee, and the State could not levy taxes on the land, and under such levy sell and make a title which might defeat the lien of the United States. In this particular, this case was affirmed in *Railway Co.* v. *McShane*, 22 Wall. 444, 462, and *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600.

Apparently to provide for this contingency and to render these lands subject to state taxation, Congress, on July 10, 1886, 24 Stat. 143, passed an act to provide for the taxation of railroad grant lands and for other purposes, the first section of which enacted "that no lands granted to any railroad corporation by any act of Congress shall be exempted from taxation by States, Territories and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting and conveying the same, or be-

cause no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: *Provided*, That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect to such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties: *Provided further*, That at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto."

In view of this statute it is difficult to see how these lands, which are the very ones provided for by the statute, can escape taxation, if the State chooses to tax them. The argument of the railroad company in this connection is that, by the General Statutes of Nevada upon the subject of taxation, § 1080, "nothing . . . shall be so construed as to exempt from taxation possessory claims to the public lands of the United States, or of this State: . . . *and provided further*, that nothing herein shall be so construed as to interfere with the primary title to the lands belonging to the United States;" that by § 1081, "the term 'real estate,' when used in this act, shall be deemed and taken to mean and include . . . the ownership of, or claim to, or possession of, or right of possession to any lands within the State, and the claim by or the possession of any person, firm, corporation, association or company to any land, and the same shall be listed under the head of real estate;" that, by § 1088, "it is the duty of the assessor to prepare a tax list, or assessment roll, . . . in which . . . shall be listed . . . all real estate, including the ownership or claim to, or possession of, or right of possession to any land and improvements," etc.; that this action was brought by the State of Nevada to subject these lands to taxation upon the ground that the railroad company

had a "possessory claim" to them, which the proper officers of the State had assessed for taxes; that the railroad company, in its answer, denied that it had any possessory claim in or to said lands, and alleged that its only interest was that derived from the land grant acts of Congress of 1862 and 1864, and that as to said lands a portion were unsurveyed and unpatented, a portion surveyed but unpatented and costs of survey unpaid, and but a small portion patented; that the pleadings thus presented a direct issue as to whether the company had a "possessory claim" in these lands, which could be taxed by the State; that the only evidence upon such issue was the stipulation above recited, to the effect that the defendant never had any other possession of any part of said lands than such as may be inferred from executing said mortgages and leases, and by virtue of the land grants; that the Supreme Court of the State, in considering the taxing statute above recited, held, in respect to the *unsurveyed* lands, that the terms "possessory claims," "claim to possession or right to possession" to any lands did not mean such right or claim when not accompanied by actual possession, and hence that unsurveyed lands were not subject to taxation; that such construction of the term "possessory claims" applies to *surveyed* as well as unsurveyed lands; and hence it must follow that there is nothing to tax, unless the title is subject to taxation, and that this court has held in the three cases above cited, that the title to surveyed patented lands, upon which the costs of survey have not been paid, is not subject to taxation.

It is a sufficient answer to this argument to say that, whether the inclusion of these lands in the land grant acts of 1862 and 1864, and the subsequent mortgaging and leasing of them by the railroad company, constituted a "possessory claim" to the lands under the taxing laws of Nevada, is not a Federal question, but a question as to the proper construction of the words "possessory claim," used in the state statute. It is true that, with respect to the unsurveyed lands, the Supreme Court held that the railroad company had no such actual and substantial possession as would justify their taxation under the statute, and that it does not expressly appear from the opinion that

the court put the right of the State to recover its taxes upon the surveyed lands upon the ground that the railroad did have a possessory claim thereto; but it does not necessarily follow that any Federal question was thereby raised, or that any right, title, privilege or immunity set up under a statute of the United States was denied to it. It does explicitly appear that authority was given by Congress to the States to tax these lands; but whether, under the state laws, the railroad had any taxable interest therein, or whether the decision of the court that it had no such interest in the unsurveyed lands is consistent with its opinion that it had such interest in the surveyed lands, is immaterial, so long as no Federal right was denied to it. It is perfectly obvious that no attempt was made to tax the title of the government, and that the subjection of these lands to taxation by the State must have rested upon some theory that the railroad had a taxable interest in them. What that interest was does not concern us, so long as it appears that, so far as Congress is concerned, express authority was given to tax the lands.

No action on the part of the State or its legislature was necessary to signify its acceptance of the authority conferred by the Federal statute. Where a grant of lands is made by Congress to a State for the purpose of building a railroad, it has been customary for the State to accept such grant as authority for the conveyance of the lands to a designated railway company; but where a simple power is given, no acceptance of such power by the State is necessary as a preliminary to its exercise.

Nor, conceding that the General Statutes of Nevada were inoperative to authorize the taxation of these lands prior to the act of Congress of July, 1886, was any reënactment of those statutes necessary, since the effect of this act was merely to remove the only obstacle to their enforcement. As was said by this court with respect to an act of Congress declaring intoxicating liquors to be subject to the laws of each State, upon their arrival therein, "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws with respect to imported packages in their original condition, created by the absence of

a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within local jurisdiction." *In re Rahrer*, 140 U. S. 545, 564; see also *Butler* v. *Goreley*, 146 U. S. 303, 314.

While, as above stated, it does not clearly appear from the opinion of the Supreme Court of Nevada, in this particular case, what the distinction is as to a possessory claim between surveyed and unsurveyed lands, there is a clear distinction in the fact, that until lands are surveyed, it is impracticable to identify them for the purposes of taxation. This question had theretofore been considered by the Supreme Court of Nevada in the case of the *State* v. *Central Pacific Railroad*, 25 Pac. Rep. 442, and probably the court, in delivering its opinion in this case, did not deem it necessary to restate the distinction there made. In the opinion of the court in that case it was said: "A reason for withholding the right to tax unsurveyed lands may be found in the fact that it is impracticable to assess them. It is a well established principle of law that land assessed for the purpose of taxation must be so described that it may be identified. . . . The lands granted to the railroad company were the odd numbered sections within the limits of twenty miles on each side of the railroad, except such as had been sold or otherwise disposed of by the United States, or to which a homestead or preëmption claim had attached, or mineral lands. Until the surveys are made it cannot be known what parts of the land are within the enumerated exceptions, or what sections or parts of sections will belong to the company, nor until then can the locality of the lands be determined so that a description will identify them. . . . It must be borne in mind that the unsurveyed lands are not described by metes and bounds, or by common designation or name, but as sections and parts of sections, and, as alleged by the complaint, 'as their designation will appear when the surveys of the United States are extended over them.' It is plain that this is not a description by which the identity of the lands may be established, and it is equally plain that possession of the lands so described can-

not be established until the surveys are made." See also *Robinson* v. *Forrest*, 29 California, 317, 325; *Middleton* v. *Low*, 30 California, 596, 605; *Bullock* v. *Rouse*, 81 California, 590; *People* v. *Mahoney*, 55 California, 286; *Keane* v. *Cannovan*, 21 California, 291, 302. Evidently this course of reasoning does not apply to lands which have been surveyed.

2. It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excludes mineral lands; not only minerals but mineral lands; that the right and power to ascertain which of the lands are mineral and which non-mineral is vested exclusively in the officers of the government, and can be proved only by the issue of a patent, as held by this court in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288. It is argued that, if the railroad company paid taxes upon these lands, it might never own or acquire them, and the tax would consequently be paid on property it never owned or could own; and that, upon the other hand, if the company should not pay the taxes, and the lands be sold under the judgment appealed from, the title to the lands, if the assessment were valid, would pass to the purchaser, whether they were mineral or not.

But, if the railroad has a possessory claim to these lands, they are taxable under the statute of Nevada, and it is this and this only which the State has assumed to tax. If it has no possessory claim, because the lands are mineral, it certainly cannot be injured by a sale of the lands to pay the tax, and whether the sale of such lands would pass the title or not is a question in which the railroad company is not interested. The company has an enormous land grant, embracing every alternate section of land within twenty miles on each side of the road, with a reservation of mineral lands from the operation of the act. Can it possibly have been intended that these lands should remain wholly untaxed, until the mineral lands, which it may be assumed represent but a very small portion of the total grant, have been identified and excepted? Clearly not. There is no presumption that the land is mineral, and if it be so, and the railroad company disclaims title to it for that reason, it would probably be a good defence to a suit for

taxes. But the possibility that certain lands may turn out to be mineral lands surely cannot be a defence to a claim for taxes applicable to the entire grant, so long as the railroad company lays claim to the right of the possession of such lands.

It is true that in the *Barden case* we held that mineral lands were excluded from the operation of the Pacific Railroad land grants, whether such minerals were known or unknown at the date of the grant, because the statutes had excepted them in the most unequivocal terms; but nothing was said in that case to impugn the authority of previous cases which had held that these grants were *in præsenti* of lands to be afterwards located. They became so located when they were surveyed. "Then the grants attached to them, subject to certain specified exceptions," (p. 313,) one of which was that minerals should be discovered upon them before the issue of a patent, when as to such lands the title of the company failed. The possibility, however, that minerals might be discovered upon certain sections of these lands, as to which the title of the railway company might be defeasible, would not impair their title to the great bulk of the grant, or enable the company with respect thereto to evade its just obligations to the State. Should the company disclaim a right to the possession of any portion of these lands by reason of the discovery of minerals thereon, there would remain no right to tax them under the statutes of Nevada, but so long as the company asserts a possessory claim to them it implies a corresponding obligation to pay the taxes upon them. *State* v. *Central Pacific Railroad*, 20 Nevada, 372.

The company has had possession of these lands for some thirty years; has offered them for sale, and sold them as its own, and, whenever it has been for its advantage to do so, has claimed possession of them and dealt with them as its private property. To assert all the rights of ownership, and at the same time to repudiate all its obligations consists neither with the terms of the grant nor with the dictates of natural justice.

The act of Congress, in providing that such lands shall not be exempted from taxation, impliedly assents to their sale, but also guards its own right to them by providing that they shall

be taken by the purchaser subject to the lien for costs for surveying, to be paid in such manner as the Secretary of the Interior may provide; and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect to such lands; and also by providing that at any such sale the government may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto. The rights of the government with respect to such lands are thus carefully preserved and protected.

If the company is liable for taxes upon lands which have been surveyed, but the cost of which survey has not been paid, *a fortiori* it is liable, if the cost has been paid.

The decree of the court below is, therefore, in each case,

Affirmed.

Mr. Justice Field dissenting.

I am unable to concur with my associates in affirming the judgment of the Supreme Court of Nevada in this case, and will state as briefly as possible the grounds of my dissent.

The case comes before us on a writ of error to the Supreme Court of that State, alleging error in its decision against the Central Pacific Railroad Company, a corporation organized under the laws of California, but doing business and possessed of property, real and personal, in Nevada.

That State commenced an action in December, 1888, in the district court for Lander county in Nevada, against the Central Pacific Railroad Company, and certain described real estate and improvements thereon, situated within the State, belonging to that company. By the laws of Nevada, an action against a railroad company doing business and holding property therein, may be brought against the company to recover a money judgment against it, and at the same time against its property to obtain a judgment establishing a lien thereon for the amount recovered against the company.

The question in the present case is whether the lands taxed by the State are, in fact, subject to taxation. It does not appear to me that they are thus subject, for they are not free

from the lien of the government or from its control and disposition. Until they are thus freed and the right of the Central Pacific Railroad Company to the lands has accrued beyond question, they are not in my judgment open to taxation as the property of such company. So long as the government retains, as it now does, the legal title to the lands, and the control thereof with a substantial interest therein, the lands cannot properly be treated as private property and be subjected to taxation on that account. By the acts of Congress of July 1, 1862, and July 2, 1864, the Central Pacific Railroad Company was invested with similar powers, conferred by them upon the Union Pacific Railroad Company, and like grants of land were made to it to aid in the construction of its railroad and telegraph lines, and it was subjected to the same conditions. The property taxed by Nevada as that of the Central Pacific Railroad Company was granted to it by Congress as above stated, and consists largely of mineral lands. But a joint resolution was passed by Congress in January, 1864, declaring "that no act passed at the first session of the Thirty-eighth Congress, [that being of the year 1864,] granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grants." 13 Stat. 567. Attempts to subject lands, thus reserved and controlled by the government, to taxation on private account until the government is released of all interest in the property appears to me only as a wanton invasion upon its rights. I therefore dissent from the judgment herein, and from the opinion of the court pronouncing it.

Mr. Justice Brewer and Mr. Justice Peckham took no part in the consideration and decision of these cases.

GIRARD INSURANCE AND TRUST COMPANY *v.* COOPER.

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

No. 164. Argued March 23, 1896. — Decided April 20, 1896.

A coal and railway company contracted with C. to construct a building for it in the Indian Territory. After the work was begun a receiver of the property of the company was appointed under foreclosure proceedings. This building was not covered by the mortgage. C. was settled with for work up to that time, and all further work was stopped, except such as might be necessary for the protection of the building, which was to be done under order of court. An order was issued for roofing, which C. did, and then continued work on the building without further authority from the court. The receiver, on learning this, notified him to stop and make out his bill to date of notice; said that he would furnish designs for further work to be done; and asked C. to name a gross sum for doing it. C. stopped as directed, the designs were furnished, and C. named the desired gross sum. No further order of court was named, nor was any contract signed by the receiver; but the architect employed by the receiver drew up a contract and specification, and the work was done by C. in accordance therewith with the knowledge and approval of the receiver. The receiver having declined to sign the contract, or to make payments thereunder, C. filed a petition in the foreclosure proceedings for payment of the amount due him. Thereupon a reference was made to a master, who reported in favor of C. The court adjudged the claim to be a valid one, entitled to preference, and the receiver was ordered to pay the amount reported due; which decree was, on appeal, affirmed by the Circuit Court of Appeals. *Held*, that there was no error in the court's ordering C.'s bill to be paid as a preferred claim, as the work had been commenced before the receivership and was done in good faith for the benefit of the company and the receivers, and as the building must either have been finished or the work already done become a total loss to the company; that it appeared to have been constructed for the accommodation of the officers of the road, and in other respects in furtherance of the interests of the road, and was an asset in the hands of the receivers, which might be sold, and the money realized therefrom applied to the payment of the claim; and that the fact that it was not covered by the mortgage rendered it the more equitable that the proceeds of the sale should be applied to the payment of the cost of its construction.

This was a petition by the firm of W. H. Cooper & Son, originally filed in the United States court for the Indian

Territory, against Edwin D. Chadick and Francis I. Gowen, receivers of the Choctaw Coal and Railway Company, a corporation created under the laws of the State of Minnesota, with a right, among other things, to build and operate railways and to own and develop coal mines, and which had been authorized by acts of Congress approved February 18, 1888, and February 13, 1889, to construct a railway within the Indian Territory.

The company having become embarrassed, Chadick and Gowen were, on January 8, 1891, appointed co-receivers, and continued to act as such until August 28, 1891, when an order was made giving said Chadick a leave of absence for one year, and in the mean time vesting all the power of both receivers in Gowen for the period named. In connection with the building and operation of its railway and the development of its mining industries, the company, in May, 1890, undertook the erection at South McAlester, in the Indian Territory, of a building to be used as a hotel and offices for the company; and on May 23, 1890, Chadick entered into a contract with Cooper & Son for the furnishing of the greater part of the work and material needed in the erection of the building, which was called the Kali-Inla Hotel. This contract was signed by W. H. Cooper & Son, and by H. W. Cox, architect, for E. D. Chadick.

It seems that Chadick, at the instance of the board of directors, had gone before the Judiciary Committee in Congress, and said that, if Congress would locate a United States court at South McAlester, the company would provide accommodations for the court and its officers, free of cost to the United States, and that Congress, accepting the proposition thus made, designated South McAlester as one of the points for holding court in the Territory.

At the beginning of the receivership (January 8) Cooper & Son were settled with in full, and all work was to be stopped, except such as was necessary to protect the building, which work was to be carried on under the order of the court. Shortly thereafter, a petition was presented to the court for permission to enter into a contract for the roofing of the

building, to protect it from the weather, and an order to that effect was obtained from the court before the work was begun. This appears to have been the only order obtained for any further work upon the building, but after this job had been finished, Cooper & Son continued their work without further authority from the court.

In June, 1891, Mr. Gowen, learning that Cooper & Son had continued working upon the building, wrote Mr. Cooper the following letter, addressed to Cooper & Son, and signed by both receivers:

"SOUTH MCALESTER, IND. TER., *June* 3, 1891.

"Messrs. W. H. Cooper & Son,

"*South McAlester, I. T.*

"GENTLEMEN: Under direction of the court we notify you to stop all work on the Kali-Inla Hotel from this date, and make out your bill for the work done up to and including to-day.

"We will then furnish you with designs and directions as to the work to be done, and you will name a gross sum for the performance of the same, which we will submit to the court for their approval or disapproval.

"EDWIN D. CHADICK,

"FRANCIS I. GOWEN,

"*Receivers Choctaw Coal and Railway Co.*"

Upon receipt of this letter Cooper & Son ceased work upon the building, and made out a bill or statement of the sum then due them, which was approved by the auditor of the receivers.

On or about June 7, H. W. Cox, who acted for the receivers as supervising architect, furnished Cooper & Son with details and specifications of the work required to be done to fit the building for occupancy by the court and officers of the company, which Cooper & Son agreed to do, by letter written to Mr. Chadick June 24, 1891, for the sum of $10,250, allowing the company $2500 for the value of material on hand. Their proposition was not formally accepted by the receivers, and

no order of court was obtained authorizing it, but on July 7, 1891, a contract was prepared by Cox, to which were attached certains plans and specifications. The contract was not signed by any one, but the plans and specifications were signed by W. H. Cooper & Son and by "H. W. Cox, supervising architect," and the contractors proceeded with the work therein called for, with the knowledge and approval of Chadick, the receiver who then had immediate charge of the work being done on the railway line.

At the hearing, the master, who was also clerk of the court, stated that the plans and specifications were submitted to him and to the judge of the court to see if the court apartments suited them, and whether they had any suggestions as to the arrangement of the rooms, but no order was made by the court as to the price to be paid for the work, or as to the manner of payment; and that neither he nor the court knew anything as to what the price of the work was. The contract of July 7 was not signed, accepted or approved by either receiver, and was not submitted to Mr. Gowen until the 29th day of August, 1891, which was the first knowledge he had that any such contract was in existence. Cooper then presented his contract to Mr. Gowen, as a prerequisite to his permitting the marshal to take possession of the rooms which had been fitted up for the clerk and marshal's offices. At this time Cooper did not ask for any pay and was not promised any payment, and all that he insisted upon was that his contract should be signed. Mr. Gowen refused to sign the contract because the work had not been authorized by the court, and because he was not satisfied that the price named in the contract was proper and reasonable, but promised Mr. Cooper that he would undertake to ascertain whether the price named was a proper one; and to this end he secured the services of an architect, and had him make a thorough examination of the building with a view of determining the value of the work done and materials furnished.

Cooper & Son made out their bills for the amount claimed to be due them for work done since June 3, which was certified as correct by the architect having supervision of the work

Statement of the Case.

done in remodelling the building. For the purpose of securing payment of the sums claimed to be due them, the contractors filed a petition in the foreclosure proceedings, setting forth the facts and praying for an order upon the receivers, directing them to make payment of the sums claimed to be due, and further praying that a lien in their favor be put upon the building, and for other relief. To this petition Gowen, as receiver, and the Girard Life Insurance, Annuity and Trust Company, as trustee, filed answers, and thereupon the court, on October 13, 1891, entered an order, which was drawn and consented to by the receiver and the trustee of the bondholders, "that the claim of W. H. Cooper & Son be referred to the master to take testimony thereon, and to ascertain the amount justly and equitably due, as the true value of the work done and the materials furnished by them upon and for the Kali-Inla Hotel building at South McAlester, and that receiver's certificates bearing 7% interest be issued and delivered to them for one third of the amount so found to be due, and to sell and deliver in settlement thereof lumber at the market price thereof for one third of said amount and the balance in cash to be borrowed on certificates, as hereinafter authorized."

Upon a hearing by the master in pursuance of this order he made a report, finding a balance due Cooper & Son of $14,919.37, and also made certain findings of fact and law printed in the margin,[1] to which report appellants filed excep-

[1] "FINDINGS OF FACT.

"1. I find that the vouchers above mentioned are valid, and were issued in good faith by agents of the receivers, having authority so to do; and that W. H. Cooper & Son were given credit upon the books of said company for the amounts so vouchered, and were charged with such vouchers; and that said amounts constituted and became a debt from the receivers to W. H. Cooper & Son, due and payable upon date of issuance.

"2. I find that the contract under and by virtue of which all work was done and materials furnished upon Kali-Inla Hotel from and after June 3, 1891, and the specifications, plans and drawings furnished therewith were executed, furnished and delivered by agents of the receivers having authority so to do, and under the special direction and approval of the receivers themselves and this honorable court.

tions. Cooper & Son thereupon moved the court to strike out these exceptions, upon the ground that the report of the special master was conclusive upon the facts involved, and binding upon the receiver, and also because the Girard Life Insurance etc. Company was not a party to the proceeding and had no interest therein.

Upon the hearing of this motion to strike the exceptions

"3. That the work performed and material furnished were so furnished and performed by W. H. Cooper & Son under and by virtue of and in reliance upon the contract aforesaid, and that the receivers knew that said W. H. Cooper & Son were so performing work and furnishing materials under and by virtue of said contract, and in full reliance thereon; and with such knowledge approved of the work of said Cooper & Son, and managed and directed said Cooper & Son in the progress of said work, and have now received the benefit of said work, and are in the possession of said hotel.

"4. I find that said W. H. Cooper & Son did all of the work done under the contract of July 7, 1891, in strict accordance with the details, plans and specifications furnished them with said contract by said receivers, and are entitled to the contract price.

"5. Further, that the extra work charged for was done under and by virtue of a provision in said contract, and at the suggestion of the supervising architect, furnished by the receivers, and with his approval; and that the prices charged for such extra work and materials furnished are reasonable and true.

"Findings of Law.

"1. I find, as a matter of law, that the vouchers hereinbefore mentioned are in the nature of accounts stated, and having been acquiesced in by both parties cannot now be impeached by either party except through allegation and proof of fraud or mistake.

"2. I find, as a matter of law, that the receivers having had full knowledge of the fact that W. H. Cooper & Son were doing work and furnishing materials on Kali-Inla Hotel, in reliance upon contract of July 7, 1891, and that the receivers having encouraged and countenanced their work thereunder and furnished them with a supervising architect to superintend the same, and that the receivers having received and gone into possession thereof, are now estopped from denying their obligations to said Cooper & Son under said contract, and that their only defence to that part of the claim of said Cooper & Son is in showing that the work performed by said Cooper & Son and materials furnished by them were not in accordance with the details, plans and specifications attached to said contract.

"William Nelson,
"*Special Master.*"

from the files, the court held that the order of October 13, 1891, was conclusive as to the validity of the claim of Cooper & Son, and the court, having referred the claim to a special master with instructions to find the amount due, and having further ordered that the receiver should pay the amount so found to be due, granted the motion and entered a final decree in favor of Cooper & Son against the receivers in the sum of $14,749.45, costs and interest.

A rehearing having been demanded by the receivers and also by the Girard Life Insurance &c. Company, and denied, they appealed to the Circuit Court of Appeals for the Eighth Circuit, by which court the case was heard and the decree of the court below affirmed, with costs, in so far as it awarded judgment for the sum therein named, and the case was remanded with directions "to enter an order directing the mode and time of payment, such as the court may be advised is required by the equities of the case, in conformity with the opinion of this court." 4 U. S. App. 631.

Whereupon the Life Insurance Company and the acting receiver appealed to this court.

Mr. Samuel Dickson, (with whom was *Mr. J. W. McLeod* on the brief,) for appellants.

In view of the statement of the master and of the acts of the parties, it is indisputable that the court never gave precedent authority to accept and execute the contract, and with all deference to the Circuit Court of Appeals, it is submitted with great confidence that one of the receivers, at least, never assented to the contract. Under these circumstances, the contention of the trustee and of Mr. Gowen was most reasonable. No attempt was made to throw out the claim altogether, and all that was asked was that only so much should be charged upon the trust estate as was justly and equitably due, or, in other words, that the recovery should be upon the basis of *quantum meruit*.

This was the basis adopted in the leading case of *Vanderbilt* v. *Little*, 43 N. J. Eq. 669, where a most elaborate opin-

ion was delivered by Mr. Justice Magie, and the contract reformed and compensation allowed upon an equitable basis. This case is cited with approval by Mr. Justice Jackson in *Chicago Deposit Co.* v. *McNulta*, 153 U. S. 554, and fully justifies the position taken by the appellants before the master and in the courts below.

As the claimants have refused to accept compensation upon the basis of what their work was actually worth, it seems entirely proper and justifiable to point out that they are not legally entitled to anything. The ruling in *Fosdick* v. *Schall*, 99 U. S. 235, which displaced liens of record in favor of certain equitable claimants, was avowedly made as an innovation, and was justified upon the score of necessity. Acting under its authority, courts having supervision of receivers have felt warranted in sanctioning expenditures in the way of railroad extensions and betterments, which have resulted in sweeping away the entire *corpus* of the mortgaged property, which the courts had undertaken to conserve and protect.

It is not proposed to question the plenary power of the court where the addition or betterment is strictly appurtenant to the mortgaged property and the fruit of the expenditure becomes subject to the lien of the mortgage. In the land grant cases, of which the St. Paul and Pacific is a type, the precedent set by Judge Dillon may be technically justifiable, though in many cases the practical result has been most disastrous, as in the *Miltenberger case*, 106 U. S. 286; or in *Stanton* v. *Alabama & Chattanooga Railroad*, 2 Woods, 506, where the receivers' certificates authorized to complete the road to Chattanooga exceeded the value of the entire road. But the captain cannot put a bottomry bond on the ship to carry out a contract having no relation to the vessel, and the court below had no power to spend the money of the mortgage creditors of a railroad to build an hotel or court house upon land belonging to others, and to which the railroad company and the receivers had no title. If the judge had even proceeded judicially, and received testimony and called upon the receivers to justify the proposed construction, he might, perhaps, have elicited and found facts to warrant his

action, but it appears affirmatively, on the record, that the question of cost and the terms and conditions of the contract were never considered, and no action in court was ever taken. Something more than this is necessary to warrant the diversion of trust funds and the cancellation of liens of record.

The language of Mr. Justice Brewer in *Kneeland* v. *American Trust Co.*, 136 U. S. 89, 97; of Mr. Justice Blatchford in *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 477; and of Mr. Justice Jackson in *Chicago Deposit Vault Co.* v. *McNulta*, 153 U. S. 554, has been understood to mean that mortgage securities are not to be postponed or confiscated except in cases of overruling necessity, ascertained and adjudicated after careful examination and patient hearing. No such necessity did, in fact, exist in the present case; but if it did, it was never made to appear, and was never judicially adjudged and decreed.

Mr. Arthur G. Moseley for appellees.

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

There can be no doubt of the correctness of the master's finding with regard to the work done by Cooper & Son prior to June 3, 1891. This work was done under a contract made May 23, 1890, between Cooper & Son and Chadick, who was at the time general manager of the Choctaw Coal and Railway Company, and who, by authority of the board of directors, had arranged with the Judiciary Committees of Congress for the location of the United States court at South McAlester, upon condition that the company would provide the officers of the court, free of all cost, with suitable quarters. While the contract was not signed by Chadick, but by Cox, the architect, it was so signed under special authority from Chadick, and it provided that the work was to be done to the satisfaction and under the supervision of the architect. Bills were rendered for this work, which were certified by the chief engineer and assistant manager of the company. Mr. Chadick

testified that the appellee's claim for this work is just and correct, and in a letter of June 19, he says that he is unable to settle the amount due, but expects to be able to do so early in July. It is true that the company, in December, 1890, was put into the hands of receivers; but, with full knowledge of all that was being done, they allowed the work to continue without interruption, until June 3, 1891, and were justly held to be liable for what had been done up to that time, according to the terms of the contract. A settlement appears to have been had on January 8, and some of the subsequent work was done without a prior order of the court, but no objection was ever made to it by the receivers upon that ground prior to June 3 when the work was stopped.

The principal matter in dispute relates to the proper interpretation of the order of October 13, 1891, referring the claim of Cooper & Son to the master, "to ascertain the amount justly and equitably due as the true value of the work done and materials furnished," and to the refusal of the master, under the terms of this order, to permit the appellants to prove the cost and value of the building, without reference to any contract. In this connection, the master found that the contract under which the work was done was executed by agents of the receivers, having authority so to do, and under special direction and approval of the receivers themselves, and of the court; that the work was performed and materials furnished in reliance upon this contract; that the receivers knew of this, and with such knowledge approved of this work, received the benefit of it, and took possession of the hotel; and also that the work was done in strict accordance with the plans and specifications. While the findings of the master in this particular are not absolutely binding upon the court, there is a presumption in their favor, and they will not be set aside or modified in the absence of some clear error or mistake. *Camden* v. *Stuart*, 144 U. S. 104, 118.

On June 3 the receivers ordered the work to be stopped, and a bill to be rendered for what had been done up to that time, saying that the receivers would "then furnish you with designs and directions as to the work to be done, and you

will name a gross sum for the performance of the same, which we will submit to the court for their approval or disapproval." The matter rested here until June 23, when, as the result of a conference between Mr. Cox, the architect, and Major Nelson, the master in chancery, the receiver addressed the following letter to Cooper & Son:

"GENTLEMEN: We have been advised by Maj. William Nelson, master, of the following order of the United States court: 'You are hereby directed to finish up court-room, all the offices on lower floor of hotel building, and also such rooms on the second floor as may be necessary, in accordance with estimates to be hereafter furnished.'"

In the meantime, and in consequence of the same conference, Chadick instructed the architect, Mr. Cox, to make the plans and specifications of what was required for the accommodation of the court, and send them up to Muscogee for the inspection of Major Nelson, the master. He sent them there on June 6. The master appears to have submitted them to the judge and marshal, who approved of them, and directed the work to be done, though no order of court was entered to that effect, and no question of price was considered, this matter being left to the receivers. Upon the return of these plans and specifications to Mr. Cox, the architect, he drew up a contract in compliance with them, sent one copy to Mr. Cooper, with specifications annexed, and another copy to Mr. Chadick's office. Cooper & Son, who appear to have already seen the plans and specifications, addressed Mr. Chadick a letter under date of June 24, agreeing to do the work for $10,250. Chadick testified that his recollection was that the receivers accepted the proposition, though he seems never to have formally answered the letter. But however this may be, a contract was drawn up bearing date July 7, and signed by Cooper & Son, and by Cox, as supervising architect, not at the foot of the contract itself, but at the end of the specifications, which followed the contract. Mr. Cox testified that Chadick ordered the work to go ahead, and knowing the amount, he inserted it in the contract; that Mr. Chadick came

to the building after this, told him what the court wanted and approved of, and ordered him to go ahead with it. In the same connection, Chadick testified that the contract was drawn up by Cox and submitted to him; that he approved it, not formally, because Mr. Gowen was not there, but looked it over and thought it was just and right. Mr. Cox was the supervising architect, appointed first by the manager and continued by the receivers, and all the contracts for buildings and specifications for buildings before this had been drawn by him. This was in the ordinary line of his business and duty. "I knew that Mr. Cooper was working upon this building in reliance on this contract and in accordance with its terms; I supposed these specifications would govern the settlement of it; Mr. Gowen knew of this contract at the time; he was present when it was given to me in the early part of July." Mr. Cooper also testified that he made his bid in compliance with directions from Mr. Chadick; that he, Chadick, accepted it and told him to go to work, which he did, and completed the work according to the contract, plans and specifications furnished him by Mr. Cox. It further appears that after the contract was completed a bill was made out showing an amount due of $11,092.74, and that Mr. Cox certified to the correctness of the account.

In this connection Mr. Gowen, the principal witness for the appellants, states that, shortly after his appointment, permission was asked of the court to enter into a contract for the roofing of the building, and an order procured to that effect, and that he concurred in the making of a contract for this work; that he gave the matter no further consideration until March, when his attention was called to the fact that the inside work was still going on; that he then called Mr. Chadick's attention to the matter, who said that nothing was being done beyond making the building weathertight, and undertook to have authority procured to do the necessary work in closing the building. Subsequently, upon Chadick's representations that their offices were so cramped as to greatly interfere with the efficient transaction of business, he agreed to the fitting up of quarters in the hotel building, and after

consulting as to the amount of room required, Chadick undertook to secure the necessary order of the court.

Upon the occasion of his next visit, which was in the latter part of May, he learned that the work was still progressing, and had an altercation with Mr. Chadick upon the subject, in which he reminded him that he had undertaken to have the work entirely stopped, to which Mr. Chadick stated that he thought he would be able to make an advantageous use of the building upon its completion, and that he had assumed the responsibility for the continuance of the work, although against Mr. Gowen's wish. The result of this conversation was the stoppage order of June 3, which was designed to prevent Cooper's entering into any further arrangement without his concurrence and the prior approval of the court. He further stated that he never saw or heard of the letter of June 24 of Cooper & Son, proposing to do the work for $10,250, although he knew and saw that work upon the court-rooms and offices was going on, and was informed by Mr. Chadick that this was being done by direction of the court; and that he believed that Cooper was going on with the work without furnishing an estimate or making any contract, as had been the case heretofore, and felt certain that Mr. Cooper would not be allowed any excessive sum; that the first intimation he had of the existence of the contract was on August 29, when he was asked to sign such contract as a prerequisite to Mr. Cooper's allowing the marshal to take possession of the rooms fitted up for the court and its officers; he declined to sign the contract; never promised to pay Mr. Cooper the amount claimed, because he was not satisfied that the price named therein was a proper one, and that he subsequently obtained an appraisement by builders of his own employment, who reported that the charges were grossly excessive. He further stated that he never gave Mr. Cox authority to bind the receivers by estimates or contracts such as this.

It seems that, near the end of August, when Mr. Cooper had this conversation with Mr. Gowen, he was told there was going to be a change in the administration; that Gowen was going to take charge as managing receiver; that he was

reluctant to turn over the building until he had some assurances of his money, and so notified the receivers; but, as he says, upon the assurance of Mr. Gowen that it would be only a matter of a few days when he would have his money, he allowed them to take possession of the building. The statement in this particular is confirmed by McLoud, the attorney of the Insurance Company, who advised Mr. Cooper that he would lose no right by giving up possession of the building.

On October 8, this petition was filed, alleging that the work subsequent to June 3 was done by virtue of direct authority from Messrs. Chadick and Gowen and Major Nelson, the master in chancery, and in compliance with the specifications signed by Cooper & Son and Cox. The answer of Gowen denied the contract of July 7, though it admitted an arrangement made with Mr. Chadick, with the approval of the judge and special master, to make certain alterations and additions to the hotel building, to fit it up for a court-room and the rooms necessary for the officers of the court.

In this state of the case, and on October 13, Mr. Gowen, as receiver, and the Life Insurance Company, by its attorney, appeared before the court and submitted to it the so-called Ardmore order, which was entered by the court with the consent of all the parties. This order, upon its face, is undoubtedly susceptible of the interpretation put upon it by the appellants, and authorized the master to receive testimony as to the actual value of the work done and materials furnished, irrespective of any contract between the parties; and yet in view of the antecedent facts it does not seem probable that the court thereby intended to rule out all evidence of the contract. The petition of Cooper & Son relied upon their arrangement with Chadick as a contract. The answer denied the contract, and under these allegations it can scarcely have been intended by Cooper & Son to waive entirely the benefit of such contract, if it existed. In fact, it would appear that, prior to this order, it had been determined by the court that such contract was made, since in the final decree, which was entered on January 19, 1892, it is said "that in the order there made October 13, 1891, the court, *upon the evidence then*

adduced, recognized and declared the validity of the claim of W. H. Cooper & Son," and that it was not the intention of the court to confine Cooper & Son to a *quantum meruit* is patent from the further clause of such decree, "that it being stated by receivers that they were entitled to certain credits upon said account, the court referred the said claim to the special master, with instructions to ascertain the amount due upon said claim, *the validity of which had been adjudged by the court.*"

If such contract existed, was within the competency of the parties, and was proven to the satisfaction of the court, it superseded the necessity of introducing testimony as to the actual value of the work done.

We think the testimony fully justified the master in his finding that a contract had been made with Mr. Chadick for the work. The stoppage order of June 3 indicated an intention on the part of the receivers to furnish Cooper & Son with further designs and directions as to the work to be done, for which work they anticipated a bid, and agreed to submit the same to the court for its approval or disapproval. Within a few days thereafter, plans and specifications, furnished by the architect of the receivers, with a notice that the court had ordered the court-room, all the offices on the lower floor of the hotel building, and also such rooms on the second floor as might be needed, to be finished up, were sent to Cooper & Son; and after an examination of the plans and specifications, they made a bid for a certain amount, which Chadick, acting for the receivers, accepted verbally. Cooper & Son thereupon signed the plans and specifications, with the architect, and proceeded to do the work in reliance upon the contract. Whether the contract was actually signed by the receivers was quite immaterial, so long as the terms of the contract were agreed upon and understood between the parties, and, as observed by the court below, "when Cooper & Son were directed to proceed with the work called for by the plans, the contract between the parties was closed, and the preparation and signing of a formal writing would only have called into existence additional evidence of the fact."

It is said, however, that the contract being for the construction of a large building, not necessary to the company in the conduct of its regular business, and upon land which did not belong to the company and was not covered by the lien of the mortgage, was such a one as required a prior order of the court, and that no such order was given in this case. Assuming this to be so, the objection is a purely technical one. It appears that the plans and specifications were laid before the judge and other officers of the court; were approved by them, and the work directed to be done, though no order of the court was formally entered. Subsequently, the court, with full knowledge of the facts, and "upon evidence then adduced," declared the validity of the claim and referred it to the master to ascertain the amount due. We think this is a sufficient ratification of the act of Mr. Chadick in directing the work to be done; and, so far as the price is concerned, his action, or that of his authorized agent, Cox, is binding in the absence of fraud or mistake. It certainly would have been more satisfactory if the court had been fully informed of the terms of the contract, and especially of the price to be paid, and had given the receiver the requisite authority before he entered into it, but it was a question for the court whether it should not leave the price to be determined by the discretion of the receiver.

In the very case of *Vanderbilt* v. *Central Railroad Co.*, 43 N. J. Eq. 669, so strongly relied upon by appellants, it was remarked in the opinion of the court, p. 684:

"It must have been contemplated that in the performance of those multifarious duties some degree of discretion might be accorded to the receiver. Whether a power to exercise such discretion would not be assumed to exist in every case without a special order need not be considered, for it is clear that the chancellor may accord such discretionary power to a receiver by a general order — such as was made in this cause. . . .

"If the contract has been completely performed and its performance accepted by the receiver, and the claim is merely for compensation, relief of that nature would seem necessarily

to be awarded, unless the applicant should appear to have dealt fraudulently or collusively with the receiver to the detriment of the trust. Even if, in the judgment of the chancellor, the contract was improvident and unreasonable, unless the contractor should appear to have contracted with notice of the improper character of the contract, no just reason could be given for debarring him from the agreed-on compensation which the receiver might, for his negligence or misconduct, be required to repay to the fund."

The work done having thus received the sanction and approval of the court, it can make no difference, so far as the legal aspect of the case is concerned, whether the contract was executed by one or both of the receivers. Indeed, in view of the fact that two or more receivers of a railway are frequently appointed who sometimes reside at considerable distances from each other, we are unwilling to say that a contract may not lawfully be made by one of such receivers, which shall be binding upon the estate. The necessities of the case may sometimes require that contracts of a local character shall be made, where it is inconvenient, or perhaps impossible, to obtain the consent of the other receiver. So, if by arrangement between themselves one is constituted managing receiver, his authority may have a broader scope and may approximate to that of a sole receiver. Mr. Chadick may have made an injudicious bargain in agreeing to pay $10,250 for the job, but so long as no bad faith is imputed to him and no fraud or mistake is charged, it is difficult to see how the company can escape payment. The contract having been fully performed, evidence of the actual value of the work and materials was irrelevant, and in this view of the case the master did not err in ruling it out and holding the receivers to the contract. "The true value of the work done and materials furnished" may be, with entire appropriateness, said to be the value which the parties have deliberately and knowingly put upon them, and "the amount justly and equitably due" the contractor under such circumstances is the amount which the receiver has promised to pay him. In addition to this, there was extra work per-

formed by Cooper & Son, the amount of which was to be determined upon the principles of *quantum meruit*, as to which work this language was especially applicable.

The fact that the court did not direct the computation to be made irrespective of the contract, and that it subsequently recognized the validity of the claim and directed it to be paid, is inconsistent with the idea that it did not intend that the contract should be respected. If Mr. Gowen, who appears to represent more particularly the interests of the bondholders and knew the work was being done, had desired to know the terms upon which Cooper & Son were doing the work, he might easily have informed himself, as he had done before, and called the attention of the court to the matter, when it may be assumed the court would have protected his rights. His testimony that he did not suppose the work was being done under contract is somewhat inconsistent with his stoppage order of June 3, which plainly contemplated a contract for future work.

There was no error in the court ordering the bill of Cooper & Son to be paid as a preferred claim. The work had been commenced before the receivership and was done in good faith, for the benefit of the company and the receivers. The building must either have been finished or the work already done become a total loss to the company. It appears to have been constructed for the accommodation of the officers of the road, and in other respects in furtherance of the interests of the road, and is an asset in the hands of the receivers, which may be sold, and the money realized therefrom applied to the payment of the claim. The fact that it is not covered by the mortgage renders it the more equitable that the proceeds of this sale shall be applied to the payment of the cost of its construction.

The decree of the court below is, therefore,

Affirmed.

HARWOOD *v.* WENTWORTH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 756. Submitted March 9, 1896. — Decided April 13, 1896.

The act of March 21, 1895, classifying the counties of the Territory of Arizona, and fixing the compensation of the officers therein (Laws 1895, p. 68), purports on its face to be an act of that Territory, to have been approved on the 21st of March, 1895; and the original is filed with, and is in the custody of the Secretary of the Territory; is signed by the Governor as approved by him; is signed by the President of the Territorial Legislative Council as duly passed by that body; and is signed by the Speaker of the Territorial House of Representatives as duly passed by that body. *Held*, that, having been thus officially attested, and approved, and committed to the custody of the Secretary of the Territory as an act passed by the territorial legislature, that act is to be taken as having been enacted in the mode required by law, and to be unimpeachable by recitals or omissions of recitals in the journals of legislative proceedings which are not required by the fundamental law of the Territory to be so kept as to show everything done in both branches of the legislature while engaged in the consideration of bills presented for their action.

Field v. *Clark*, 143 U. S. 649, considered, affirmed, and applied to this case as decisive of it.

That act is not a local or special act, within the meaning of the act of Congress of July 30, 1886, c. 818, 24 Stat. 170.

This was a contest as to the right to exercise the functions of the office of county recorder of Cochise county, Territory of Arizona.

The defendant in error filed in the district court of the First Judicial District of that Territory, holden in Cochise county, a petition alleging that, at a general election held in Arizona on the 6th day of November, 1894, he was duly elected to the office of county recorder of Cochise county, and thereafter, having first duly qualified, entered upon the discharge of his duties as such officer; that that county, at the time of such election, was what is denominated as a first class county of the Territory; that at a regular meeting of the board of supervisors of the county he was duly elected and appointed to the office of clerk of that board, and, having

qualified, entered upon the duties of the office; that thereafter, on or about March 21, 1895, the Legislative Assembly of Arizona, for the purpose of classifying the counties of the Territory and fixing the compensation of county officers, passed an act entitled "An act classifying the counties of the Territory, and fixing the compensation of the officers therein," which was approved March 21, 1895, by the Governor of the Territory, and went into effect thirty days after its passage, namely, on the 21st day of April, 1895; and that, according to the provisions of the act, Cochise county became and is a county of the third class, and its recorder clerk *ex officio* of the board of supervisors.

The plaintiff averred in his petition that as recorder he was, and had been since April 21, 1895, *ex officio* clerk of the board of supervisors, and as such entitled to the possession of the books, papers, records, seals and documents pertaining to that office, but the same were in the hands of the defendant Harwood, who, upon demand duly made, refused to deliver them to the plaintiff.

The prayer of the petition was that a writ of mandamus be issued, commanding the defendant to forthwith deliver all of said books, papers, records, seal and other documents to the plaintiff as recorder of Cochise county and *ex officio* clerk of said board of supervisors; that plaintiff be adjudged to be such recorder and clerk; and that the defendant be enjoined and restrained from exercising or performing any of the duties of that office.

The petition having been supported by the plaintiff's affidavit, an alternative mandamus was directed to be issued commanding the defendant to deliver to the plaintiff all the books, papers, etc., pertaining to the office of clerk of the board of supervisors of Cochise county, or to show cause, by a day named, why the writ should not be made final and peremptory in the premises.

The defendant Harwood averred that the act referred to in the plaintiff's petition, and referred to in the record as House bill No. 9, was not a law; that the same did not pass the Legislative Assembly as alleged; that that act, "as the same passed both houses of said Legislative Assembly," contained a clause

that it should not take effect and be in force before January 1, 1897; that that clause or section was stricken out, omitted and taken from the act after the same had passed both houses of the assembly, but is a part of the act; that there was also a clause that "all acts or parts of acts in conflict with this act are hereby repealed," and that that clause was also omitted and stricken out in the same way; and that "the said alleged act was not duly passed by the Legislative Assembly or by either house thereof, and that the same is not a law."

By consent of the parties the case was tried by the court upon a stipulation as to the facts, and without a jury.

It was agreed by the parties that the act of March 21, 1895, as it appears in the printed laws of Arizona for 1895, (p. 68,) is filed with and is in the custody of the Secretary of the Territory, and is signed as it appears in those laws to be signed, namely, by the Governor, the Speaker of the House, and the President of the Council.

The affidavits of A. J. Doran and J. H. Carpenter, and also the affidavits of Charles D. Reppy and Charles F. Hoff, with the exhibits attached thereto, were read in evidence, and were treated as containing a true statement of the journals and proceedings of both houses, and of the facts stated in them, subject to the objection by the plaintiff that the enrolled bill, signed by the Governor and lodged with the Secretary of the Territory, could not be attacked by any evidence.

The witness Doran stated that he was President of the Council of the Legislative Assembly of the Territory; that the session terminated March 21; that it was his custom as President to sign bills when presented to him by the chairman of the enrolling and engrossing committee of either house; that it had been the practice to so sign bills when presented, whether the Council was in session or not, though ordinarily it would be done when the Council was in session; that if signed when the Council was in session there was no formality gone through with; that the attention of the Council was not called to the fact that the President was about to sign the bill, nor was its business interrupted for the purpose of signing the bill, nor was a member who was speaking interrupted; and

that it was simply handed up to the President and he would sign his name and hand it back.

The witness Carpenter, who was Speaker of the House of Representatives of the Legislative Assembly of the Territory, testified: "That the session terminated on March 21. It was the universal custom for him as such Speaker to sign bills when presented to affiant by the chairman of the enrolling and engrossing committee of either house; that affiant so signed them without reading them or without comparing them in any manner; and that as a matter of fact he did not compare any one bill signed by him before he signed it. It was his custom, and it has been the practice, to sign bills when presented, whether the house was in session or not. If signed when the house was in session, there was no formality gone through with. The attention of the house was not called to the fact that the Speaker was about to sign a bill, nor was the business of the house interrupted for the purpose of signing bills, nor was a member who was speaking interrupted. The facts are that a bill was simply handed up to the Speaker and he would simply sign his name and hand it back." He also stated that he was "certain that house bill No. 9, when it passed the house, contained a clause that it should go into effect January 1, 1897."

Hoff and Reppy were chief clerks, respectively, of the Council and House of Representatives of the territorial Legislative Assembly, by which the said act of March 21, 1895, purported to have been passed. Referring to the original bill and to the numerous indorsements or minutes thereon made by them respectively, each witness stated that the bill, as it passed the body of which he was an officer, and, therefore, as it passed both houses, contained the clause, "This act shall take effect and be in force from and after January 1, 1897;" consequently, according to their evidence, the omission of that clause from the bill occurred after it passed both houses, and while it was in the hands of the committee on enrolment.

Upon these facts the court found the issues for the plaintiff, and its judgment was affirmed in the Supreme Court of the Territory.

Statement of the Case.

The statutes of the United States, as well as the statutes of the Territory of Arizona, which bear more or less upon the present controversy, are, for convenience, given in the margin.[1]

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[1] STATUTES OF UNITED STATES.

Revised Statutes.

SEC. 1841. The executive power of each Territory shall be vested in a governor, who shall hold his office for four years, and until his successor is appointed and qualified, unless sooner removed by the President. . . .

SEC. 1842. Every bill which has passed the legislative assembly of any Territory shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it originated, and that house shall enter the objections at large on its journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that house agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall be likewise reconsidered; and, if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journal of each house. If any bill is not returned by the governor within three days, Sundays excluded, except in Washington and Wyoming, where the term is five days, Sundays excluded, after it has been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislative assembly, by adjournment *sine die*, prevent its return, in which case it shall not be a law: *Provided*, That so much of this section as provides for making any bill passed by the legislative assembly of a Territory a law, without the approval of the governor, shall not apply to the Territories of Utah and Arizona.

SEC. 1843. There shall be appointed a secretary for each Territory, who shall reside within the Territory for which he is appointed, and shall hold his office for four years, and until his successor is appointed and qualified, unless sooner removed by the President. . . .

SEC. 1844. The secretary shall record and preserve all the laws and proceedings of the legislative assembly and all the acts and proceedings of the governor in the executive department; he shall transmit one copy of the laws and journals of the legislative assembly, within thirty days after the end of each session thereof, to the President, and two copies of the laws, within like time, to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress. He shall transmit one copy of the executive proceedings and official correspondence semi-annually, on the first day of January and July in each year, to the President. He shall prepare the acts passed by the legislative assembly for publication, and furnish a copy thereof to the public printer of the Territory within ten days after the passage of each act.

SEC. 1846. The legislative power in each Territory shall be vested in the

Argument for Appellant.

Mr. William H. Barnes for appellant.

In *Gardner* v. *Collector*, 6 Wall. 499, 508, 511, Miller, J., said

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governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. . . .

SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . .

SEC. 1861. The subordinate officers of each branch of every legislative assembly shall consist of one chief clerk, who shall receive a compensation of eight dollars per day, and of one assistant clerk, one enrolling clerk, one engrossing clerk, one sergeant-at-arms, one doorkeeper, one messenger, and one watchman, who shall each receive a compensation of five dollars per day during the sessions, and no charge for a greater number of officers and attendants, or any larger per diem, shall be allowed or paid by the United States to any Territory.

Act of July 19, 1876, *c.* 212.

By an act of Congress, approved July 19, 1876, c. 212, 19 Stat. 91, entitled "An act relating to the approval of bills in the Territory of Arizona," (Supp. R. S. 112, c. 212,) it was provided:

"*Be it enacted, etc.*, That every bill which shall have passed the legislative council and house of representatives of the Territory of Arizona shall, before it becomes a law, be presented to the governor of the Territory; if he approve it, he shall sign it, but if he do not approve it, he shall return it, with his objections, to the house in which it originated, who shall enter the objections at large upon their journal, and proceed to reconsider it. If after such reconsideration, two thirds of that house shall pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law, the governor's objection to the contrary notwithstanding; but in such case, the votes of both houses shall be determined by yeas and nays, and be entered upon the journal of each house respectively. And if the governor shall not return any bill presented to him for approval, after its passage by both houses of the legislative assembly within ten days (Sundays excepted) after such presentation, the same shall become a law, in like manner as if the governor had approved it: *Provided, however*, That the assembly shall not have adjourned *sine die* during the ten days prescribed as above, in which case it shall not become a law: *And provided further*, That acts so becoming laws as aforesaid shall have the same force and effect and no other, as other laws passed by the legislature of said Territory."

STATUTES OF ARIZONA.

Revised Statutes, 1887.

SEC. 2940. All official acts of the governor, his approval of the laws excepted, shall be authenticated by the great seal of the Territory, which shall

of the public statute in question, in that case: "It is one of which the court takes judicial notice without proof." "We are of opinion, therefore, on principle as well as authority,

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be kept by the secretary thereof. SEC. 2878. The legislative assembly shall consist of: 1. Twenty-four members of the house of representatives; 2. Twelve members of the council. SEC. 2889. The chief clerks of each house must attend each day, call the roll, read the journals and bills and superintend any matters required of them. SEC. 2890. The enrolling and engrossing clerk of each house must enroll and engross such bills or resolutions, as may be required of him by the house to which he is attached. SEC. 2895. Each house shall keep a journal of its proceedings and publish the same, except such parts as may require secrecy. The yeas and nays of the members of either house, on any question, shall be entered on the journal at the request of one fifth of the members elected. Any member of either house may dissent from and protest against any act, proceeding or resolution which he may deem injurious to any person or the public, and have the reason of his dissent entered on the journal. SEC. 2899. Every bill and joint resolution, except of adjournment, passed by the legislature, shall be presented to the governor before it becomes a law. If he approve, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated, which shall enter the objections at large upon their journal. SEC. 2901. Every bill and joint resolution shall be read three times in each house before the final passage thereof. No bill or joint resolution shall become a law, without the concurrence of a majority of all the members present, and constituting a quorum of each house. On the final passage of all bills, and all joint resolutions having the effect of law, the vote shall be by ayes and nays, and entered on the journal. SEC. 2921. Every bill must, as soon as delivered to the governor, be endorsed as follows; "This bill was received by the governor this — day of ——, eighteen ——." The indorsement must be signed by the private secretary of the governor. SEC. 2928. The original acts of the legislature shall be deposited with and kept by the secretary of the Territory. SEC. 2929. All acts of the legislature and joint resolutions having the effect of law, shall take effect and be in force on the thirtieth day after being approved by the governor, and deposited in the office of the secretary of the Territory, unless otherwise ordered by the legislature. SEC. 2947. The secretary of the Territory has such powers and shall perform such duties as are prescribed by the laws of the United States, and in addition thereto it is the duty of the secretary of the Territory: — 1. To attend at every session of the legislature for the purpose of receiving bills and resolutions thereof, and to perform such other duties as may be devolved upon him by resolution of the two houses, or either of them. . . . 9. To deliver to the printer, at the earliest day practicable after the final adjournment of each session of the legislature, copies of all laws, resolutions, (with marginal notes,) and journals, kept, passed or adopted at such session; to superintend the printing thereof, and

that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

This case is cited with approval in *Purdy* v. *People*, 4 Hill, 384; *DeBow* v. *People*, 1 Denio, 9; *Spangler* v. *Jacoby*, 14 Illinois, 297; *Young* v. *Thompson*, 14 Illinois, 380; *Speer* v. *Plank Road Co.*, 22 Penn. St. 376; *In the matter of Welman*, 20 Vermont, 653; *Supervisors* v. *Heenan*, 2 Minnesota, 330; *Fowler* v. *Peirce*, 2 California, 165.

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have proof sheets of the same compared with the originals and corrected. 10. To cause to be published annually such laws, reports and documents, in addition to those required by the laws of the United States, as the legislature may direct. SEC. 2948. He shall secure and safely keep in his office all original acts and joint resolutions of the legislature, and cause the same to be substantially bound in suitable and convenient volumes. SEC. 2949. He is charged with the custody of : — 1. All acts and resolutions passed by the legislature. 2. The journals of the legislature. 3. All books, records, deeds, parchments, maps and papers kept or deposited in his office pursuant to law. SEC. 2950. He shall immediately after the publication of the statutes distribute volumes thereof as follows : 1. To the President of the United States one copy. 2. To the President of the United States Senate one. 3. To the Speaker of the House of Representatives of the United States, one copy. 4. To each Department of the Government at Washington, D.C., and of the government of this Territory, one copy. 5. To the Library of Congress, one copy. 6. One copy each to the governor, members of the legislature by which such laws were enacted, the delegate in Congress, the Secretary of the Territory, each judge of a court of record in the Territory, the attorney general, territorial treasurer, territorial auditor, clerk of the Supreme and District Courts, county treasurers, recorders, sheriffs, district attorneys and boards of supervisors, court or public libraries, the Attorney General of the United States and the governor of each of the States and Territories of the United States for the use of such State or Territory. SEC. 2951. He shall distribute the journals of the legislature in the manner provided by the law of the United States, and also one copy each to the persons mentioned in subdivision six of the preceding section. SEC. 2952. He shall deposit in the territorial library forty copies of the statutes and twenty copies of the journals.

It was approved in *Lapeyre* v. *United States*, 17 Wall. 191; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Walnut* v. *Wade*, 103 U. S. 683; *Post* v. *Supervisors*, 105 U. S. 667; *Jones* v. *United States*, 137 U. S. 202; *In re Duncan*, 139 U. S. 449.

These are all the cases down to *Field* v. *Clark*, 143 U. S. 649. The opinion, in that case, on p. 672, lays great stress on the fact that the signing by the speaker of the house and President of the Senate was in open session, and so an official attestation by the two houses of the bill as one that has passed Congress.

Whatever weight, and the court seems to lay great weight upon it, is to be given to the signatures of the presiding officers in the presence of the houses in open session, that weight is destroyed by the fact which appears in this case, that it is not the practice in Arizona and never has been, and was not true as to this bill, and no inference of approval by the house can be drawn by the fact of signature here. The case in argument goes far to close the door.

We urge that that case is against the weight of authority and contrary to the former decisions of this court. It does not overrule *Gardner* v. *Collector*, or the former cases, and it particularly cites that case with approval.

If the case stood alone it would be authority for the startling doctrine that no matter how, whether by fraud or mistake, a law so authenticated is law, though it never passed.

The question again came before the court in *Lyons* v. *Woods*, 153 U. S. 649. The validity of a law of New Mexico was involved. The legality of the organization of the council was the question, and while the court quotes *Field* v. *Clark*, approvingly, it says: "Perhaps, however, it would be proper to extend our examination somewhat further. The question whether a seeming act of the legislature has become a law in accordance with the fundamental law is a judicial one to be tested by the courts and judges, and not a question of fact to be tried by a jury:" citing *Ottawa* v. *Perkins*, *Post* v. *Supervisors*, *Gardner* v. *Collector*, and quotes the language of the last case. It thereby reaffirms it and cites *In re Duncan* and *Jones* v. *United States*. The court then in a long opin-

ion goes into the whole case, the journals and intrinsic facts, and holds to the validity of the law.

But the court expressly declines to decide under what circumstances they would be compelled to decide that an enactment was by an illegal body. Such a question may arise. It cites with approval *Clough* v. *Curtis*, 134 U. S. 361. It seems that this last decision intentionally leaves the question an open one, to be settled by the facts of each case.

The Supreme Court of the United States is therefore on both sides of the question. The weight and number of the cases in this court uphold the view we contend for, and the court has never discarded it.

We insist that *Lyons* v. *Woods* clearly indicates that the court went too far in *Field* v. *Clark*. The court clearly intimates that cases may arise when a law must be declared void, even though authenticated.

If there ever can be such a case, the case at bar is that case. None stronger can be found, and we have no doubt in the light of the cases in this court that this law will be declared void upon the authorities of the Supreme Court of the United States alone. When we throw in the almost overwhelming weight of the authority from the other courts, we confidently say this is not a law. *People* v. *Dunn*, 80 California, 211.

This is not a question as to whether this law was read three times in each house, as required by statute, nor as to whether the law received a concurrence of a majority of a quorum; nor whether on final passage the votes were by ayes and nays, entered on the journal.

No such question as that is presented. Those are facts which the journals will disclose, and it is with reference to constitutional questions of that kind that the question arises as to which is to have the greater weight, the signed bill with the secretary or the journals of the houses as a question of evidence. It is at this point that the authorities differ. Some say the former is conclusive; others say not so, but that the court will look into the journals and proceedings to see whether the constitution has been obeyed. The question

here goes farther than that. The facts show that this bill was never before either house at all; was never passed by either house; but after a bill had passed both houses, an entirely different bill was made up by some clerk of a committee, and handed to the governor to sign. The bill handed to the governor is not an enrolled copy of the bill which passed the house, and hence the bill never passed at all. Here is the question presented, and here is the issue. I do not claim for the agreed case anything more than bringing to the actual knowledge and attention of the court facts of which the court takes judicial knowledge. If the authenticated bill is conclusive the court will look no further. If not, then here are the facts under the eyes of the court to be examined and determined.

Mr. A. Wentworth, defendant in error, for himself.

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

The statute which purports to be an act of the legislature of the Territory of Arizona, entitled "An act classifying the counties of the Territory and fixing the compensation of officers therein," and to have been approved by the Governor on the 21st day of March, 1895, not only appears in the published laws of the Territory, but is filed with and in the custody of the secretary of the Territory, and is signed, the parties agree, by the Governor, the President of the territorial Legislative Council, and the Speaker of the territorial House of Representatives.

Is it competent to show, by evidence derived from the journals of the Council and House of Representatives, as kept by their respective chief clerks, from the indorsements or minutes made by those clerks on the original bill while it was in the possession of the two branches of the legislature, and from the recollection of the officers of each body, that this act, thus in the custody of the territorial Secretary, and authenticated by the signatures of the Governor, President of the Council, and Speaker of the House of Representatives,

contained, at the time of its final passage, provisions that were omitted from it without authority of the council or the house, before it was presented to the Governor for his approval?

Upon the authority of *Field* v. *Clark*, 143 U. S. 649, 671, *et seq.*, this question must be answered in the negative. That case, in its essential features, does not differ from the one now before the court. It was claimed in that case that a certain provision or section was in the act of Congress of October 1, 1890, c. 1244, 26 Stat. 567, as it passed, but was omitted without authority from the bill or act authenticated by the signatures of the presiding officers of the two houses of Congress and approved by the President. What was said in that case is directly applicable in principle to the present case. After observing that the Constitution expressly required certain matters to be entered on the journal, and, waiving any expression of opinion as to the validity of a legislative enactment passed in disregard of that requirement, the court said: "But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signature of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication." Again: "The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled

bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

It is said that, although an enrolled act properly authenticated is sufficient, nothing to the contrary appearing on its face, to show that it was passed by the territorial Legislature, it cannot possibly be — that public policy forbids — that the judiciary should be required to accept as a statute of the Territory that which may be shown not to have been passed in the form in which it was when authenticated by the signatures of the presiding officers of the territorial Legislature, and of the Governor. This, it is contended, makes it possible for these officers to impose upon the people, as a law, something that never, in fact, received legislative sanction. Considering a similar contention in *Field* v. *Clark*, the court said: "But this possibility is too remote to be seriously considered in the pres-

ent inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a coördinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them." These observations are entirely applicable to the present case.

But it may be added that, if the principle announced in *Field* v. *Clark* involves any element of danger to the public, it is competent for Congress to meet that danger by declaring under what circumstances, or by what kind of evidence, an enrolled act of Congress or of a territorial Legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it is committed by statute, may be shown not to be in the form in which it was when passed by Congress or by the territorial Legislature.

It is difficult to imagine a case that would more clearly demonstrate the soundness of the rule recognized in *Field* v. *Clark* than the case now under examination. The President of the Council and the Speaker of the House of Representatives state that it was not "the custom," when an enrolled bill was presented for signature, to call the attention of their respective bodies to the fact that such bill was about to be signed; that the bill was simply handed up, when it would be signed and handed back, without formality and without interrupting legislative proceedings. The Speaker of the House of Representatives, in addition, stated that he was certain that the original

bill when it passed that body contained a clause that it should go into effect on the 1st day of January, 1897. But what made him so certain of, or how he was able to recall, that fact, is not stated.

Equally unsatisfactory, as proof of what occurred in the territorial Legislature, are the indorsements made by the chief clerks of the council and the house upon the original bill. The indorsements made by the chief clerk of the house are as follows: "Introduced by Mr. Fish January 28, 1895; read 1st time; rules suspended; read 2d time by title; 100 copies ordered printed and referred to committee on judiciary. Reported printed, 2, 5, '95. — Reported by committee amended and recommended that it do pass as amended. Referred to committee of whole with report of committee and its amendments. 2, 7, '95. — Considered in committee of whole, amended, and reported back with recommendation that it do pass as amended. 2, 15, '95. — Amendments adopted and 100 copies ordered printed. 2, 21, '95. — Reported printed and ordered engrossed and to have third reading. 2, 28, '95. — Rep'd engrossed, read 3d time, placed on final passage, and passed — ayes, 17; noes, 6; absent, Brown, sick." The indorsements made by the chief clerk of the Council were these: "Rec'd from house; read first time; rule suspended; read 2d time by title; referred to com. on ways and means, 2, 28, '95. — Rep't back that it be referred to a com. of the whole; rep'd adopted and made sp'c'l order for Tuesday, March the 12th, at 2 P.M., 3, 7, '95. Made sp'c'l order for 4 P.M. this day, 3, 16, '95. Considered in com. of whole; rep't back; progress, 3, 18, '95. Considered in committee of the whole; amendment, no. 1 and no. 2 offered and adopted. Ordered to have third reading, 3, 19, '95. Read third time; placed upon its final passage and passed council. Taken to house, 3, 20, '95." Again: "3, 20, '95, house. Rec'd by message; amended in council; amendments concurred by house; ordered enrolled. 3, 21, '95. — Rep't enr'd and in hands of governor." These indorsements, in themselves, throw no light upon the inquiry as to whether the particular clause, alleged to have been omitted, was, in fact, stricken out by the direction of the Council and House.

They show, it is true, that amendments of the original bill were made, but not what were the nature of those amendments. If it be said that certain amendments are attached to the original bill, and are attested by one of the clerks, the answer is, that other amendments may have been made that were not thus preserved. It was not required that each amendment should be entered at large on the journal.

If there be danger, under the principles announced in *Field* v. *Clark*, that the Governor and the presiding officers of the two houses of a territorial Legislature may impose upon the people an act that was never passed in the form in which it is preserved by the Secretary of the Territory, and as it appears in the published statutes, how much greater is the danger of permitting the validity of a legislative enactment to be questioned by evidence furnished by the general indorsements made by clerks upon bills previous to their final passage and enrolment — indorsements usually so expressed as not to be intelligible to any one except those who made them, and the scope and effect of which cannot in many cases be understood unless supplemented by the recollection of clerks as to what occurred in the hurry and confusion often attendant upon legislative proceedings.

We see no reason to modify the principles announced in *Field* v. *Clark*, and, therefore, hold that, having been officially attested by the presiding officers of the territorial Council and House of Representatives, having been approved by the Governor, and having been committed to the custody of the Secretary of the Territory, as an act passed by the territorial Legislature, the act of March 21, 1895, is to be taken to have been enacted in the mode required by law, and to be unimpeachable by the recitals, or omission of recitals, in the journals of legislative proceedings which are not required by the fundamental law of the Territory to be so kept as to show everything done in both branches of the legislature while engaged in the consideration of bills presented for their action.

It remains to consider whether that act is repugnant to the act of Congress of July 30, 1886, c. 818, 24 Stat. 170, entitled

"An act to prohibit the passage of local or special laws in the Territories of the United States to limit territorial indebtedness, and for other purposes."

That act declares that the legislatures of the Territories of the United States shall not pass local or special laws in any of the following, among other, enumerated cases: "Regulating county and township affairs;" "for the assessment and collection of taxes for territorial, county, township or road purposes;" "creating, increasing or decreasing fees, percentage or allowances of public officers during the term for which said officers are elected."

The territorial act, alleged to be repugnant to the act of Congress, is declared to be "for the purpose of fixing the compensation of county officers" of the Territory, and to that end all the counties of the Territory are classified according to the equalized assessed valuation of property in each county. County treasurers, district attorneys, county recorders, assessors and probate judges are to receive salaries of specified amounts, as the counties of which they are officers are in one or the other of the six classes established. In other words, the salaries of officers in each class are specified, the largest salary that each can receive being that named for a county of the first class having an equalized assessed valuation of property of three million dollars or more, and the smallest that each can receive being that named for counties of the sixth class, having an equalized assessed valuation of property of less than one million dollars. Laws of Arizona, 1895, p. 68.

We are of the opinion that the territorial act is not a local or special law within the meaning of the act of Congress. It is true that the practical effect of the former is to establish higher salaries for the particular officers named, in some counties, than for the same class of officers in other counties. But that does not make it a local or special law. The act is general in its operation; it applies to all counties in the Territory; it prescribes a rule for the stated compensation of certain public officers; no officer of the classes named is exempted from its operation; and there is such a relation

between the salaries fixed for each class of counties, and the equalized assessed valuation of property in them, respectively, as to show that the act is not local and special in any just sense, but is general in its application to the whole Territory and designed to establish a system for compensating county officers that is not intrinsically unjust, nor capable of being applied for purposes merely local or special. It is not always easy to fix a basis for the salaries of county officers, so as to compensate them fairly for their services, and yet be just to taxpayers. Certainly those named in the territorial act of 1895 ought not to receive as much compensation for services in a county having a few people, and in which a small amount of taxes is collectible, as in a populous county, in which a large amount of taxes is collectible. The services performed by such officers in the latter class of counties would necessarily be greater than those required in the former. The assessed valuation of property in a county furnishes a reasonable test of the character of the services required at the hands of county officers; at any rate, the adoption of such a test does not show that the act was designed to defeat the objects of Congress, nor that it is local or special legislation. If the territorial act is embraced by the act of Congress, and if the Territory by legislation of that kind cannot fix the salaries of county officers, and thereby displace the system of fees, percentages and allowances, it would follow that many county officers would receive compensation out of all proportion to the labor performed and the responsibility incurred by them. It seems to us that the act in question cannot be characterized as local or special any more than an act which did not create, increase or diminish fees, percentages or allowances of public officers during the term for which they were elected or appointed, but which, prospectively, fixed their compensation upon the basis of a named per cent of all the public moneys that passed through their hands. Could an act of the latter kind be regarded as local or special because, under its operation, officers in some counties would receive less than like officers would receive in other counties whose population was larger, and where busi-

ness was heavier and property of larger value? We think not. And yet we should be obliged to hold otherwise, if we approved the suggestion that the territorial act of March 21, 1895, was local or special, simply because, under its operation, county treasurers, district attorneys, county recorders, assessors and probate judges will receive larger salaries in some counties than like officers will receive in other counties.

In support of the appellant's contention numerous adjudged cases have been cited. We have examined them, but do not find that they are in conflict with the conclusions reached by us in this case.

The judgment of the Supreme Court of the Territory is

Affirmed.

GIBSON *v.* MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 711. Argued and submitted December 18, 1895. — Decided April 13, 1896.

The principle reaffirmed that while a State, consistently with the purposes for which the Fourteenth Amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury; yet a denial to citizens of the African race, *because of their color*, of the right or privilege accorded to white citizens of participating as jurors in the administration of justice would be a discrimination against the former inconsistent with the amendment and within the power of Congress, by appropriate legislation, to prevent.

Section 641 of the Revised Statutes, providing for the removal of civil suits or criminal prosecutions from the state courts into the Circuit Courts of the United States, does not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence. For such denials arising from judicial action after a trial commenced, the remedy lies in the revisory power of the higher courts of the State, and ultimately in the power of review which this

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court may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated. The denial or inability to enforce in the judicial tribunals of the States rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them resulting from the constitution or laws of the State, rather than a denial first made manifest at or during the trial of the case.

The fact that citizens of the African race had been excluded, because of their race, from service on previous grand juries as well as from the grand jury which returned the particular indictment in the case on trial, will not authorize a removal of the prosecution under section 641 of the Revised Statutes, but is competent evidence only on a motion to quash the indictment.

It is not every denial by a state enactment of rights secured by the Constitution or laws of the United States that is embraced by section 641 of the Revised Statutes. The right of removal given by that section exists only in the special cases mentioned in it.

The requirement of the Mississippi constitution of 1890 that no person should be a grand or petit juror unless he was a qualified elector and able to read and write did not prevent the legislature from providing, as was done in the Code of 1892, that persons selected for jury service should possess good intelligence, sound judgment and fair character. Such regulations are always within the power of a legislature to establish unless forbidden by the constitution. They tend to secure the proper administration of justice and are in the interest, equally, of the public and of persons accused of crime.

The Mississippi Code of 1892, in force when the indictment was found, did not affect in any degree the substantial rights of those who had committed crime prior to its going into effect. It did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, nor alter the legal rules of evidence in order to convict the offender.

The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.

The conduct of a criminal trial in a state court cannot be reviewed by this court unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument.

Statement of the Case.

Mere error in administering the criminal law of a State or in the conduct of a criminal trial — no Federal right being invaded or denied — is beyond the revisory power of this court under the statutes regulating its jurisdiction. Indeed, it would not be competent for Congress to confer such power upon this or any other court of the United States.

The Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. Those guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the Nation and of the State, without reference to considerations based upon race. In the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes.

The plaintiff in error was indicted in the Circuit Court of Washington county, Mississippi, for the crime of having, in that county and on the 12th day of December, 1892, killed and murdered one Stinson.

When the case was called for trial the accused presented a petition for its removal to the Circuit Court of the United States for the western division of the Southern District of Mississippi. The petition was verified by the oath of the accused to the effect that the facts set forth in it were true and correct to the best of his knowledge and belief, and was as follows:

"This petition respectfully shows unto this court that John Gibson, a citizen of said State and of the United States of America, is a negro of the African descent and color black. That under the constitution of the State of Mississippi, which was adopted in the constitutional convention in November, 1890, it prescribes that the qualification for persons to serve as jurors in said State shall be that the ability of said citizens, qualified electors of the county and State, male, being citizens thereof, not having [been] convicted of specified crimes, shall be able to read and write; but the legislature shall provide by law for procuring a list of persons so qualified to draw therefrom grand and petit jurors for each term of the Circuit Court. Constitution of Mississippi, Sec. 264. Section 2358

of the Code of Mississippi for 1892, adopted the 1st day of April, 1892, and in force at the time of the finding of the bill of indictment filed herein against relator, provides that at the first meeting of each year, or as soon as practicable thereafter, the board of supervisors shall make a list of persons to serve as jurors in the Circuit Court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them, as nearly as it can conveniently from the several districts in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors. Relator states that under section 283 of the new constitution of Mississippi the indictment returned against him should have been by a jury of the grand inquest of the said county, under the laws of the code of said State, adopted in 1880, because the crime for which this indictment was returned is alleged to have been committed January, 1892, before the statute of 1892 took effect.

"Relator states that under the laws of said State, provided by the Code of 1880 thereof, the only qualifications required were as shown by sec. 1661 of said code, to wit, 'All male citizens of the United States and not being under the age of twenty-one years nor over the age of sixty years, and not having been convicted of any infamous crime, shall be qualified to serve as jurors within the county of their residence.' Section 1664 of Code of 1880 also provides that the board of supervisors of each county shall, at least twenty days before every term of the Circuit Court, select twenty persons competent to serve as jurors in said county, to be taken, as nearly as conveniently may be, in equal numbers from each supervisor's district of the county, who shall serve as grand jurors for the next ensuing term of said court.

"Relator states that at the time the said grand jury of said county was elected, empanelled and charged by this court at the December term, 1892, a great Federal [right] of his was

abridged, viz., the civil right guaranteed to him under the Fourteenth Amendment to the Constitution of the United States, particularly, to wit, no State shall deny to any person within its jurisdiction the protection of the laws.

"Relator states that, on the 9th day of January, 1892, Robert Stinson, a white man, was killed at Refuge plantation in the said county, and that he was accused of the homicide; that prosecution against him had been commenced before the adoption of the Code of 1892; that by reason of the great prejudice against him by the officers charged with the selection of the said jury of grand inquest for the said December term of the said Circuit Court, which officers so charged are all members of the white race, and the relator herein being a member of the black race — black in color. Although at the time of selecting the grand jurors for the said December term, 1892, there were in the five supervisor districts of the said county of Washington 7000 colored citizens competent for jury service of the county of Washington, State of Mississippi, and 1500 whites qualified to serve as jurors in said county, there had not been for a number of years any colored man ever summoned on the grand jury of said county court; and that the colored citizens were purposely, on account of their color, excluded from jury service by the officers of the law charged with the selection of said jurors. Relator states that by reason of the great prejudice against him in this matter that the said officers of the law charged with the selection of the said grand jurors for the December term, 1892, on account of his color, being that of a negro, black, and the deceased being that of a white man of the white race, in selecting persons to serve as grand jurors at said term, all colored men were purposely on account of their color excluded by said officers; and that the said grand jury did then and there, being all white men purposely selected on account of their color, present the bill of indictment against relator for the murder of Robert Stinson aforesaid, on account of his color, and pray summons for witnesses to prove same. Relator avers that by reason of the great prejudice against him on account of his color, he could not secure a fair and impartial trial by an impartial

petit jury of the county of Washington, State aforesaid, and prays an opportunity to subpœna witnesses to prove the same, and, therefore, after hearing same, doth pray the removal of his case from this court to the United States Circuit Court for the western division of the Southern District of Mississippi, and that record hereof be properly certified to said court by an order from this court."

The petition for removal was denied, and the defendant excepted to the action of the court.

Thereupon the accused demanded that a special venire be summoned to try his case. The regular jury box for the court having been produced for the purpose of drawing therefrom the special venire, the defendant moved "to quash said jury box," upon the ground that it was illegal and had but few names therein. That motion was sustained, and a writ of special *venire facias* was directed to be issued for summoning fifty good and lawful men and qualified jurors to appear on a named day to serve as jurors in the cause. The sheriff was directed to serve on the defendant or his counsel a copy of the writ of *venire facias*, together with his return thereon, showing the names of the persons so summoned, and also a copy of the indictment. This order was executed, and the requisite number of jurors having appeared, on a subsequent day of the court the defendant moved to quash the special venire. The motion was overruled, the defendant taking an exception. The accused then announced himself ready for trial. A jury was selected, the defendant pleaded not guilty, and the trial resulted in a verdict of guilty as charged in the indictment. The opinion of the Supreme Court of the State states that this was the third trial of the defendant for the crime charged, each trial resulting in a verdict of guilty.

A new trial was asked upon various grounds, one of which was that the court erred in overruling the defendant's petition for the removal of the cause into the Circuit Court of the United States for trial; another, that it erred in not sustaining the motion to quash the special venire of fifty "good and lawful" men to serve as special jurors. These points were insisted upon in the Supreme Court of Mississippi. But that

court held that there was no error in overruling the motion to remove the case into the Federal Circuit Court. It also refused to disturb the verdict and judgment.

Mr. Emanuel M. Hewlett, (with whom was *Mr. Cornelius J. Jones* on the brief,) for plaintiff in error.

The question in this case is, whether the plaintiff in error was indicted, tried and convicted in the state courts regularly, and in due course of law, as prescribed by the laws of the State of Mississippi and the Constitution and laws of the United States.

It is well settled in the law and practice of this court that in dealing with such a question, the record alone is to be looked to, in ascertaining the true issue. Before we refer to the record it is proper to inform the court that the claim which plaintiff in error sets up in asserting his right to the relief, by this proceeding is, that he, a citizen, and a person of color, was within the jurisdiction of the State of Mississippi, by that State denied the equal protection of the laws thereof; that he was by the agents and officers of said State purposely discriminated against on account of his race, a negro, and his color.

The Fourteenth Amendment reserves to the plaintiff in error the right to have been first duly and regularly indicted by a grand jury of Washington county duly elected, summoned, sworn and charged according to the laws of the State, without partiality to the race or color of said jurors and without prejudice to the accused on account of the offence charged or his race and color. It must be admitted that wherever these rights are asserted a constitutional right is asserted. At the time of its adoption, the colored race had been recently emancipated from a condition of servitude, and made citizens of the States. It was apprehended that in some of the States of the Union, feelings of antipathy between the races would cause the dominant race by unfriendly legislation to abridge the rights of the other, and deny to them equal privileges and protection of the laws. To guard the previously subjected race from the effect of discrimination these provisions are

made a part of the fundamental law of the land, and their rights were placed under the protection of the Federal government. It was designed to assure the colored race the enjoyment of all of the civil rights that under the law are enjoyed by white persons, and to give that race the protection of the Federal government in that enjoyment, when it should be denied by the States. *Slaughter House cases*, 16 Wall. 67.

Considering this authority we contend that no other construction can be placed upon such actions of the said jury officers of Washington county aforesaid as are complained of in the petition for removal, especially after having been brought to the judicial notice of the trial court, and by that court approved, than, that the discrimination complained of was the action of the State of Mississippi.

The accused filed his petition for the removal of his trial from the circuit court of Washington county, State of Mississippi, to the United States Circuit Court for the western division of the Southern District of Mississippi. It was charged in that petition that the accused was purposely discriminated against on account of his race and color, by the exclusion from the grand jury which presented the indictment therein filed against him, of all members of his race, on account of their race and color. This exclusion complained of was charged to the officers of the said county who were charged under the laws with the duty of selecting, listing, summoning, empanelling and charging the said grand jury, and that the petit jury which was summoned to try the accused, was a jury of white men, selected and procured with the same gross irregularities as was the grand jury herein complained of, and for the same purposes.

The accused duly swore to that petition upon knowledge and belief. The trial court heard the petition, and, without any resistance on part of the State, denied the same and the accused was forced to trial.

Now then, the regular steps by way of appeal to the state Supreme Court having been taken, and judgment of affirmance having been rendered by that court, the record stands in this court for ultimate review.

The laws of the State of Mississippi regarding the selecting,

listing and forming the grand jury of the county aforesaid, cannot and are not complained of as the law; but the white race of the county of Washington entertaining such great prejudice against the negro race, and especially the accused, which prejudice was charged in the petition for removal, and the said officers of the law being all members of the white race, did, in their proceedings in the discharge of their duty in the said selection of jurors, wilfully and purposely turn from the well directed paths prescribed by the legislature of the State of Mississippi. Had they adhered to the letter of the state law the registration roll of the voters of the county should have been used by the Board of Supervisors of the county in listing the names of persons to serve as grand jurors for said December term of said circuit court.

The only qualifications required for jury service of any one under the law are likewise required of persons to be qualified voters in said county and State. Then, assuming that the Board of Supervisors did regularly select and list the names of the jurors for that term of the court at which the indictment was presented, and certified the same according to law, in face of the fact that on the registration roll of voters at that time there were seven thousand negroes of the county duly qualified for jury service and enrolled upon the registration roll of voters of the county, and only fifteen hundred white persons of the county so qualified, and the number of names required by law having therefrom been regularly drawn, delivered to the circuit clerk of said county by the clerk of the said Board of Supervisors, and by the circuit clerk aforesaid each name was copied on a separate slip of paper and regularly deposited in the jury box of the county, — we appeal to the reason of this court to know, if under these conditions any result could have been attained other than a fair and equitable listing of jurors for said term of court.

With these steps regularly taken by the proper authorities, followed up with the further requirements of the law, the names of the jurors listed, certified and delivered to the circuit clerk of the county, who copies the names on separate slips of paper and deposits the whole list of names delivered

and deposited as aforesaid, the law duly observed, there is no doubt in the minds of this court that some of those names drawn would have been those of negroes. Once in the "jury box" those names, in the course of the regular drawing of said jurors for the said term of fifty names for the first week, thirty names for the second week, thirty names for the third week, thirty names for the fourth week, thirty names for the fifth week and thirty names for the sixth week, making a total of two hundred names to have been drawn for that term of the circuit court at which the indictment was returned, could it be probable or reasonable to suppose that all the names so drawn, to the number of two hundred, would have by chance been all names of white men? The accused charged, in the presence of the jury officers of the county, that because of the great prejudice prevailing against him among the white race, with which race the said jury officers were identified, which officers under the law were charged with the duty of forming the grand jury for said December term, they did purposely disregard the state law, and thereby did, with the intent so to do, select as such jurors for said December term an entire white jury, to the entire exclusion of all negroes of the county aforesaid, though legally qualified for such jury service: and that such exclusion by said officers, of the negroes, was purposely made on account of their race and color.

We submit to the court, that the charges so made by the accused were grave, and merited some apprehension on the part of those charged, and prompt investigation on the part of the trial court.

The argument may be advanced, that, as the exclusion complained of is shown, upon the face of the petition for removal, to have been the unauthorized acts of individuals acting in disregard of the laws and hence not binding on the State, the State is not responsible for the acts of persons in official positions, who act contrary to the rule prescribed by the constitution or laws thereof; and that, as the laws of the State are not complained of by the accused, no remedy lies: but such a position is in discord with the *principles* underlying the Fourteenth Amendment, especially in

the State where the negroes, duly qualified in one of its counties for jury service in the circuit courts of such county, number seven thousand, to the number of fifteen hundred whites so qualified; and where the race prejudice prevails as it does in Washington county, Mississippi. Such a State through its people in its organic law, or Legislature, may enact the finest kind of laws, and spread them upon its constitution or statutes, merely to avoid Federal interference; and yet permit its officers (who are of the white race, the dominant race) to try white persons touching their life, liberty and property, strictly in accordance with the laws of the State, and try negroes touching their same interests contrary to the laws; thus accomplishing in an indirect manner the very deprivation which the people of the United States sought to prohibit by the enactment of the Fourteenth Amendment. We are to look to the spirit of the law of the amendment, and thus it will be seen that there is no sound principle supporting the doctrine, so advanced by the defendant in error. It is well settled by the decisions of this court that when rights are granted to the Federal government by the people of the country, Federal jurisdiction thereof becomes positive; and the rights so reserved, stand out supreme, and forbid the slightest infraction on the part of any state authorities, whether by letter of the laws or by executive or judicial officers acting in their official capacities. No State can violate these superior rules, with or without the consent of the person in whose case such reservation is shown upon the face of the proceedings to exist.

In all trials there are certain duties to be performed by the court; and a certain degree of diligence must be exercised by the accused. The court is supposed to sit in judgment upon all matters of law arising during the progress of the trial. We do not insist that the court could have had judicial knowledge of any irregularity on the part of the officers of Washington county, touching the rights of the accused in the indictment in question, in the performance of their duties in that regard as complained of, until brought to its judicial notice. We respect the presumption of due regularity always

attending the acts of officers when apparently regular upon the face of the proceedings, although the court might have known that there were seven thousand qualified jurors of the negro race in the county at the time of drawing said grand jury and only fifteen hundred whites so qualified under the law, at the time the list of two hundred names was by the said jury officers drawn to accommodate the said December term of the said circuit court; and that from the number summoned to appear at the first week of said term from which number the grand jury in question was drawn, sworn and charged, no negro was seen upon said jury. In all this there is nothing to apprise the court judicially of any irregularity in the conduct of the said officers in the discharge of their official duties, resulting in any discrimination against the accused; although the court did have judicial knowledge of the presentment on the indictment returned by the grand jury aforesaid, which the court judicially knew to have been apparently regularly empanelled for that term. Up to this stage of the proceedings the trial court, as a court, was not a party to any such discrimination as charged. It was the duty of the court to proceed regularly on with the trial; but at the January term, 1895, when the accused was about to be put upon his trial under the said indictment, he attacked the regularity and validity of the said indictment; and while the Federal Constitution has prescribed no relief for one deprived of that equal protection of the laws of the State to the enjoyment of which the accused is by the Federal Constitution guaranteed, yet the remedy for such injury is provided for by Congress, which has prescribed that such a denial in a state court entitles the accused to the removal of his trial from the state court, where such a right is denied, to the Federal court.

The plaintiff in error filed his petition for removal and thus duly informed the court of such denial and discrimination, by presenting a series of clear and distinct charges against the jury officers of the county and officers of the court in the presence and hearing of the parties charged, which we have hereinbefore particularized, and thereupon prayed the process

of the court to compel the said officers to appear at the bar of the trial court, to be there examined under oath, touching the charges so made by him.

Judging from the language of the Supreme Court of Mississippi, in this case, even though the charges so made were seriously presented to the trial court, in all the legal formality and solemnity possible, that court of original jurisdiction owed the accused no consideration, because of the fact that after the petition for removal was disposed of, no motion was made to quash the indictment; but we will submit, that the motion to quash the indictment would not in any way have emphasized the rights due the accused, as shown by the petition. The principles underlying this proposition are finally settled by this court in *Neal* v. *Delaware*, 103 U. S. 370. "While a colored citizen, party to a trial involving his life, liberty or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury in a particular case is not within the meaning of the Constitution or always necessary to the equal protection of the laws; it is a right to which he is entitled, that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race or discrimination against them because of their color." See also *Strander* v. *West Virginia*, 100 U. S. 303; *Prigg* v. *Pennsylvania*, 16 Pet. 539; *United States* v. *Reese*, 92 U. S. 214.

The accused lost no right, merely because he did not move the trial court to quash the indictment. It was the duty of the court to have granted the petition for the removal, or of its own motion upon the facts charged and proven in the petition to have quashed the indictment, which latter action would have immediately divested all Federal jurisdiction and fully restored the jurisdiction of the state court. The question as to whether the petition for removal disclosed a case of denial of the constitutional right guaranteed him under the Fourteenth Amendment thereof is for this honorable court to answer by its judgment, if the acts of the officers of said county as charged in said petition constitute a denial on the part of the State in the manner prohibited by the said amend-

ment. This honorable court so declared in *Bush* v. *Kentucky*, 107 U. S. 110, 119, wherein Mr. Justice Harlan delivering the opinion of this court among other things said: "Again, it was declared that a denial upon the part of the officers of the State, charged with the duties in that regard of the right of a colored man, 'to a selection of grand and petit jurors without discrimination against his race because of their color, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia* v. *Rives*, 100 U. S. 313, 'the court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a Superior Court, and ultimately in this court upon review.'"

The Federal Constitution is a code of granted organic powers, and these powers so granted are intended by the grantors for the perpetual preservation of the superior State, which is inseparable and indissoluble. This court has proper jurisdiction over matters respecting such granted powers, and the relief sought by the petition for removal in this cause is among the rights enumerated in the Constitution of the United States. Having laid down the law involving a construction of the Federal Constitution, wherein such discrimination as charged in the petition for removal was declared to be a violation to the Fourteenth Amendment, that judgment, coming as it did from the highest court in the nation with full jurisdiction over the subject reviewed thereby, becomes of equal binding force on the actions of all inferior courts in the Nation, as if the words in which such judgment was written were expressed upon the face of the Federal Constitution, or in the Federal statutes. *Green* v. *Neal*, 6 Pet. 291. When the trial court of Mississippi failed to grant the petition for removal, as prayed for in said petition, or to quash the indictment of its own motion; and the Supreme Court of the State declined to grant the proper relief, the State of Mississippi wilfully and intentionally violated the Constitution and laws of the United States, in discriminating against the plaintiff in error on the account of his race and color, and further by denying to him that equal protection

of its laws to which he was entitled under the Constitution and laws of the United States, for which it must account at the bar of this court.

As to whether Mississippi as a State is responsible for the act of the jury officers, as charged in the petition for removal, or whether the officers so charged are individually responsible, we contend that the doctrine upon that point is clearly laid down in the language of this court in *Ex parte Virginia*, 100 U. S. 339, by Mr. Justice Strong.

"The State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." See also *Neal* v. *Delaware*, 103 U. S. 370.

Mr. Frank Johnston, attorney general of the State of Mississippi, submitted on his brief.

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

The first question presented for our consideration relates to the application of the accused for the removal of the prosecution from the state court into the Circuit Court of the United States.

By section 641 of the Revised Statutes it is provided: "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State, where such suit or prosecution is pending, any right secured to him by any law pro-

viding for the equal civil rights of citizens of the United States, . . . such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state court shall cease," etc.

In *Neal* v. *Delaware*, 103 U. S. 370, 385, 386, reference was made to the previous cases of *Strauder* v. *West Virginia*, *Virginia* v. *Rives* and *Ex parte Virginia*, 100 U. S. 303, 313, 339, and to sections 641 and 1977 of the Revised Statutes; also to the act of March 1, 1875, c. 114, 18 Stat. 335, which, among other things, declared that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude." The cases cited were held to have decided that the statutory enactments referred to were constitutional exertions of the power of Congress to enact appropriate legislation for the enforcement of the provisions of the Fourteenth Amendment, which was designed, primarily, to secure to the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; that while a State, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury, yet a denial to citizens of the African race, *because of their color*, of the right or privilege accorded to white citizens of participating as jurors in the administration of justice would be a discrimina-

tion against the former inconsistent with the amendment and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which were excluded, *because of their color*, men of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws; and that such exclusion of the black race from juries because of their color was not less forbidden by law than would be the exclusion from juries, in States where the blacks have the majority, of the white race because of *their* color.

But those cases were held to have also decided that the Fourteenth Amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section authorized the removal of a criminal prosecution before trial, it did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them resulting from the constitution or laws of the State, rather than a denial first made manifest at or during the trial of the case.

We therefore held in *Neal* v. *Delaware* that Congress had not authorized a *removal of the prosecution from the state court* where jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the State, excluded colored citizens from juries because of their race.

In view of this decision, it is clear that the accused in the present case was not entitled to have the case removed into the Circuit Court of the United States unless he was denied by the constitution or laws of Mississippi some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that State. The equal protection of the laws is a right now secured to every person without regard to race, color or previous condition of servitude; and the denial of such protection by any State is forbidden by the supreme law of the land. These principles are earnestly invoked by counsel for the accused. But they do not support the application for the removal of this case from the state court in which the indictment was found, for the reason that neither the constitution of Mississippi nor the statutes of that State prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the State without regard to race, color or previous condition of servitude. Nor would we be justified in saying that the constitution and laws of the State had, at the time this prosecution was instituted, been so interpreted by the Supreme Court of Mississippi as to show, in advance of a trial, that persons of the race to which the defendant belongs could not enforce in the judicial tribunals of the State the rights belonging to them in common with their fellow-citizens of the white race. If such had been the case, it might well be held that the denial of the equal protection of the laws arose primarily from the constitution and laws of the State. But when the constitution and laws of a State, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the state court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, *for removing the prosecution* into the Circuit Court of the United States in advance of a trial.

We may repeat here what was said in *Neal* v. *Delaware*, namely, that in thus construing the statute "we do not with-

hold from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the State, his constitutional equality of civil rights, all opportunity of appealing to the courts of the United States for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied, in the subsequent proceedings of the state court, or in the execution of its judgment, any right, privilege or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review."

So, in *Bush* v. *Kentucky*, 107 U. S. 110, 116, which was an indictment for murder, returned before but tried after the Court of Appeals of Kentucky held unconstitutional a statute of that Commonwealth excluding from grand or petit juries citizens of African descent because of their race and color, and had declared that thereafter every officer charged with the duty of selecting or summoning jurors must so act without regard to race or color, this court said: "That decision was binding as well upon the inferior courts of Kentucky as upon all its officers connected with the administration of justice. After that decision, so long as it was unmodified, it could not have been properly said in advance of a trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within their jurisdiction. The last indictment was consequently not removable into the Federal court for trial under section 641 at any time after the decision in *Commonwealth* v. *Johnson* [78 Kentucky, 509] had been pronounced. This point was distinctly ruled in *Neal* v. *Delaware*, and is substantially covered by the decision in *Virginia* v. *Rives* [100 U. S. 313]. If any right, privilege or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States, had been denied by a refusal of the state court to set aside either that indictment or the panel of petit jurors, or by any erroneous ruling in the progress of the trial, his remedy would have been through the revisory power of the highest court of the State, and ulti-

mately through that of this court." See also *In re Wood*, 140 U. S. 278, 284.

In his petition for the removal of the prosecution into the Circuit Court of the United States the defendant also states that, notwithstanding at the time of selecting the grand jurors for the said December term 1892 there were in the five supervisors' districts of the county of Washington 7000 colored citizens competent for jury service and 1500 whites qualified to serve as jurors, there had not been for a number of years any colored man summoned on the grand jury in that county; and that colored citizens were purposely, on account of their color, excluded from jury service by the officers of the law charged with the selection of jurors. It is clear, in view of what has already been said, that these facts, even if they had been proved and accepted, do not show that the rights of the accused were denied by the constitution and laws of the State, and therefore did not authorize the removal of the prosecution from the state court. If it were competent, in a prosecution of a citizen of African descent, to prove that the officers charged with the duty of selecting grand jurors had, in previous years and in other cases, excluded citizens of that race, because of their race, from service on grand juries — upon which question we need not express an opinion — it is clear that such evidence would be for the consideration of the trial court upon a motion by the accused to quash the indictment, such motion being based upon the ground that the indictment against him had been returned by a grand jury from which were purposely excluded, because of their color, all citizens of the race to which he belonged. *United States* v. *Gale*, 109 U. S. 65, 69. But there was no motion to quash the indictment. The application was to remove the prosecution from the state court, and a *removal*, as we have seen, could not be ordered upon the ground simply that citizens of African descent had been improperly excluded, because of their race, and without the sanction of the constitution and laws of the State, from service on previous grand juries, or from service on the particular grand jury that returned the indictment against the accused.

Opinion of the Court.

We do not overlook in this connection the fact that the petition for the removal of the cause into the Federal court alleged that the accused, by reason of the great prejudice against him on account of his color, could not secure a fair and impartial trial in the county, and that he prayed an opportunity to subpœna witnesses to prove that fact. Such evidence, if it had been introduced, and however cogent, could not, as already shown, have entitled the accused to the *removal* sought; for the alleged existence of race prejudice interfering with a fair trial was not to be attributed to the constitution and laws of the State. It was incumbent upon the state court to see to it that the accused had a fair and impartial trial, and to set aside any verdict of guilty based on prejudice of race.

The petition for removal also proceeds upon the ground that the indictment was returned by a grand jury organized under the Code of Mississippi which went into operation in 1892 after the date of the alleged murder, when, it is contended, it should have been organized in the mode required by the Mississippi Code of 1880, in force at the time the offence in question was committed.

The organization of the grand jury under a statute of the State, (even if that statute was not applicable to offences committed before its passage,) rather than under a statute that was applicable, constitutes no ground for the removal of the prosecution into the Federal court, unless the statute whose provisions were followed either expressly or by its necessary operation denied to the accused some "right secured to him by any law providing for the equal civil rights of citizens of the United States." It is not every denial by a state enactment of rights secured by the Constitution or laws of the United States that is embraced by section 641 of the Revised Statutes. The right of removal given by that section exists only in the special cases mentioned in it. Whether a particular statute, which does not discriminate against a class of citizens in respect of their civil rights, is applicable to a pending criminal prosecution in a state court, is a question, in the first instance, for the determination of that court, and its right and duty to finally determine such a question cannot be interfered with

by removing the prosecution from the state court, except in those cases which, by express enactment of Congress, may be removed for trial into the courts of the United States. If that question involves rights secured by the Constitution and laws of the United States, the power of ultimate review is in this court whenever such rights are denied by the judgment of the highest court of the State in which the decision could be had. As the judges of the state courts take an oath to support the Constitution of the United States as well as the laws enacted in pursuance thereof, and as that Constitution and those laws are of supreme authority, anything in the constitution or laws of any State to the contrary notwithstanding, "upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;" and "if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination." *Robb* v. *Connolly*, 111 U. S. 624, 637.

But it is said that the statute under which the grand jury was organized was *ex post facto* when applied to the case of the present defendant, and for that reason the judgment should be reversed. This question does not depend upon section 641 of the Revised Statutes, but upon the clause of the Constitution forbidding a State to pass an *ex post facto* law. It is not clear that the record so presents this point as to entitle us to consider it under the statutes investing this court with jurisdiction to reëxamine the final judgments of the highest courts of the several States. But, as human life is involved, as the defendant pleaded not guilty, and as the State, by its attorney general, has discussed the question upon its merits without disputing the authority of this court to pass upon it, we will assume, and we think it may be properly assumed, that the plea of not guilty, in connection with the petition for removal,

sufficiently presents the question, and shows that the state court denied to the accused what he specially set up and claimed to be a right secured to him by the Constitution of the United States.

By the constitution of Mississippi of 1890 which was in force at the time of the commission of the alleged offence, it was provided: "No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the Circuit Court." Sec. 264. And by the same instrument it was also provided: "All crimes and misdemeanors and penal actions shall be tried, prosecuted and punished as though no change had taken place, until otherwise provided by law." Sec. 283. By the Mississippi Code of 1880, in force when the alleged murder was committed, it was provided that "all male citizens of the United States and not being under the age of twenty-one years, nor over the age of sixty years, and not having been convicted of any infamous crime, shall be qualified to serve as jurors within the county of their residence," Sec. 1661; and by section 1664 of the same code it was provided that "the board of supervisors of each county shall, at least twenty days before the term of every Circuit Court, select twenty persons competent to serve as jurors in said county, to be taken, as nearly as conveniently may be, in equal numbers from each supervisor's district of the county, who shall serve as grand jurors for the next ensuing term of said court."

The Annotated Code of 1892 went into effect on the first day of November, 1892, all prior statutes being thereby repealed. Sections 2358, 2361, 2365 of that code provide: Sec. 2358. "The board of supervisors, at the first meeting in each year, or at a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the Circuit Court for the next two terms to be held more than thirty days afterwards, and, as a guide in making the list, they shall use the registration books of voters; and it shall select and

list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them, as nearly as it conveniently can, from the several election districts, in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors." Sec. 2361. "The names of the persons on the jury list shall be written on separate slips of paper by the clerk of the Circuit Court, and put in a box kept for that purpose, marked 'Jury box,' which shall be securely locked and kept closed and sealed, except when opened to draw the jurors." Sec. 2365. "At each regular term of the Circuit Court, and at a special term if necessary, the judge shall draw, in open court, from the jury box the slips containing the names of fifty jurors to serve as grand and petit jurors for the first week and thirty to serve as petit jurors for each subsequent week of the next succeeding term of the court; and he shall make and carefully preserve separate lists of the names, and shall not disclose the name of any juror drawn. The slips containing the names so drawn shall be placed by the judge in envelopes, a separate one for each week, and he shall securely seal and deliver them to the clerk of the court, so marked as to indicate which contains the names of the jurors for the first and each subsequent week. If in drawing it appears that any juror drawn has died, removed or ceased to be qualified or liable to serve as a juror, the judge shall cause the slip containing the name to be destroyed, the name to be stricken from the jury list, and he shall draw another name to complete the required number."

The contention of the accused is that the constitution of the State (Sec. 283) required that the indictment against him should have been by a jury of the grand inquest organized as directed in the Code of 1880, because that code was in force at the date of the murder charged to have been committed; and that the law upon that subject in the Code of 1892 would be *ex post facto* if applied to his case.

We perceive in these constitutional and statutory provisions nothing upon which to rest the suggestion that the accused was tried under a law that was *ex post facto* in its application

to his case. At the time the homicide was committed no person was competent to be a grand or petit juror unless he was a qualified elector and able to read and write. This requirement was attended by an injunction that the legislature should provide by law for procuring a list of persons so qualified, and for drawing therefrom of grand and petit jurors for each term of the Circuit Court. Miss. Const. Sec. 264. And, as we have seen, it was further provided that all crimes and misdemeanors and penal actions should be tried, prosecuted and punished as though no change had taken place until otherwise provided by law. Miss. Const. Sec. 283. It is clear that the provision in the constitution of 1890 prescribing the qualifications of grand and petit jurors became the law of the State immediately upon the adoption of the constitution, and that legislation was not necessary to give it effect; and that the provisions of the Code of 1880 for the conduct of trials were superseded by those on the same subject in the Code of 1892.

It is equally clear that the provisions of the Code of 1892 regulating the selection of grand and petit jurors were not *ex post facto* as to the case of Gibson, although they were not in force when the alleged homicide was committed. The requirement of the constitution of 1890 that no person should be a grand or petit juror unless he was a qualified elector and able to read and write did not prevent the legislature from providing, as was done in the Code of 1892, that persons selected for jury service should possess good intelligence, sound judgment and fair character. Such regulations are always within the power of a legislature to establish unless forbidden by the constitution. They tend to secure the proper administration of justice and are in the interest, equally, of the public and of persons accused of crime. We do not perceive that the Code of 1892, in force when the indictment was found, affected in any degree the substantial rights of those who had committed crime prior to its going into effect. It did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its com-

mission, nor alter the legal rules of evidence in order to convict the offender. These are the general tests for determining whether a statute is applicable to offences committed prior to its passage. *Calder* v. *Bull*, 3 Dall. 386, 390; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Kring* v. *Missouri*, 107 U. S. 221, 228; *Duncan* v. *Missouri*, 152 U. S. 377, 382. The provisions in question related simply to procedure. They only prescribed remedies to be pursued in the administration of the law, making no change that could materially affect the rights of one accused of crime theretofore committed. The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments. In *Hopt* v. *Utah*, 110 U. S. 574, 589, a statute that permitted the crime charged to be established by witnesses who by the law at the time the offence was committed were incompetent to testify in any case whatever was adjudged not to be *ex post facto* within the meaning of the Constitution, the court observing that such a statute did not increase the punishment nor change the ingredients of the offence nor the ultimate facts necessary to establish guilt, but related "to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure." Hence it has been held that a general statute giving the government more challenges than it had at the time of the commission of a particular offence was constitutional. *Walston* v. *Commonwealth*, 16 B. Mon. 15, 39.

It is also assigned for error: 1. That the court ordered the sheriff "to summon fifty men from the good and lawful body of Washington county," etc., when he should have been ordered to summon "persons qualified as jurors," or "said fifty men, jurors as required by law." 2. That the order

directed the sheriff to "summon said fifty men to serve as special jurors in the case of *State* v. *John Gibson*, when the order should have directed the sheriff to summon fifty men or persons as jurors, and to serve as jurors in the case of the *State* v. *John Gibson* as special jurors." Without stopping to consider whether the particular order complained of was in accordance with correct practice, it is only necessary to say that the objection presented by the assignment of error raises no question of a Federal nature. The conduct of a criminal trial in a state court cannot be reviewed by this court unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Mere error in administering the criminal law of a State or in the conduct of a criminal trial — no Federal right being invaded or denied — is beyond the revisory power of this court under the statutes regulating its jurisdiction. See *Andrews* v. *Swartz*, 156 U. S. 272, 276; *Bergemann* v. *Backer*, 157 U. S. 655, 659. Indeed, it would not be competent for Congress to confer such power upon this or any other court of the United States.

We may observe that the former decisions of this court, upon which the counsel for the accused relied with much confidence, do not go to the extent claimed by them. Underlying all of those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. Those guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the Nation and of the State, without reference to considerations based upon race. In the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes. The safety of the race the

larger part of which was recently in slavery, lies in a rigid adherence to those principles. Their safety — indeed, the peace of the country and the liberties of all — would be imperilled, if the judicial tribunals of the land permitted any departure from those principles based upon discrimination against a particular class because of their race. We recognize the possession of all these rights by the defendant; but upon a careful consideration of all the points of which we can take cognizance, and which have been so forcibly presented by his counsel, who are of his race, and giving him the full benefit of the salutary principles heretofore announced by this court in the cases cited in his behalf, we cannot find from the record before us that his rights secured by the supreme law of the land were violated by the trial court or disregarded by the highest court of Mississippi. We cannot say that any error of law of which this court may take cognizance was committed by the courts of the State, nor, as matter of law, that the conviction of the accused of the crime of murder was due to prejudice of race.

The judgment is, therefore,

Affirmed.

CHARLEY SMITH *v.* MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 710. Argued and submitted December 13, 16, 1895. — Decided April 13, 1896.

An affidavit to a petition for removal filed under section 641 of the Revised Statutes, to the effect that the facts therein stated are true to the best of the knowledge and belief of the accused, is not evidence in support of a motion to quash the indictment, unless the prosecutor agrees that it may be so used, or unless by the order of the trial court it is treated as evidence.

A motion to quash an indictment against a person of African descent upon the ground that it was found by a grand jury from which were excluded because of their race persons of the race to which the accused belongs can be sustained only by evidence independently of the facts stated in the motion to quash.

Statement of the Case.

THE plaintiff in error, Charley Smith, was charged by indictment in the Circuit Court of Bolivar county, Mississippi, with having, on the 14th day of May, 1894, in that county, wilfully, feloniously and of malice aforethought killed and murdered one Wiley Nesby.

Before arraignment the accused moved, upon grounds stated in writing, to quash the indictment. One of those grounds was that the grand jurors who presented the indictment were not impartial, "as guaranteed by the constitution of the State aforesaid and of the United States, of which the defendant is a citizen of color, black;" another, "because of the prejudice against him and his race on account of their color, the grand jury aforesaid was purposely selected of the white race, to the exclusion of the colored persons of the county competent for jury service, by the officers charged therewith, under the state law, on account of their color, for the purpose of procuring this indictment against defendant in violation of his constitutional right to be tried for his life upon the charge of murder herein in the Circuit [Court] of Bolivar county, State aforesaid;" still another, that the grand jury "was not a duly elected and legally empanelled grand jury as contemplated in the guarantees of the constitution of the State of Mississippi, and the Constitution of the United States."

The motion to quash the indictment was overruled. The record shows that the defendant duly excepted to the action of the court, but does not show that any evidence was introduced in support of the motion.

The accused was then arraigned and pleaded not guilty. He demanded a special venire. Thereupon fifty names were drawn from the jury box in open court, and process was issued for those persons.

The case having been continued, the accused at the next term made an application by petition for the removal of the cause for trial into the Circuit Court of the United States for the western division of the Southern District of Mississippi. The petition is here given in full:

"This petition respectfully shows that Charley Smith, a citizen of the United States, is in custody of the sheriff of

Bolivar county, Mississippi, by virtue of an indictment presented by what purports to have been a regular grand jury for the May term of said Circuit Court, 1894, upon a charge of murder. Relator states that he is a citizen of the State of Mississippi, and that under the constitution of said State, section 14 thereof, he is guaranteed that for such an offence he shall first be presented and tried by an impartial jury. Further, that he shall not be deprived of his liberty or of his life in the State aforesaid except by due process of law, and that said state constitution, as shown and prescribed in section 264 thereof, which qualifications shall be required of jurors, grand and petit, in the said State; and that the statute of 1892 of said State, styled the Annotated Code of Mississippi, adopted by the state legislature on —— day of April, 1892, prescribes new and separate requirements for jurors, different, separate and distinct from those requirements fixed by the constitution of said State, to wit: The constitution of the State prescribes, section 264, that all qualified electors able to read and write shall be competent to serve as jurors in the courts of the State. The statute of said State, viz., the Annotated Code of 1892, section —— thereof, provides that the board of supervisors of said county shall use as a guide (in selecting names of persons to serve as jurors for the two terms of the Circuit Court next, respectively, to be holden after the then list being prepared by them, the said board of supervisors) the registration roll of legal voters of the county, and that they shall select for jurors to serve as aforesaid persons of 'good intelligence, fair character and sound judgment;' and such of said statute is in conflict with the constitution of said State. Further, the record of the board of supervisors of said county shows that the list of jurors averring to have been drawn by them for the term then next to follow, being the said May term, 1894, was prepared under an order of said board of said county, which is as follows: 'Ordered by the board that the following named persons be, and are hereby, selected to serve as petit jurors for the next term of the Circuit Court,' which said order of said board fails to show upon its face that the list so selected for the purpose aforesaid was selected from

the registration roll of said county; said order fails to show that the persons so named in the list were citizens of said county, or were selected according to the laws of the State, or that they were qualified voters, duly registered according to law, and further fails to show that they, the persons so selected, were so selected to serve in Bolivar county, State aforesaid. Relator further states that the certificate of the circuit clerk of the said county, the sheriff of said county, and the chancery clerk of said county, which is attached to the list of names drawn from the jury box, constituting the petit jurors for the first week of said May term of Circuit Court of said county and copied in the minutes of the first day's proceedings of the said court, is void: First, because the circuit clerk, J. E. Ousley, did not personally attend the drawing of said list, but said certificate shows that he was represented in said drawing by deputy clerk. The statute prescribes that the circuit clerk shall officiate at said drawing, which must not be more than 15 days before first day of said term. Second, because the said officers charged with the drawing of said jurors failed to certify, as the law directs, 'whether the envelopes containing the names appeared to have been opened or disfigured,' and this list of names contained the names of the persons who were selected by the Circuit Court on the first day of said May term, 1894, as grand jurors, which grand jury presented relator on said indictment.

"Relator charges that the said officers charged with the selection, listing and drawing said jury list, preparatory to the holding of the said May term of said Circuit Court, wilfully and intentionally excluded all colored men from the said list of jurors on account of the fact of their color, and that relator is a colored man charged with murder, and that at the time the said jury list was selected, listed and drawn, as aforesaid, there were in the county of Bolivar 1300 or more duly registered colored voters in said county, and 300 white voters upon the registration roll of said county; the white voters registered did not outnumber the colored voters, and that had the registration roll been used as their guide, as the law directs, they would have drawn some

colored voters' names; but to the prejudice of defendant in the indictment and relator therein, said colored voters were, on account of their color, purposely excluded, and no black person has been summoned to serve as such juror in said county since the adoption of the new constitution on account of the great prejudice against the black race by those in authority, and of the white race, and relator asks subpœnas for said officers to prove same. Relator charges that his right to equal protection by the laws of the State, as guaranteed in Article Fourteen of the Amendments to the Constitution of the United States, was purposely ignored on account of his color and race by the officers charged with the selection of said jury at said term. This he is ready to prove, and prays subpœnas for said officers. That he is not indicted according to the due course of the law of the said State, and therefore prays that his trial under said indictment be removed from this court to the United States Circuit Court for the western division of the Southern District of the State of Mississippi, and that the record bear evidence of such an order of this court, and that said removal of said case be granted by this court upon such terms and conditions as the law directs."

The petition to remove the cause was verified by the oath of the accused to the effect that the facts set out in it were "true to the best of his knowledge and information and belief."

The application to remove the cause into the Circuit Court of the United States for trial was denied, and the accused excepted to this action of the state court.

The defendant then moved that the trial be postponed to a future day of the term on account of the absence of certain witnesses, without whose testimony, he alleged, he could not safely go to trial. Evidence was heard upon this motion, and the application to postpone the trial was denied.

The accused moved to quash the venire of jurors summoned for the second week of the term upon the following grounds: "Because they have not been regularly drawn from the jury box by the officers of the county whose duty it is under the law to draw the venire for the second week of said term,

to wit, the chancery and circuit clerks and sheriff of the county, and that said list of the venire, as appears in the record of the first day's proceedings of the term, is not certified to by the officers of the county charged with the selection of the jury as the law directs, but said jury as now answers to their call as said venire for said week is an illegal venire, and a trial by said jurors or any of them as such venire will be contrary to his rights under the constitution of the State of Mississippi and his rights under the Constitution of the United States, and that defendant, being a citizen of the State of Mississippi and of the United States, he insists upon his right to be tried for this offence by due course of law."

The motion was denied, and the defendant excepted. It does not appear from the record that any evidence was introduced in support of this motion.

The accused having received the panel of jurors, moved that the same be quashed upon the following grounds: "Because the said jury is made up of persons whose names are upon the record as jurors for the second week of the said term of the court, and said list of jurors, constituting the venire for the second week of said term so summoned by the sheriff of the county, was not drawn from the jury box of the county by the chancery clerk and circuit clerk and sheriff of the said county, which the law directs. Nor do the officers of the said county, charged with the drawing of said venire under the law, to wit, as aforesaid, certify to said list so appearing on the minutes of the first day of the said term, and there is no record that such list as does appear, purporting to be said venire for said week, was drawn from the jury box of the county, and said panel is void because composed of persons named being exclusively white jurors chosen on account of their color, as such jurors so illegally summoned to serve and now tendered defendant, he being a negro of the black race, and persons of his race and color were purposely, on account of their color, excluded by said officers of the law. Defendant is a citizen of the State of Mississippi and of the United States, and insists upon his right to be tried by due course of law, as guaranteed him under the rights incorporated in the

constitution of the State of Mississippi and the Constitution of the United States, and the panel now tendered him, from which members of his race are purposely excluded by the officers charged therewith for no other reason than their color, and that 1500 colored men duly qualified to serve as jurors being in the county, to 500 whites, is an abridgment of his rights under the Federal Constitution."

It does not appear that any evidence was introduced or offered in support of this motion to quash, and the motion was overruled, the defendant excepting.

During the examination of jurors on their *voir dire* the accused excepted to certain jurors, but not upon any grounds that involved rights secured by the Constitution of the United States.

The trial of the case was then entered upon, and the defendant was found guilty of murder, and sentenced to suffer the punishment of death.

The record contained the following minute: "On the 6th day of December, 1894, being a day of the said criminal term of said court, the defendant having informed the court on the day of his conviction, before sentence was pronounced on him by the court, that he wished to be allowed to prepare a motion in arrest of judgment, the court held that the motion in arrest of judgment and the motion for a new trial could not be made in one motion, but on said 5th day aforesaid the court ordered counsel to present both motions in one; that it would fine defendant's counsel for contempt unless he combined the motion in arrest of judgment and the motion for a new trial, that both might be heard as one motion, to which action the defendant then and there excepted."

A motion for a new trial was made and denied. Among the grounds of that motion were that the court erred in overruling: 1. The defendant's motion to quash the indictment. 2. His application for a removal of the cause to the United States Circuit Court. 3. The motion to quash the weekly venire. 4. The motion to quash the panel. Other grounds were that the defendant was not tried by a jury fairly and

Counsel for Parties.

impartially selected according to the laws of Mississippi and the Constitution of the United States, and was not convicted by due process of law, but was denied equal protection under the laws of the State on account of his race.

The case was carried, upon writ of error, to the Supreme Court of Mississippi, one of the errors assigned being that the application for the removal of the cause into the Circuit Court of the United States for trial was improperly overruled.

The judgment of conviction was affirmed by that court. Its opinion was as follows:

"The action of the court below in overruling the application for removal was not error. See *John Gibson* v. *State*, decided at the present term of this court. The motion to quash the indictment was properly denied. There was either no evidence offered in support of the motion, or, if offered, it does not appear in the record, and in this case we can do nothing but affirm the action of the court in denying this motion. The affidavit appended to the motion in its terms affords no sort of evidence (even if it had been agreed to be considered as such, as was the case in *Neal* v. *Delaware*, 103 U. S. 370) that the affiant had any personal knowledge touching any of the facts relied upon as grounds for upholding the motion. It was made 'as to the affiant's knowledge and belief,' and yet the affiant may have no personal knowledge whatever as to any of the material facts. The affidavit was not evidence to support the motion. In *Neal* v. *Delaware*, *supra*, the verified petition for removal was treated by the court as evidence for the motion to quash, because of the agreement of the Attorney General of Delaware with the prisoner's counsel to that effect, as the same was construed by the majority of the court."

Mr. Cornelius J. Jones for plaintiff in error. *Mr. Emanuel M. Hewlett* was with him on his brief.

Mr. Frank Johnston, attorney general of Mississippi, submitted on his brief.

Opinion of the Court.

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

1. For the reasons stated in the opinion of the court in *Gibson* v. *Mississippi*, *ante*, 565, just decided, it must be adjudged that the petition of the accused for the removal of the prosecution into the Circuit Court of the United States was properly denied. Neither the constitution nor the laws of Mississippi, by their language reasonably interpreted, or as interpreted by the highest court of the State, show that the accused was denied or could not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, "any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the United States." Rev. Stat. § 641.

2. No evidence was offered in support of the motion by the accused to quash the indictment, unless the facts set out in the written motion to quash, verified "to the best of his knowledge and belief," can be regarded as evidence in support of the motion. We are of opinion that it could not properly be so regarded. The case differs from *Neal* v. *Delaware*, 103 U. S. 370, 394, 396. In that case, upon the hearing of the motion to quash the indictment, based upon grounds similar to those here presented, it was agreed between the State, by its attorney general, and the prisoner, by his counsel, with the assent of the court, that the statements and allegations in the petition for removal should be taken and treated, and given the same force and effect, in the consideration and decision of the motions, "as if said statements and allegations were made and verified by the defendant in a separate and distinct affidavit." We said in that case: "The only object which the prisoner's counsel could have had in filing the affidavit was to establish the grounds upon which the motions to quash were rested. It was in the discretion of the court to hear the motions upon affidavit. No counter affidavits were filed in behalf of the prosecution." Again: "We are of opinion that the motions to quash, sustained by the affidavit

of the accused — which appears to have been filed in support of the motions, without objection as to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned — should have been sustained. If, under the practice which obtains in the courts of the State, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the State could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its attorney general. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit 'in the consideration and decision' of the motions, implied, as we think, that the State was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice." The case before us is presented, so far as the present question is concerned, in a different aspect. The facts stated in the written motion to quash, although that motion was verified by the affidavit of the accused, could not be used as evidence to establish those facts, except with the consent of the state prosecutor or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced or offered to be introduced by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was, therefore, unsupported by any competent evidence; consequently, it cannot be held to have been erroneously denied.

3. It is assigned for error that the trial court refused to postpone the trial, to quash the weekly venire of jurors and the panel of jurors, or to sustain the exception of the accused to the qualifications of jurors tendered to him. None of these motions are so presented by the record as to raise any question as to the deprivation of rights secured to the accused by the Constitution or laws of the United States.

4. The overruling of the motion for a new trial is not a

matter which this court can reëxamine upon writ of error — the granting or refusing of such a motion being a matter within the discretion of the trial court.

5. In view of the order of the trial court directing the motion for a new trial and a motion to arrest the judgment to be embraced in one motion, we have, in our consideration of the case, treated the motion for new trial as having been intended to be also one to arrest the judgment. We are of opinion, for the reasons stated in *Gibson* v. *Mississippi*, as well as in this opinion, that no error of law was committed by the trial court in declining to arrest the judgment. As the application to remove the cause into the Circuit Court of the United States was properly overruled, and as the motion to quash the indictment was, for the reasons above stated, also properly overruled, the order refusing to arrest the judgment cannot be held to be erroneous upon any ground of which this court can take cognizance in its review of the proceedings of the Supreme Court of Mississippi.

It results that the judgment must be

Affirmed.

FEE *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 165. Submitted March 20, 1896. — Decided April 27, 1896.

The reservations granted by provision "First" in § 1 of the act of December 19, 1854, c. 7, 10 Stat. 598, "to provide for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them," etc., are limited to the territory ceded by the Indians, both as applied to Indians of pure blood, and to Indians of mixed blood.

The scrip certificates, under which the defendant in error claims, were intended to be located only by half-breeds to whom they were issued, and patents were to be issued only to the persons named in those certificates; and, consequently, the right to alienate the lands was not given until after the issue of the patents.

The act of June 8, 1872, c. 357, 17 Stat. 340, "to perfect certain land titles," etc., was intended to permit a purchaser of such scrip certificates, who through them had acquired an invalid title to public land, to perfect that title by compliance with the terms of that statute.

Statement of the Case.

THIS was an action of ejectment, originally brought in the district court of Arapahoe county, Colorado, by Jane C. Brown, against the plaintiff in error, Fee, to recover a tract of land in Pueblo county, to which plaintiff claimed title under a patent issued December 1, 1876, to Henry C. Brown. This land had been located by authority of certain scrip, issued to the Chippewa Indians of Lake Superior, under a treaty made with them September 30, 1854, 10 Stat. 1109, by which the Chippewas ceded to the United States certain lands, theretofore owned by them, and in return the United States agreed to issue patents for eighty acres of land to each head of a family, or single person over 21 years of age, of mixed bloods. In executing this provision, the beneficiaries were identified by the issuance of certificates called "Chippewa half-breed scrip."

One Mary Dauphinais, having received a scrip certificate as a beneficiary under such treaty, Henry C. Brown, the patentee, from whom the plaintiff claimed title, in February, 1867, purchased the scrip so issued to Mary Dauphinais, from one Daniel Witter, who, acting as attorney in fact of Dauphinais, located the land in controversy. A patent was issued therefor in December, 1868, to Mary Dauphinais, the beneficiary. Under a second power of attorney Witter, as her attorney in fact, immediately conveyed the patent title to Brown, who subsequently conveyed to Jane C. Brown through one Frank Owers, an intermediary.

In view of certain abuses and frauds which appear to have sprung up in relation to the issue, sale and dealings in this scrip, as well as some conflicting rulings of the land department, as to whether such scrip could be used to locate lands outside of the treaty cession, Congress, on June 8, 1872, passed an act authorizing the Secretary of the Interior to permit the purchase of such lands as might have been located with claims arising under the Chippewa treaty in question, at a price not less than $1.25 per acre, and also permitting owners and holders of such claims in good faith to complete their entries, and to perfect their titles under such claims, provided the claims were held by innocent parties in good faith, etc.

Argument for Plaintiff in Error.

In May, 1875, Brown having been informed by certain judicial rulings of the invalidity of his title, by reason of the scrip having been located outside of the ceded territory, made application for the issue of a new patent, under the provisions of the act of June 8, 1872; surrendered and relinquished to the United States all his rights under the Dauphinais patent, and, after a contest with one Smith, was adjudged by the Secretary of the Interior to be entitled to a new patent, which was accordingly issued to him December 1, 1876. This patent Fee attacked as void upon its face, and as having been issued without authority of law.

Defendant Fee settled upon the land in question on September 12, 1888, and upon the same date made application to the register of the land office at Pueblo, Colorado, to enter the land as a homestead, under the laws of the United States, and tendered to the receiver of the land office his legal fees and commissions due upon making such application. This application is now, and was at the time this action was commenced, undetermined by the officers of the United States having control of the sale and disposition of the public lands. Fee has resided on the land ever since his settlement there, September 12, 1888, and was residing thereon when issue was joined in this action.

An order having been entered changing the venue to the county of Pueblo, defendant answered denying the allegations of the complaint, alleging the invalidity of plaintiff's title, and setting up his own title under the homestead entry.

The court having sustained a demurrer to this answer, the parties entered into a stipulation, pursuant to which a judgment was entered in favor of the plaintiff for a recovery of the possession of the premises, and for a writ of possession. Defendant thereupon appealed the case to the Supreme Court of the State, which affirmed the judgment of the court below. 17 Colorado, 510. Whereupon defendant Fee sued out a writ of error from this court.

Mr. J. M. Vale, *Mr. C. C. Clements* and *Mr. F. Betts* for plaintiff in error.

Argument for Plaintiff in Error.

The act of June 8, 1872, does not extend the operation of the treaty and the act of December 19, 1854, as to the location of land by Chippewas of mixed blood. It expressly limits the Secretary of the Interior to "permitting the purchase of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty," and the history of the times shows that Congress then knew of many claims which had been located within the ceded territory, presumably in good faith. And as no claim could legally arise under this clause of the treaty which would warrant the location of land beyond the cession, clearly the Secretary of the Interior acquired no jurisdiction from the act of 1872 to sell and issue a patent for lands lying outside that territory.

It cannot be disputed that without the powers conferred upon the officers of the Land Department by the act of 1872 no jurisdiction existed to sell the land in controversy to Brown and issue a patent therefor; but the difficulty is only intensified by looking at the act of 1872 in connection with the patent. That act limits the jurisdiction of the Secretary, by its express terms, to the sale of land located with claims arising under the seventh clause of the second article of the treaty, which clearly could only arise within the ceded territory; the patent to Brown is for lands outside of the ceded territory, and no jurisdiction attached to the officers of the Land Department under the act of 1872 to issue it, and it is therefore void upon its face, because no provision has ever been made by law for the sale of the land in the manner it purports to have been sold to Brown. *Polk's Lessee* v. *Wendell*, 9 Cranch, 87; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 641; *Wright* v. *Roseberry*, 121 U. S. 485, 519; *Patterson* v. *Winn*, 11 Wheat. 380.

The act of 1872, so far as it relates to public lands, is *in pari materia* with the act of December 19, 1854, the treaty of 1854, in its seventh clause of the second article thereof, and the act of April 24, 1820. It does not repeal by its terms either of the prior acts, or modify the terms of the treaty. The cited acts and the clause of the treaty must be so con-

strued as to give force and effect to all and every part thereof. This cannot be done by extending the operations of the act of 1872, in its remedial effects, to lands lying beyond the ceded territory.

Mr. James H. Brown for defendant in error.

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

This case turns upon the proper interpretation of the act of Congress of June 8, 1872, c. 357, 17 Stat. 340, subsequently incorporated into the Revised Statutes as section 2368, authorizing the Secretary of the Interior to permit the purchase of such lands as may have been located with Chippewa half-breed scrip, provided that such locations have been made in good faith, and by innocent holders of the same. Did this authorize the purchase of land which had been located outside of the territory ceded to the United States by the treaty of September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi? 10 Stat. 1109.

To answer this question satisfactorily requires the consideration of the exact terms of the treaty and the proceedings thereunder. By the first article the Chippewas of Lake Superior ceded certain territory to the United States, theretofore owned by them in common with the Chippewas of the Mississippi, and the latter assented and agreed to such cession upon certain terms, unnecessary to be specified. By article 2, the United States agreed "to set apart and withhold from sale, for the use of the Chippewas of Lake Superior," certain tracts of land described in six paragraphs, all of which tracts lie in the neighborhood of Lake Superior and within the States of Michigan, Wisconsin and Minnesota. The seventh paragraph of article 2 provides that "each head of a family or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be

selected by them under the direction of the President, and which shall be secured to them by patent in the usual form." Article 3 provides that the reserved tracts shall be surveyed; that the President shall make assignments to the parties entitled to the lands in severalty, and issue patents as fast as the occupants become capable of transacting their own affairs, with such restrictions upon the power of alienation as he may see fit to impose. The other articles of the treaty cut but a small figure in this case.

As a means of identifying the persons, who, under the seventh paragraph of the second article, were entitled to the lands, certificates were issued to such persons, which became known as Chippewa half-breed scrip. These certificates provided that any sale, transfer, mortgage, assignment or pledge thereof, or of any right accruing thereunder, would not be recognized as valid by the United States, and that patents for lands located by authority thereof should be issued directly to the person named in the certificate, and should in nowise enure to the benefit of any other person or persons whatsoever. This seems to be conceded in this case. Notwithstanding this provision, which was intended to secure to the holder of the certificates the land itself, they were made the subject of purchase and sale, through the device of powers of attorney signed by the person to whom the scrip was issued, authorizing some person, whose name was left blank, to locate the scrip upon lands to be selected by him, and to sell and convey the lands so selected. On the patent being issued to the person named in the certificate, the name of the attorney was filled in, and the deed executed by such person as the attorney-in-fact of the person named in the certificate, to the actual purchaser. Of course this scheme was in the nature of a fraud upon the act.

There was no legal restriction against the conveyance by the half-breed of the patent title when once acquired; and no provision upon the face of the scrip limiting its purchasing power to any particular portion of the unappropriated public lands of the government. In fact, it appears from the time it first began to be issued, that it was expressly recognized and

received by officers of the land office as subject to be located anywhere upon the public domain, both within and without the land ceded to the government by the treaty provisions.

The abuses connected with the transfer of this scrip in the manner above stated finally became so flagrant, that the attention of Congress was called to the subject, and on December 20, 1871, a resolution was adopted calling, among other things, for the following information:

"1. The number of pieces of scrip of 80 acres each, and the names of the parties to whom issued. . . .

"4. A copy of said scrip, the manner of locating the same, whether by the parties to whom it was issued, or by others; whether located upon *lands ceded by said tribe*, and all decisions of the Department of the Interior in relation to the issuance and location of said scrip."

There appears to have been a report made in pursuance of this resolution on March 12, 1872; and on June 8, 1872, an act was passed in the following terms:

"The Secretary of the Interior be, and he is hereby, authorized to permit the purchase, with cash or military bounty land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September thirtieth, eighteen hundred and fifty-four, at such price per acre as the Secretary of the Interior shall deem equitable and proper; but not at a less price than one dollar and twenty-five cents per acre; and that owners and holders of such claims in good faith be also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned: *Provided*, That it shall be shown to the satisfaction of the Secretary of the Interior that such claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith, and by innocent holders of the same." Act of June 8, 1872, c. 357, 17 Stat. 340.

In pursuance of this act, Brown applied for and obtained, upon the payment of $2.50 per acre, a new patent for the lands which had been located by Witter in Colorado.

We think it was probably intended that the power to locate this scrip should be confined to the territory ceded to the United States by the first article, though perhaps not to the tracts named in the first six paragraphs of the second article of the treaty of September 30, 1854. By this second article the United States agreed to set apart and withhold from sale for the use of the Chippewas of Lake Superior certain tracts of land, all of which were within the States of Michigan, Wisconsin and Minnesota, and in the same article, paragraph 7, provided that each head of a family or single person over 21 years of age, of mixed blood, should be entitled to eighty acres of land, to be selected by them under the direction of the President. By article 3 the boundaries of the tracts were to be determined by actual survey, and the President was authorized to assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use, and as fast as the occupants became capable of transacting their own affairs, to issue patents therefor to such occupants, with such restrictions upon the power of alienation as he might see fit to impose. There is some reason for saying that this article was intended to apply to Indians of pure, as distinguished from those of mixed blood. By subsequent articles the United States agreed to pay for the land ceded an annuity, and also a certain sum in agricultural implements, household furniture and cooking utensils, and also to furnish guns, rifles, beaver traps, ammunition and ready made clothing, to be distributed among the young men of the nation, as well as to furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments. Article 7 provided against the manufacture, sale or use of spirituous liquors on any of the lands therein set apart for the residence of the Indians, and the sale of the same was prohibited in the territory thereby ceded until otherwise ordered by the President.

The whole scope and purpose of this treaty was evidently to induce the Chippewas to relinquish their claims to a large amount of territory theretofore owned by them, and to re-

ceive in lieu thereof a certain annuity, and also six tracts of land within the States above named, which were to be allotted, at the discretion of the President, in severalty, and in parcels of eighty acres each to heads of families and single persons over 21 years of age. If there were any doubt upon the question, arising from article 2, the subsequent articles indicate very clearly that the reserved tracts were intended to be for the actual residence of the Indians and were to be within the States above named.

Beyond this, however, Congress, on December 19, 1854, passed an act, 10 Stat. 598, c. 7, which, though subsequent in date to the treaty, must, we think, be read in connection with it, and be held to operate as a ratification of it, by which the President was authorized to enter into negotiations with the Chippewa Indians for the extinguishment of their title to all the lands owned by them in Minnesota and Wisconsin, "which treaties shall contain the following provisions and such others as may be requisite and proper to carry the same into effect:"

"First. Granting to each head of a family, in fee simple, a reservation of eighty acres of land, *to be selected in the territory ceded*, so soon as surveys shall be completed, by those entitled, which said reservations shall be patented by the President of the United States, and the patent therefor shall expressly declare that the said lands shall not be alienated or leased by the reservees," etc.

If there were doubts latent in the language of the treaty itself, it is clear from this act that it was the intention of Congress to limit the reservations to the territory ceded, both as applied to Indians of pure and mixed blood.

This was the distinct ruling of the Supreme Court of California in *Parker* v. *Duff*, 47 California, 554, 566, in which an attempt had been made to locate certain of this scrip in California, and we see no escape from that conclusion. It is also entirely clear that this scrip was intended to be located by the half-breeds themselves; that the patents were to be issued to the persons named therein, and that the right to alienate the lands was never intended to be given until the patents had been issued. It follows from this that the loca-

tion of these lands in the State of Colorado gave no title to Brown, and that the patent issued thereon was void and of no effect.

The validity of Brown's title must turn, then, upon the patent issued to him on June 8, 1872. The argument of the plaintiff in error in this connection is that, under the terms of this act, the Secretary of the Interior could only permit the purchase of such lands as may have been located "with claims arising under the seventh clause of the second article of the treaty;" that the facts show that Congress then knew of the existence of more than 450 claims arising under this clause of the treaty, which had been located within the ceded territory, presumably in good faith, by innocent holders thereof; that, as no claim could legally arise under this clause which would warrant the location of lands beyond the cession, the Secretary of the Interior acquired no jurisdiction from the act of 1872 to sell or issue a patent for lands lying outside that territory.

We are not, however, disposed to put so narrow an interpretation upon this act. While it is true that Congress may have been apprised of the fact that a large number of claims had been located within the ceded territory, it is also apparent from the resolution of December 20, 1871, that it had also been informed of the location of half-breed scrip upon lands which had not been ceded by the Chippewas, and that there had been certain decisions of the land department to the effect that this might lawfully be done. The evil to be remedied was the one relating to these illegal locations, and, if consistent with its language, the act ought to receive a construction broad enough to effectuate this remedy. While Congress was not disposed to validate these locations as if they had been lawfully made, it did recognize them as giving to the locator a primary right of purchase, at a price not less than the minimum price of public lands, namely, $1.25 per acre.

Upon the theory of the plaintiff in error, that the act applied only to such locations as had been made in pursuance of the treaty within the lands ceded, it is difficult to see any substantial reason for this legislation, since, if the lands had been

already properly located, why compel the settlers to pay for them again, or why speak of them as holders of such claims in good faith, who should be permitted to complete their entries and perfect their titles? Or why provide that it should be shown that such claims were held by innocent parties in good faith, and that the locations made under such claims had been made in good faith by innocent holders? Strictly speaking, no person who had located this scrip, except the half-breeds themselves, could be said to be purchasers in good faith, since they were apprised by the treaty and the act of December 19, 1854, that the scrip could only be located within the ceded territory by the beneficiaries therein named, and that such scrip was incapable of alienation.

Congress, however, was evidently moved to use these words by the fact that this scrip had been misused by designing parties; had become an ordinary subject of barter and sale; had been located with the assent of the land department upon lands in other States, by unlearned men, who had acted themselves in perfect good faith, supposing that they had a legal right to do as they had done, and that to compel them to relinquish their holdings would be a great hardship to them and no advantage to the government, provided they were required to reimburse the government by paying for such holdings at the ordinary price at which public lands were sold. The words "located with claims arising under the seventh clause of the second article of the treaty," may doubtless be interpreted as referring to claims which could only arise within the ceded territory. But we are satisfied that it was not the intention of Congress to give it that narrow construction, and that it adopted a course which, partially at least, protected the holder of the land and at the same time insured to the government a proper compensation for them. It was doubtless contemplated that these lands might in the meantime have largely risen in value, or that persons obtaining knowledge of the invalidity of the original location may have proceeded to preëmpt them, to locate them under the homestead laws, or otherwise with a design of obtaining for a nominal consideration the benefit of their rise in value.

Statement of the Case.

We are, therefore, of opinion that Brown obtained a good title to the land in question by the patent of December 1, 1876, and the judgment of the Supreme Court of Colorado is accordingly

Affirmed.

WILSON *v.* UNITED STATES.

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

No. 884. Submitted April 13, 1896. — Decided April 27, 1896.

Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight, unless explained by the circumstances, or accounted for in some way consistent with innocence.

The existence of blood stains at or near a place where violence has been inflicted is relevant and admissible in evidence, and, if not satisfactorily explained, may be regarded by the jury as a circumstance in determining whether or not a murder has been committed.

The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and such weight is to be given to it as in their judgment it ought to have.

In the trial of a person accused of murder, the picture of the murdered man is admissible in evidence, on the question of identity, if for no other reason.

The true test of the admissibility in evidence of the confession of a person on trial for the commission of a crime is that it was made freely, voluntarily and without compulsion or inducement, and this rule applies to preliminary examinations before a magistrate of persons accused of crime.

When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject it if, upon the whole evidence, they are satisfied that it was not the voluntary act of the defendant.

Wilson was convicted of the murder of one Thatch, both being white men and not Indians, on May 15, 1895, at the Creek Nation in the Indian country, and sentenced to be

hanged. There was evidence tending to show that Thatch's body was found in a creek near where Wilson and Thatch had camped together two weeks before, in a state of decomposition indicating that deceased had been dead for that length of time. Wilson was arrested the day the body was discovered, and had in his possession five horses and a colt, a wagon, gun, bed clothing and other property that had belonged to Thatch. When Thatch left home he had no money except some thirty dollars in cash and a certificate of deposit for one hundred and forty dollars, issued by the bank of Springdale, Arkansas. Wilson, when taken, had about twenty-eight dollars, and the certificate of deposit was found among Thatch's things in a trunk claimed by Wilson. All of Thatch's clothing was in the possession of Wilson, except a pair of overalls, and the body had on a pair of overalls similar to Thatch's. The bed clothing was bloody and the blood had passed through the bed, the bloody parts being a foot or more in diameter; a pillow case belonging to Thatch was sewed over the blood spots on one side of the bed tick and a flour sack sewed over those on the other; charred pieces of cloth and some buttons were found at the camping place, and some blood in the ground under where there had been fire.

Wilson claimed that Thatch was his uncle, but Thatch's relatives knew of no such relationship; also, that he had known Thatch for several years, but the evidence tended to show that Thatch had never known Wilson before he was brought to his camp by a boy who had started with Thatch from Springdale, Arkansas, but concluded to return, and was requested to find some one else to go in his place.

On the day before that on which he was alleged to have been killed, Thatch and Wilson were seen camping at dark near the creek, and that night about ten o'clock two gun shots were heard in that direction, but the body was so badly decomposed that it could not be told whether any bullets had entered it. The head was crushed with some blunt instrument, and there was testimony that an axe found in Wilson's possession had blood on it. Wilson was seen at the camp the next morning at sunrise, but Thatch was not there. Wilson

said that Thatch had left about two weeks before the discovery of the body, and that he had heard nothing from him since; told contradictory stories as to where Thatch had gone; asserted that Thatch owed him and the indebtedness was liquidated by his purchasing the wagon and two of the horses; that he bought the clothing after the time he said Thatch had left; that the pillow case was sewed on the bed tick when he bought it; that Thatch rode away on horseback, though Thatch's saddle was there, the only pair of shoes that Thatch had was there, the plates had been taken from the heels of the shoes, and similar plates were found in Wilson's possession. The body had on no shoes, hat or coat, only an undershirt, overalls and a pair of socks. Tracks resembling Wilson's near where the body was found were testified to. Wilson admitted that he had been there, and then said that it was lower down the creek. One witness, after Wilson was put in jail, assured him that he would go and look for Thatch if necessary, and Wilson told him not to go, as it was not necessary. His explanations of the appearances against him, on the stand and otherwise, were inadequate and improbable, and evidence in much detail showed that many of his statements were false.

Wilson called witnesses to show that the blood found on the bed clothes had gotten there from the blood of a prairie chicken which they had killed, and also from the bleeding of sick horses, and that Thatch had been seen in Oklahoma Territory several times after the body was found.

Wilson testified, among other things, as set forth in the bill of exceptions, "that after he was arrested he was taken to Keokuk Falls, where a great crowd of people gathered around him and threatened to mob him, and he was taken before J. B. George, who proceeded to examine him in the presence of the crowd without giving him the benefit of counsel, or warning him of his right of being represented by counsel, or in any way informing him as to his right to be thus represented."

On behalf of the United States a written statement purporting to have been made by Wilson before J. B. George was offered in evidence and objected to "on the ground that it was not voluntary;" whereupon J. B. George was examined on be-

half of the government and testified that he was a United States commissioner; that Wilson was brought to his office at night; there was a crowd at the door and talk of mobbing; and he directed him to be turned over to the city marshal to be taken to jail; that he examined him the next day, and that the statement was his statement as made and written down at the time; that he read the charges to Wilson and went on and examined him, and he answered the questions; that he was not represented by any attorney; that witness had the questions and answers taken down by others than himself, but did not read them over to Wilson as he remembered; it was just Wilson's statement of the case; that Wilson voluntarily made the statement — that is, he (George) asked the questions and Wilson went on and answered them. He did not tell Wilson that he had a right to answer or not as he chose, or advise him as to his rights, or tell him he had the right to be represented by counsel; that there were a dozen or more present; that there had been a talk of mobbing before Wilson was interrogated. The witness said that he told Wilson that the bed clothes and the axe showed his guilt, but that was not before he made the statement but at the winding up; that other witnesses were examined, but not in the presence of Wilson. George was asked whether "the statement was made freely and voluntarily," and answered "Yes, sir. I stated the charge to him and went on and asked him these questions and he answered them, and that is what was done. He went on and made these replies to my questions." One Edmons testified that he wrote down some of the questions and answers and did it correctly. The statement was then again offered in evidence, defendant objected, his objection was overruled, the statement admitted, and he excepted. This statement was throughout a denial of guilt, but contained answers to questions which were made the basis for contradiction on the trial.

The district attorney offered in evidence a picture purporting to be that of Thatch. Defendant objected to its introduction, his objection was overruled, and he excepted.

The court charged the jury, among other things, as follows:

(1) "The law says that if a man has been killed, and killed

in such a way as to show that it was done murderously under the law I have given you defining the crime of murder, then you are to look to see whether the party accused of the killing was found in possession of any of the property of the man killed. If so, that is the foundation for a presumption. It is not conclusive in the beginning, but it is a presumption which you are to look at just as you would look at it as reasonable men outside of the jury box. The party so found in possession of such property, recently after the crime, is required to account for it, to show that as far as he was concerned that possession was innocent and was honest. If it is accounted for in that way then it ceases to be the foundation for a presumption. If it is not accounted for in that satisfactory, straightforward and truthful way that would stamp it as an honest accounting, then it is the foundation for a presumption of guilt against the defendant in this case, just upon the same principle if a certain man is charged with robbery or larceny, and is found in the possession of the property stolen or robbed recently after the crime, he is called upon to explain that possession. If his explanation of it is truthful; if it is consistent; if it is apparently honest; if it is not contradictory; if it is the same at all times; if it has the indicia of truth connected with it, that may cause to pass out of the case the consideration of the presumption arising from the possession of the property, but if it is not explained in that way it becomes the foundation of a presumption against the party who is thus found in possession of that property.

(2) "Now, that is not the only foundation for a presumption, but you take into consideration the very appearance of this property, whether there were blood stains upon it, indicating that there was blood of some kind there; and, if so, whether that fact has been satisfactorily explained by the defendant in this case. If not, whether, in your judgment, there is that in these numerous blood stains upon these clothes, bed clothing, and found upon the straw in that bed, whether or not that fact, if it has not been satisfactorily explained, is a fact upon which you may base a presumption that there was an act of deadly violence perpetrated while the party was

upon these bed clothes, or while he was connected with them in such a way as that the blood was the blood of the murdered man or the missing man.

(3) "Now, another foundation of a presumption is the fact of his false statements. . . . If a man makes a statement to you today about a transaction, which is one thing, and details to you another one tomorrow, which is something else, and another again, which is something else, you necessarily call upon him to explain why he has made these contradictory statements, because you know they are not the attributes of truth; you know they do not belong to the truth, because the highest attribute which it possesses is harmony, is consistency, and it possesses these attributes at all times. . . . Therefore, if statements in this case before you, which are false, were made by the defendant or upon his side of the case; if they were made by his instigation, and they were knowingly instigated by him, you have a right to take into consideration the falsehoods of the defendant, first to see whether they are falsehoods. Then you are to look at them to see whether he satisfactorily explains to you the making of these false statements, and if he does not they are the foundation of a presumption against him for the reasons I have given you, because if they are not in harmony with nature, if they are not in harmony with truth, if they do not speak the voice of truth, then they speak the voice of falsehood; they speak the voice of fraud; they speak the voice of crime, for they are not in harmony with that great law of truth which in all of its parts is consistent and harmonious. Then look at these statements and view them not alone, but in connection with the other circumstances in the case — all the other circumstances which have gone before you as evidence — to see whether or not the conduct which is urged by the government as accusatory, as inculpatory, has been satisfactorily explained by the defendant upon the theory of his innocence. If so, then that conduct passes away as proving facts in the case. It is no longer the foundation as proving facts for a presumption; but if these explanations are not satisfactory, if they are not in harmony with the truth, the presumption must remain in the

case, and you have a right to draw inferences from these circumstances I have named.

* * * * *

(4) "The defendant goes upon the stand in this case, and you are to view his evidence in the light of his relation to the case, in the way I have named, and in addition thereto you are to look at all the other facts and circumstances in the case as bearing upon his evidence to see whether it contradicts what he says, and therefore weakens it; whether it is so as to be contradictory and inconsistent from statements made by him at other times; whether it is shown to lack these elements of truthfulness known as rationality, known as consistency, known as naturalness.

"Whether these things are all absent from it, or whether in your judgment it seems to be consistent and probable in itself when you come to look at the story and listen to it and weigh it by your judgment. If it has these attributes they are evidences of its being true. If it hasn't them, but has the opposite, this opposite condition made up of these circumstances is an evidence of its being false."

The defendant saved exceptions to each of the foregoing instructions numbered 1, 2, 3 and 4.

Errors were assigned to the admission of the picture; the admission of the statement; and the giving of instructions.

No appearance for plaintiff in error.

Mr. Solicitor General and *Mr. Assistant Attorney General Dickinson* for defendants in error submitted on their brief.

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

Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. 1 Greenl. Ev. (15th ed.) § 34. In *Rickman's case*, 2 East P. C.

1035, cited, it was held that on an indictment for arson, proof that property was in the house at the time it was burned, and was soon afterwards found in the possession of the prisoner, raises a probable presumption that he was present and concerned in the offence; and in *Rex* v. *Diggles*, (Wills Cir. Ev. *53,) that there is a like presumption in the case of murder accompanied by robbery. Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with its legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict. *Williams* v. *Commonwealth*, 29 Penn. St. 102; *Commonwealth* v. *McGorty*, 114 Mass. 299; *Sahlinger* v. *People*, 102 Illinois, 241; *State* v. *Raymond*, 46 Connecticut, 345; Whart. Cr. Ev. § 762.

The trial judge did not charge the jury that they should be controlled by the presumption arising from the fact of the possession of the property of one recently murdered, but that they might consider that there was a presumption and act upon it, unless it were rebutted by the evidence or the explanations of the accused.

Again, the existence of blood stains at or near a place where violence has been inflicted is always relevant and admissible in evidence. Wharton Crim. Ev. § 778; *Commonwealth* v. *Sturtivant*, 117 Mass. 122. The trial judge left it to the jury, if they found that there were blood stains and that the defendant had not satisfactorily explained them, to draw the inference, in the exercise of their judgment, that there was an act of deadly violence perpetrated against a person while upon or connected with the bed clothing. In other words, that the jury might regard blood stains not satisfactorily explained as a circumstance in determining whether or not a murder had been committed.

Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right not only to take such statements into consideration in connection with all the other circumstances of the case in

determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defence made or procured to be made as in themselves tending to show guilt. The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury. 1 Greenl. § 37; 3 Id. § 34; *Commonwealth* v. *Webster*, 5 Cush. 295.

The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have. *Hicks* v. *United States*, 150 U. S. 442, 452; *Allison* v. *United States*, 160 U. S. 203. The trial judge did not charge the jury to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses, and left it to them to give to his evidence, under all the circumstances affecting its credibility and weight, such consideration as they thought it entitled to receive.

We cannot reverse this judgment for error in either of the instructions complained of.

No ground of objection is specified to the admission of the picture of Thatch, nor is any particular ground disclosed by the record. It was, we presume, admitted on the question of identity, and as such was admissible in connection with the other evidence. *Udderzook* v. *Commonwealth*, 76 Penn. St. 340; *Cowley* v. *People*, 83 N. Y. 464; *Ruloff* v. *People*, 45 N. Y. 213; *Luke* v. *Calhoun County*, 52 Alabama, 115; *Franklin* v. *State*, 69 Georgia, 36. And see *Luco* v. *United States*, 23 How. 515.

This brings us to consider the exception taken to the admission of defendant's statement in evidence. The ground of the objection was that it was not voluntary. Although his answers to the questions did not constitute a confession of guilt, yet he thereby made disclosures which furnished the basis of attack, and whose admissibility may be properly passed on in the light of the rules applicable to confessions. Of course, all verbal admissions must be received with caution, though free,

deliberate and voluntary confessions of guilt are entitled to great weight. But they are inadmissible if made under any threat, promise, or encouragement of any hope or favor. 1 Greenl. Ev. §§ 214, 215, 219.

In *Hopt* v. *Utah*, 110 U. S. 574, 584, Mr. Justice Harlan, delivering the opinion of the court, remarked: "While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in *Regina* v. *Baldry*, 2 Den. Cr. Cas. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., 1 Leach, 263, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers.' Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession. 1 Greenleaf Ev. § 215; 1 Archbold Cr. Pl. 125; 1 Phillips Ev. 533–34; Starkie Ev. 73.

"But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self control essential to make his confession voluntary within the meaning of the law. Tested by these conditions, there seems to have been no reason to exclude the confession of the accused; for the existence of any such in-

ducements, threats or promises seems to have been negatived by the statement of the circumstances under which it was made."

In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.

The same rule that the confession must be voluntary is applied to cases where the accused has been examined before a magistrate, in the course of which examination the confession is made, as allowed and restricted by statute in England and in this country in many of the States. Gr. Ev. § 224. But it is held that there is a well defined distinction between an examination when the person testifies as a witness and when he is examined as a party accused; *People* v. *Mondon*, 103 N. Y. 211; *State* v. *Garvey*, 25 La. Ann. 191; and that where the accused is sworn, any confession he may make is deprived of its voluntary character, though there is a contrariety of opinion on this point. Gr. Ev. § 225; *State* v. *Gilman*, 51 Maine, 215; *Commonwealth* v. *Clark*, 130 Penn. St. 641; *People* v. *Kelley*, 47 California, 125. The fact that he is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. *Sparf* v. *United States*, 156 U. S. 51; *Pierce* v. *United States*, 160 U. S. 355; *State* v. *Gorham*, 67 Vermont, 365; *State* v. *Ingram*, 16 Kansas, 14. And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. Joy on Confessions, *45, *48, and cases cited.

In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him "without giving him the benefit

of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented." He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statement before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law.

When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. *Commonwealth* v. *Preece*, 140 Mass. 276; *People* v. *Howes*, 81 Michigan, 396; *Thomas* v. *State*, 84 Georgia, 613; *Hardy* v. *United States*, 3 Dist. Col. App. 35. The question here, however, is simply upon the admissibility of the statement; and we are not prepared to hold that there was error in its admission in view of its nature and the evidence of its voluntary character; the absence of any threat, compulsion or inducement; or assertion or indication of fear; or even of such influence as the administration of an oath has been supposed to exert.

Judgment affirmed.

CRAIN *v.* UNITED STATES.

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

No. 557. Submitted March 3, 1896. — Decided April 20, 1896.

One count in an indictment may refer to matter in a previous count so as to avoid unnecessary repetition; and if the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made.

A count in an indictment which charges that the defendant did certain specified things, and each of them, the doing of which and of each of which was prohibited by statute, and also that he caused the doing of such things and of each of them, is not defective so as to require that judgment upon it be arrested; and there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.

A record which sets forth an indictment against a person for the commission of an infamous crime; the appearance of the prosecuting attorney; the appearance of the accused in person and by his attorney; an order by the court that a jury come "to try the issue joined;" the selection of a named jury for the trial of the cause, who were "sworn to try the issue joined and a true verdict render;" the trial; the retirement of the jury; their verdict finding the prisoner guilty; and the judgment entered thereon in accordance therewith; does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, and the conviction must be set aside; as it is better that a prisoner should escape altogether than that a judgment of conviction of an infamous crime should be sustained, where the record does not clearly show that there was a valid trial.

THIS writ of error brought up for review a judgment in the District Court of the United States for the Western District of Arkansas, by which the plaintiff in error was sentenced to imprisonment in the House of Correction at Detroit, Michigan, at hard labor, for the term of three years.

The defendant was indicted under section 5421 of the Revised Statutes, which provides: "Every person who falsely makes, alters, forges or counterfeits; or causes or procures to be falsely made, altered, forged or counterfeited; or willingly

aids or assists in the false making, altering, forging or counterfeiting, any deed, power of attorney, order, certificate, receipt or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or who utters or publishes as true, or causes to be uttered or published as true, any such false, forged, altered or counterfeited deed, power of attorney, order, certificate, receipt or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited; or who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, shall be imprisoned at hard labor for a period of not less than one year nor more than ten years; or shall be imprisoned not more than five years and fined not more than one thousand dollars."

The indictment contained three counts. The first count set out in full a declaration purporting to have been made by one Spahiga, a resident of the Creek Nation, in the Indian Territory, for an invalid pension, to which was appended a certificate or statement purporting to have been made by two persons named Marrel and Fixico, to the effect that they were present and saw Spahiga sign his name or make his mark to said declaration, and that they had every reason to believe that he was the identical person that he represented himself to be. The declaration and accompanying certificate or statement purported to have been sworn to on the 4th day of August, 1892, before "A. W. Crain, U. S. Comm'r, Pension Notary."

The second count charged: "That herefore, to wit, on the 4th day of August, A.D. 1892, one Spahiga is alleged to have executed a certain declaration and affidavit; said declaration and affidavit are in words and figures as set out in the first count of this indictment, and said declaration and affidavit

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purporting to be executed before one A. W. Crain, United States commissioner in the Creek Nation, in the Indian Territory, the said Spahiga claiming in said declaration a pension from the United States as soldier of war of rebellion, who in said declaration was alleged to have enlisted under the name of Spahiga, at ——, on the 12th day of August, 1863, Company D, First Regiment, Indian Home Guards, Indian Territory; in the war of the rebellion; said declaration and affidavit, after being so made, executed and falsely counterfeited and forged by said Alex. W. Crain, was by said Alex. W. Crain forwarded, with intent to defraud the United States and to obtain certain moneys from the United States, to the office of the Commissioner of Pensions, in the Department of the Interior, at the city of Washington, in the District of Columbia, where the same was duly filed on the 12th day of August, 1892, as a claim against the Government of the United States for a pension by the said Spahiga, as soldier aforesaid, as aforesaid, and being so filed for approval by the said A. W. Crain, in the office aforesaid, by the Commissioner of Pensions, and the said affidavit and declaration being material on the question pending before said Commissioner of Pensions as to whether the said Spahiga was by the laws of the United States entitled to a pension. And the jurors aforesaid upon their oaths aforesaid do further present that on the 4th day of August, 1892, at the Creek Nation, Indian Territory, and within the Western District of Arkansas, at which date said declaration, affidavit and claims were prepared and made for filing in the office of the Commissioner of Pensions, as aforesaid, the same being an office of the United States, for the purpose aforesaid, one Alex. W. Crain did make, execute and forge, and cause to be made, executed and forged, a certain pretended and false affidavit, or the same may be called a certificate, the same being one and the same paper, and being in form and substance as hereinafter set out, which said forged, false and counterfeited affidavit or certificate was fraudulent, and was a part of the said declaration and affidavit above mentioned, and was forwarded, together with the said declaration, to the office of the Commissioner of Pensions aforesaid

for the purpose of defrauding the United States and of aiding and abetting the said Spahiga to obtain the approval of the said Commissioner of Pensions to his said claim for a pension as aforesaid, for the purpose of aiding the said Spahiga fraudulently to obtain money from the United States; which said pretended and false affidavit and certificate is in substance set out in the first count of this indictment. The said pretended affidavit and certificate and declaration were forged, false and fraudulent, and did contain fraudulent and fictitious statements, as the said A. W. Crain well knew, in this: That Pahose Marrell, Spahiga and Nokos Fixico did not sign said pretended affidavit and certificate, declaration and affidavit, as set forth in said false certificate and affidavit, and said Pahose Marrell, Spahiga and said Nokos Fixico were not sworn as to the truth of the matters and things set forth in said pretended declaration, affidavit and certificate, but in truth and fact the said A. W. Crain did knowingly and wilfully, feloniously and falsely make, counterfeit, forge and cause to be made, counterfeited and forged the names of Pahose Marrell, Spahiga and Nokos Fixico to and upon the said false and forged affidavit and certificate with intent to defraud the United States and to aid the said Spahiga in obtaining money fraudulently from the United States, and that the said A. W. Crain did not swear the said Pahose Marrell, said Spahiga, and the said Nokos Fixico as to the truth of the matters and things set forth in said declaration, affidavit and certificate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The third count charged "that A. W. Crain, on the 4th day of August, A.D. 1892, at the Creek Nation, in the Indian country, within the Western District of Arkansas aforesaid, unlawfully and feloniously did transmit to the office of the Commissioner of Pensions of the United States, the same being an office under the government of the United States, and for the purpose of defrauding the United States, the false and forged instrument of writing set out in the first count of this indictment, contrary," etc.

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The record of the trial in the trial court, omitting captions, was as follows:

"FRIDAY, *November* 7, 1890.

"On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come, the said defendant, in his own proper person and by his attorney, Wm. M. Mellette, Esq., and on motion of plaintiff, by its attorney, it is ordered by the court that a jury come to try the issue joined; whereupon the following were selected for the trial of this cause, to wit, [naming them] twelve good and lawful men of the district aforesaid, duly selected, empanelled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and, after hearing the evidence and argument of counsel and receiving the charge of the court, retired to consider of their verdict, and after a short time returned into court the following verdict, to wit:

"We, the jury, find the defendant, A. W. Crain, guilty as charged in the first, second, and third counts of the within indictment.

(Signed) "J. L. MCCONNELL, *Foreman.*"

"Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant committed to the custody of the marshal to await final sentence.

"MONDAY, *Nov.* 12, 1894.

"On this day comes the said defendant, by his attorney, and files his motion for arrest of judgment herein."

That motion was as follows:

"Now comes the defendant and moves the court to arrest the judgments on the verdict of the jury rendered on the three counts herein for the following reasons, and to set aside said verdicts:

"1st. Because the first count of the indictment upon which said verdict was rendered is defective in substance, in this, that it does not state in what particular the affidavit, declaration or certificate set forth therein is forged, and traverses the same.

"2d. Because said indictment does not state which declaration, certificate or affidavit therein set forth is false, there being two such documents.

"3d. Because the first count of said indictment does not allege that defendant knew that the document set forth therein was false.

"4th. Because said first count charges no act which is a crime or misdemeanor under the laws of the United States.

"5th. Because the second count in said indictment is double, containing and including three distinct offences therein, to wit: That the defendant forwarded to the Pension Department of the United States two separate and distinct affidavits or declarations or certificates for the purpose of defrauding the United States, and that the defendant did falsely make, counterfeit and forge and cause to be made, counterfeited and forged a certain pretended and false affidavit or certificate for the purpose of defrauding the United States and obtaining money from the United States.

"6th. Because the second count of said indictment does not set out with sufficient certainty the affidavit, certificate or declaration alleged therein to have been falsely made, forged and counterfeited and unlawfully forwarded to the office of the Commissioner of Pensions.

"7th. Because the said count is not complete within itself, but in an indefinite and uncertain manner refers to a document contained and set forth in the first count of said indictment.

"8th. Because the second count of said indictment is indefinite and misleading, in this, that it alleges that the names of Pahose Mahlah, Spahiga and Nocus Fixico were forged to one and the same document, as set out in the first count of the indictment, which is not a fact.

"9th. Because said second count does not state in what particular the affidavit or declaration or certificate set out therein is false and was forged.

"10th. Because the said second count does not in a legal manner charge any offence against the laws of the United States.

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"11th. Because the third count of said indictment is defective in substance, in this, that it does not state in what particular the affidavit or instrument of writing therein referred to as being set out in the first count of said indictment is false and forged.

"12th. Because the reference made in said third count to an instrument of writing set forth in the first count is indefinite and uncertain.

"13th. Because said third count does not state which instrument of writing set forth in the first count was unlawfully forwarded to the Pension Office.

"14th. Because the third count of said indictment does not state that the defendant knew that the instrument of writing alleged to have been unlawfully forwarded to the Pension Office was false and forged.

"15th. Because said third count charges no act which is a crime under the laws of the United States.

"Wherefore defendant prays that he be discharged."

On the 28th of December following the court sustained the motion for arrest of judgment as to the first and third counts, and overruled it as to the second count. The record then proceeds:

"On motion of Jas. F. Read, Esq., attorney for the western district of Arkansas, the said defendant, A. W. Crain, was brought to the bar of the court in custody of the marshal of said district, and, it being demanded of him what he has or can say why the sentence of the law upon the verdict of guilty (second count) heretofore returned against him by the jury in this cause on the 9th day of Nov., A.D. 1894, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said."

The court then sentenced the prisoner to imprisonment at hard labor for three years. On the 22d day of January, 1895, the following entries appear in the record.

"Now comes defendant, Alex. W. Crain, by his attorney, Wm. M. Mellette, Esq., and tenders this his bill of exceptions in the above entitled cause and asks that the same be signed and made a part of the record in this case, which is accordingly done.

"Also at the same time presents his assignment of errors, which is ordered filed.

"Also at the same time presents his petition asking for writ of error to the Supreme Court of the United States, which petition is ordered filed and writ of error ordered issued."

The exception was to the overruling the motion in arrest of judgment as to the second count of the indictment.

The assignments of error were: (1) That it was error to overrule the motion in arrest of judgment upon the conviction upon the second count of the indictment; (2) That it was error to render judgment against the defendant upon the verdict of guilty on that count, and to sentence him to imprisonment thereon.

In the brief for the plaintiff in error in this court it was said: "The plaintiff in error was not given an opportunity to plead to the indictment before being put upon his trial, never having been arraigned, as is fully shown by an inspection of the printed record. An arraignment is essential to a valid trial."

Mr. A. H. Garland and *Mr. R. C. Garland* for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

The transcript before the court must be taken to be as certified, namely, a true and complete copy of the record and proceedings in this case. It appears from the first order of record in the trial court that the defendant came "in his own person, and by his attorney;" that, on motion of the United States, by its attorney, it was "ordered by the court that a jury come to try the issue joined;" that a jury was selected, empanelled and sworn "to try the issue joined, and a true verdict render according to the law and the evidence;" and that the jury found the defendant "guilty as

charged in the first, second and third counts of the within indictment."

The defendant moved, upon written grounds filed, to arrest the judgment, and to set aside the verdict. The grounds of that motion all related to the sufficiency of the several counts of the indictment. The motion was overruled as to the second count, and sustained as to the first and third.

The defendant, on a subsequent day, tendered his bill of exceptions, embodying the motion in arrest of judgment, with the grounds therefor, and at the same time presented an assignment of errors.

The errors assigned by him in the court below, and made part of the record, were: 1. The overruling of the motion in arrest of judgment upon the conviction on the second count of the indictment. 2. The rendering of judgment upon the verdict of guilty on that count, and the sentence of imprisonment.

When the accused was brought into court, after verdict, it was demanded of him what he had or could say why the sentence of the law upon the verdict of guilty on the second count should not be pronounced against him. He replied that he had nothing further to say than he had theretofore said.

1. One of the objections made to the second count was that it was incomplete, and referred in an uncertain, indefinite manner to documents set forth in the first count. The reference to the declaration and affidavit set forth in the first count indicated the documents that were intended to be incorporated, by reference, into the second count; and this reference was not affected by the fact that the first count was defective, or by the fact that judgment upon that count was arrested. One count may refer to matter in a previous count so as to avoid unnecessary repetition; and if the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made. *Blitz* v. *United States*, 153 U. S. 308, 317.

2. It is said that the second count charges three separate, distinct felonies, and is, therefore, materially defective within the rule that two offences cannot be charged in the same count. 1 Archbold's Cr. Pr. & Pl. 95; 1 Bishop's Cr. Pro. § 432. Undoubtedly the section of the Revised Statutes, under which the indictment was framed, embraces several distinct acts, the doing of either of which is punishable. It is prohibited either to falsely make, alter, forge or counterfeit, or to cause to be falsely made, altered, forged or counterfeited, any deed, power of attorney, order, certificate, receipt or other writing for the purpose of obtaining, recovering or enabling any other person, either directly or indirectly, to obtain or receive, from the United States any sum of money. It is also prohibited to any person to transmit, or present at, or cause or procure to be transmitted to or presented at, any office or to any officer of the government, any deed, power of attorney, order, certificate, receipt or other writing, in support of or in relation to, any account or claim with the intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited. The second count charged, in substance, not only that the defendant did things and each of them, the doing of which or either of which the statute prohibited, but also that he caused the doing of such things and of each of them. Was the count, thus drawn, so defective as to require that judgment upon it be arrested?

In *Rex* v. *Hunt*, 2 Camp. 583, the question was whether a defendant might be found guilty upon a count in an information, charging him with having composed, printed and published a libel, if it were proved that he simply published but did not compose it. Lord Ellenborough held that it was enough to prove publication. "If an indictment," he said, "charges that the defendant did and caused to be done a particular act, it is enough to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." Chitty says: "If an indictment charge that the defendant did, and caused to be done, a particular act, it is enough to prove

either. Thus, under an indictment for forgery, stating that the defendant forged, and caused to be forged, it suffices to prove either." 1 Chitty's Cr. Law, 251; Starkie's Cr. Pl. 339.

In *Rasnick* v. *Commonwealth*, 2 Virginia Cases, 356, it was held that an indictment charging the defendant with the making of certain base coin, of causing and procuring such coin to be made, and of assisting in making it — three distinct offences set out in one count — was sufficient to authorize judgment upon a general verdict of guilty.

So, in *Commonwealth* v. *Tuck*, 20 Pick. 356, it was adjudged that a count in an indictment, alleging that the defendant broke and entered a shop with intent to commit larceny, and did there commit larceny, was not double. In that case, doubt was expressed whether the objection that an indictment, containing one count, and embracing more than one offence, could be taken advantage of in arrest or on error — the court observing that the better opinion was that it cannot, and that the appropriate remedy of the accused, in order to avoid the inconvenience and danger of having to meet several charges at the same time, is a motion to quash the indictment or to confine the prosecutor to some one of the charges. In another case, arising under a statute of Massachusetts making it an offence to set up *or* promote certain exhibitions, without license therefor, an indictment, containing a single count, and charging that the defendant set up *and* promoted a certain exhibition, was sustained against the objection of duplicity. *Commonwealth* v. *Twitchell*, 4 Cush. 74.

Under a statute of New Jersey, making it an offence to burn *or* cause to be burned any barn, not parcel of a dwelling house, an indictment, containing one count, charging that the defendant "burned *and* caused to be burned," etc., was sustained by the Supreme Court of New Jersey in *State* v. *Price*, 6 Halsted, pp. 203, 215. Among other authorities the court cited Starkie, who says: "It is the usual practice to allege offences cumulatively, both at common law and under the description contained in penal statutes; as that the defendant published and caused to be published a certain libel; that he forged and caused to be forged," etc. Starkie's Cr. Pl. 271.

So, under a statute of Pennsylvania, making it an offence for supervisors of highways to neglect to open *or* repair a public highway, it was held proper to charge in one count the neglect to open *and* repair such highway, the court observing that the offences of not opening and not repairing were of the same character and description, if indeed they were distinct. *Edge* v. *Commonwealth*, 7 Penn. St. 275, 278.

We are of opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the United States by means of fraudulent deeds, powers of attorney, orders, certificates, receipts or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years and a fine of not more than one thousand dollars. We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it.

3. But an objection is made to the proceedings in the court below which is of a serious character.

The record does not show that the accused was ever formally arraigned, or that he pleaded to the indictment, unless all that is to be inferred simply from the order, made at the beginning of the trial and as soon as the accused appeared, reciting that the jury were selected, empanelled and sworn "to try the issue joined," and from the statement in the bill of exceptions that the jury were "sworn and charged to try the

issues joined." What that issue was is not disclosed by the record.

The Government does not, in terms, claim that it was unnecessary for the defendant to plead to the indictment. But it assumes (although the record does not state such to be the fact) that the defendant pleaded not guilty, and contends that the omission to record that plea is only a clerical error which did not prejudice his substantial rights.

By section 1025 of the Revised Statutes of the United States it is declared that "no indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Is it a matter of form only whether the accused pleads or does not plead to an indictment for an infamous crime? If it be not a matter of form, then it would seem that, if convicted, the fact that the accused did plead should clearly appear from the record, and not be left to mere inference arising from a general recital that the jury was sworn to try and did try "the issue joined," without stating what was such issue. While, as said in *Pointer* v. *United States*, 151 U. S. 396, 419, all parts of the record are to be interpreted together, so that, if possible, effect be given to all, and a deficiency in one part of it supplied by what appears elsewhere, it was there held that "the record of a criminal case must state what will affirmatively show the offence, the steps without which the sentence cannot be good, and the sentence itself."

In capital or other infamous crimes an arraignment has always been regarded as a matter of substance. "The arraignment of the prisoner," Lord Coke said, "is to take order that he appear, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the indictment or other record." Co. Litt. 263*a*.

According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is, the

"demanding of him whether he be guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him *cul. prist*, and enters the prisoner's plea; then he demands how he will be tried, the common answer is, *by God and the country*, and thereupon the clerk enters *po. se*, and prays to God to send him a good deliverance." 2 Hale's Pl. Cr. 219. So, in Blackstone: "To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment." "After which [after the indictment is read to the accused] it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty." 4 Bl. Com. 322, 323 to 341. Chitty says: "The proper mode of stating the arraignment on the record is in this form, 'and being brought to the bar here in his own proper person, he is committed to the marshal,' etc. And being asked how he will acquit himself of the premises (in case of felony, and of 'the high treasons,' in case of treason) 'above laid to his charge, saith,' etc. If this statement be omitted, it seems the record will be erroneous." 1 Chitty's Cr. Law, *419.

The importance attached to the proper arraignment of one accused of felony, including the demand upon him to plead to the indictment, was illustrated in *Commonwealth* v. *Hardy*, 2 Mass. 303, 316. That was a case of murder. The accused was arraigned before one of the justices of the Supreme Judicial Court of Massachusetts. He pleaded not guilty, and put himself for trial upon the country. The plea was recorded, and counsel was assigned to him at his own request. On a subsequent day the prisoner was brought into court, three justices being present, and the clerk having been directed to arraign him, he informed the court, that the prisoner had been arraigned and had pleaded not guilty. The prisoner made no objection to proceeding, and he was convicted. The question arose whether the conviction was valid under a statute then in force which provided that "all indictments which may be found for any capital offence shall be heard, tried and determined exclusively in the courts which are to be holden pursuant to the second section hereof by

three or more of the said justices." Chief Justice Parsons said: "We are all of opinion that the power of hearing, trying and determining an indictment for a capital offence includes a power to arraign a prisoner, and to record his plea. It is therefore one of the powers which the court, when holden by one judge, is restrained from exercising. Consequently the arraignment of a prisoner, and his plea, were not *coram judice*." Again: "No possible inconvenience has resulted to the prisoner from the proceedings in this case. His plea, that was recorded, was the most favorable plea he could have pleaded; and when the jury was called, he made no objection to proceed in the trial of his issue, but assented by making his challenges. But an objection, founded in a want of jurisdiction, however small, and from which no inconvenience has arisen, is not, in capital cases, taken away, by an implied assent."

In *Grigg* v. *People*, 31 Michigan, 471, which was an indictment for larceny, the record did not show that the accused had been arraigned or that any plea was made or entered of record. Nevertheless, he was convicted and sentenced to the House of Correction. The court, speaking by Chief Justice Graves, (Justices Cooley and Campbell concurring,) said: "The attorney general, whilst admitting that an arraignment and plea were indispensable, as of course they were, submits to the court whether, in the absence of any express matter in the record as returned to show the contrary, it ought not to be intended that both proceedings were actually had. An arraignment and plea being steps imperatively required, the recital of them, if they were taken, was a necessary ingredient of the record." The judgment was reversed, that the accused might be lawfully arraigned or otherwise dealt with agreeably to law.

The Supreme Court of Wisconsin, in a case of misdemeanor, said: "The record in this case fails to show any issue which the jury was called upon to try. It is the business and the duty of the prosecuting officer of the government to move on the trial of criminal cases and to see that the proper issue be made up. It may be probable that the defendant in this case was perfectly aware of the offence with which he was charged,

It appears that he consented to go to trial. But a trial of what did he consent to? He was arrested and held in custody under the process of the court. It was his right to be informed, and it was the duty of the government to inform him of the accusation against him. This is done by arraignment and requiring the defendant to plead. It is true, this right of arraignment may, in minor offences, be waived, but a plea, an issue, is absolutely essential. Nor can we supply an issue corresponding to the verdict when the record is entirely silent on the subject." *Douglass* v. *State of Wisconsin*, 3 Wisconsin, 715, 716.

In *People* v. *Corbett*, 28 California, 328, 330, it appeared that the defendant, indicted for grand larceny, asked, when brought into court, a separate trial, which was granted; the jury was empanelled; witnesses were introduced by him; the case was argued by his counsel, and the jury, having been charged by the court, returned a verdict of guilty. The Supreme Court of California said: "If the defendant had at any time, anterior to the trial, plead not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured on the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury, nor did all of them combined, cure the want of a plea. There was not only no arraignment, but over and beyond that there was no issue for the jury to try. Not only did the defendant not plead, but inasmuch as the statute opportunity for pleading was never extended to him, he was never under any obligation to plead. A verdict in a criminal case where there has been neither arraignment nor plea, is a nullity, and no valid judgment can be rendered thereon. And so is a verdict rendered upon a plea put in by the attorney of a party indicted for a felonious assault with intent to rob."

In *State* v. *Hughes*, 1 Alabama, 655, 657, it was held to be error to swear the jury to pass upon the guilt or innocence of the accused before calling upon him to plead. The court said that until the prisoner was called on for his plea, it could not be known whether there would be an issue of fact for the jury,

or what the issue (if any) might be; that the prisoner, instead of submitting the question of his guilt, might have pleaded in abatement, or have presented to the court legal objections to the indictment; and that, though a formal arraignment of one charged with a criminal offence may not be indispensable to the regularity of a conviction, it was clear that the case must be put in a condition for trial before the jury is sworn.

In *Sartorious* v. *State*, 24 Mississippi, 602, 611, 612, which was an indictment for buying certain goods, knowing them to be stolen, the court said: "The record does not show that the prisoner was arraigned or that he pleaded to the indictment. In trials for minor offences a formal arraignment in practice is generally dispensed with. In such cases, where the defendant has pleaded to the indictment, an arraignment will be presumed. But a party, before he can be put upon his trial, must plead to the indictment. In civil proceedings it is error to submit a cause to the jury without an issue in fact having been made up by parties. In prosecutions for offences it must be equally erroneous to put a party upon his trial, unless he has taken issue upon the charge by pleading to the indictment."

In *Bowen* v. *State*, 108 Indiana, 411, 413, the court said: "Under the decisions of this court it can no longer be recognized as a subject of controversy that where the record in a criminal case fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous, to say the least."

In *Aylesworth* v. *People*, 65 Illinois, 301, 302, which was an indictment for a misdemeanor, the record failed to show that the accused was ever arraigned or pleaded. The Supreme Court of Illinois said: "The record should also show that the plea of not guilty was entered. Without it there is nothing for the jury to try. *Johnson* v. *People*, 22 Illinois, 314." The judgment was reversed. In the subsequent case of *Hoskins* v. *People*, 84 Illinois, 87, which was an indictment for larceny, the court said: "It appears from the record that defendant 'waived arraignment, copy of indictment, list of jurors and witnesses,' etc., but no plea of any kind was entered,

So far as this record discloses, no plea was entered before the accused was placed on trial. On the authority of the former decisions of this court, this was error. *Johnson* v. *People*, 22 Illinois, 314; *Yundt* v. *People*, 65 Illinois, 372. It was held in those cases that, without an issue formed, there could be nothing to try, and the party convicted could not properly be sentenced." So, in *Parkinson* v. *People*, 135 Illinois, 401, 403, which was an indictment for a felony: "There must be a plea; and if a trial is had, and no plea of any kind is interposed and shown by the record, it is reversible error."

In *State* v. *Ulger Chenier*, 32 La. Ann. 103, 104, which was an indictment for rape, the accused, after the trial commenced, was, by order of court, arraigned and his plea made. The trial then proceeded under the direction of the court. The Supreme Court of Louisiana said: "We cannot sanction such a departure from ancient landmarks in criminal procedure. The prisoner must be arraigned and must plead to the indictment before the case can be set down for trial or tried. It may be that, in this particular case, no prejudice was wrought to the accused. Still we think it unsafe to sanction such irregularities in capital cases."

In *Ray* v. *People*, 6 Colorado, 231, which was an indictment for forgery, it was assigned for error that the accused never was arraigned, and that he never pleaded or was required to plead to the indictment. Upon these points the record was silent. The statutes of Colorado required all criminal trials to be conducted according to the course of the common law, except where a different mode is pointed out. The court held that without an issue there was nothing to try, and if the record failed to show an arraignment and plea prior to trial the proceeding was a nullity.

In *State* v. *Vanhook*, 88 Missouri, 105, the Supreme Court of Missouri reversed a judgment of conviction, because the record did not show an arraignment and plea of not guilty, observing that the error was a fatal one, and that it was for the legislature, and not the court, to change the law on the subject.

To the same general effect are *State* v. *Wilson*, 22 Pac. Rep. (Kansas) 622, 626; *Jefferson* v. *State*, 7 S. W. Rep. (Texas)

244; *Hicks* v. *State*, 12 N. E. Rep. (Indiana) 522; *State* v. *Agee*, 68 Missouri, 264; *State* v. *Saunders*, 53 Missouri, 234.

The American treatises upon criminal law are to the same effect. Bishop says: "It is laid down, in a general way, that the arraignment and plea are a necessary part of the proceeding, without which there can be no valid trial and judgment. With the consent of the court the prisoner may waive the reading of the indictment, though without waiver it will be read, even where he has been furnished with a copy. And as the object of the arraignment is to obtain the plea, if the prisoner voluntarily makes it without, and it is accepted by the court, nothing more is required. But without plea there can be no valid trial. Nor will the proceeding be rendered good by the fact that the defendant went to trial voluntarily and without objection, knowing there was no plea. It must be before the jury are sworn; afterward the plea comes too late." 1 Bishop's Cr. Pro. § 733. "There can be no trial on the merits without a plea of not guilty." Ib. § 801. Wharton: "When brought to the bar in capital cases, and at strict practice in all cases whatever, the defendant is formally arraigned by the reading of the indictment and the calling on him for a plea. . . . The right of arraignment in a criminal trial may, in some cases, be waived, but a plea is always essential." 1 Amer. Cr. Law. § 530.

Without citing other authorities we think it may be stated to be the prevailing rule, in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced, and that unless this fact appears affirmatively from the record the judgment cannot be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury were sworn to "try the issue joined." The record should be a permanent memorial of what was the issue tried, and show whether the judgment, whereby it was proposed to take the life of the accused or to deprive him of his liberty, was in accordance with the law of

the land. In *Hopt* v. *Utah*, 110 U. S. 574, 579, this court, observing that the public has an interest in the life and liberty of an accused person, said: "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 views we have expressed would seem to be the necessary result of section 1032 of the Revised Statutes, which provides: "When any person indicted for any offence against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

This statute is based on the act of April 30, 1790, c. 9, § 30, 1 Stat. 112, 119; the act of March 3, 1825, c. 65, § 14, 4 Stat. 115, 118; and the act of March 3, 1835, c. 40, § 4, 4 Stat. 775, 777. It proceeds upon the established principle that before a criminal trial can be legally commenced there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. And the section above quoted requires the entry of the plea before the trial commences. Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea?

Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are

often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear, affirmatively, from the record that every step necessary to the validity of the sentence has been taken. That cannot be predicated of the record now before us. We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely. That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently, such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes, but involves the substantial rights of the accused.

It is true that the Constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous. The suggestion that the trial court would not have stated, in its order, that the jury was sworn to try and tried "the issue joined," unless the defendant pleaded, or was ordered to plead, to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime

where the record does not clearly show that there was a valid trial.

The judgment is reversed and the case is remanded that the defendant may be properly arraigned and plead to the indictment, and for further proceedings in conformity with law.

Mr. Justice Peckham, with whom concurred Mr. Justice Brewer and Mr. Justice White, dissenting.

I dissent from the judgment of the court in this case. It seems to me to proceed, not alone upon the merest technicality, but also upon an unwarranted presumption of error arising from the absence of a formal statement in the record showing that the defendant was duly arraigned and pleaded not guilty, although the inference that he was so arraigned and that he did thus plead seems to be plain from the facts which the record discloses. At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punishments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe, if not cruel, penalty, should be accorded great weight, and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defence against prosecutions which might otherwise be successful, and which at the same time ought not to succeed. These times have passed and the reasons for the strict and slavish adherence to mere form have passed with them.

In this case there cannot be a well founded doubt that the defendant was arraigned and pleaded not guilty. The presumption of that fact arises from a perusal of the record and it is, as it seems to me, conclusive. There is no presumption in favor of a defendant upon a criminal trial, excepting that of innocence. Error in the record is not presumed, but must be shown. A presumption that proper forms were omitted is not

to be made. There must be at least some evidence to show it. And yet, because the record fails to make a statement in terms that the defendant was thus arraigned and did so plead, this judgment is to be reversed, and that, too, without an allegation or even a pretence that the defendant has suffered any injury by reason of any alleged defect of the character in question. I think such a result most deplorable.

The record sets out the indictment. It then shows that the district attorney for the United States appeared in court and the defendant in his own person, and by his attorney, also appeared, and then, on motion by the district attorney, it is ordered by the court that a jury come to try the issue joined, and a jury is duly selected, empanelled and sworn to try the issue joined, and a true verdict to render according to the law and the evidence. The trial proceeds and the jury return a verdict that the defendant is guilty as charged in the first, second and third counts of the indictment. In the bill of exceptions, a document prepared by the defendant, it is also asserted that a jury was empanelled, sworn and charged to try the issues joined in the cause. Can there, from these facts, be a doubt founded upon any fair presumption that the defendant had been arraigned and had pleaded not guilty?

That the plea was of that nature must be presumed from the fact that the jury was summoned to try the issue, and that upon the trial of such issue the defendant was convicted on the first, second and third counts of the indictment. The evidence stated in the bill of exceptions is directed solely to the issue of guilt or innocence. It would be wholly immaterial upon any other issue, and it is also of such a nature as to show beyond all rational doubt that it was received upon the trial of the issue raised by a plea of not guilty. No other presumption than that an arraignment and a plea of not guilty had been interposed, could from such a record be reasonably indulged in. The record further shows a motion made in arrest of judgment and the grounds thereof, among which no mention is made of any alleged failure to arraign the defendant. The motion is sustained as to the first and third counts of the indictment, and overruled as to the second,

and the defendant excepts to the ruling. The record then continues, and states that on motion of the district attorney the defendant was brought to the bar of the court in custody of the marshal, and it being demanded of him what he has to say why sentence should not be pronounced upon the verdict, says he has nothing further to say than as already said. There is no statement in the record that the defendant, when thus called upon to speak, said one word or raised any objection as to any failure to arraign him or take his plea. If there had been such failure, was not that a time to speak, and would the defendant not then have spoken? Further, the defendant, after his sentence, obtains a writ of error from this court, and files an assignment of error, and yet no mention is therein made of any absence of an arraignment. Is it reasonable upon such a record to infer that no arraignment was had and no plea taken? Is it not, on the contrary, reasonable to infer that defendant was arraigned, and that he did plead not guilty? Yet, by this decision, it results that unless the record states in terms an arraignment and plea, a judgment must be reversed, although the presumption that there was an arraignment and plea arising from the contents of the record is both strong and uncontradicted.

In the face of such a presumption, the simple failure of a clerk to make an entry of the fact of arraignment and plea, although both presumably took place, is yet made a substantial ground for a reversal of a judgment which actually was rendered in due course of a criminal prosecution and by a court of competent jurisdiction. This ought not to be. There is but a mere suggestion at the end of the brief of the counsel for the plaintiff in error, filed in this court, where the objection is for the first time raised that defendant was not given an opportunity to plead to the indictment before being put upon his trial, never having been arraigned. For the *facts* counsel refer to the record, and that shows what has already been set forth. I think a clear and necessary inference arises from the contents of the record that the defendant was arraigned and pleaded.

Suppose, however, the defendant through mere inadver-

tence had not been formally arraigned at the bar, and had not in terms pleaded, but that he was placed on trial without objection on his part, and both sides treated the case as if he had been arraigned and pleaded not guilty, could it be plausibly contended that, nevertheless, a fatal error had been committed by a neglect of this form, and that a judgment of conviction must on that account be reversed? Is it possible that for the first time a defendant can in this court successfully raise this formal objection, and under circumstances showing a waiver of the rule, and yet obtain a reversal of the judgment on that ground alone? To my mind the mere statement of these questions furnishes their conclusive answer. Some cases may hold the necessity of a formal plea and that the conduct of a defendant in going to trial without any objection, and as if a plea of not guilty had been entered, did not waive the necessity of such a plea. Those cases are not based on principles which, in my judgment, ought now to be followed.

Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.

It is not necessary, however, in this case to place my judgment upon any doctrine of waiver, and I do not base my dissent upon that view of the case.

This record is, as I have said, far from showing that through mere inadvertence the defendant was not arraigned and did not plead. On the contrary, the necessary presumption arising from the facts appearing therein is that the

Counsel for Plaintiff in Error.

defendant was arraigned and did plead. To reverse the judgment upon the pure technicality (raised in this court for the first time) that the record does not *in terms* show an arraignment and a plea, where the presumption arising from the contents of the record is that both occurred, is to my mind a sacrifice of justice to the merest and most formal kind of an objection, founded upon an unjustifiable presumption of error and entirely at war with the facts as they occurred. If the statute cited in the opinion of the court, Rev. Stat. § 1025, do not apply to a case such as this, it is difficult to think of one for which its provisions could more properly be invoked.

The judgment should be

Affirmed.

I am authorized to state that MR. JUSTICE BREWER and MR. JUSTICE WHITE concur in this opinion.

WESTERN UNION TELEGRAPH COMPANY *v.* JAMES.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 206. Argued and submitted April 2, 1896. — Decided May 4, 1896.

The statute of the State of Georgia of October 22, 1887, requiring every telegraph company with a line of wires, wholly or partly within that State, to receive dispatches, and, on payment of the usual charges, to transmit and deliver them with due diligence, under a penalty of one hundred dollars, is a valid exercise of the power of the State in relation to messages by telegraph from points outside of and directed to some point within the State.

THE case is stated in the opinion.

Mr. John F. Dillon, (with whom were *Mr. George H. Fearons* and *Mr. Rush Taggart* on the brief,) for plaintiff in error.

No appearance for defendant in error.

Opinion of the Court.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought by the defendant in error against the telegraph company to recover the amount of a penalty which the plaintiff below alleged the company had incurred, and also to recover damages which the plaintiff alleged he had sustained by reason of the failure of the company to promptly deliver a telegraphic dispatch directed to plaintiff at his residence in Blakely, in the State of Georgia.

The statute under which the action was brought was passed by the legislature of the above named State, October 22, 1887, and reads as follows:

"An act to prescribe the duty of electric telegraph companies as to receiving and transmitting dispatches, to prescribe penalties for violations thereof, and for other purposes.

"SEC. 1. Be it enacted by the general assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, every electric telegraph company with a line of wires, wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment of the usual charges according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue: *Provided*, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit.

"SEC. 2. Be it further enacted, that such companies shall deliver all dispatches to the persons to whom the same are addressed or to their agents, on payment of any charges due for the same. *Provided*, such persons or agents reside within

one mile of the telegraphic station or within the city or town in which such station is.

"SEC. 3. Be it further enacted, that in all cases the liability of said companies for messages in cipher, in whole or in part, shall be the same as though the same were not in cipher.

"SEC. 4. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are hereby, repealed."

The plaintiff recovered in the trial court the statutory penalty of $100, sued for, and also the sum of $242.60 damages, for the non-delivery of the telegram in question, and upon appeal to the Supreme Court of Georgia that court reversed the judgment as far as it was based upon the actual damages claimed but affirmed it for the penalty of $100, provided for by the statute above quoted. Under the direction of the Supreme Court the plaintiff remitted the claim for damages, and accordingly the judgment for the penalty and for costs was affirmed, and from that judgment the company prosecuted a writ of error from this court.

The defendant by its answer denied that it had been guilty of any violation of the statute in question, and among other defences it set up by an amended plea that the plaintiff ought not to recover the statutory penalty of $100 sued for, because the message in question was an interstate message and part of interstate commerce. Upon the trial the court in its charge to the jury stated: "I charge you that if the defendant telegraph company undertook to transmit to this place a message which had been paid for at the other end of the line and did fail to deliver the message to James within a reasonable time from the time it was received, the plaintiff is entitled to recover for the failure to deliver $100 as a penalty fixed upon that act by law." The court also charged as follows: "I charge you that if you find that the message was not delivered within a reasonable time under the attending circumstances, your verdict should be for the plaintiff upon both propositions," which included the claim for the penalty and for actual damages.

The following facts are stated in the bill of exceptions: The plaintiff, who was a cotton merchant in Blakely, Georgia, on

the 4th day of November, 1890, sent a message from his residence to Tullis & Co., who were in the same business in Eufaula, in the State of Alabama, offering to sell certain cotton on terms named in the message, and asked to have an answer that night. Tullis & Co. received the message on that day and at once sent a message in reply accepting the offer of the plaintiff upon certain conditions. This message was received at Blakely late in the evening of November 4, but was not delivered until the morning of November 5. The plaintiff alleged that the delivery was not made with due diligence, and the result of the delay in the delivery of the message was as he stated, the loss of the sale of the cotton upon the terms mentioned in the message. He therefore brought his action to recover both the penalty and the actual damages which he alleged he had sustained by reason of this failure on the part of the company to deliver the message with due diligence. By the decision of the Supreme Court the claim for damages was not sustained, and the judgment given was solely for the penalty.

The only question, therefore, before this court is whether the statute of the State of Georgia, providing for the recovery of such penalty, is a valid exercise of the power of the State in relation to messages by telegraph from points outside and directed to some point within the State of Georgia.

The plaintiff in error insists that the act in question is a violation of that portion of section 8 of Article I of the Federal Constitution, which empowers Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes." The validity of the statute is based upon the general power of the State to enact such laws in relation to persons and property within its borders as may promote the public health, the public morals and the general prosperity and safety of its inhabitants. This power is somewhat generally described as the police power of the State, a detailed definition of which has been said to be difficult, if not impossible to give. However extensive the power may be, it cannot encroach upon the powers of the Federal government in regard to rights granted or secured by the Federal

Constitution. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; *Walling* v. *Michigan*, 116 U. S. 446, 460; *Gulf, Colorado & Santa Fé Railway* v. *Hefley*, 158 U. S. 98.

It has been settled by the adjudications of this court that telegraph lines, when extending through different States, are instruments of commerce which are protected by the above clause in the Federal Constitution, and that the messages passing over such lines from one State to another constitute a portion of commerce itself. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347. Such messages come within the protecting clause of the Constitution just quoted, and if the statute in question can be construed as regulating commerce between the States, the statute would be invalid on that account.

The Congress of the United States, by the act of July 24, 1866, c. 230, 14 Stat. 221, legislated upon the subject of telegraph companies. That legislation has become a part of the United States Revised Statutes, §§ 5263 to 5269, both inclusive. The sections referred to do not, however, touch the subject-matter of the delivery of messages as provided for in the state statute. The provision in the section of the Revised Statutes as to the precedence to be given to the messages of officers of the government in relation to their official business are not inconsistent with or in any manner opposed to the provisions of the Georgia act, nor are they upon the same subject within the meaning of the rule which permits state legislation in some instances only until Congress shall have spoken.

The company now contends that under the cases decided in this court, some of which are above cited, and by reason of the act of Congress just mentioned, it is so far within the commerce clause of the Federal Constitution as to be protected from any state legislation of the character of the act in question. It is urged that although there is no statute of Congress expressly providing a penalty for a failure to deliver telegraphic messages impartially and with due diligence, yet, still the very fact of the absence of such legisla-

tion is equivalent to a declaration by Congress that no penalty should be affixed, and that the company should be left free to pursue its business untrammelled by any state legislation upon the subject.

In regard to those matters relating to commerce which are not of a nature to be affected by locality, but which necessarily ought to be the same over the whole country, it has been frequently held that the silence of Congress upon such a subject, over which it had unquestioned jurisdiction, was equivalent to a declaration that in those respects commerce should be free and unregulated by any statutory enactment. *Welton* v. *Missouri*, 91 U. S. 275, 282; *Hall* v. *De Cuir*, 95 U. S. 485, 490. The matters upon which the silence of Congress is equivalent to affirmative legislation are national in their character, and such as to fairly require uniformity of regulation upon the subject-matter involved affecting all the States alike. *Mobile County* v. *Kimball*, 102 U. S. 691.

In *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209, Mr. Justice Brown, in delivering the opinion of the court, said: "The adjudications of this court with respect to the power of the State over the general subject of commerce are divisible into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the State cannot interfere at all." On page 211 of the report are cited many cases as coming within the second class, among which are laws for the regulation of pilots; for quarantine and inspection; for policing harbors; improving navigable channels; regulating wharves, piers and docks; constructing dams and bridges across navigable waters of a State; and also laws for the establishment of ferries. In relation to the power of Congress to regulate commerce in cases of the second class, it is said that it is not its mere existence but its exercise by Congress which may be incompatible with the exercise of the same power by States, and that the States may legislate in the absence of Congressional regulations. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193. When the sub-

jects in regard to which the laws are enacted, instead of being of a local nature affecting interstate commerce but incidentally, are national in their character, then the non-action of Congress indicates its will that such commerce shall be free and untrammelled. It has been held that it is not every enactment which may incidentally affect commerce and the persons engaged in it that necessarily constitutes a regulation of commerce within the meaning of the Constitution. *Sherlock* v. *Alling*, 93 U. S. 99; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Mobile County* v. *Kimball*, 102 U. S. 691; *Smith* v. *Alabama*, 124 U. S. 465. A state statute was held valid in this last cited case, which provided for an examination of engineers of locomotives by a state board of examiners, and it was applied to an engineer engaged in running a locomotive on one continuous trip from Mobile in Alabama to Corinth in Mississippi. It was held to be a valid police regulation.

Legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect commerce itself. *Mobile County* v. *Kimball*, 102 U. S., already cited.

On the other hand, a state statute which only assumed to regulate those engaged in interstate commerce, while passing through the particular State, has been held void because it in effect and necessarily regulated and controlled the conduct of such persons throughout the entire voyage, which stretched through several States. Such is the case of *Hall* v. *De Cuir*, 95 U. S. 485, 489.

The statute in that case, after providing that common carriers of passengers should have the right to refuse certain classes of undesirable and improper persons passage on their vehicles, gave the power to carriers to expel such persons after admission, and also gave them power to expel all who should commit any act in violation of the rules and regulations prescribed for the management of the business of the carrier after such rules and regulations should have been made known, "provided such rules and regulations make no discrimination on account of race or color;" and the statute also

prohibited all persons engaged in the business of common carriers of passengers, except in the cases enumerated, from refusing admission to their conveyances or from expelling therefrom any person whatsoever. The plaintiff was a person of color and took passage upon the steamboat owned by the defendant's intestate on her trip up the river from New Orleans to Hermitage, both within the State of Louisiana. Being refused accommodations on account of her color in the cabin especially set apart for white persons, she brought an action under the provisions of the state act above referred to for the purpose of recovering damages sustained on account of such refusal. The defence set up was that the statute was inoperative and void as to the owner of the steamboat, because as to his business it was an attempt to regulate commerce among the States, and it was so held here. Although, in the case in question, the passage was taken from and to a point both of which were within the State of Louisiana, it was held that such fact was not material; that the effect of the statute necessarily was to regulate interstate commerce.

The court, speaking by Mr. Chief Justice Waite, said:

"While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the

conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in the business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It is seen from this reasoning that the foundation for holding the act void was that it necessarily affected the conduct of the carrier and regulated him in the performance of his duties outside and beyond the limits of the State enacting the law. A provision for the delivery of telegraphic messages arriving at a station within the State is not of the same nature as that statute and would have no such effect upon the conduct of the telegraph company with regard to the performance of its duties outside the State.

In *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 358, the State of Indiana required telegraph companies to deliver dispatches by messenger to the persons to whom the same were addressed, or to their agents, provided they resided within one mile of the telegraph company's station within the city or town within which such station was. That statute was held to conflict with the clause of the Constitution of the United States which vests in Congress power to regulate commerce among the States in so far as it attempted

to regulate the delivery of such dispatches to places situate in other States, and it was said that the reserved police power of the State under the Constitution, although difficult to define, did not extend to the regulation of the delivery at points without the State of telegraphic messages received within the State. In that case the action was brought by Pendleton to recover of the telegraph company the penalty of $100, prescribed by statute for failing to deliver at Ottumwa, in the State of Iowa, a message received by the company in Indiana for transmission to that place. The action was brought in the State of Indiana and it was held that it was an attempt on the part of that State to enforce its own statute outside and beyond the territorial limits of the State. The object of vesting the power to regulate commerce in Congress, it was said by Mr. Justice Field speaking for the court in that case, was "to secure with reference to its subjects uniform regulations where such uniformity was practicable against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different States if each State was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as their transmission, would vary according to the judgment of each State." "Whatever authority the State may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other States."

In *Telegraph Co.* v. *Texas*, 105 U. S. 460, it was held that a telegraph company in respect to its foreign and interstate business was an instrument of commerce subject to the regulating powers of Congress, and that state laws, so far as they imposed upon it a specific tax upon each message which it transmitted beyond the State, or which an officer of the United States sent over its lines on public business, were unconstitutional.

With this brief reference to some of the cases that have been decided in this court respecting the commerce clause in the Constitution, the question arises, which of the classes spoken

of in *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. *supra*, 204, includes the statute under review? Is it a mere police regulation, that but incidentally affects commerce, such as *Smith* v. *Alabama*, 124 U. S. 465, and which, at any rate, would be valid until Congress should legislate upon the subject; or is it of such a nature, so extensive and national in character, that it could only be dealt with by Congress? We do not think it is the latter. It is not at all similar in its nature to the case above cited of *Hall* v. *De Cuir*, 95 U. S. 485. In one sense it affects the transmission of interstate messages, because such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it. But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other States. It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor.

The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any

regulation of a nature calculated to at all embarrass, obstruct or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several States by holding that in regard to such a message as the one in question, although it comes from a place without the State, it is yet under the jurisdiction of the State where it is to be delivered, (after its arrival therein at the place of delivery,) at least so far as legislation of the State tends to enforce the performance of duty owed by the company under the general law. So long as Congress is silent upon the subject, we think it is within the power of the state government to enact legislation of the nature of this Georgia statute. It is not a case where the silence of Congress is equivalent to an express enactment. As has been said, this statute levies no tax and seeks no revenue from the company by reason of these interstate messages.

The case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, is an illustration of the invalidity of an attempt to tax persons or property received and landed within a State which had been transported from another State. It was there held that the tax was upon interstate commerce and a regulation thereof upon a matter national in character, requiring uniformity of regulation, and that, therefore, the power of Congress was exclusive. If Congress were silent, no exactions could be made or levied. In the case at bar there is no tax laid upon these messages, and no obstruction is placed in the way of the company in regard to the performance of any duty owed by it in connection with them. Instead of obstructing, this statute aids commerce. The subject of the act is not national in character nor is uniformity at all requisite. Conduct which might incur the penalty of $100 in one State might violate no statute in another, and in still a third might subject the carrier to a penalty of but $50, and yet there would exist no reason for uniformity of rule governing the subject, and the carrier would really suffer nothing from its absence.

Nor is the statute open to the same objections that were

regarded as fatal in the *Pendleton case*, 122 U. S. 347. No attempt is here made to enforce the provisions of the state statute beyond the limits of the State, and no other State could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the State of Georgia. No confusion therefore could be expected in carrying out within the limits of that State the provisions of the statute. It is true it provides a penalty for a violation of its terms and permits a recovery of the amount thereof irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it. We do not mean to be understood as holding that any state law on this subject would be valid, even in the absence of Congressional legislation, if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legislation. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harass and to impede it. While the penalty in the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the State to enact.

While it is vitally important that commerce between the States should be unembarrassed by vexatious state regulations regarding it, yet on the other hand there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the State over the subject.

Opinion of the Court.

Again, it is said that this company entered into a valid contract in Alabama with the sender of the message, which provided that it would not be liable for mistakes in its transmission beyond the sum received for sending the message, unless the sender ordered it to be repeated and paid half the sum in addition, and this statute changed the liability of the company as it would otherwise exist. The message was not repeated. This kind of a contract it is said was a reasonable one, and has been so held by this court. *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1. This, however, is not an action by the person who sent the message from Alabama, and this plaintiff is not concerned with that contract, whatever it was. There was no mistake in the transmission of the message, and there was no breach of the agreement. The action here is not founded upon any agreement and the judgment neither affects nor violates the contract mentioned. Nor are we here concerned with the provisions of the third section of the act relating to the damages to be recovered in the case of cipher messages. This was not such a message, and this judgment is solely based upon the penalty granted by the statute for non-delivery, and could be sustained even if the third section of the act were not valid, which is a question we do not decide nor express any opinion concerning it. The residue of the act could stand without the third section. After a careful review of the case, we think the judgment is right and that it should be

Affirmed.

Mr. Justice Shiras and Mr. Justice White dissent, and refer for their reasons to the case of *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347.

Syllabus.

COFFIN *v.* UNITED STATES.

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

No. 801. Argued March 5, 6, 1896. — Decided May 4, 1896.

Coffin v. *United States*, 156 U. S. 432, affirmed on the following points:

(1) That the offence of aiding or abetting an officer of a national bank in committing one or more of the offences set forth in Rev. Stat. § 5209, may be committed by persons who are not officers or agents of the bank, and, consequently, it is not necessary to aver in an indictment against such an aider or abettor that he was an officer of the bank, or occupied any specific relation to it when committing the offence;

(2) That the plain and unmistakable statement of the indictment in that case and this, as a whole, is that the acts charged against Haughey were done by him as president of the bank, and that the aiding and abetting was also done by assisting him in the official capacity in which alone it is charged that he misapplied the funds.

Instructions requested may be properly refused when fully covered by the general charge of the court.

When the charge, as a whole, correctly conveys to the jury the rule by which they are to determine, from all the evidence, the question of intent, there is no error in refusing the request of the defendant to single out the absence of one of the several possible motives for the commission of the offence, and instruct the jury as to the weight to be given to this particular fact, independent of the other proof in the case.

The refusal to give, when requested, a correct legal proposition does not constitute error, unless there be evidence rendering the legal theory applicable to the case.

When it is impossible to determine whether there was evidence tending to show a state of facts adequate to make a refused instruction pertinent, and there is nothing else in the bill of exceptions to which the stated principle could apply, there is no error in refusing it.

Several other exceptions are examined and held to be without merit.

A bank president, not acting in good faith, has no right to permit overdrafts when he does not believe, and has no reasonable ground to believe, that the moneys can be repaid; and if coupled with such wrongful act, the proof establishes that he intended by the transaction to injure and defraud the bank, the wrongful act becomes a crime.

When the principal offender in the commission of the offence made criminal by Rev. Stat. § 5209 and the aider and abettor were both actuated by the

criminal intent specified in the statute, it is immaterial that the principal offender should be further charged in the indictment with having had other intents.

THE various counts of the indictment in this case charged Francis A. Coffin, the plaintiff in error, Percival B. Coffin, and Albert S. Reed with having (in violation of section 5209 of the Revised Statutes) aided and abetted one Haughey, as president of the Indianapolis National Bank, in criminal misapplications of the moneys, funds and credits of that bank, and with having aided and abetted the making or causing to be made by Haughey of a false entry on the books of the bank. A prior conviction of the plaintiff in error and Percival B. Coffin, upon the indictment in question, was here reviewed and the verdict and sentence were reversed. 156 U. S. 432. On the second trial only seventeen out of the fifty counts contained in the indictment were submitted to the jury, and a verdict was returned finding the plaintiff in error guilty on seven counts, that is, Nos. 4, 9, 11, 12, 13, 14 and 39, and the defendant Percival B. Coffin not guilty. After the overruling of a motion for a new trial and in arrest of judgment, plaintiff in error was sentenced on each of the seven counts to imprisonment in the penitentiary for eight years. The imprisonment under each count was ordered to be concurrent and not cumulative. This writ of error was thereupon sued out.

Mr. W. H. H. Miller and *Mr. Ferdinand Winter*, (with whom was *John B. Elam* on the brief,) for plaintiff in error.

Mr. Solicitor General for defendants in error.

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

Fifty-two requests for instructions were submitted on behalf of the defendants to the trial court. The assignments of error are sixty-two in number. The uselessness of this multitude of assignments is demonstrated by the fact that but nineteen out of the sixty-two were relied upon at bar. These nineteen are grouped in the brief of counsel for plaintiff in error under

twelve headings. We shall confine our examination to the consideration of the matters embraced under these headings, and in the order in which they are discussed by counsel.

I. Point 1 alleges that the court erred in refusing to give instructions requested, numbered 47 and 48.

No. 47 reads as follows:

"47. In the indictment in this case it is charged that Theodore P. Haughey, president of the Indianapolis National Bank, with intent to injure and defraud the bank, wilfully misapplied the funds of the bank, and also that, with intent to defraud the bank and to deceive an agent appointed or to be appointed to examine its affairs, he made or caused to be made false entries upon the books of the bank. The defendants Francis A. Coffin and Percival B. Coffin are charged with having, with like intent, aided and abetted said Haughey in said wrongful acts. In order to sustain this charge of aiding and abetting against the defendants the evidence must show beyond a reasonable doubt that the defendants acted in the matter with a like intent as that attending the action of Mr. Haughey — that is, it must be shown that the Coffins, charged as aiders and abettors, stood in a similar relation to the alleged crime as Mr. Haughey; that they approached it from the same direction and touched it at the same point. If, as matter of fact, in any of the transactions charged as criminal in this indictment, Mr. Haughey acted with one intent and the defendants acted with a different and unlike intent, then, as to that transaction, they are not guilty as charged in this indictment."

No. 48 is similar to No. 47, except that the words "stood in a similar relation to the alleged crime," contained in the third sentence of No. 47, are omitted in No. 48.

We held in our former opinion, 156 U. S. 446, that the language of the statute fully demonstrated the unsoundness of the contention then advanced, that no offence was stated in the indictment against the aiders and abettors, because in none of the counts was it asserted that they were officers of the bank or occupied any specific official relation to it.

The ruling then made establishes the error of the foregoing

requests to charge, and hence, practically, disposes of the questions arising under this heading. However, as counsel now contend that their former position was misunderstood and was not adequately met by the reasoning previously adopted, we add the following considerations: The contention now advanced admits that one not an officer of the bank may be, under some circumstances, an aider or abettor in violation of section 5209, Revised Statutes, but urges that in order to be such aider or abettor the person so charged, when not an officer of the bank, must stand in such relation to the recreant bank officer, or have such interest with him in other enterprises, "as that they may work together for the hurt of the bank for a common purpose." In other words, the argument substantially asserts that an essential element of the offence of aiding and abetting is the existence of a common purpose between the officer and the aider and abettor to promote or subserve the joint interest of the wrongdoers in enterprises in which they are mutually interested. But the statute nowhere requires that there should be a "common purpose" on the part of the principal and the aider and abettor to subserve their joint interests by the misapplication committed. It only requires that there should be a misapplication of the moneys of the bank with a joint intent to "injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association or any agent appointed to examine the affairs of such association." It is clear that the statute has been violated if the one charged with aiding and abetting is shown to have actually aided and abetted the officer of the bank in misapplying its funds, no matter whom the accused may have ultimately intended to benefit by his misconduct, provided, of course, there existed the intent to defraud enumerated in the act of Congress. In accord with this view the court properly instructed the jury that there must have existed in the minds of both Haughey and the defendants the wrongful intent stated in the law. The intent contemplated by counsel in the requested instruction was evidently the other and different one heretofore referred to, namely, the beneficial purpose to

be subserved or common interest to be promoted by the performance of the wrongful act. But, as we have said, it is not essential that the intent should, in this particular, have been coincident, provided there existed the intent which the law ordains.

The proposition upon which reliance is mainly placed is that the person charged as an aider and abettor "must stand in the same relation to the crime as the principal, approach it in the same direction, touch it at the same point." This language is taken from the opinion in *State* v. *Teahan*, 50 Connecticut, 92. In that case it was held that one who bought intoxicating liquors from another, the sale being illegal, was not an aider and abettor of the offence of unlawful selling within the meaning of a general statute, which provided that "every person who shall assist, aid, counsel, cause, hire or command another to commit any offence, may be prosecuted and punished as if he were a principal offender." The court said:

"The 'abetting' intended by it is a positive act in aid of the commission of the offence — a force, physical or moral, joined with that of the perpetrator in producing it. This is clear from the context, where aiding is classed with 'assisting,' 'causing,' 'hiring' and 'commanding.' The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal, approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side. He touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges a man to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offence wholly on the other side. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he cannot be said to 'assist' him in it. The whole force, moral or physical, that went to the production of the crime as such was the seller's."

Separated from the context in which the sentence was used

by the Connecticut court, it becomes meaningless and confusing. The direction from which the parties must approach the transaction, that is, the intent to defraud, is accurately specified in the statute under consideration. The meaning which counsel affix to the sentence which they excerpt from *State* v. *Teahan*, *supra*, is illustrated by their assertion that it appears from the bill of exceptions that Haughey, the president, had no interest in the cabinet company for whose benefit the indictment alleges the misapplications and false entries were made, nor any interest in or relation to the defendants, and that neither the plaintiff in error nor any other person connected with or interested in the cabinet company, or any of the other companies, had any interest in the bank or with Haughey of any kind whatsoever. Conceding this to be so, the accused was none the less guilty of a violation of the statute if he aided and abetted in the misapplication of the funds of the bank with the intent specified in the law. The contention that if Haughey, the president, intended to benefit the bank by the transactions complained of, he therefore could not have had a common purpose, with the person receiving the money, to defraud the bank, amounts simply to the assertion that if the proof showed that there was no intent on the part of Haughey to defraud the bank, it was the duty of the jury to acquit. However, the real premise, upon which the whole argument rests, is that if the accused was guilty at all, he was guilty as a principal and not as an aider and abettor. But it is not necessary to give much time to the consideration of this claim, in view of the clear intent of Congress as expressed in the statute under review. It is evident that no matter how active the coöperation of third persons may have been in the wrongful act of a bank officer or agent, such third person is required to be charged as an aider and abettor in the offence and prosecuted as such. The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons coöperating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender. In every criminal offence

there must, of course, be a principal, and it follows that without the concurring act of an officer or agent of a bank, third persons cannot commit a violation of the provisions of section 5209. If, therefore, a violation of the statute in question is committed by an officer and an outsider the one must be prosecuted as the principal and the other as the aider and abettor.

II. Under point 2, error is alleged to the refusal of the court to give the following requested instruction:

"6. The fourth count of the indictment charges that Theodore P. Haughey, as president of the Indianapolis National Bank, did, on the 20th day of May, 1893, unlawfully, wilfully and feloniously misapply certain moneys of said bank in said count specifically named, to wit, the sum of $3272.29. The count does not charge that the defendants aided or abetted said Haughey in misapplying the same moneys which he is charged to have misapplied. Under these circumstances this count charges no crime against the defendants, and on this count you should not convict the defendants."

The proposition embodied in this request rests on the assumption that the aiding and abetting clause in the fourth count of the indictment does not refer to the identical misapplication which that count charges to have been committed by the president. In other words, that there is a want of identity between the offence which the accused is charged to have aided and abetted and the offence there averred to have been committed by the president. The count charges the president with having on the 20th of May, 1893, misapplied a specific and enumerated sum by then and there "paying and causing said sum to be paid out of the moneys, funds and credits of said association upon certain divers checks drawn upon said association by the Indianapolis Cabinet Company, which checks were then and there cashed and paid out of the moneys, funds and credits of said association, which said sum aforesaid and no part thereof was said Indianapolis company entitled to withdraw from said bank because said company had no funds in said association to its credit." The aiding and abetting clause charges that the accused did "on the 20th of

May, 1893, aid and abet said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously and wilfully misapply the moneys, funds and credits of said association, to wit," specifying a sum identical in amount with that referred to in the previous part of the indictment. The contention is that the word "said" preceding and the words "as aforesaid" following the name of Haughey, president, do not refer to the sum previously charged to have been misapplied, and, therefore, there is a want of relation between the averred misapplication and the alleged aiding and abetting. When this case was previously before us substantially the same general complaint was made against all the counts of the indictment, the contention then being that the words "said" and "as aforesaid" did not aver that those who aided and abetted knew that Haughey was the president of the bank, and, hence, the counts were bad. We said (p. 449): "Without entering into any nice question of grammar, or undertaking to discuss whether the word 'said' before Haughey's name, and the words 'as aforesaid' which follow it, are adverbial, we think the plain and unmistakable statement of the indictment as a whole is, that the acts charged against Haughey were done by him as president of the bank, and that the aiding and abetting was also knowingly done by assisting him in the official capacity in which alone it is charged that he misapplied the funds." This reasoning is conclusive of the point now made. The words "said" and "as aforesaid" which we then considered as sufficiently referring to the capacity in which the act was averred to have been committed in the first part of the indictment, also adequately connected the acts charged against the aider and abettor with the offence stated against the principal offender.

III. This point complains of the refusal to give the following instructions:

"19. Evidence has been introduced upon the trial with reference to drafts drawn by the Indianapolis Cabinet Company on the Tufts Cabinet Company and accepted in the name of the latter company, and it is claimed on behalf of the government that there never was any such organization

as said Tufts Cabinet Company, but that the same was wholly fictitious. This evidence has been permitted to be introduced before you for the purpose of throwing light upon the intent of the defendants and of Theodore P. Haughey in connection with the charge of wrongdoing by them in the various counts of the indictment. This evidence can only be considered by you for this purpose, as there is no charge in any count of the indictment based upon this particular transaction, and the light it may throw upon the intent of the defendants or either of them or of said Haughey must depend upon all the circumstances shown to have attended the transaction."

"43. As you have been already told, the government in this case is prosecuting the defendants for particular transactions charged to have been unlawful and criminal, as specifically set forth in certain specific counts of the indictment. Evidence has been introduced by the government of other transactions between the Indianapolis Cabinet Company and the Indianapolis National Bank and various other parties. This evidence has been allowed to go before you solely upon the question of intent and should be considered by you only in so far as it may tend to illustrate the intent of Mr. Haughey or of the defendants. Except for that purpose you have nothing to do with other transactions than those specifically charged and prosecuted under this indictment. Except as illustrating such intent, the question of the lawfulness or unlawfulness of such other transactions is one with which you have nothing to do."

We think the instructions here requested were properly refused because fully covered by the general charge of the court. *Northern Pacific Railroad* v. *Urlin*, 158 U. S. 271, 277; *Grand Trunk Railway* v. *Ives*, 144 U. S. 408, 433; *Erie Railroad* v. *Winter*, 143 U. S. 60, 74; *Ayers* v. *Watson*, 137 U. S. 584, 601, 603.

Repeatedly in the instructions given, the jury were told that they could not find the defendants guilty, unless they were satisfied beyond a reasonable doubt that Haughey and the defendants had committed the specific criminal acts alleged in the counts of the indictment which were sub-

mitted to them with the intent therein charged. Thus the court, in the opening of its charge, said: "You have nothing to do with the other counts of the indictment, which are withdrawn from your consideration." Again, in another portion of the charge: "The particular acts of misapplication described in the several specific counts of the indictment on trial before you must be established by the proofs as therein respectively charged." And yet further: "You are not authorized to find the defendants guilty of any other charge of aiding and abetting in the wilful misapplication of the moneys, funds and credits of said bank, except those specifically charged in the first twelve counts of the indictment now on trial before you, and also on the specific charges elected by the Government, as above stated, under the thirteenth, fourteenth, fifteenth and sixteenth counts of the indictment." Having thus repeatedly called the attention of the jury to the fact that they were confined in the determination of the guilt of the accused to the specific matters submitted to them, the court, on the subject of intention, also correctly instructed them that for this purpose and for this purpose alone they might consider the proof introduced as to other misapplications than those charged in the counts which were before them. For instance, the court observed: "In determining whether they had the criminal intent to deceive or defraud as charged, or whether they acted in good faith, you should take into consideration the situation of the parties, the course of business between them as well as between the cabinet company and the bank, and all the facts and circumstances in proof before you." We think there can be no doubt that the charge of the court as given, therefore, left no question in the minds of the jury that they could only find the defendants guilty upon the particular matters specified in the counts submitted to them, and that they could not find them guilty of a different misapplication from that charged, whether or not there was proof establishing such other misapplications.

IV. The fourth point alleges, as error, the refusal of the court to give the following requested instruction:

"15. The intent on the part of Mr. Haughey in the alleged misapplications of the moneys of the bank to injure or defraud the bank is an essential ingredient of the offence charged against the defendants. In determining the question, therefore, of Mr. Haughey's intent, you should take into consideration the relation he bore to this bank, both as an officer and shareholder, and whether the evidence shows any motive on his part for defrauding or injuring the bank, and it is for you to say, in the light of all the evidence, whether Mr. Haughey, in letting the cabinet company have such moneys, did so with such intent. If the evidence does not satisfy you beyond a reasonable doubt of such intent, then the government's case is not made out. In determining this question you may consider whether Mr. Haughey was in any way benefited, or hoped to be benefited, by the loans or advances to the cabinet company; and, if you find from the evidence that there was no such benefit or hope thereof on the part of Mr. Haughey, such fact may be considered by you in determining whether there was any such intent as is charged, and, if the making of such loans and advances was under such circumstances shown by the evidence as would injure or tend to injure Mr. Haughey, that fact may be considered in like manner and for the same purpose."

The complaint is made that nowhere in the charges given did the court expressly inform the jury that they might consider, in determining the question of criminal intent, whether the evidence disclosed that the motive of personal gain induced Haughey to commit the offence charged. But the instruction requested, in the particular mentioned, was not upon the law of the case, but upon the inferences to be drawn from the evidence, a matter peculiarly within the province of the jury. The court did charge that the jury might look at all the proofs in the case in determining the question of guilty intent, and while it also instructed that it was not necessary for the commission of this offence that the officer of the bank who makes a wilful misapplication should derive any personal benefit or advantage from the transaction, the court added that: "When the moneys, funds or credits of the bank are

unlawfully taken from its possession and knowingly and wilfully misapplied, by converting them to the use of any person or company other than the bank, with the intention to injure and defraud, the offence described in the statute has been committed." So, also, the court elsewhere in its instructions to the jury said: "If loans and discounts are made by the president of a national bank in bad faith for the fraudulent purpose of giving gain or advantage to some other person or company, and not in the honest exercise of official discretion, the officer making them passes the line dividing honesty and dishonesty, and his action is criminal if done with intent to injure and defraud the banking association, and it so results."

The accused could not properly single out the absence of one of several possible motives for the commission of an offence, isolate it in an instruction from all the other facts of the case, and demand that the court instruct the jury as to the weight to be given this particular fact, independent of all the other proof in the case. The charge as a whole having correctly conveyed to the jury the rule by which they were to determine from all the evidence the question of intent, we think there was no error to the prejudice of the defendant in refusing the request which he asked.

V. This point alleges error in the refusal of the court to give two instructions requested by plaintiff in error, one to the effect that the allowance of mere overdrafts was not of itself sufficient to show any criminal intent on the part of Haughey, and the other, that, notwithstanding that the statute forbids loans to any one person in excess of ten per cent of the capital stock, such loan, although unlawful, was not for that reason alone criminal. The first instruction referred to is, in substance, given in various parts of the charge of the court. Thus the court instructed the jury:

"On the counts for wilful misapplication the questions for you to determine are: Did Theodore P. Haughey, as president of the Indianapolis National Bank, knowingly and unlawfully and with intent to injure and defraud said bank in manner and in form as charged, wilfully misapply the moneys, funds or credits of said bank by cashing, discounting and paying for

the use and benefit of the said Indianapolis Cabinet Company, knowing it to be insolvent, out of the moneys, funds and credits of the bank without authority from its board of directors, any notes, drafts or bills of exchange drawn by and upon insolvent persons, firms and companies, knowing them to be insolvent, and knowing such notes, drafts or bills of exchange to be valueless, in manner and form as charged in either count of the indictment? If he did, he has committed the offence of wilful misapplication as charged in the count or counts of the indictment now on trial relating to that subject which you find to have been so proved."

The court also said:

"If Haughey and the defendants withdrew moneys from the bank for the use of the cabinet company by means of checks drawn by it on said bank when it had no funds or moneys on deposit against which to draw, if they acted in good faith, honestly believing that the cabinet company would be able to repay the same when required, they would not be guilty of the intent to defraud the bank as charged; but, on the other hand, if they acted in bad faith and did not believe and had no reasonable ground to believe that the cabinet company could repay such overdrafts when required to do so, then they had no lawful right to make such overdrafts or allow them to be made."

We think the second requested instruction was also fully covered in the charge actually given.

VI. The refusal to give the following instruction was assigned as error:

"18. The counts of the indictment relating to misapplication charge a misapplication of the moneys of the bank. These charges of misapplication are not sustained by merely showing that the bank gave to the cabinet company credit to which it was not entitled, unless it is also shown that as a result of such credit the cabinet company was enabled to and did withdraw from the bank moneys of some kind, resulting in loss to the bank. Thus evidence of the giving by the cabinet company, and the receiving by the bank, of renewal paper upon which nothing was withdrawn from the bank, would not sustain

the charge of criminal misapplication of the credits of the bank."

There is no doubt of the soundness of the abstract principle which this request embodied. If the money of a bank be misapplied by paying it out on worthless paper, it is obvious that a subsequent renewal of such paper upon which nothing was actually obtained could not have misapplied the money of the bank. Whilst this is true in the abstract, the refusal to give, when requested, a correct legal proposition does not constitute error, unless there be evidence rendering the legal theory applicable to the case. *Stryker* v. *Goodnow*, 123 U. S. 527, and authorities there cited.

The bill of exceptions contains the following statement relative to the ninth count, to which it is asserted the instruction asked related:

Be it further remembered that there was evidence tending to show that the transactions mentioned in the ninth count of the indictment consisted solely of the taking up by the Indianapolis Cabinet Company of two drafts theretofore drawn by it upon customers and discounted by said bank, and which had not been paid or accepted by the drawees, the aggregate amount of said drafts being $3467.23, by a new draft drawn by said Indianapolis Cabinet Company on one of the drawees in the drafts taken up for the sum of $3467.23, and that there was evidence tending to show that the drawee in said last mentioned draft was, at the time the same was drawn and accepted by said bank, solvent and indebted to the cabinet company in an amount greater than the amount of said draft, for which said company had a right to draw.

"There was evidence tending to show that the drawee in said draft above mentioned was, at the time the same was drawn and placed in said bank, insolvent, and said draft was never forwarded for acceptance or collection, but was held by the direction of Theodore P. Haughey in said bank, and that said defendant knew that the drawee of said draft always refused to accept or honor drafts, and that he made all his settlements either in cash or by note, and that the indebtedness mentioned in said draft was afterwards settled by the

note of said drawee, but was not turned over to said bank, but was delivered by said defendant to other creditors. There was evidence tending to show that the notes which were claimed to have been given for said indebtedness were not executed until after the failure of the bank, and that the disposition to other creditors was made by Albert S. Reed."

From this statement it is impossible to determine whether there was any evidence tending to show a state of facts adequate to make the instruction which was refused pertinent, and there is no other matter in the bill of exceptions to which the legal principle stated could apply. It is true that counsel say that by the bill of exceptions it "appears that other transactions were based upon the renewals of paper merely without in any way depleting the funds of the bank." But the portion of the bill of exceptions which is referred to as supporting this statement relates solely to the evidence offered on the count alleging a false entry, and, therefore, in no way involves the other counts of the indictment which charged misapplication. We, therefore, find that error was not committed by the refusal in question.

VII. The refusal to give the following instruction was assigned as error:

"40. In order to warrant a conviction of the defendants as aiders and abettors of Mr. Haughey in the making of false entries, as charged in this indictment, it is not enough to show that the entries were false and that Mr. Haughey made them with the criminal intent charged, but it must also be shown by the evidence, beyond a reasonable doubt, that the defendants had knowledge of the making of such entries, and that they did acts aiding and abetting Mr. Haughey in making the same with like criminal intent. Proof of the fact that the defendants presented the paper covered by the false entry and received credit for it is not sufficient to warrant their conviction for aiding and abetting the making of the false entry on the books, unless some knowledge of or connection with the making of such false entry is brought home to them."

This instruction is fully covered in the following portion of the charge of the court, the giving of which is also alleged to have been error:

Opinion of the Court.

"If you are satisfied that Theodore P. Haughey did knowingly and purposely make or cause to be made the false entries as charged, you cannot find the defendants guilty as aiders and abettors unless you are satisfied that they with like intent unlawfully and knowingly did or said something showing their consent to and participation in the unlawful and criminal acts of said Haughey, and contributing to their execution."

The instruction is not open to the objection that the expression "unlawful and criminal acts," used in the last sentence, might have been understood by the jury as relating to unlawful and criminal acts of Haughey generally.

The court instructed the jury that an entry made knowingly and purposely in the books of the bank, with the intent to deceive or defraud, as charged, which represented as an actual transaction one which did not exist, or an entry knowingly and purposely made with the intent to deceive and defraud, which was false in a material part, constituted a false entry within the statute. It appeared that the entry, under the thirty-ninth count, related to six pieces of paper which were brought to the bank on May 29, 1893, aggregating the face value of $44,000, and the court instructed the jury as to these notes that "if the paper was never accepted or discounted by the bank, but was simply left with the bank as a mere memorandum and not as a deposit, and for the fraudulent purpose of enabling fictitious entries to be made on the books of the bank with the intent to deceive and defraud, such entry on the books of the bank would constitute a false entry." In the light of these instructions, the expression "unlawful and criminal acts" could only have been interpreted by the jury as having reference to the acts of Haughey attendant upon and connected with the making of the entry, such as the taking by him of the paper to be used as the supposed basis of the false credit.

VIII. This covers three assignments of error, (Nos. 59, 60, 61,) which assert error in the giving of the following instructions:

"It is further shown by the evidence that large sums of money were obtained from the bank by the Indianapolis Cabi-

net Company by means of notes, drafts and bills of exchange which were wholly or partially valueless.

"It is also proven that various sums of money were obtained from the bank by means of checks drawn upon it by the Indianapolis Cabinet Company, which were presented to and cashed by the bank out of its moneys and funds when said cabinet company had no moneys, funds or credits on deposit with said bank with which to pay said checks.

"It is also shown that the cabinet company and the various corporations affiliated with it organized by the defendants were during the whole period of time covered by the indictment insolvent."

It is claimed that these instructions assumed facts to have been proven which were in dispute, and also indirectly stated to the jury, as settled, propositions which were disputed and were those most earnestly contested in the case.

These criticised excerpts of the charge are contained in the latter portion thereof, and were part of a brief resumé of the salient evidence in the case. To guard against the danger that the jury might consider that there was a purpose to remove the facts from their consideration or control their judgment thereon, the court repeatedly instructed that the determination of the facts was, by law, in them vested.

Thus, immediately following the criticised portion of the charge, the court said: "Carefully weigh all the evidence in the case and from it, under the rules of law which I have given you, determine the guilt or innocence of the defendants. With you and not with the court rests the responsibility of finding and determining the facts. The views of the court on questions of fact are not controlling upon you."

Again, in the opening paragraph of the charge, it was said: "You are the sole judges of the facts and of what is proved, and any statements of fact made by the court are not controlling upon you. Such statements are intended to invite your attention to the matters of fact which the court deems important, and not for the purpose of controlling your judgment."

In the earlier portions of the charge it was especially left to the jury, when considering whether or not an offence had been

committed, to determine whether the money had been obtained by the cabinet company on worthless paper, or by payments made by the bank on checks of the company when it was insolvent and its account with the bank was overdrawn. The jury were also instructed at length with reference to the charge contained in the indictment, that divers persons, firms and corporations were insolvent. We give an extract from the charge on this subject:

"If you are satisfied that the Indianapolis Cabinet Company, or any other person, firm or corporation, alleged to have been insolvent, at the time charged, had not sufficient property or assets to pay its debts in full when wound up, then such person, firm or corporation was insolvent in manner and form as charged in the indictment."

Keeping in mind the repeated cautions given by the court to the jury, it is impossible to perceive how the language of the court in the matter excepted to could have been understood by the jury as binding them to accept, as controlling, the statements of the court regarding the facts.

IX. The giving of the following instruction was assigned as error No. 55:

"In order to make the defendants liable as aiders and abettors, as charged in the indictment, it is necessary that they should be proved to have done or said something showing their consent to or participation in the unlawful and criminal acts of Theodore P. Haughey, and contributing to their execution as charged in the indictment."

It is complained that the instruction was erroneous, because it assumes that Haughey had committed a criminal offence, and that the defendants were liable as aiders and abettors, if it was shown that they either consented to or participated in the unlawful and criminal acts of the president.

But prior to this portion of the charge the court directly instructed the jury that the guilt of Haughey was necessary to be established by the government. Following the instruction above quoted, the court also said:

"The burden of proving Haughey and the defendants

guilty as charged rests upon the government, and this burden does not shift from it.

"Haughey and the defendants are presumed to be innocent until their guilt in manner and form, as charged in some count of the indictment, is proved beyond a reasonable doubt. To justify you in returning a verdict of guilty, the evidence should be of such a character as to overcome this presumption of innocence and to satisfy each one of you of the guilt of Haughey and the defendants as charged to the exclusion of every reasonable doubt."

It is not possible that the jury could have supposed that the court intended, from the portion of the charge claimed to be erroneous, that the acts of Haughey were "to be accepted and treated by them as criminal acts."

So, also, the jury could not have been misled, by the use of the disjunctive "or," into supposing that the court instructed them that mere consent of the defendants to the unlawful and criminal acts of Haughey would be sufficient to sustain a verdict of guilty. The consent or participation was required to be such as "contributed to the execution of" the unlawful and criminal acts of Haughey charged in the indictment. From the entire context it is clear that the court required the jury to find participation as well as consent. For instance, the court in its charge said to the jury:

"If you are satisfied that Theodore P. Haughey did knowingly and purposely make or cause to be made the false entries as charged you cannot find the defendants guilty as aiders and abettors unless you are satisfied that they with like intent unlawfully and knowingly did or said something showing their consent to and participation in the unlawful and criminal acts of said Haughey and contributing to their execution."

X. This alleges error in the following portion of the charge of the court:

"If Haughey and the defendants withdrew moneys from the bank for the use of the cabinet company by means of checks drawn by it on said bank when it had no funds or moneys on deposit against which to draw, if they acted in good faith, honestly believing that the cabinet company

would be able to repay the same when required, they would not be guilty of the intent to defraud the bank as charged; but, on the other hand, if they acted in bad faith, and did not believe, and had no reasonable ground to believe, that the cabinet company could repay such overdrafts when required to do so, then they had no lawful right to make such overdrafts or allow them to be made."

But this instruction should be read in connection with the paragraph following, which is as follows:

"Every person is presumed to intend the natural and ordinary consequences of his own acts. Hence, if the natural and ordinary consequences of the acts of Haughey and the defendants, as shown by the proofs, were to injure and defraud the bank as charged, you would be authorized to find that such was their intent, if such intent is in harmony with the other proofs in the case."

It cannot be disputed that a bank president not acting in good faith has no right to permit overdrafts when he does not believe and has no reasonable ground to believe that the moneys can be repaid. And if, coupled with such wrongful act, the proof establishes that he intended by the transaction to injure and defraud the bank, the wrongful act becomes a crime.

XI. This embraces assignments of error Nos. 49 and 50, which allege error in the giving of the following instructions:

"If, however, the entry truly represents an actual *bona fide* transaction, then it would not constitute a false entry.

"But if the paper was never accepted or discounted by him for the bank, but was simply left with the bank as a mere memorandum and not as a deposit and for the fraudulent purpose of enabling fictitious entries to be made on the books of the bank with the intent to deceive or defraud as charged, such entry on the books of the bank would constitute a false entry."

These sentences were contained in the following paragraph of the charge of the court:

"An entry knowingly and purposely made on the books of the bank, with intent to deceive or defraud, as charged, which represents as an actual transaction, one which does not

and did not exist, or an entry knowingly and purposely made, with intent to deceive and defraud, as charged, which in a material part falsely and untruly represents an actual and existing transaction, would constitute a false entry within the meaning of the statute. If, however, the entry truly represents an actual *bona fide* transaction, then it would not constitute a false entry."

The objection to this portion of the charge is that it assumes that an entry is false unless it represents a transaction entered into in good faith and without fraud. It is contended that this instruction is within the condemnation of this court as expressed in its former opinion, 156 U. S. 463, where it was said:

"The exception reserved to the charge actually given by the court (on the subject of false entries) was well taken, because therein the questions of misapplication and of false entries are interblended in such a way that it is difficult to understand exactly what was intended. We think the language used must have tended to confuse the jury and leave upon their minds the impression that if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry exactly as it occurred constituted 'a false entry;' in other words, that an entry would be false, though it faithfully described an actual occurrence, unless the transaction which it represented involved full and fair value for the bank. The thought thus conveyed implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute. We think it is clear that the making of a false entry is a concrete offence which is not committed where the transaction entered actually took place, and is entered exactly as it occurred."

The objection is not meritorious. The trial court carefully distinguished between an entry based upon an actual discount of paper and credit predicated thereon, and a credit not representing an actual deposit or discount. The expression *bona fide* was used in the sense of "real," and but emphasized the word "actual." Nor is there force in the suggestion that the instruction "must have tended to confuse the jury and

leave upon their minds an impression that if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry, exactly as it occurred, constituted a false entry."

It is claimed that under the proof these instructions were wholly irrelevant. Reliance is placed upon a statement in the bill of exceptions "that the evidence showed that all the paper upon which the credit mentioned in said thirty-ninth count was based was retained in said bank as a part of its assets until the same matured, when it was renewed by other paper of the same kind, and again renewed from time to time as it matured, until said bank failed, at which time said paper, so renewed, was in possession of said bank as a part of its assets and passed as such into the possession of the receiver, by whom it was held as a part of the indebtedness of the cabinet company to said bank, secured by the mortgage executed (to Haughey as trustee for said bank) by said cabinet company to secure the indebtedness of said cabinet company to said bank."

But this is entirely consistent with the claim that the original paper "was simply left with the bank as a mere memorandum, and not as a deposit," etc. The fact that other notes were substituted for this paper does not necessarily import that the original transaction was an actual one if the notes were originally given to the bank as a mere pretext to enable the false entry to be made, and the subsequent renewals were equally unreal and made for a like purpose. The receiver was empowered, finding them in the hands of the bank, to retain them as a part of its assets. Prior to the statement in the bill of exceptions, which we have quoted, the following recital appears: "It was claimed on behalf of the government, and evidence was by it introduced tending to show, that the paper was not *bona fide* paper, representing the value for which the same was credited or any substantial value, and that said paper was not actually discounted by said bank or actually received as a genuine deposit, but was only received as a memorandum deposit to serve for the time being only, for the purpose of giving the Indianapolis Cabinet Company an apparent credit upon the books of the bank, which in fact

it did not have, and that said entries represented no actual transactions whatever." We think this extract clearly indicates that the charge as given was relevant to the issue.

XII. This heading alleges error in overruling the motion in arrest of judgment. We do not deem it necessary to consider it at length. It is predicated on the assertion that six of the seven counts upon which conviction was had were bad, because it alleged that the bank had been "heretofore" created and organized under the laws of the United States. If we assume that the word should have been "theretofore" in order to make it certain that prior to the finding of the indictment the association had been incorporated, and if we further assume that the allegation as to the incorporation of the bank was material, the averment was only an imperfect statement of that which the law implies to be true after verdict. Wharton Crim. Plead. Ev. § 760. Under this heading it is moreover contended that the thirty-ninth count was defective, because the principal offender was charged with having made the false entries with the intent to injure and defraud the bank, and also with the intent to deceive any agent appointed and any agent or agents who might thereafter be appointed by the Comptroller of the Currency to examine the affairs of the association, whilst the aiders and abettors were charged only with having had an intent to deceive the agent appointed by the Comptroller. The answer is self-evident. It was wholly immaterial that the principal offender should have had several intents, provided the principal and the aider and abettor were both actuated by the criminal intent specified in the statute. The alleged additional intent on the part of the principal offender might well have been treated as surplusage; besides, it appears from the recital in the bill of exceptions that there was evidence tending to show that the purpose of Haughey in causing the false entry to be made was to deceive any officer who might be sent by the Comptroller of the Currency to make an examination of the bank, and that the paper upon which the entry was made, as stated in the count, was furnished by the defendant Coffin at the request of Haughey with a like intent.

Syllabus.

This completes the review of all the very numerous grounds of error which have been pressed upon our consideration, and the result is that we find that they are all without merit.

The judgment is, therefore,

Affirmed.

PUTNAM *v.* UNITED STATES.

SAME *v.* SAME.

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

Nos. 573, 574. Submitted January 23, 1896. — Decided May 4, 1896.

An indictment against its president for defrauding a national bank, described the bank as the "National Granite State Bank," "carrying on a national banking business at the city of Exeter." The evidence showed that the authorized name of the bank was, the "National Granite State Bank of Exeter." *Held*, that the variance was immaterial.

Conversations with a person took place in August, 1893. In December, 1893, he testified to them before the grand jury which found the indictment in this case. On the trial of this case his evidence before the grand jury was offered to refresh his memory as to those conversations. *Held*, that that evidence was not cotemporaneous with the conversations, and would not support a reasonable probability that the memory of the witness, if impaired at the time of the trial, was not equally so when his testimony was committed to writing; and that the evidence was therefore inadmissible for the purpose offered.

On the trial of a national bank president for defrauding the bank, a witness for the government was asked, on cross-examination, as to the amount of stock held by the president. This being objected to, the question was ruled out, as not proper on cross-examination, the government "not having opened up affirmatively the ownership of the stock." *Held*, that, as the order in which evidence shall be produced is within the discretion of the trial court, and as the matter sought to be elicited on the cross-examination for the accused was not offered by him at any subsequent stage of the trial, no prejudicial error was committed by the ruling.

When an offence against the provisions of Rev. Stat. § 5209 is begun in one

State and completed in another, the United States court in the latter State has jurisdiction over the prosecution of the offender.

The proof of guilt in this case was sufficient to warrant the court in leaving to the jury to decide the question of the guilt of the accused.

The sentence on both counts having been distinct as to each, the entire amount of punishment imposed will be undergone, although the conviction and sentence as to the second count are set aside.

This case having been submitted, the court ordered the judgment below to be affirmed. Subsequently, that judgment was vacated. The case is stated in the opinion.

Mr. Frank S. Streeter for plaintiff in error.

Mr. Solicitor General for defendant in error.

Mr. Justice White delivered the opinion of the court.

This is a writ of error to obtain a reversal of a judgment of the Circuit Court of the United States for the District of New Hampshire, entered on a verdict of a jury, finding the defendant guilty upon the second and seventh counts of an indictment which alleged violations of the provisions of section 5209 of the Revised Statutes.

The indictment originally consisted of ten counts. A demurrer to counts 3, 5 and 8 was sustained. Upon the trial, at the close of the evidence for the prosecution, counts 4, 6, 9 and 10 were withdrawn from the consideration of the jury, and the case was submitted to them on counts 1, 2 and 7. Counts 1 and 2 covered the same transaction, count 1 charging an embezzlement, while count 2 charged an unlawful abstraction of the same property.

The second count charged the defendant, as president of the "National Granite State Bank," with having, on July 26, 1893, at Exeter, New Hampshire, unlawfully abstracted and converted to his own use certain described bonds and obligations, the property of said association.

The seventh count charged that the defendant, while president as aforesaid, and at the place aforesaid, did, between January 1, 1893, and July 15, 1893, "unlawfully and wilfully, and without

the knowledge and consent of said association, and with intent to injure and defraud said association, abstract and convert to his own use the moneys, funds and credits of the property of said association, to wit, forty thousand dollars of the moneys, funds and credits of said association, a more particular description of which moneys, funds and credits is to the said jurors unknown." Before the trial, a statement of the items upon which the government intended to rely for a conviction under the seventh count was furnished, by the district attorney, to counsel for the accused, and the court limited the evidence with reference to that count to matters embraced in the list. The specification referred to fifteen sums, each of which was stated to have been drawn by the accused upon checks signed by him, in the name of the bank as its president, and made payable to the order of the American Loan and Trust Company of Boston, or to the order of H. N. Smith on the National Bank of Redemption, a banking institution located and doing business at Boston. The checks were delivered by the defendant to the payees thereof in Boston in return "for cash or funds in the form of checks or drafts" handed to him in Boston, and the checks were paid by the Boston bank on whom they were drawn.

A motion in arrest of judgment having been overruled, the court, on January 31, 1895, separately sentenced the defendant on each count to five years imprisonment in the state-prison at Concord, but ordered that the imprisonment under the seventh count should be concurrent with that under the second count.

The errors assigned are eighteen in number. In addition a second writ of error was sued out, and on this writ errors were assigned relating solely to the validity of the sentence imposed. This second writ was separately docketed and numbered in this court. We are relieved from considering the legality of this second writ, as well as the soundness of the errors thereon assigned, as all the matters complained of thereon were abandoned on the hearing.

Of the eighteen assignments of error, four (Nos. 7, 8, 11 and 18) are not pressed by counsel, and need not be reviewed.

Ten assignments (Nos. 1 to 6 and 13 to 16) affect both of the counts upon which conviction was had, and relate to an asserted variance between the name of the bank alleged in the indictment to have been defrauded and the name established by the proof. Assignment No. 9 affects the second count alone, and alleges error in permitting a witness for the prosecution, upon his direct examination, to refresh his memory in a manner claimed to be illegal. Assignment No. 10 alleges error in the sustaining of objections to questions as to the amount of stock of the bank owned by the defendant during the period when the alleged unlawful acts referred to in the seventh count were committed, while assignments Nos. 12 and 17 attack the jurisdiction of the court over the offence set forth in the seventh count.

We will consider the questions which arise from these assignments in the order in which they have just been mentioned.

1. *Variance asserted to exist between the name of the bank charged in the indictment and the name as established by the proof.*

The bank alleged to have been defrauded was referred to in the indictment as "a certain national banking association, then and there known and designated as the National Granite State Bank, which said association had been heretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at the city of Exeter under the laws aforesaid."

The evidence offered proved that the authorized name of the bank was the National Granite State Bank of Exeter, the omission of the words "of Exeter" being, therefore, the variance relied on. The court held that this was not material, if the bank carried on its business and was as well known by the one name as the other.

The text writers state the rule to be that where the name of a third person is used in an indictment, it must be proved as laid. (Whart. Crim. Ev. sec. 102*a*; 1 Bish. Crim. Proc. sec. 488, sub. 3, and sec. 667, sub. 3.) Many authorities illustrating this rule are referred to in the brief of counsel. We

notice only the two cases principally relied on, to wit: *McGary* v. *People*, 45 N. Y. 153, and *Sykes* v. *People*, 132 Illinois, 32. Both of these cases are in conflict with *Commonwealth* v. *Jacobs*, 152 Mass. 276, in which last case the rule is laid down as declared by the trial court in the case at bar. However, the case now before us is distinguishable from that presented in *McGary* v. *People*, and *Sykes* v. *People*, *supra*, from the fact that the variance relied on in those cases was in an integral part of the name proper, whilst here it consists simply in the omission of the words "of Exeter," which, whilst a part of the name, would be commonly understood as referring only to the place of business of the corporation. A case precisely in point is *Rogers* v. *State*, 90 Georgia, 463, where a railroad company was referred to in an indictment by the name under which it usually transacted business, and it was held, in a well reasoned opinion, that the omission of the words "of Georgia" at the close of the designated name of the company was not a fatal variance.

In the indictment at bar, the accused was charged as president of the bank, and it was alleged that the institution carried on business at Exeter. It is impossible, therefore, to suppose that the omission of the words "of Exeter" could have in any way misled the defendant, or failed to convey to his mind what bank was intended to be referred to. It is manifest, therefore, that the omission could not have operated to his prejudice. These views dispose of assignments from 1 to 6.

2. *Error averred to have been committed by the court in permitting the prosecution to refresh the memory of a witness, called by it, by reference to certain testimony previously given by the witness before the grand jury.*

The ruling of the court from which this error is asserted to have resulted was made during the examination in chief of C. M. Dorr, a witness for the prosecution. He was a bank examiner, and was being questioned as to the whereabouts of certain bonds referred to in the second count of the indictment. The testimony of the witness was important, and the matter as to which he was being examined had a direct bear-

ing upon the guilt or innocence of the accused. The bill of exceptions discloses what took place at the time of the ruling, as follows:

"Q. Did he ever, at any time, tell you what he had done with these bonds?

"A. Not that I now recollect.

"Mr. Branch: I propose to ask this witness a leading question, because I am taken by surprise at his answer. I have his testimony before the grand jury, and I wish to ask him if he did not testify to certain things before the grand jury.

"The Court: You may do that.

"Mr. Streeter: To that I object and except.

"The Court: It is a matter of discretion with the court to allow counsel on either side who say they are surprised to ask such question. It is not a matter of exception.

"By Mr. Branch:

"Q. (Referring to minutes, and apparently reading for the purpose of putting the question.) Do you now recollect that you testified before the grand jury that when you discovered those bonds were gone you went to Boston and learned that Mr. Putnam had them, and that he acknowledged to you he had those bonds on the 3d day of August? Did you not so testify before the grand jury?

"A. If it is a matter of record, I suppose that it is so. Mr. Putman done considerable of the business by letters.

"Q. I am asking if you did not so testify before the grand jury?

"A. If it is a matter of record, I do not dispute the record.

"Q. Do you not recollect that fact that you asked him what he had done with them?

"Mr. Streeter: I still object and except to this because it is the record taken before the grand jury and should not be introduced here; it is improper and I object to it.

"The Court: I do not think you ought to say it is improper after the court has ruled that it is.

"Mr. Streeter: I beg your honor's pardon; I did not understand that you had ruled on this point.

"The Court: It is a thing often done, and when counsel say

they are surprised by the way a witness recollects a thing it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection.

"By the Court:

"Q. Do you recollect this conversation in view of your attention being now called to it?

"A. I do not recall distinctly where I had that interview, but I think it must have been at the station at Exeter.

"Q. It is not a question of where it must have been, but whether you recall it now.

"By Mr. Branch:

"Q. Let me refresh your recollection a little further. Did you testify before the grand jury that you said to him something about the bond, and he said, 'Mr. Dorr, I will state to you I am not going away?'

"A. Yes, sir; I did.

"Mr. Streeter: I object to the reading here before this tribunal of the records taken before the grand jury — records of the grand jury room — and I renew the objection I took when my brother first put it in, two or three minutes ago. I renew the objection I then took to the production of grand jury records before this court.

"Mr. Branch: I am not.

"The Court: It is competent.

"Mr. Streeter: I except.

"Q. And did he not say, 'I will get the bonds for you as soon as I can?'

"A. Yes; I can assent to that.

"The Court: It must be understood that the putting into the question a conversation is merely done for the purpose of directing the witness's attention to the matter, and that it is not in, unless the witness remembers the conversation and states it here.

"Mr. Streeter: If your honor will pardon me, my exception to its being read is in the record, and I do not want to be deprived of that.

"The Court: That is all right."

Many objections are pressed upon our attention which are alleged properly to arise from the exceptions which were taken during the proceedings just quoted, but which we deem either unfounded or not reserved by the exception as taken.

It is settled that a trial court can, in its discretion, permit, upon direct examination, a leading question to be asked, when the counsel conducting the examination is surprised by the statements of the witness. *St. Clair* v. *United States*, 154 U. S. 134, 150. It is also clear that where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by the witness or under his direction, or he must be connected with it in such a way as to make it competent for the purpose for which it is proposed to use it. But here the objection below did not address itself to the fact that the minutes of the testimony taken before the grand jury had not been properly authenticated or that they had not been reduced to writing in the presence of the witness or read over or examined by him at the time. The exception taken, therefore, reserves none of these questions. We shall hence, in considering the matter, assume that in these particulars the use of the testimony taken before the grand jury to refresh memory was not objectionable.

It is elementary that the memory of a witness may be refreshed by calling his attention to a proper writing or memorandum. The rule is thus stated by Greenleaf (1 Greenl. Ev. § 436):

"Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum or entry in a book, and may be compelled to do so if the writing is presented in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particu-

lars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence: for if inadmissible in itself as for want of a stamp, it may be still referred to by the witness."

The very essence, however, of the right to thus refresh the memory of the witness is, that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. Indeed, the rule which allows a witness to refresh his memory by writings or memoranda is founded solely on the reason that the law presupposes that the matters, used for the purpose, were reduced to writing so shortly after the occurrence, when the facts were fresh in the mind of the witness, that he can with safety be allowed to recur to them in order to remove any weakening of memory on his part, which may have supervened from lapse of time.

In *Maxwell* v. *Wilkinson*, 113 U. S. 656, 658, speaking through Mr. Justice Gray, the court said:

"Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. *Nicholls* v. *Webb*, 8 Wheat. 326, 337; *Ins. Co.* v. *Weide*, 9 Wall. 677, and 14 Wall. 375; *Chaffee* v. *United States*, 18 Wall. 516.

"It is well settled that memoranda are inadmissible to refresh the memory of a witness unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been 'presently committed to writing,' Lord Holt in *Sandwell* v. *Sandwell*, Comb. 445; *S. C.* Holt, 295; 'while the occurrences mentioned in it were recent, and fresh in his recollection,' Lord Ellenborough in *Burrough* v. *Martin*, 2 Camp. 112; 'written contemporaneously with the transaction,' Chief Justice Tindal in *Steinkeller* v. *Newton*, 9 Car. & P. 313; or 'contemporaneously or nearly so with the facts deposed to,' Chief Justice Wilde (afterwards Lord Chancellor Truro) in *Whitfield* v. *Aland*, 2 Car. & K. 1015. See, also, *Burton* v. *Plummer*, 2 Ad. & El. 341; *S. C.* 4 Nev. & Man. 315; *Wood*

v. *Cooper*, 1 Car. & K. 645; *Morrison* v. *Chapin*, 97 Mass. 72, 77; *Spring Garden Ins. Co.* v. *Evans*, 15 Maryland, 54."

In appreciating what length of time after the occurrence may be considered as "contemporaneous," as "shortly after the time of the transaction," or "while fresh in his recollection," courts have differed somewhat, depending of course upon the facts of each particular case.

In *Wood* v. *Cooper*, 1 Car. & K. 645, 646, a witness was allowed to look at his examination before commissioners in bankruptcy, signed by him, given within a fortnight of the time of the happening of certain occurrences, and when the facts were fresh in his memory. So in *State* v. *Colwell*, 3 R. I. 132, a witness was allowed to refer to a memorandum made a day or two after a previous trial, when an interval of about eight days had elapsed from the time when the occurrences transpired concerning which the witness gave testimony. In *Billingslea* v. *State*, 85 Alabama, 323, it was held proper to allow a witness to refresh his recollection by resort to the minutes of statements made to a grand jury within a week after the occurrence about which he was being interrogated. In *Spring Garden Mutual Ins. Co.* v. *Evans*, 15 Maryland, 54, it was held that a witness, who, five months after the occurrence of certain facts, and at the request of a party interested, made a statement in writing and swore to it, could not be allowed to testify to his belief in its correctness.

In the case at bar the indictment was found at the December term, 1893, of the District Court, and the testimony used to refresh the memory of the witness was given at that time before the grand jury. The conversations to which the testimony of the witness, given before the grand jury, related transpired on the third of the previous August. The effort, therefore, was to refresh the memory of the witness as to an interview, which had taken place in August, 1893, by referring to his testimony given in December, 1893; in other words, by the use of testimony given by the witness more than four months after the occurrence. We think it clear that testimony given after this lapse of time was not contemporaneous, and that it would not support a reasonable probability that

the memory of the witness, if impaired at the time of the trial, was not equally so when his testimony on the prior occasion was committed to writing.

In conflict with the well settled rule to which we have just referred, there are some adjudications of the courts of last resort of several States, noted in the margin of this opinion,[1] holding that there exists an exception to the general rule which restricts the right to refresh memory to contemporaneous memoranda or writing. This exception is said to arise when a party is surprised by the unexpectedly adverse testimony of his own witness, in which case he may, for the purpose of refreshing the memory of the witness, be permitted to ask him as to any prior statements, whether oral or written, without reference to their contemporaneousness. The error of this conclusion, as we shall hereafter demonstrate, originally arose from a misconception of the doctrine laid down in *Wright* v. *Beckett* or *Melhuish* v. *Collier*, *infra*, and has been continued by merely following this first departure from correct principles. And this confusion of thought and misunderstanding of those cases seems to have operated upon the mind of the trial court, for it said "it is a thing often done, and when counsel say they are surprised by the way a witness recollects a thing, it is within the discretion of the court to allow counsel to direct the attention of the witness to something which may refresh his recollection." But the right of counsel to refresh the memory of a witness in no way depends on the surprise which may have been created by the testimony of the witness. The right to refresh the memory of a witness, by proper matter, exists independently of surprise. Where a legal instrument for refreshing the memory exists, it may be availed of by the witness himself or may be permitted to be referred to by the court without reference to the course of

[1] *Campbell* v. *State*, 23 Alabama, 44; *Hemingway* v. *Garth*, 51 Alabama, 530; *Bullard* v. *Pearsall*, 53 N. Y. 230; *Hurley* v. *State*, 46 Ohio St. 320; *People* v. *Kelly*, 113 N. Y. 647, 651; *Hildreth* v. *Aldrich*, 15 R. I. 163; *State* v. *Sorter*, 52 Kansas, 531; *Humble* v. *Shoemaker*, 70 Iowa, 223; *Hall* v. *Chicago &c. Railroad*, 84 Iowa, 311; *George* v. *Triplett*, (N. Dak.) 63 N. W. Rep. 891.

the examining counsel. Surprise on the part of the examiner of a witness by the latter's unexpected adverse testimony, on direct examination, was among the elements by which it was determined that the right existed to ask a witness as to contradictory statements previously made by him, not for the purpose of refreshing his memory, but with the object of neutralizing or overthrowing his testimony, and this course was only allowed where the right to neutralize or impeach the testimony of one's own witness existed. Indeed, this doctrine of surprise was a part of the controversy as to whether one could be allowed to neutralize or contradict the testimony of his own witness under given conditions which was long agitated, and which culminated in some of the States of the Union and in England in statutory provision on the subject.

A detailed analysis of the cases to which we have above referred will make clear the fact that they rest not upon sound reason, but solely upon the supposed exception to which we have adverted.

In *Wright* v. *Beckett*, 1 Moo. & Rob. 414, it was held by Lord Denman, (Bolland, B., dissenting,) upon a review of previous cases, that where a witness gives evidence destructive of the case which he was called to prove, the party calling him may be permitted, in order to neutralize his testimony, to interrogate the witness as to whether he had not at a previous time given an account of the transaction entirely different from that sworn to by him at the trial, and that the party may also call other witnesses to establish the fact of the making of such prior inconsistent statements.

In *Melhuish* v. *Collier*, 15 Q. B. 878, a witness for the plaintiff, on the trial, having omitted in her testimony to speak of an act of violence committed on the plaintiff by the defendant, was questioned by the plaintiff's counsel, as in cross-examination, and asked whether she had not seen the defendant take the plaintiff by the hair; she denied this, and was then asked whether on an examination before magistrates she had not said to the plaintiff's attorney that she saw it. The witness answered that if she had said so, it was all lies

She was then asked whether she had not made to the same attorney a further specified statement, and on objection being made the court "ruled that the question might be put, not to discredit, but to remind the witness."

In the course of the argument, at the Queen's Bench, of the motion for a new trial, counsel for defendant urged that it was error to have permitted the question to be put, but Patterson, J., called his attention to the fact that it had only been allowed for the purpose of "reminding" the witness. The counsel evidently understood that the word "remind" was synonymous with a mere caution to the witness, for he said (p. 886):

"A question merely to remind should have had the character of those general admonitions which are sometimes given to a witness to recollect himself and to consider that he is speaking on oath, and which the judge does not take down, or notice to the jury. It ought not, at farthest, to have gone beyond the simple inquiry whether the party had not been examined before. It should, at any rate, have been so shaped that the witness might have admitted the former statement alluded to without discrediting herself."

So, also, the opposing counsel urged that the objection was premature, saying (p. 882): "If counsel had gone on to ask her whether the former statements were not the true ones, it would have been the proper time to object; but the objection would have differed from that now taken."

Patterson, J., found difficulty in coming to a conclusion. (p. 888.)

Coleridge, J., observed (p. 889):

"I agree in the distinction which has been taken between putting a question to the witness as to the former statements, and contradicting his answer. It has been ingeniously suggested by Mr. Smith that, if the question be admissible, it must be so put as to recall the fact to the witness's memory, without tending to impeach his credit if the account he then gives be different from the first: and I can conceive a case in which that might happen. The witness may be flurried on his first examination and afterwards vary his statement when his

attention is recalled to circumstances; but it is said that here the object of the question was distinctly to contradict the witness. It is difficult to draw a line, and I am not disposed to draw it too closely. I think that, in the present case, the question did not go farther than inquiry may properly be carried."

Erle, J., said (p. 890):

"A plaintiff's witness says, in effect, that the plaintiff has no cause of action. Then he is asked whether he has not, formerly, made a different statement. I think that question is proper, and not inconsistent with the rule that a party knowing a witness to be infamous ought not to produce him, and must not be allowed to take the chance of his answers and then bring evidence to contradict him. We do not interfere with that rule. There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then, for a bribe or from some other motive, make statements in support of the opposite interest. In such cases, the law undoubtedly ought to permit the party calling the witness to question him as to the former statement, and ascertain, if possible, what induces him to change it."

The judges, moreover, intimated a doubt as to the correctness of Lord Denman's opinion in *Wright* v. *Beckett*, in so far as it recognized the right of a party, when surprised by the testimony of his own witness, to call other witnesses, to prove his contradictory statements, but followed *Wright* v. *Beckett* to the extent that it held that one might, when surprised by the testimony of his witness, ask him as to inconsistent statements, in order to neutralize his testimony, employing, however, the word "remind," in the stead of neutralize. The word "remind," used in *Melhuish* v. *Collier*, in its broadest sense, would, certainly, be susceptible of the interpretation of refreshing memory, and if it were to receive that construction the case would undoubtedly be authority for the proposition that one taken by surprise, by the testimony of his own witness, could refresh the memory of the witness by calling his attention to contradictory statements previously made by him without reference to

whether such statements were or were not contemporaneous, or whether oral or written. But the context of the opinions demonstrates that the case has no such significance. The learned judges were considering not the right of one to refresh the memory of his witnesses, but whether he could neutralize the testimony of his own witness; that is, whether a party had the right to do so as to a witness by him introduced though the incidental effect might be to impeach his credit. The reasoning of the opinion shows that the use of the word "remind" was intended rather as a qualification on the right to neutralize, in case of surprise, which was recognized in *Wright* v. *Beckett*, and, therefore, it was not the purpose of the ruling in the *Melhuish case* to overthrow the elementary rule of evidence which restricts refreshing the memory of a witness to contemporaneous memoranda or writings. And support for the view that the reminding of the witness spoken of in the *Melhuish case* was not considered as synonymous with the right to refresh recollection, is found in the fact that the judge, before whom that case was first tried, subsequently, in 1853, in the case of *Regina* v. *Williams*, 6 Cox C. C. 343, held that where a witness for the prosecution gave a different answer on his examination in chief from that which was expected, his deposition before the coroner or justice, as the case might be, might be put in his hands for the purpose of "refreshing his memory," and then a question from the deposition might be put to him in leading form. The court further said that if the witness persisted in giving the same answer after his memory had been so refreshed, the question might be repeated to him from the deposition in leading form, but when the witness answered that question the counsel could not proceed any further.

A few years after *Melhuish* v. *Collier* was decided, in 1854, Parliament adopted the Common Law Procedure Act, which, among other things, provided as follows:

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the

judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." 17 and 18 Vict. c. 125, § 22.

Clearly the purpose of this statute was to give one a right under certain circumstances to neutralize or discredit the testimony of his own witness, and in no way to change the rule as to refreshing a witness's memory by contemporaneous writings or memoranda. This statute was, substantially, a legislative recognition of the correctness of the rule laid down in *Wright* v. *Beckett*, and the modern English cases have treated the act as applying to the power to contradict and neutralize the testimony of one's own witness when he proves adverse or hostile, and as controlling the examination of the witness himself concerning prior inconsistent statements, as well as the proof thereof by other witnesses. *Faulkner* v. *Brine*, 1 Fost. & Finl. 254; *Dear* v. *Knight*, 1 Fost. & Finl. 433.

This view of the act is also the one taken by Taylor in his treatise on Evidence. He refers to the Common Law Procedure Act of 1854, as having settled "the question how far a party is at liberty to discredit his own witness," a question which he says "for years was agitated in Westminster Hall." 2 Taylor Ev. § 1246. Statutes similar to the English act have been passed in various States of the Union, some before and others subsequent thereto. 1 Greenl. Ev. note b to § 444.

The case of *Campbell* v. *State*, 23 Alabama, 44, held that a trial court had not committed error in permitting the State's attorney to inquire of a witness for the prosecution whether he had not, on the day preceding, made statements conflicting with what he had said on the trial, the avowed object of the question being to refresh the witness's memory. The ruling was rested on the authority of *Wright* v. *Beckett*, *supra*, and on the opinions of Greenleaf and Phillips. But the learned court overlooked the fact that *Wright* v. *Beckett* expressly

confined the right to put the question, in order to neutralize the testimony of the witness when the party introducing him was taken by surprise, and that neither in the treatise of Greenleaf nor that of Phillips is this right to examine a witness for the purpose of neutralizing his testimony confounded or confused with the distinct and different faculty of refreshing the memory of the witness by contemporaneous writings or memoranda. *Hemingway* v. *Garth*, 51 Alabama, 530, was placed simply upon the authority of the previous case.

In *Bullard* v. *Pearsall*, 53 N. Y. 230, upon the trial in the lower court, a witness was called for the purpose of proving that a certain conversation took place between the witness and the defendant previous to the 17th of June, 1868, but to the surprise of the plaintiff the witness testified that the conversation took place on the 24th of July. The date was material. The plaintiff was permitted to ask the witness whether he had not, on a prior examination, sworn that the conversation took place in June, and this action of the trial judge was held to be proper. The Court of Appeals, speaking through Rapallo, J., said (p. 231):

"We are of opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry."

As authority supporting this language the learned judge said (p. 232):

"The principal cases in this State in which the subject is referred to are: *People* v. *Safford*, 5 Denio, 118; *Thompson* v. *Blanchard*, 4 Comst. 311; *Sanchez* v. *People*, 22 N. Y. 147; and in England it is very thoroughly discussed in *Melhuish*

v. *Collier*, 15 Q. B. 878. It has since been there regulated by act of Parliament, passed in 1854. The English and American authorities are referred to in 1 Greenl. Ev. sections 442, 444, 444*a* and notes."

The fact that *Melhuish* v. *Collier* does not sustain the proposition which it is thus cited to support we have already established, and even a casual examination of the New York cases referred to demonstrates that they not only do not uphold the views expressed, but, on the contrary, are adverse to them. The only remaining reference is to sections 442, 444 and 444*a* of Greenleaf on Evidence. One of these sections (444) which we have already quoted, bears no relation to the subject. The other, 442, does not refer to refreshing recollection, but treats of the question whether one may contradict his own witness. The third section referred to, 444*a*, is not a part of the treatise of Greenleaf. The learned judge of course referred to the twelfth, or Redfield's, edition of Greenleaf's work, published in 1866, where the comments of the editor are included in the text, in brackets, and by way of supplemental sections. In this edition there is such a section, 444*a*:

"[The author seems in the preceding section to have stated the doctrine of the right of a party to contradict his own witness who unexpectedly testifies against him, somewhat more strongly than is held by the English courts; and the rule of the American courts is even more restricted than that of the English courts in that respect. The question is extensively discussed in the case of *Melhuish* v. *Collier*, 15 Q. B. 878, both by counsel and by the different members of the court, and the conclusion arrived at is, that you may cross-examine your own witness if he testify contrary to what you had a right to expect, as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness and give him full opportunity to set the matter right if he will, and at all events to set yourself right before the jury. But you cannot do this for the mere purpose of discrediting the witness, nor can you be allowed to prove the contradictory statements

of the witness upon other occasions, but must be restricted to proving the fact otherwise by other evidence. And the same rule prevails in the courts of admiralty. *The Lochlibo*, 14 Jur. 792; 1 Eng. L. & Eq. 645.]"

This language, however, as we have seen, is not the opinion of Greenleaf, but the comment of his editor Redfield, and was doubtless influenced by the same mistaken view of what was really decided in *Melhuish* v. *Collier*, to which we have already adverted.

Brevity prevents a detailed review of the other cases on this subject previously mentioned in the margin hereof. Suffice it to say that an examination discloses that they all rest upon the mistaken idea which we have pointed out. Indeed, if the principles upon which these cases necessarily rest are pushed to their logical conclusion, they not only under the guise of an exception overthrow the general rule as to refreshing memory, but also subvert the elementary principles of judicial evidence. The fact that these consequences are the legitimate and necessary outcome of the cases we have reviewed, depends not on mere abstract reasoning, but is demonstrated by the case of *People* v. *Kelly*, 113 N. Y. 647, 651 (1889). In that case, upon the sole authority of *Bullard* v. *Pearsall*, it was held that where inconsistent or adverse statements had not been given by a witness for the State, but, from mere forgetfulness or a wish to befriend the accused, the witness had omitted to testify to certain details, error had not been committed by the court in allowing the prosecuting attorney, for the purpose of refreshing the recollection of the witness, to inquire of him whether he had not testified to the omitted facts before the committing magistrate and grand jury, and, upon his admission that he had done so, to ask if the statements theretofore made were not true, and that the affirmative reply of the witness was competent evidence to submit to the jury. Not only the error but the grave consequences to result from such a doctrine were aptly pointed out by Chief Justice Shaw in *Commonwealth* v. *Phelps*, 11 Gray, 73, where an attempt was made to refresh the memory of a witness by reference to testimony before

a grand jury not contemporaneously given. The Chief Justice said:

"It is not a regular mode of assisting the recollection of a witness to recur to his recollection of his testimony before the grand jury. If it was not true then, it is not true now; if it was true then, it is true now, and can be testified to as a fact. Of what importance is the fact that he had a memorandum to aid him in testifying before the grand jury? To ask what he testified to before the grand jury has no tendency to refresh his memory. The fact of his having testified to it then is not testimony now. It is an attempt to substitute former for present testimony."

Equally lucid and cogent are the expressions of the Supreme Court of Pennsylvania in *Velott* v. *Lewis*, 102 Penn. St. 326, where, in holding that the memory of a witness could not be refreshed by reading to him notes of testimony given by him in a former trial of the same cause, the court said (p. 333): If the fact that "a witness failed to recollect what he had previously sworn to were enough to admit the notes of a former trial, we might as well abandon original testimony altogether, and supply it with previous notes and depositions." "It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always be thus led to the exact words of his former evidence. As we are not yet prepared for an advance of this kind, we must accept the ruling of the court below as correct."

In leaving this branch of the case it is well to say that *Hickory* v. *United States*, 151 U. S. 303, referred to by the Supreme Court of North Dakota in *George* v. *Triplett*, 63 N. W. Rep. 891, as sustaining the exception to the general rule there announced, does not warrant the assumption. *Hickory* v. *United States* concerned merely the question of the right of a party, after proper foundation had been laid, to contradict his own witness, and in no way involved the right to refresh the memory without reference to the contemporaneousness of the statements, or whether they were oral or written.

Our conclusion, therefore, is that the exception to the action of the court in allowing the use made of the minutes of the grand jury was well taken, and that there was prejudicial error in this particular. Its existence, however, relates to and affects only the conviction under the second count of the indictment.

3. *Defendant's ownership of stock in the bank.*

The tenth assignment alleged error in sustaining an objection to a question propounded by counsel for the defendant upon the cross-examination of a witness for the prosecution. The witness (Charles E. Byington) had testified, on direct examination, that the defendant had turned over to the bank bonds of the par value of thirty-five thousand dollars, and that the defendant had a paramount interest in the companies which had issued such bonds. On cross-examination, the witness stated that the accused held, on his own account, a large amount of the stock of the companies referred to, was buying and selling, and had on hand more or less of said securities. The counsel for the accused then asked the following question:

"Q. What percentage of the stock of the National Granite State Bank of Exeter did Mr. Putnam own during the first six months of 1893?"

On objection being made by the government, counsel stated that his purpose was to show the relations of the accused to the bank and his ownership of the stock, and that the proposed evidence was pertinent as bearing upon the intent of the defendant with reference to the purchasing of securities for the bank, and in dealing with the bank's funds; and that it made a difference whether he owned all of the stock or did not own any of it. The court ruled that the government had not "opened up affirmatively the ownership of the stock," and that the proposed evidence was not proper cross-examination.

As the order in which evidence shall be produced is within the discretion of the trial court, and as the matter sought to be elicited on the cross-examination for the accused was not offered by him at any subsequent stage of the trial, it is mani-

fest that no prejudicial error was committed by the ruling complained of.

4. *Jurisdiction of the court over the seventh count.*

The twelfth and seventeenth assignments of error result from an exception taken to the refusal of the court to grant defendant's request, made at the close of the testimony, for a peremptory instruction in his favor, as to the seventh count. This request was based on the assumption that all the acts relied on, to convict, under that count, and which were enumerated in the bill of particulars, took place in Massachusetts, and hence were beyond the jurisdiction of the court. A like question also arises from an exception taken to the charge of the court on the same subject. We will consider first the exception taken to the charge of the court, since if it erroneously applied the law to the facts it must lead to reversal, although the court may have rightly refused the peremptory instruction.

As heretofore stated, this count charged the unlawful abstraction and conversion to his own use by the defendant at Exeter, New Hampshire, of "monies, funds and credits of the property of said association," (the National Granite State Bank, etc.,) "a more particular description of which monies, funds and credits is to the said jurors unknown;" and that the district attorney furnished to the counsel for the defendant a bill of particulars covering fifteen checks.

In considering these assignments it is at the outset clear that, although the commission of the offence charged may have been begun in Massachusetts, if it was completed in New Hampshire the court had jurisdiction, under Rev. Stat. § 731, which provides: "That when any offence against the United States is begun in one judicial district and completed in another, it should be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district in the same manner as if it had been actually and wholly committed therein."

We summarize the facts, which are stated at length in the bill of exceptions, as follows: The National Granite State Bank of Exeter kept an account with the National Bank of

Redemption of Boston, which was a reserve agent. From time to time deposits were made by the bank of Exeter with the Boston bank, and were placed to the credit of this account, and checks were drawn by the bank of Exeter on the Boston bank, and when paid by the latter were debited to the account. The checks mentioned in the bill of particulars were all drawn by the accused, as president of the National Granite State Bank of Exeter, on the Boston bank. Two of these checks were drawn respectively on January 17 and 23, and were for $5000 each. These checks were both drawn and dated in Boston; were made payable to the American Loan and Trust Company there, which company gave to the accused, as consideration for them, its drafts on Winslow, Lanier & Co., of New York, which drafts were paid to the accused or his assigns, and the proceeds in no way enured to the benefit of the Exeter bank. The American Loan and Trust Company, the payee of the checks, collected them in Boston, and the sum of the checks thus paid out by the Boston bank was by it debited to the account of the Exeter bank. The other checks referred to in the bill of particulars were also drawn by the accused, as president of the Exeter bank, on the Boston bank, between the 1st day of April and the 6th day of May, 1893, and they were delivered in Boston to the payees thereof for a valuable consideration, which also in no way enured to the Exeter bank, and were paid, and the amount was also debited to the account of the Exeter bank. At the time these checks were drawn, and when they were presented to and paid by the Boston bank and debited by it, there was a credit to the account of the bank of Exeter adequate to meet the checks, so that the effect of debiting them was not to overdraw the account of the Exeter bank. The bill of exceptions moreover recites that:

"Evidence was admitted, subject to defendant's exception, tending to show that at a meeting of the directors of the bank at Exeter, held about one year prior to the alleged unlawful drawing of checks by the defendant at Boston, a vote had been passed by the board of directors that no one but the cashier should thereafter have authority to draw checks

against the account with the reserve agent; that the defendant was present at that meeting and acted as clerk of the board.

"Such a vote was never recorded in the directors' record, and the reserve agent was never notified of it."

There was also testimony tending to show that the Boston and Exeter banks twice a month adjusted their running account by means of statements which are called in the record "reconciliation sheets." When these reconciliation sheets came to the Exeter bank in February they were accompanied with vouchers, among which were the two cancelled checks for $5000, each drawn in January, and which had been paid and debited, as above stated. The evidence also tended to show that the bank at Exeter owed to the American Loan and Trust Company a note or notes amounting to $10,000. When the cashier of the Exeter bank discovered the debit of the two January checks on the reconciliation sheets and observed these checks among the vouchers returned by the Boston bank, he asked the president (the accused) for what purpose he had drawn the checks, and the president answered they had been drawn in order to pay the note or notes of the Exeter bank held by the American Loan and Trust Company. Thereupon the cashier entered on the books of the bank at Exeter the payment of the note or notes held by the American Loan and Trust Company, and settled the reconciliation sheets with the Boston bank, and accordingly credited the account of the Boston bank with the sum of the two January checks. There was also testimony tending to show that neither the cashier or directors (except the accused) knew anything of the checks drawn in January until the receipt of the February reconciliation sheets, and that they also knew nothing of the April and May checks until the reconciliation sheets for May, with their accompanying vouchers, were received. The evidence also tended to show that when the payment of these last checks by the Boston bank was discovered, the defendant was asked for an explanation. He first refused to give information, then evaded doing so, until about the 24th of May, when he stated to the directors

of the Exeter bank that the checks had been used in order "to put money into the Leavenworth Electric Railway Company and the Hydraulic Company."

On the face of the foregoing facts it is evident that the alleged criminal acts arising from the two January checks were begun in Massachusetts. The question is, were such acts there completed or did the final fact, which was essential to effectually absorb the credit of the Exeter bank with the Boston bank, take place in New Hampshire? The relation between the banks was that of debtor and creditor. The checks having been drawn, collected and debited in Boston, constituted a concluded transaction, if there was authority to draw them. On the contrary, if there was no authority, the mere fact that they were debited to the account of the Exeter bank did not absorb the credit of that bank, as only a lawful and authorized check could have justified the debit. Of course, no ratification was essential to cause the checks to successfully obtain the money of the Boston bank, for such obtaining was consummated and concluded by the fact of paying out the same on the checks. But we are here concerned not with whether the checks obtained the money of the Boston bank, but with whether such checks absorbed the credit of the Exeter bank, which fact was distinct and separate from the question of payment, and depended on whether the debit made in consequence of the payment of the checks lawfully absorbed the credit of the Exeter bank. If, then, the checks were unauthorized and the illegal debit which was made as the result of their payment was ratified and made binding in New Hampshire by the Exeter bank, it is clear that the act which consummated the taking of the credit of the Exeter bank was completed in New Hampshire, and was therefore within the jurisdiction of the court. Such was the view taken by the court in its charge to the jury, as follows:

"Mr. Branch, representing the government, says the whole transaction in Boston, so far as the drawing of the checks and the receiving of the money was concerned, was fraudulent. He argues that the bank at a meeting had adopted a resolution, providing that the president should not draw checks,

and that, therefore, the president had no authority, and the president knew he had no authority, to draw checks. This becomes material if you find it was so, because if he had the authority to draw checks and did withdraw the funds, although he may have done it for the purpose of misappropriating and abstracting the money, if he had authority to draw those checks, it would become a past and completed act in Massachusetts as you will see ; but, if he did not have authority, if he was acting outside of his authority, and acting fraudulently, while the drawing of the checks was effectual in withdrawing the funds from the Bank of Redemption in Boston, it would not withdraw and abstract the credit of the bank in Exeter, existing in its behalf in the Bank of Redemption in Boston, because notwithstanding his drawing the checks, if he had no authority to draw them, the Exeter bank would still be in position to enforce its rights and receive the benefits of its credit which had been improperly and unlawfully interfered with by some unauthorized act in Boston, and while the money had gone and been misapplied the credit of the Exeter bank would be the same substantially and might be enforced. . . . So, in order to give jurisdiction here and enable you to pass upon this question, you must find that the offence was partly committed in Massachusetts, which it is conceded was so, if there was any offence, and partly here, that is, in order to give this court jurisdiction, in order to make this offence completed partly in Massachusetts and partly here, you must find that he conceived the plan, not only of abstracting the moneys by means of the checks, but of making the transaction complete and effectual by withdrawing the credit existing in behalf of the Exeter bank. So if he came into New Hampshire, and through artful deception and fraudulent misrepresentation, with the intent of making the abstraction begun in Massachusetts complete, induced the officers of the bank to surrender that credit, then he is guilty under this charge which alleges that he wilfully and unlawfully abstracted moneys, funds and credits of the Exeter bank."

Having determined the correctness of this instruction, it

remains only to ascertain whether the proof sustained the court in leaving to the jury the ascertainment of the facts contemplated in the charge, that is to say, whether the court rightly refused the peremptory request, made by the defendant, to direct a verdict in his favor. There can be no doubt that the president of a national bank, *virtute officii*, has not necessarily the power to draw checks against the account kept with another bank by the bank of which he is president. Indeed, the statutes expressly provide that the powers of the president of a national bank may be defined by the board of directors. Rev. Stat. § 5136. True it is, that by a course of dealing with a particular person, the power of an officer to perform a particular act may be implied when such power is not inconsistent with law. *Merchants' Bank* v. *State Bank*, 10 Wall. 604. Now, here there was an entire absence of all proof as to a course of business implying authority on behalf of the president to draw checks in the name of the bank. In view of the fact that the power to draw the check did not inhere in the functions of the president, and in consequence of the absence of proof as to a course of business implying the power, as also in consideration of the fact that the January checks were not drawn at the banking establishment, but in another city, we think the proof was adequate to justify the court in refusing to take the case from the jury, and in leaving it to them to determine whether there was such infirmity in the checks as made a subsequent ratification, obtained in New Hampshire by the fraudulent representation of the defendant, one of the efficient causes for the absorption of the credit resulting from the debit of the checks. Apart from this view, which was covered by the charge of the court, there were other considerations which rendered it equally improper to take the case from the jury. It cannot be denied that if when the January checks were called to the attention of the bank at Exeter, the authority of the president to draw them had been repudiated, and if such denial had been communicated to the Boston bank the ability of the president of the Exeter bank to have obtained payment of the subsequent checks would not have existed. As the failure of the Exeter

bank to repudiate the January checks, and in so doing give notice to the Boston bank, may have been consequent upon the fraudulent misrepresentation as to the purpose for which the January checks were drawn, it was competent for the jury to consider the relation which this fact bore to the drawing of the subsequent checks. In other words, the condition of evidence was such that the misrepresentation made in New Hampshire as to the reason for the drawing of the January checks, in connection with all the other evidence, was competent to go to the jury as tending to show not only the completion in New Hampshire of the wrongful obtaining of the credit, commenced by the drawing and debiting, in Boston, of the January checks, but also the initiation in New Hampshire of the wrongful obtaining of the credit completed subsequently in Massachusetts by the drawing of the April and May checks, if the jury thought from all the evidence that when the misstatements were made as to the January checks the purpose was to further defraud by drawing the subsequent checks.

The foregoing considerations dispose of all the questions presented, and the conclusion which results from them is, that there is error in the conviction as to the second count, and none as to that under the seventh count. The sentence imposed in consequence of the verdict of guilty on both counts was distinct and separate as to each count, and was made only concurrent. It follows, therefore, that if the verdict and sentence, as to the second count, be set aside, nevertheless the entire amount of punishment imposed will be undergone. Under these circumstances, it is doubtful whether the error committed, as to the second count, should be treated as prejudicial, since the only effect of reversing and ordering a new trial, as to this count, will be to leave the full term of the existing sentence in force and to submit the accused to another trial on the second count, from which trial, if convicted, an additional sentence may result. Considering this situation, we deem that

The ends of justice will best be subserved by affirming the judgment and sentence under the seventh count, and by

reversing the judgment as to the second count, and remanding the case to the court below for such proceedings with reference to that count as may be in conformity to law, and it is so ordered.

The CHIEF JUSTICE dissenting: MR. JUSTICE BREWER, MR. JUSTICE BROWN and myself think the conviction on the second count ought to stand. In our opinion the discretion of the Circuit Court was properly exercised in allowing leading questions to be put to the witness Dorr, and they amounted to nothing more than enabling him to overcome temporary forgetfulness by reference to what he had said on a prior examination.

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witness appeared before the commissioner, and was sworn to the truth of what he had stated; and the commissioner is entitled to a separate fee therefor. *United States* v. *Julian*, 324.

FRENCH SPOLIATION CLAIMS.

1. The proviso in the act of March 3, 1891, c. 540, 26 Stat. 908, "That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representative on whose behalf the award is made represents the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards," purposely brought the payments thus prescribed within the category of payments by way of gratuity and grace, and not as of right as against the government. *Blagge* v. *Balch*, 439.
2. Congress intended the next of kin to be beneficiaries in every case; and the express limitation to this effect excludes creditors, legatees, assignees and all strangers to the blood. *Ib.*
3. The words "next of kin," as used in the proviso, mean next of kin living at the date of the act, to be determined according to the statutes of distribution of the respective States of the domicil of the original sufferers. *Ib.*
4. This court is inclined to adopt the established rule of interpretation in England, which is that the phrase "next of kin," when found in ulterior limitations, must be understood to mean nearest of kin without regard to the statutes of distribution. *Ib.*

INDIAN RESERVATIONS.

1. The reservations granted by provision "First" in § 1 of the act of December 19, 1854, c. 7, 10 Stat. 598, "to provide for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them," etc., are limited to the territory ceded by the Indians, both as applied to Indians of pure blood, and to Indians of mixed blood. *Fee* v. *Brown*, 602.
2. The scrip certificates, under which the defendant in error claims, were intended to be located only by half-breeds to whom they were issued, and patents were to be issued only to the persons named in those certificates; and, consequently, the right to alienate the lands was not given until after the issue of the patents. *Ib.*
3. The act of June 8, 1872, c. 357, 17 Stat. 340, "to perfect certain land titles," etc., was intended to permit a purchaser of such scrip certificates, who through them had acquired an invalid title to public land,

INDICTMENT.

See CRIMINAL LAW, 17, 18, 19, 28.

INTERSTATE COMMERCE.

PRACTICE.

PUBLIC LAND.

See LOCAL LAW, 1;
TAX AND TAXATION.

RAILROAD.

ings. This building was not covered by the mortgage. C. was settled with for work up to that time, and all further work was stopped, except such as might be necessary for the protection of the building, which was to be done under order of court. An order was issued for roofing, which C. did, and then continued work on the building without further authority from the court. The receiver, on learning this, notified him to stop and make out his bill to date of notice; said that he would furnish designs for further work to be done; and asked C. to name a gross sum for doing it. C. stopped as directed, the designs were furnished, and C. named the desired gross sum. No further order of court was named, nor was any contract signed by the receiver; but the architect employed by the receiver drew up a contract and specification, and the work was done by C. in accordance therewith with the knowledge and approval of the receiver. The receiver having declined to sign the contract, or to make payments thereunder, C. filed a petition in the foreclosure proceedings for payment of the amount due him. Thereupon a reference was made to a master, who reported in favor of C. The court adjudged the claim to be a valid one, entitled to preference, and the receiver was ordered to pay the amount reported due; which decree was, on appeal, affirmed by the Circuit Court of Appeals. *Held*, that there was no error in the court's ordering C.'s bill to be paid as a preferred claim, as the work had been commenced before the receivership and was done in good faith for the benefit of the company and the receivers, and as the building must either have been finished or the work already done become a total loss to the company; that it appeared to have been constructed for the accommodation of the officers of the road, and in other respects in furtherance of the interests of the road, and was an asset in the hands of the receivers, which might be sold, and the money realized therefrom applied to the payment of the claim; and that the fact that it was not covered by the mortgage rendered it the more equitable that the proceeds of the sale should be applied to the payment of the cost of its construction. *Girard Insurance & Trust Co.* v. *Cooper*, 529.

REMOVAL OF CAUSES.

1. This case comes within the established rule that on an application of removal from a state to a Federal court, the Federal question or the Federal character of the defendant company must appear from the complaint in the action, in order to justify a removal; and such Federal question or character does not appear in this case. *Oregon Short Line & Utah Northern Railway Co.* v. *Skottowe*, 490.
2. Section 641 of the Revised Statutes, providing for the removal of civil suits and of criminal prosecutions from the state courts into the Circuit Courts of the United States, does not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the

B. Statutes of the United States.

See Criminal Law, 4, 5, 20, 27; French Spoliation Claims, 1; Indian Reservations, 1, 3; Interstate Commerce, 5, 8; Jurisdiction, A, 2, 7; C, 3; D; Removal of Causes, 2, 4, 5; Statute, A, 2, 4; Tax and Taxation, 1; Texas, 1.

C. Statutes of States and Territories.

Arizona Territory. *See* Statute, A, 2, 4.
California. *See* Central Pacific Railroad Company.
Georgia. *See* Constitutional Law, 6.
Mississippi. *See* Constitutional Law, 1; Local Law, 2, 3.
New York. *See* Jurisdiction, A, 2; United States, 5.
Texas. *See* Local Law, 1; Texas.

TAX AND TAXATION.

TRESPASS.

UNITED STATES.