UNITED STATES REPORTS

VOLUME 165

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1896

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1897

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.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1896.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* MATTHEWS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 105. Argued and submitted November 4, 1896. — Decided January 4, 1897.

A statute of a State, which enacts that every railroad corporation, owning or operating a railroad in the State, shall be responsible in damages to the owner of any property injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon its railroad; and which provides that it shall have an insurable interest in the property upon the route of its railroad, and may procure insurance thereon in its own behalf; does not violate the Constitution of the United States, as depriving the railroad company of its property without due process of law, or as denying to it the equal protection of the laws, or as impairing the obligation of the contract made between the State and the company by its incorporation under general laws imposing no such liability.

THIS was an action brought in an inferior court of the State of Missouri, by an owner of land in St. Louis county, against a railroad corporation organized under the laws of the State, and owning and operating with locomotive engines a line of railway adjoining the plaintiff's land, to recover damages for the destruction of the plaintiff's dwelling-house, barn, out-

buildings, shrubbery and personal property upon that land, by fire communicated from one of those engines on August 9, 1887.

The petition contained two counts, the first of which alleged negligence on the part of the defendant; and the second did not, but was founded on the statute of Missouri of March 31, 1887, by which "each railroad corporation, owning or operating a railroad in this State, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation; and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf, for its protection against such damages." Missouri Laws of 1887, p. 101; Rev. Stat. of 1889, § 2615.

The answer, among other defences, set up that the statute violated the Constitution of the United States, by depriving the defendant of its property without due process of law; and by denying to it the equal protection of the laws; and by impairing the obligation of the contract made between it and the State, "by the terms and provisions of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel said locomotive engines and cars attached thereto, and be responsible only for the negligent and careless use thereof."

The defendant was incorporated September 10, 1875, under the general laws of the State, which authorized railroad corporations to be formed by voluntary articles of association filed in the office of the secretary of State; and to lay out and construct their railroad; to take lands for the purpose; and "to take and convey persons and property on their railroad by the power or force of steam, or of animals, or by any mechanical power, and to receive compensation therefor." Missouri Gen. Stat. of 1865, c. 63, §§ 1, 2; Rev. Stat. of 1889, §§ 2542, 2543.

At the trial, the plaintiff introduced evidence tending to

support the allegations of the petition; and the court, at his request, instructed the jury that "if they believe from the evidence that during the month of August, 1887, plaintiff was the owner of the land in the petition described, and defendant was the owner or operating a railroad adjoining said land, having locomotive engines in use upon said road, and that on August 9, 1887, fire was communicated from a locomotive engine, then in use upon the railroad owned or operated by defendant, to plaintiff's property on his said land, and thereby the buildings and other property in the petition mentioned, or any of it, were destroyed, then the jury will find for the plaintiff."

The court refused to give to the jury the following instruction requested by the defendant: "Though the jury may believe from the evidence that fire was communicated from a locomotive engine in use on defendant's railroad to plaintiff's property, as charged in the second count of plaintiff's petition, yet that fact is only *prima facie* evidence of negligence on the part of defendant, and unless the jury believe from the whole evidence in the case that said fire was either negligently set out by defendant, or was communicated to plaintiff's property by reason of defendant's negligence, the plaintiff cannot recover."

The defendant excepted to the instruction given, as well as to the refusal to instruct as requested; and, after verdict and judgment for the plaintiff, appealed to the Supreme Court of the State, which held the statute to be constitutional, and affirmed the judgment. 121 Missouri, 298. The defendant sued out this writ of error.

Mr. David D. Duncan, (with whom were *Mr. John F. Dillon* and *Mr. Winslow F. Pierce* on his brief,) for plaintiff in error.

Mr. L. F. Parker filed a brief for plaintiff in error in which the following citations were made: *Fletcher* v. *Peck*, 6 Cranch, 87; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Green* v. *Biddle*, 8

Wheat. 1; *Planters' Bank* v. *Sharp*, 6 How. 301; *Commonwealth* v. *Erie & Western Transp. Co.*, 107 Penn. St. 112; *Pennsylvania Railroad* v. *Baltimore & Ohio Railroad*, 60 Maryland, 263; *Bank of the Republic* v. *Hamilton*, 21 Illinois, 53; *Payne* v. *Baldwin*, 3 Sm. & Marsh. 661; *Edwards* v. *Kearzey*, 96 U. S. 595; *Howard* v. *Bugbee*, 24 How. 461; *Meriwether* v. *Garrett*, 102 U. S. 472; *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608; *Louisiana* v. *New Orleans*, 102 U. S. 203; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works* v. *Rivers*, 115 U. S. 674; *People* v. *Jackson & Michigan Plank Road Co.*, 9 Michigan, 285; *Sloan* v. *Pacific Railroad*, 61 Missouri, 24; *Smith* v. *Hannibal & St. Joseph Railroad*, 37 Missouri, 287; *Burroughs* v. *Housatonic Railroad*, 15 Connecticut, 124; *Moshier* v. *Utica & Schenectady Railroad*, 8 Barb. 477; *Rood* v. *N. Y. & Erie Railroad*, 18 Barb. 80; *Knoop* v. *Piqua Branch, Bank of Ohio*, 16 How. 369; *Dodge* v. *Woolsey*, 18 How. 331; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Ashbury Railway &c. Co.* v. *Riche*, L. R. 7 H. L. Cas. 653; *Bailey* v. *Phil., Wilmington &c. Railroad*, 4 Harr. (Del.) 389; *Lake View* v. *Rose Hill Cemetery*, 70 Illinois, 191; *Ohio & Mississippi Railroad* v. *Lackey*, 78 Illinois, 55; *Thorpe* v. *Rutland & Burlington Railroad*, 27 Vermont, 140; *Benson* v. *New York*, 10 Barb. 223; *Small* v. *Chicago, Rock Island &c. Railroad*, 50 Iowa, 338; *Vincennes University* v. *Indiana*, 14 How. 268; *Scotland County* v. *Missouri, Iowa &c. Railroad*, 65 Missouri, 123; *State* v. *Greer*, 78 Missouri, 188; *Pearson* v. *Portland*, 69 Maine, 278; *State* v. *Hayes*, 81 Missouri, 574; *Chicago, St. Louis &c. Railway* v. *Moss*, 60 Mississippi, 641; *Slaughter House cases*, 16 Wall. 36; *Railroad Tax cases*, 13 Fed. Rep. 722; *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *Ohio & Mississippi Railroad* v. *Lackey*, 78 Illinois, 55; *Kahle* v. *Hobein*, 30 Mo. App. 472; *Zeigler* v. *South & North Alabama Railroad*, 58 Alabama, 594; *Miller* v. *Martin*, 16 Missouri, 508; *Catron* v. *Nichols*, 81 Missouri, 80; *Wally's Heirs* v. *Kennedy*, 2 Yerg. 554; *Chapman* v. *Atlantic & St. Lawrence Railroad*, 37 Maine, 92; *Ross* v. *Boston & Worcester Railroad*, 6 Allen, 87.

Mr. Percy Werner and *Mr. Garland Pollard*, for defendant in error, submitted on their brief.

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

The only question presented by the record, of which this court has jurisdiction, is whether there is anything inconsistent with the Constitution of the United States in the statute of Missouri of March 31, 1887, by which every railroad corporation owning or operating a railroad in the State is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines; and is declared to have an insurable interest in property along its route, and authorized to insure such property, for its protection against such damages.

It has been strenuously argued, in behalf of the plaintiff in error, that this statute is an arbitrary, unreasonable and unconstitutional exercise of legislative power, imposing an absolute and onerous liability for the consequences of doing a lawful act, and of conducting a lawful business in a lawful and careful manner; and that the statute violates the Constitution of the United States, by depriving the railroad company of its property without due process of law, by denying to it the equal protection of the laws, and by impairing the obligation of the contract previously made between it and the State by its incorporation under general laws authorizing it to convey passengers and freight over its railroad by the use of locomotive engines.

The argument that this statute is in excess of the power of the legislature may be the most satisfactorily met by first tracing the history of the law regarding the liability of persons for fire originating on their own premises and spreading to the property of others.

At common law, every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor; and to have been liable to an action if a fire, lighted in his own house, or upon his land, by

the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest or other inevitable accident which he could not have foreseen. Thirning, C. J., and Markham, J., in *Beaulieu* v. *Finglam*, Yearbook 2 H. IV, 18; *Anon.*, Cro. Eliz. 10; 1 Rol. Ab. 1, Action sur Case, B; 1 D'Anvers Ab., Actions, B; *Turberville* v. *Stamp*, (1698) Comyns, 32; *S. C.*, 1 Salk. 13; Holt, 9; 1 Ld. Raym. 264; 12 Mod. 152; Com. Dig., Action upon the Case for Negligence, A, 6; 1 Vin. Ab. 215, 216; 1 Bac. Ab., Action on the Case, F, (Amer. ed. 1852) p. 122; *Canterbury* v. *Attorney General*, 1 Phil. Ch. 306, 316-319; *Filliter* v. *Phippard*, 11 Q. B. 347, 354; *Furlong* v. *Carroll*, 7 Ontario App. 145, 159.

The common law liability in case of ordinary accident, without proof of negligence, was impliedly recognized in the statute of Anne, passed within ten years after the decision in *Turberville* v. *Stamp*, above cited, and providing that "no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby; any law or usage or custom to the contrary notwithstanding." Stats. 6 Anne, (1707) c. 31 [58], § 7; 8 Statutes of the Realm, 795; 10 Anne, (1711) c. 14 [24], § 1; 9 Statutes of the Realm, 684. By the statute of 14 Geo. III, (1774) c. 78, § 86, the statute of Anne was extended to "any person in whose house, chamber, stable, barn or other building, or on whose estate, any fire shall accidentally begin."

In modern times in England, the strict rule of the common law as to civil liability in damages for fire originating on one's own land, and spreading to property of another, has been recognized as still existing, except so far as clearly altered by statute.

In *The King* v. *Pease*, (1832) 4 B. & Ad. 30; *S. C.*, 1 Nev. & Man. 690, a corporation, expressly authorized by act of Parliament to establish a railway between certain points, and to use locomotive engines thereon, was held not to be liable to

an indictment for a nuisance by frightening horses travelling upon a highway parallel to the railroad.

In *Aldridge* v. *Great Western Railway*, (1841) 3 Man. & Gr. 515; *S. C.*, 4 Scott N. R. 156, which was an action against a railway corporation created by similar acts of Parliament, to recover damages for property destroyed by fire kindled by sparks from a locomotive engine, it was argued for the plaintiff that by the common law a civil action for damages could be sustained by proof of injury, without evidence of negligence. See Broom's Legal Maxims, (5th ed.) 366, 367; Holmes on Common Law, 85-88. But the court held that the corporation could not be held liable, unless negligent. In *Pigot* v. *Eastern Counties Railway*, (1846) 3 C. B. 229, the same rule was recognized, although the fact of the property having been fired by sparks from the engine was held sufficient proof of negligence.

In the course of the argument in *Blyth* v. *Birmingham Waterworks*, (1856) 11 Exch. 781, 783, Baron Martin said: "I held, in a case tried at Liverpool in 1853, that, if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers; that they were liable for all the consequences."

In *Vaughan* v. *Taff Vale Railway*, (1858) 3 H. & N. 743, the Court of Exchequer held that a railway company, expressly authorized by its charter to use locomotive engines on its railway, was responsible for damages caused to property by fire communicated from such engines, although it had taken every precaution in its power to prevent the injury. But the judgment was reversed in the Exchequer Chamber; and Lord Chief Justice Cockburn said: "Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal, or using the instrument; yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been used to prevent injury, the sanction of the legislature

carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." 5 H. & N. (1860) 679, 685.

The final decision in that case has since been considered in England as establishing that a railway company which by act of Parliament has been expressly authorized to use locomotive engines upon its railway, without being declared to be responsible for fires communicated from those engines, is not, in the absence of negligence on its part, liable for damages caused by such fires. *Fremantle* v. *Northwestern Railway*, (1861) 10 C. B. (N. S.) 89; *Hammersmith &c. Railway* v. *Brand*, (1869) L. R. 4 H. L. 171; *Smith* v. *London & Southwestern Railway*, (1870) L. R. 6 C. P. 14, 21, 22; *London, Brighton & Southcoast Railway* v. *Truman*, (1885) 11 App. Cas. 45.

On the other hand, a railway company, chartered by act of Parliament in 1832 to make and maintain a "railway or tramroad for the passage of wagons, engines and other carriages" for the purpose of conveying coals and other minerals, and neither expressly authorized nor prohibited to use locomotive engines, was held liable for damages by sparks from such an engine, although proved to have taken all reasonable precautions to prevent the emission of sparks; Mr. Justice Blackburn saying that "the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part"; and that, in order to bring them within the decision in *Vaughan* v. *Taff Vale Railway*, above cited, "it is essential to show that their act authorized the use of locomotive engines, and it is not enough to show that it authorized the making and using of a railway, and that there are no words, either prohibiting the use of locomotives, or showing that the legislature meant to prohibit the use." *Jones* v. *Festiniog Railway*, (1868) L. R. 3 Q. B. 733, 736, 737.

So where acts of Parliament, authorizing and regulating

the use of locomotive engines on turnpike and other roads, provided that nothing in the acts contained should be construed as authorizing any person to use upon the highway a locomotive engine so constructed or used as to cause a public or private nuisance; and that every person so using such an engine should be liable to an action for such use, when such an action could have been maintained before the passage of the acts; the Court of Appeal held that a man who used upon a public highway a locomotive engine constructed in conformity with the provisions of the acts, and managed and conducted with all reasonable care and without negligence, was liable for a destruction of property on land adjoining the highway by sparks proceeding from his engine; Lord Justice Bramwell saying: "The passing of the engine along the road is confessedly dangerous, inasmuch as sparks cannot be prevented from flying from it. It is conceded that at common law an action may be maintained for the injury suffered by the plaintiffs. The Locomotive Acts are relied upon as affording a defence; but, instead of helping the defendant, they show not only that an action would have been maintainable at common law, but also that the right to sue for an injury is carefully preserved. It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage." *Powell* v. *Fall*, (1880) 5 Q. B. D. 597, 601.

In this country, the strict rule of the common law of England as to liability for accidental fires has not been generally adopted; but the matter has been regulated, in many States, by statute. *Clark* v. *Foot*, 8 Johns. 329; *Bachelder* v. *Heagan*, 18 Maine, 32; *Tourtellot* v. *Rosebrook*, 11 Met. 460; *Finley* v. *Langston*, 12 Missouri, 120; *Miller* v. *Martin*, 16 Missouri, 508; *Catron* v. *Nichols*, 81 Missouri, 80; Cooley on Torts, 14, 590–592; 1 Thompson on Negligence, 148–150.

In the Colony of Massachusetts, from the first settlement, it was an object of legislation, "for the preservation of houses, hay, boards, timber, &c." 1 Mass. Col. Rec. (1631) 90, (1639) 281; 3 Mass. Col. Rec. (1646) 102. In 1660, or earlier, it was enacted that "whoever shall kindle any fires in the woods, or grounds lying in common, or enclosed, so as the same shall run into corn grounds or enclosures," at certain seasons, should "pay all damages, and half so much for a fine"; "provided that any man may kindle fire in his own ground so as no damage come thereby either to the country or to any particular person." Mass. Col. Laws of 1660, p. 31; of 1672, p. 51.

Soon after the introduction of railroads into the United States, the legislature of the State of Massachusetts, by the statute of 1837, c. 226, provided that a railroad corporation should be held responsible in damages for any injury done to buildings or other property of others by fire communicated from its locomotive engines, "unless the said corporation shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury"; and that any railroad corporation should have an insurable interest in property along its route for which it might be so held responsible in damages, and might procure insurance thereon in its own behalf.

Three years later, that statute was repealed, and was reenacted with the omission of the clause above quoted, thus making the liability of the railroad corporation absolute, and not dependent upon negligence on its part. And the statute in this form, with merely verbal changes, has been continued in force by successive reënactments. Mass. Stat. 1840, c. 85; Gen. Stat. of 1860, c. 63, § 101; Stat. 1874, c. 372, § 106; Pub. Stat. of 1882, c. 112, § 214.

In the first reported case under this statute, it was held by the Supreme Judicial Court of Massachusetts that the liability of the railroad company was not restricted to a building by the side of its road, which the very particles of fire emanating from the engines fell upon and kindled a flame in, but extended to a building across a street, set on fire by sparks wafted by the wind from the first building while it was burning; and

Chief Justice Shaw, in delivering judgment, said: "We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it." *Hart* v. *Western Railroad*, (1847) 13 Met. 99.

Two years afterwards, the same court adjudged that the statute applied to railroad companies incorporated before its passage; and that it extended as well to estates, a part of which had been conveyed by the owner, as to those of which a part had been taken by law, for the purposes of a railroad; and Mr. Justice Dewey, in delivering judgment, said: "We can perceive no sound distinction between the cases supposed. Each of these modes for acquiring the necessary real estate for the purpose of a railroad is authorized, both by the general laws and by the acts creating railroad corporations. In each, the landowner is supposed to receive full satisfaction for all the injuries necessarily resulting from the use of the same for a railroad. But with the use of locomotive engines, greater hazard to contiguous buildings and property owned by the adjacent landowners may arise, than was originally contemplated, or ought to be left to the ordinary common law remedies. We consider this provision of the statute of 1840, c. 85, as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and

circumstances may reasonably justify." *Lyman* v. *Boston & Worcester Railroad*, (1849) 4 Cush. 288.

The same statute was held to cover personal property in a building, and growing trees, destroyed by fire from a locomotive engine; Chief Justice Bigelow saying: "It is not a penal statute, but purely remedial in its nature; and it is to be interpreted fairly and liberally, so as to secure to parties injured an indemnity from those who reap the advantages and profits arising from the use of a dangerous mode of locomotion, by means of which buildings and other property are destroyed." *Ross* v. *Boston & Worcester Railroad*, (1863) 6 Allen, 87.

Again, in *Ingersoll & Quigley* v. *Stockbridge & Pittsfield Railroad*, (1864) 8 Allen, 438, it was held, following *Hart* v. *Western Railroad*, above cited, to be immaterial that a building was destroyed by the spreading of a fire from other buildings on which the sparks from the engine had fallen; and it was also held to be immaterial that the building stood partly within the location of the railroad; Mr. Justice Hoar saying: "The fact that a building or other property stands near a railroad, or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility, in case it is injured by fire communicated from their locomotives. The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause."

Upon facts very like those of that case, this court, at October term, 1875, sustained an action under a statute of Vermont, copied from the Massachusetts statute of 1837; and, speaking by Mr. Justice Strong, said: "The statute was designed to be a remedial one. In Massachusetts, there is a statute almost identical with that of Vermont"; and, referring to that case as directly in point, quoted the passage above cited from the opinion, ending with the words: "The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." *Grand Trunk Railway* v. *Richardson*, 91 U. S. 454, 456, 472.

The statute of Massachusetts, existing at the time of that decision and for thirty-five years before, and enforced in the Massachusetts cases, imposed a liability upon the railroad company, wholly independent of negligence on its part; and the terms in which this court referred to that statute, and quoted from one of those cases, show that no doubt of its constitutionality was entertained.

In Maine and in New Hampshire, statutes substantially like the statute of Massachusetts of 1840, making railroad corporations absolutely liable, without regard to negligence, for injuries to property by fire communicated from their locomotive engines, were enacted in 1842, and have been since continued in force, and their validity upheld by the highest courts of those States, as applied to corporations created either before or after their passage. Maine Stat. 1842, c. 9, § 5; Rev. Stat. of 1883, c. 51, § 64; *Chapman* v. *Atlantic & St. Lawrence Railroad*, 37 Maine, 92; *Pratt* v. *Same*, 42 Maine, 579; *Stevens* v. *Same*, 46 Maine, 95; *Sherman* v. *Maine Central Railroad*, 86 Maine, 422; N. H. Rev. Stat. of 1842, c. 142, §§ 8, 9; Gen. Stat. of 1867, c. 148, §§ 8, 9; Gen. Laws of 1878, c. 162, §§ 8, 9; *Hookset* v. *Concord Railroad*, 38 N. H. 242; *Rowell* v. *Railroad*, 57 N. H. 132; *Smith* v. *Boston & Maine Railroad*, 63 N. H. 25.

In Connecticut, before any legislation towards holding railroad corporations liable for property burned by sparks from their locomotive engines, they were held not to be so liable, if their use of such engines was with due care and skill, and in conformity with their charters. *Burroughs* v. *Housatonic Railroad*, 15 Conn. 124. The subsequent legislation upon the subject, and the reasons for it as stated by the Supreme Court of the State, were as follows: Experience demonstrated that in all cases of fire set by the operation of railroads it was extremely difficult, and in some cases impossible, to prove negligence even when it existed. This led to the passage in 1840, and to the reënactment in 1875, of a statute providing that, in all actions for any injury occasioned by fire communicated by any railway locomotive engine in the State, proof that such fire was so communicated should be *prima facie*

evidence of negligence. Conn. Stat. 1840, c. 26; Gen. Stat. of 1875, tit. 19, c. 11, § 29. Even then, the difficulty was but partially removed, for in most cases the defendant could easily produce evidence of due care, and the plaintiff would be ill prepared to meet it. Therefore, in 1881, the legislature took the broad, equitable ground that upon proof of the fact that the locomotive engine communicated fire to and destroyed property the company should be liable, independently of the question of negligence; and accordingly enacted another statute, in the words of the Massachusetts statute of 1840, before mentioned, imposing an absolute liability, qualified only by the insertion of the words, "without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured." Conn. Stat. 1881, c. 92. The statutes of 1875 and 1881 were both reënacted in the Revised Statutes of 1888, §§ 1096, 3581. *Martin* v. *New York & New England Railroad*, 62 Conn. 331, 339. The provisions of the statute of 1881 have been repeatedly upheld and enforced. *Simmonds* v. *New York & New England Railroad*, 52 Conn. 264; *Grissell* v. *Housatonic Railroad*, 54 Conn. 447; *Regan* v. *New York & New England Railroad*, 60 Conn. 124; *Martin* v. *Same*, above cited.

In *Grissell* v. *Housatonic Railroad*, the validity of that statute was strongly assailed upon all the grounds taken by the plaintiff in error in the present case; and the court, in the course of a well-considered opinion, said: "It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extrahazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk and pay the loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved." The court referred to early statutes of Connecticut, which required no proof of negligence in two classes of actions of tort; the one, making the owner of a dog, or, if the owner was a minor or an apprentice, his parent, guardian or master, liable for all damage done by the dog; Conn. Stat. of 1789, Acts and

Laws of 1796, p. 383; Gen. Stat. of 1875, p. 267, § 3; Rev. Stat. of 1888, § 3761; *Russell* v. *Tomlinson*, 2 Conn. 206; *Woolf* v. *Chalker*, 31 Conn. 121, 133; the other, making every person setting a fire on his own or any land, that runs upon the land of any other person, liable for all damage done by the fire. Conn. Col. Laws of 1750, p. 247; 2 Swift's System, 81; Gen. Stat. of 1875, p. 489, § 6; Rev. Stat. of 1888, § 1344; *Grannis* v. *Cummings*, 25 Conn. 165; *Ayer* v. *Starkey*, 30 Conn. 304. The court added: "We are not aware that the validity of any of these statutes has been called in question. The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it. Fire has always been subject to arbitrary regulations, and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgment (Action on the Case, B, tit. *Fire*) it is said: 'If my fire by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house, he shall have his action on the case against me. So, if the fire is caused by a servant or a guest, or any person who entered the house with my consent. But otherwise, if it is caused by a stranger who entered the house against my will.'" "There is no force in the suggestion that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them, because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that too for the sole profit of the corporation." 54 Conn. 461, 462.

In Iowa, before the passage of any statute making railroad corporations responsible for damage done by sparks from their locomotive engines, it was held that no action could be main-

tained for such damage, without proof of negligence on their part. *Gandy* v. *Chicago & Northwestern Railroad*, 30 Iowa, 420. The legislature then passed a statute providing that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway." Iowa Code of 1873, § 1289. The Supreme Court of the State, assuming this statute to impose a liability independent of negligence, held it to be constitutional, and applicable to companies incorporated under general laws before its passage; and said: "The statute simply recognizes the doctrine that the use of the locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks and cause destructive conflagrations; that when this occurs loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury." "What the policy of this legislation may be, experience alone can show. It may be that it will prove to be unreasonably severe, and to stand in the way of material progress and the best interests of the country at large. It may, upon the other hand, promote a high degree of skill and care, and stimulate the invention and use of improved appliances, lessening the danger of fires, and greatly increasing the safety of property, without any detriment to public interests. With these questions we have nothing to do. For us it is enough to know that the statute contravenes no constitutional provision, state or national; and that it does not do so we entertain no doubt." *Rodemacher* v. *Milwaukee & St. Paul Railroad*, 41 Iowa, 297, 309. The subsequent decision, by a majority of the same court, cited by the plaintiff in error, that this statute only made the fact of an injury so occurring *prima facie* evidence of negligence, was based wholly upon a peculiar construction of this section in connection with other provisions of the code, and in no degree upon any suggestion that, regarded as imposing an absolute liability, it would be unconstitutional. *Small* v. *Chicago, Rock Island & Pacific Railroad*, 50 Iowa, 338.

In a recent case in the Circuit Court of the United States for the Northern District of Iowa, Judge Shiras said: "The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the State; and it certainly cannot be denied that it is for the State to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the State determines the width of the right of way used by the companies. The State may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick or other like material, when built in cities or in close proximity to other buildings. The State, by legislation, may establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads." *Hartford Ins. Co.* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 62 Fed. Rep. 904, 907.

In Missouri, a statute was enacted in 1853, requiring railroad corporations, whether already existing or thereafter formed under the laws of the State, to erect and maintain fences on the sides of their railroads, where they passed through enclosed fields, with openings or gates or bars at farm crossings, and also cattle-guards at all road crossings, suitable and sufficient to prevent cattle, horses or other animals from getting upon the railroads; and, until such fences and cattle-guards were duly made, making the corporation liable for all damages done by its agents or engines to animals on the railroad. Missouri Stat. February 24, 1853, §§ 51, 56, Laws of 1853, pp. 143, 144. The Supreme Court of the State, following the opinion of Chief Justice Redfield in the leading case of *Thorpe* v. *Rutland & Burlington Railroad*, 27 Vermont, 140, and referring to *Lyman* v. *Boston & Worcester Railroad*, 4 Cush. 288, above stated, held the statute constitutional as applied to companies incorporated under general laws before its passage; and Mr. Justice Scott, in delivering

judgment, said: "Where such dangerous and powerful agents as steam engines are brought into use, there should be a power in the legislature to prescribe such reasonable regulations as will prevent injuries resulting from their employment. The foresight of man is not competent to the task of prescribing in a charter all the regulations which time may show to be necessary for the security of the interests of the people of the State against injuries caused by the introduction of new, powerful and dangerous agents for carrying on her intercourse and commerce. The charter must be taken subject to the understanding that, in its operation affecting the interests of society, it will be, like individuals, liable to be controlled by such reasonable enactments as may be dictated by a sense of what is required for the preservation of the persons, lives and property of the people, such enactments not contravening the expressed or plainly implied provisions of the charter." *Gorman* v. *Pacific Railroad*, 26 Missouri, 441, 450, 451. That statute was afterwards reënacted, modified by including unenclosed lands as well as enclosed or cultivated fields, and by making the corporation liable in double the amount of damages to cattle, horses or other animals, occasioned by failure to construct or maintain such fences or cattle-guards. Missouri Gen. Stat. of 1865, c. 63, § 43; 1 Wagner's Stat. c. 37, art. 2, § 43; Stat. February 18, 1875, Laws of 1875, p. 131; Rev. Stat. of 1889, § 2611. And the statute, as so modified, and as applied to existing railroad corporations, was held to be valid by a decision of that court, affirmed by this court. *Humes* v. *Missouri Pacific Railway*, 82 Missouri, 221, and 115 U. S. 512.

In Missouri, before the passage of any statute concerning the liability of railroad corporations for fire communicated from their engines, they were held not to be liable, unless negligent; but the fact of fire escaping from a passing engine and burning property of another was held to be *prima facie* evidence of negligence, and to throw upon the defendant the burden of proving that it supplied the best mechanical contrivances to prevent the fire from escaping, and that there was no negligence on the part of its servants. *Fitch* v. *Pa-*

cific Railroad, 45 Missouri, 322; *Miller* v. *St. Louis, Iron Mountain & Southern Railroad*, 90 Missouri, 389. The statute of March 31, 1887, now in question, (reënacted in section 2615 of the Revised Statutes of 1889,) changed the rule, by making the railroad corporation absolutely responsible in damages to the owners of property "injured or destroyed by fire communicated, directly or indirectly, by locomotive engines" in use upon its railroad; and providing that it should have an insurable interest in property along its route, and might procure insurance thereon in its own behalf, for its protection against such damages. The constitutionality of this statute was upheld by the Supreme Court of the State in full and able opinions in the case at bar, and in a similar case decided at the same time, and now argued with it in this court. *Mathews* v. *St. Louis & San Francisco Railway*, 121 Missouri, 298; *Campbell* v. *Missouri Pacific Railway*, 121 Missouri, 340. In discussing the subject, the court said: "If the State is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly, it fails in the protection of property. The argument of the defendant, reduced to its last analysis, is this: 'The State authorized the railroad companies to propel cars by steam. To generate steam, they are compelled to use fire. Therefore, they can *lawfully use* fire, and as they are pursuing a lawful business, they are only liable for negligence in its operation; and when, in a given case, they can demonstrate they are guilty of no negligence, then they cannot be made liable.' To this the citizen answers: 'I also own my land lawfully. I have the right to grow my crops and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results, then, that the State, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The State has no right to take or damage my property without just compensation.' But what the State cannot do directly, it attempts

to do indirectly, through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that, although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, *still* fire was emitted from their engines, and the citizen's property burned, notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the State to require the company who set out the fire to pay his damages." "The organic law of the State prescribed, before defendant obtained its charter, that 'the exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the State.' Constitution of Missouri, art. 12, sec. 5. Let it be conceded, for it is true, that, prior to the enactment of section 2615, by the decisions of this and other courts, defendant was only liable for negligence in setting out fire; is it to be concluded that the legislature is powerless to enact laws which will give ample protection to citizens against fires? Most certainly not. Fire, as one of the most dangerous elements, has ever been the subject of legislative control. It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law, before any statutes were enacted"—quoting Rolle's Abridgment, before cited. "Under ordinary circumstances, this was thought to be a harsh rule, and it was not generally adopted by the courts of the several States; but the question we are discussing is not what the courts have generally regarded as the reasonable rule, but what is the power of the lawmaking power to adopt as a correct one." 121 Missouri, 315–317.

Similar statutes have also been enacted, and held to be constitutional, in Colorado, and in South Carolina. Colorado Territorial Stat. January 13, 1874, § 3, Laws of 1874, p. 225; Gen. Laws of 1877, art. 2237, § 3; Gen. Stat. of 1883, §§ 1037,

2798; *Union Pacific Railway* v. *De Busk*, 12 Colorado, 294; South Carolina Gen. Stat. of 1882, § 1511; *McCandless* v. *Richmond & Danville Railroad*, 38 So. Car. 103.

In *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469, in *Northern Pacific Railroad* v. *Lewis*, 162 U. S. 366, and in *Eddy* v. *Lafayette*, 163 U. S. 456, in which it was assumed that negligence on the part of the defendant must be proved, the action was at common law, unaffected by any statute. And the statutes of some States make negligence an essential element in the liability of a railroad company for injuries by fire from its engines. 1 Thompson on Negligence, 171.

The statute of Alabama of February 3, 1877, c. 39, which was held to be unconstitutional in *Zeigler* v. *South & North Alabama Railroad*, 58 Alabama, 594, cited by the plaintiff in error, was one providing that all corporations or persons, "owning or controlling any railroad in this State, shall be liable for all damages to live stock or cattle of any kind, caused by locomotives or railroad cars." Whatever may be thought of the correctness of that decision, no question of liability for fire was before the court, nor was any reference made to the statutes or decisions of other States upon this subject.

In each of the cases in Arkansas, cited by the plaintiff in error, the decision was that a statute of the State providing generally that, "all railroads, which are now or may be hereafter built and operated, in whole or in part, in this State, shall be responsible for all damages to persons and property done or caused by the running of trains in this State," was not intended by the legislature to make the railroad company responsible for all damages, without regard to negligence, but only to shift the burden of proof upon the defendant. Arkansas Stat. February 3, 1875, Mansfield's Digest, § 5537; *Little Rock & Fort Scott Railway* v. *Payne*, 33 Arkansas, 816; *Tilley* v. *St. Louis & San Francisco Railway*, 49 Arkansas, 535. The court, in the first of those cases, while expressing an opinion that "it was not within the province of the legislature to divest rights by prescribing to the courts what should be conclusive evidence," impliedly admitted, or at least cautiously abstained from denying, the validity of statutes like that now

in question, by saying: "In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but, in compensation, are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt." 33 Arkansas, 820.

The learning and diligence of counsel have failed to discover an instance in which a statute, making railroad companies absolutely liable for damages by fire communicated from their locomotive engines to the property of others, has been adjudged to be unconstitutional, as to companies incorporated before or since its enactment.

This review of the authorities leads to the following conclusions:

First. The law of England, from the earliest times, held any one lighting a fire upon his own premises to the strictest accountability for damages caused by its spreading to the property of others.

Second. The earliest statute which declared railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others, was passed in Massachusetts in 1840, soon after such engines had become common.

Third. In England, at the time of the passage of that statute, it was undetermined whether a railroad corporation, without negligence, was liable to a civil action, as at common law, for damages to property of others by fire from its locomotive engines; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when the acts of Parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages.

Fourth. From the time of the passage of the Massachusetts statute of 1840 to the present time, a period of more than half a century, the validity of that and similar statutes has been constantly upheld in the courts of every State of the Union in which the question has arisen.

In this court, the constitutionality of such a statute has never been directly drawn into judgment. But it appears to have been assumed in *Grand Trunk Railway* v. *Richardson*, 91 U. S. 454, 472, already cited; and it rests upon principles often affirmed here.

As was said by Chief Justice Shaw, "It is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Commonwealth* v. *Alger*, 7 Cush. 53, 84, 85. This court has often recognized and affirmed the fundamental principle so declared; and has more than once said: "Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations." *Slaughter-house Cases*, 16 Wall. 36, 62; *Patterson* v. *Kentucky*, 97 U. S. 501, 505; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672; *New Orleans Waterworks* v. *Rivers*, 115 U. S. 674, 682; *Mugler* v. *Kansas*, 123 U. S. 623, 665; *Sweet* v. *Rechel*, 159 U. S. 380, 398.

In *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33, in which a statute of Massachusetts, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, was held to be constitutional and valid, as applied to a corporation chartered long before by the State for the purpose of manufacturing malt liquors, this court, speaking by Mr. Justice Bradley, said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of

objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, already mentioned, in which a statute of Missouri, making railroad corporations, not fencing their railroads, liable in double damages for injuries thereby occasioned to cattle and other animals, was held constitutional as applied to corporations existing before its enactment, this court, speaking by Mr. Justice Field, said: "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law." "The law of Missouri, in requiring railroad corporations to erect fences where their roads pass through, along or adjoining enclosed or cultivated fields or unenclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle-guards, where fences are required, sufficient to keep horses, cattle and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the State to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations." "In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to enclose their roads with fences having gates at crossings, and cattle-guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential." 115 U. S. 520, 522.

"The objection that the statute of Missouri violates the clause of the Fourteenth Amendment, which prohibits a State to deny to any person within its jurisdiction the equal protec-

tion of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates and cattle-guards, is exacted, when its road passes through, along or adjoining enclosed or cultivated fields or unenclosed lands. There is no evasion of the rule of equality, where all companies are subjected to the same duties and liabilities under similar circumstances." 115 U. S. 523.

Like decisions, for like reasons, were made in the similar cases of *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26, and *Same* v. *Emmons*, 149 U. S. 364, in which last case this court, again speaking by Mr. Justice Field, said: "The extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the State against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employés, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the States. No contract with any person, individual or corporate, can impose restrictions upon the power of the States in this respect." 149 U. S. 367, 368.

In *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205, the judgment of the Supreme Court of Kansas in 33 Kansas, 298, maintaining the constitutionality of a statute of the State, imposing for the future upon every railroad corporation, organized or doing business in the State, a liability, to which no person or corporation was before subject, for all damages done to any of its employés by negligence or mismanagement of their fellow-servants, was affirmed by this court, saying: "The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employés, as well as the safety of the public. The business of other corporations is not subject to similar

dangers to their employés; and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories." 127 U. S. 210.

The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall; and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute, now in

question, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property. *Eastern Railroad* v. *Relief Ins. Co.*, 98 Mass. 420. The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered. *Grand Trunk Railway* v. *Richardson*, 91 U. S. 454, 472; *Huntington* v. *Attrill*, 146 U. S. 657.

The statute is a constitutional and valid exercise of the legislative power of the State, and applies to all railroad corporations alike. Consequently, it neither violates any contract between the State and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws.

Judgment affirmed.

No. 118. Missouri Pacific Railway Company *v.* Simmons, Administrator of Campbell, argued and decided with this case, and reported below in 121 Missouri, 340, was substantially similar, and in that case also the

Judgment is affirmed.

Mr. David D. Duncan, Mr. John F. Dillon and *Mr. Winslow F. Pierce* for plaintiff in error.

Mr. W. M. Williams for defendant in error.

WARNER VALLEY STOCK COMPANY *v.* SMITH.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 550. Argued December 17, 18, 1896. — Decided January 11, 1897.

A bill in equity against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain them from exercising further jurisdiction with respect to the disposition of certain public lands, and from further trespassing upon the plaintiff's right of quiet possession thereof, and to compel the Secretary to prepare patents therefor to be issued to the plaintiff, in accordance with law, and to the end that the plaintiff's title may be quieted and freed from cloud, and for further relief, abates, as to the Secretary, upon his resignation of his office, and cannot afterwards be maintained against the Commissioner alone.

THE case is stated in the opinion.

Mr. Frederic D. McKenney for appellant. *Mr. Samuel F. Phillips*, *Mr. Charles A. Cogswell* and *Mr. James B. McCrellis* were with him on his brief.

Mr. Assistant Attorney General Whitney and *Mr. Solicitor General* for appellees.

Mr. Joseph K. McCammon, *Mr. John Mullan* and *Mr. James H. Hayden* filed a brief for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed January 15, 1896, in the Supreme Court for the District of Columbia, by a corporation of the State of Oregon, against Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, both alleged in the bill to be citizens and residents of the District of Columbia, and to be "sued for acts done and threatened by them in their official capacity respectively."

The prayer of the bill was "that the said Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, their subordinates and agents, may be restrained and enjoined from assuming to exercise further jurisdiction with respect to the disposition of lands described in Oregon swamp land lists No. 30 and No. 31, and from further trespassing upon your orator's right of quiet possession thereof; and that said defendant Hoke Smith may be commanded and enjoined to prepare for issuance unto your orator, in accordance with law, patents for said lands, and to the end that your orator's title to said lands may be quieted and freed from cloud; and that such other and further relief may be administered unto your orator as the peculiar necessities and circumstances of the case may require and merit."

By the act of Congress of September 28, 1850, c. 84, entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," it was enacted that in each State the whole of the "swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to said State"; and that it should be the duty of the Secretary of the Interior as soon as might be practicable, "to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State," and at his request, "cause a patent to be issued to the State therefor; and, on that patent, the fee simple to said lands shall vest in said State, subject to the disposal of the legislature thereof." 9 Stat. 519. And by the act of March 12, 1860, c. 5, the provisions of the act of 1850 were extended to the State of Oregon, "provided that the grant hereby made shall not include any lands which the government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of said act." 12 Stat. 3.

The leading facts alleged in the bill were as follows: The lands in question were sold and conveyed by the State of Oregon in 1883 and 1884, and passed by mesne conveyances

to the plaintiff on January 15, 1892, in consideration of the payment by it of the sum of $19,000. In 1888, these lands, having previously been selected by the State as swamp and overflowed lands under the act of 1860, were certified by the Surveyor General of the United States for Oregon to the Commissioner of the General Land Office. The Commissioner, in March and April, 1892, prepared lists, numbered 30 and 31, of these lands as swamp and overflowed lands, and submitted them to John W. Noble, then Secretary of the Interior, for his approval. He approved both lists on April 9 and December 3, 1892, respectively, "subject to any valid adverse rights that may exist to the tracts of land therein described"; and his approvals were noted upon the records of the General Land Office, and a certified copy of the first list was forwarded to the governor of Oregon, who by letter dated May 12, 1892, requested that a patent of the lands in that list be issued to the State. Upon a petition filed December 29, 1892, by settlers upon the lands, claiming that they were not swamp and overflowed lands at the date of the act of 1860, Secretary Noble, on March 2, 1893, notwithstanding the plaintiff's protest against his jurisdiction to do so, made an order revoking and cancelling his approvals of the lists, and directing the Commissioner to take proper steps to make the revocation and cancellation formally effective. On December 19, 1893, his successor, the defendant Hoke Smith, decided that these lands were not swamp and overflowed lands, and that the State had no claim to them as such, and therefore directed the Commissioner to "cause all decisions, recommending or holding for cancellation entries or declaratory statements, upon the ground that the lands in contest were granted to the State of Oregon as swamp and overflowed lands by the act of March 12, 1860, to be set aside and annulled, and the cases reinstated; and all contests based upon said ground alone to be dismissed." 17 Land Decisions, 571. On October 10, 1894, a motion of the plaintiff for a review of that decision was overruled by the Secretary; and on January 5, 1895, his decision was promulgated by a letter from the Commissioner to the local land officers in Oregon.

Opinion of the Court.

The principal contention in support of the bill was that by the acts of Congress of 1850 and 1860 the title to all the swamp and overflowed lands within the State of Oregon, not reserved, sold or disposed of prior to the confirmation of title under those acts, passed to and became vested in the State, subject only to the identification by the Secretary of the Interior of the specific lands as "swamp and overflowed lands, made unfit thereby for cultivation," within the meaning of those acts; that upon such identification, evidenced by the making out of accurate lists and plats of such lands, and the transmission thereof to the governor of Oregon, the title became absolute in the State by relation as of March 12, 1860, and could not be divested by any subsequent action of the Secretary; and that the duty imposed upon him to cause patents of lands so identified and listed to be issued to the State upon the request of the governor was but ministerial.

A general demurrer to the bill was sustained, and a decree rendered thereon for the defendants, by the Supreme Court of the District of Columbia; and that decree was affirmed by the Court of Appeals of the District of Columbia on June 11, 1896, upon the ground that the whole subject remained under the control of the Secretary of the Interior until the execution of the patent. 24 Washington Law Reporter, 392.

The plaintiff took an appeal to this court; and pending this appeal the defendant Hoke Smith, on September 1, 1896, resigned the office of Secretary of the Interior.

That a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office has been determined by a series of uniform decisions of this court, and has for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published. *Secretary* v. *McGarrahan*, 9 Wall. 298, 313; *United States* v. *Boutwell*, 17 Wall. 604, 609; *Commissioners* v. *Sellew*, 99 U. S. 624, 626; *United States* v. *Schurz*, 102 U. S. 378, 408; *Thompson* v. *United States*, 103 U. S. 480, 484; *United States* v. *Chandler*, 122 U. S. 643; *United States* v. *Lamont*, 155 U. S. 303, 306; *United States* v. *Long*, 164 U. S. 701.

The reasons for this conclusion, as stated by Mr. Justice

Strong, delivering the unanimous judgment of the court, in the leading case of *United States* v. *Boutwell*, which was a petition, by the owner of an order upon the Treasury of the United States, for a writ of mandamus to the Secretary of the Treasury to pay it, were as follows: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom it is sent." "If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action; and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that, previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant; and it must appear that he refused to comply with such demand, either in direct terms, or by conduct from which a refusal can be conclusively inferred. Thus it is the personal default of the defendant, that warrants impetration of the writ; and if a peremptory mandamus be awarded, the costs must fall upon the defendant. It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate, in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the default of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty, and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative." 17 Wall. 607, 608.

The case of a public officer of the United States differs in

this respect from that of a municipal board, which is a continuing corporation (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed. As was said, in *Commissioners* v. *Sellew*, by Chief Justice Waite: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in *Boutwell's case* may be avoided." 99 U. S. 627. And in *Thompson* v. *United States*, Mr. Justice Bradley said: "The cases, in which it has been held by this court that an abatement takes place by the expiration of the term of office, have been those of officers of the Government, whose alleged delinquency was personal, and did not involve any charge against the Government whose officers they were. A proceeding against the Government would not lie." 103 U. S. 484, 485.

The main object of the present bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to the plaintiff for the lands in question. The mandatory injunction prayed for was in effect equivalent to a writ of mandamus to him. The reasons for holding a suit, which has this object, to have abated, as to him, by his resignation, are as applicable to this bill in equity, as to a petition for a writ of mandamus at common law. Consequently, as against the defendant Hoke Smith, this suit must be held to have abated by his resignation of the office of Secretary of the Interior.

It appears to us to be equally clear that the suit cannot be maintained against the Commissioner of the General Land Office alone.

By the Revised Statutes of the United States, the Secretary of the Interior "is charged with the supervision of public business relating to," among other things, "the public lands, including mines." The Commissioner of the General Land Office is to "perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate

to private claims of land, and the issuing of patents for all grants of land under the authority of the government"; and likewise, "under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations," every part of the provisions of Title 32 of the Revised Statutes, relating to public lands, not otherwise specially provided for. Rev. Stat. §§ 441, 453, 2478. The phrase "under the direction of the Secretary of the Interior," thus used in these statutes, as was said by Mr. Justice Lamar, speaking for this court, "is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims, and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States." *Knight* v. *United States Land Association*, 142 U. S. 161, 177, 178; *Orchard* v. *Alexander*, 157 U. S. 372.

The present suit was avowedly brought against Smith as Secretary and Lamoreux as Commissioner, for acts done and threatened by them in their official character respectively. The prayer of the bill was for an injunction against both of them from assuming to exercise further jurisdiction with respect to the disposition of the lands in question, and from further trespassing upon the plaintiff's right of quiet possession thereof; and that the defendant Smith be commanded to prepare patents therefor to be issued to the plaintiff, in accordance with law, and to the end that the plaintiff's title might be quieted and freed from cloud; and for further relief.

The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way

of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties, (2d ed.) bk. 3, c. 13.

This is well exemplified by a decision of Lord Chancellor Hardwicke. Under acts of Parliament, appointing commissioners to build fifty new churches, appropriating money to support the ministers, and providing that the moneys appropriated should be paid to a treasurer, not one of the commissioners, but appointed by the Crown, and should be by him disbursed and applied according to orders of the commissioners, Lord Hardwicke held that a bill by a minister of one of the churches to recover his stipend, and to have a fund in the treasurer's hands invested as required by the acts, could not be maintained against the treasurer alone, without joining any of the commissioners; and said: "This is one of the most extraordinary bills I ever remember; and there is no foundation for relief, either in law or equity. It is brought against Mr. Blackerby, who is nothing but an officer under the commissioners for building the fifty new churches. It would be absurd if a bill should lie against a person who is only an officer and subordinate to others, and has no directory power." "I should think the commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make a person who acts ministerially the sole party." *Vernon* v. *Blackerby*, 2 Atk. 144, 146; *S. C.*, Barnardiston Ch. 377.

This bill cannot be amended by making the present Secretary of the Interior a defendant, because he was not in office before the bill was filed, and had no part in the doings complained of.

As against the Commissioner of the General Land Office, the bill does not strictly abate, as upon the disappearance, by death or resignation, of the sole defendant in an action the cause of which does not survive against representatives or successors. But the bill cannot be maintained against the Commissioner, because it shows no ground for relief against him alone, and the Secretary of the Interior is not and cannot now be made a party.

Syllabus.

The objection that the bill cannot be maintained against the Commissioner alone being decisive of the case, it would be inappropriate to express an opinion upon any of the graver questions, fully argued at the bar, touching the jurisdiction of the court, and the merits of the bill; or to leave the record in such a shape as to appear to foreclose any of those questions. It is therefore

Ordered that the decree be reversed, and the case remanded, with directions to dismiss the bill, with costs, for want of proper parties.

Mr. Justice Brewer and Mr. Justice Brown concurred in the result.

AGNEW *v.* UNITED STATES.

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

No. 447. Submitted November 13, 1896. — Decided January 11, 1897.

When a person is notified that his case is to be brought before a grand jury, he should proceed at once to take exception to its competency, and if he has had no opportunity of objecting before bill found then he may raise the objection by motion to quash or by plea in abatement; but in all cases he must take the first opportunity in his power to make the objection. In this case the venire issued November 18; a second venire December 2; the court opened December 3; the indictment was returned December 12; the plea in abatement was filed December 17. *Held*, that it was too late.

An exception was saved as to the taking of notes by a juryman; but, as the record does not show that any notes were taken, there is nothing for it to rest on.

On the trial of the president of a national bank, indicted for misapplication of its funds, its cashier testified in his favor as to his financial condition and standing. He was then asked — "do you know what his commercial rating was at that time?" The question being objected to was ruled out. *Held*, that the ruling was correct.

The same witness on cross-examination was asked why he had resigned his position as cashier at a date named, which was after the acts com-

plained of and before the indictment. The question being objected to was admitted. *Held*, that there was no error in this.

The question at issue being what was the defendant's knowledge and opinion of his own financial condition evidence as to the opinion of others on that point was properly excluded.

The opinions of the financial world as to the rating or standing of the defendant when the acts complained of were committed were not admissible in evidence.

In criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial; but when a *prima facie* case has been made out, the necessity of adducing evidence then devolves on the accused.

The instruction of the trial court to the jury in this case that "if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank, but this inference or presumption is not necessarily conclusive," was not error.

The trial court is not bound to accept language which counsel employ in framing instructions, nor to repeat instructions already given in different language.

The court instructed the jury that "the crime of making false entries by an officer of a national bank with the intent to defraud, defined in the Revised Statutes of the United States, section 5209, includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association. The crime may be committed personally or by direction. Therefore the entry of a slip upon the books of the bank, if the matter contained in that deposit slip is not true, is a false entry. If the statement made upon the deposit slips is false, the entry of it in the bank and the books of the bank is false" and refused to give the following, asked for by defendant; "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 truthful entry of a transaction charged as fraudulent does not constitute a false entry within the meaning of the statute." *Held*, that there was no error.

The evidence or want of evidence justified the refusals to give the instructions requested by defendant's counsel, and referred to in No. 10, in the opinion of this court; and in regard to those referred to in No. 11, the true view of this branch of the case was fairly covered by the charge of the trial court.

PLAINTIFF in error was indicted in the United States Circuit Court for the Southern District of Florida for violation of section 5209 of the Revised Statutes, which is as follows:

"SEC. 5209. Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment contained eight counts, charging that Agnew, being president of the First National Bank of Ocala, Florida, unlawfully misapplied the moneys, funds and credits of the bank with intent to convert them to his own use, and to injure and defraud the bank, by causing a check for $3400 belonging to the bank to be entered as a credit on his personal account with the bank, his account at the time being largely overdrawn, and he being largely indebted to it: That he caused a false entry of $3400 to be made to his credit on the books of the bank by means of a false deposit slip which he caused to be made in his own favor with the intent on his part to injure and defraud the association: That he embezzled and converted to his own use, with the intent to injure and defraud the association, moneys and assets thereof to the amount of $2500: That he unlawfully misapplied the moneys, funds and credits of the association with intent to convert them to his own use, and with intent to injure and defraud the association, in this, that he purchased for the bank certain bonds of the par value of $5000, of the Globe Phosphate Mining and Manufacturing Company, paying for them the

sum of $2500, and, without the knowledge and consent of the banking association, placed the bonds among its assets, and caused them to be credited to his personal account on the books of the bank at the sum of $5000, knowing the bonds to be entirely worthless and of no commercial value, and thus wilfully misapplied the moneys, funds and credits of the bank to the amount of $2500, and converted the same to his own use: That he feloniously embezzled and converted to his own use $7500 of the moneys, funds and credits of the bank with intent to injure and defraud it: That he unlawfully and wilfully misapplied the moneys, funds and credits of the bank, with intent to convert the same to his own use and to injure and defraud the bank by purchasing, acting ostensibly for it, certain bonds of the Globe Phosphate Mining and Manufacturing Company of the par value of $10,000, for $2500, and, without the knowledge and consent of the bank, placing said bonds among the assets of the bank as a part thereof, and causing the sum of $10,000 to be credited to his own personal account on the books of the bank, he then and there well knowing that the bonds were worthless and of no commercial value, and thus wilfully misapplying and converting to his own use $7500 of the moneys, funds and credits of the association: That he embezzled and converted to his own use, with intent to injure and defraud the association, $7500 of the bank's moneys and assets: That he unlawfully and wilfully misapplied the moneys, funds and credits of the bank with intent to convert the same to his own use and to injure and defraud the bank by purchasing $10,000 of the Globe Phosphate Mining and Manufacturing Company's bonds for $2500, placing them without the knowledge and consent of the association among the assets of the association at $10,000, and causing the sum of $10,000 to be placed to his personal credit on the books of the association, knowing said bonds to be worthless and of no commercial value, thus wilfully misapplying and converting to his own use $7500 of the moneys, funds and credits of the bank with the aforesaid intent.

The indictment was returned December 12, and plaintiff in

error was arraigned December 17, 1895, and filed a plea in abatement as follows:

"And the said Enoch W. Agnew in his own proper person comes into court here and, having heard the said indictment read, says that the grand jury which found said indictment was an illegal grand jury, in this, that after sixteen had failed to attend upon the regular venire the court ordered that a special venire issue for ten grand jurors to be drawn according to law; said grand jurors so ordered by the court were directed to be taken from the county of Duval; that the clerk and marshal in drawing said venire, whenever a name was legally drawn from the box, if said party so drawn was not from the county of Duval, laid aside said name and continued drawing until ten names from the county of Duval were obtained, and which illegal drawing of said venire tended to the prejudice of this defendant, and the court, on excusing three returned on the second venire, ordered that four names be drawn for jurors to complete the panel; that said jurors were ordered to be drawn from the box, and the clerk and marshal drawing the same were ordered to take those that were from Duval County as they came from the box, and the said clerk and marshal, as the names were drawn, rejected and did not place on the venire said names so drawn, but rejected and laid them aside until names came out of the box of parties resident of Duval County, which drawing was illegal and tended to the prejudice of the defendant; and, upon said venire being returned showing A. K. Leon and Julius Kaufman summoned and Alex. Sabel and Frank Robinson not found, the court ordered that four names be drawn from the box and in said order directed that said four names should be taken from the county of Duval; that the said United States marshal and clerk, in obedience to said order, drew from the box more than four names, and where the names were of persons not resident of Duval County rejected and laid them aside and continued drawing until Dennis A. Andreu, Benjamin F. Manier, John L. Marvin, and Samuel Morris were drawn, and so John L. Marvin, John E. Onley, Z. L. Anderson, Charles E. Bell, W. G. Candlish, A. R. Paxon,

and Dennis A. Andreu were drawn illegally by said marshal and clerk and not in accordance with the statute of the United States in such case made and provided, which requires that where less than sixteen attend the court shall order the marshal to summon from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And so the names of many persons who were duly drawn from the jury-box were not placed upon the venire, but were, in the pursuance of the aforesaid orders, after being drawn from the box, rejected and laid aside by the clerk and marshal drawing the same for the purpose of completing the grand jury from the residents of the county of Duval; and the defendant says that he was entitled to have the said grand jury completed according to law; and the said grand jury so empanelled and sworn as aforesaid was not drawn and empanelled in accordance with the statutes of the United States providing for the drawing and empanelling of grand juries, but was illegal; and this defendant says that such drawing tended to his injury and prejudice.

"Wherefore he prays judgment of the said indictment, and that the same may be quashed."

To this plea the United States filed a demurrer, and issue being joined thereon, the court, after argument, held the plea insufficient, to which plaintiff in error excepted and pleaded not guilty. The cause was set for trial on January 3, on which day a jury was empanelled, the trial proceeded with, and a verdict of guilty returned January 7. Motions for new trial and in arrest of judgment were submitted and denied, and sentence thereupon pronounced and the cause brought here on writ of error.

Mr. Eleazer K. Foster 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.

Nineteen errors were assigned, of which the third, fifth, ninth and fourteenth were abandoned, and the sixth and seventh, the twelfth, sixteenth and seventeenth, and the eleventh and fifteenth were argued by counsel for plaintiff in error together. We will examine these alleged errors in their order.

1. That the court erred in sustaining the demurrer to defendant's plea in abatement.

Section 802 of the Revised Statutes is as follows: "Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services."

Under section 803, writs of *venire facias*, when directed by the court, were to issue from the clerk's office and be served and returned by the marshal in person or by his deputy, or in case the marshal or his deputy were incapacitated, by some fit person specially appointed by the court.

By section 804, when, from challenges or otherwise, there was not a petit jury, it was provided that the marshal or his deputy should, by order of the court, return jurymen from the bystanders sufficient to complete the panel.

Section 808 reads thus: "Every grand jury empanelled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose."

By the act of June 30, 1879, c. 52, 21 Stat. 43, it was provided that all jurors, grand and petit, "including those summoned during the session of the court, shall be publicly drawn

from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof. . . . The clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities, in selecting jurors in the highest courts of the State."

The plea sets up as ground for abatement of the indictment that after the original venire had been exhausted without obtaining sixteen grand jurors, the court ordered a special venire to issue for ten grand jurors to be drawn according to law, "to be taken from the county of Duval; that the clerk and marshal in drawing said venire, whenever a name was legally drawn from the box, if said party so drawn was not from the county of Duval, laid aside said name and continued drawing until ten names from the county of Duval were obtained," and that some of the ten returned on the second venire being excused, other names were drawn in the same way, and a third venire was issued, and still another, until the grand jury was completed with grand jurors from Duval County. The original venire showed that twenty-three persons were summoned from ten counties, not including the county of Duval, one or more from each, and the plea stated that when a deficiency appeared from the failure of some of those summoned to attend, the court directed the deficiency to be made up by obtaining jurors from Duval County in the manner pointed out. There are certain orders of court certified as part of the record, which directed the drawing according to law from the various counties exclusive of Duval County, and then from that county. It will be perceived then that the jurors were all drawn from the body of the district, and so distributed as not to incur unnecessary expense, or unduly burden the citizens of any part of the district with jury service.

Section 802 of the Revised Statutes was brought forward from a clause of section 29 of the judiciary act of September 24, 1789, which was regarded by Mr. Justice Curtis as applicable to grand as well as petit juries. *United States* v. *Stowell*, 2 Curtis, 153. In that view we are inclined to concur, but apart from this, and without considering how far, if at all, the section may have been modified by the act of June 30, 1879, we think the plea was properly adjudged insufficient.

Such a plea must be pleaded with strict exactness. *United States* v. *Hammond*, 2 Woods, 197; *O'Connell* v. *Reg.*, 11 Cl. & Fin. 155; *Dolan* v. *People*, 64 N. Y. 485; *Jenkins* v. *State*, 35 Florida, 737; *McClary* v. *State*, 75 Indiana, 260; Whart. Cr. Pl. & Pr. § 427; Bishop New Cr. Pro. §§ 327, 745.

Dr. Wharton lays it down (Whart. Cr. Pl. & Pr. §§ 344, 350) that "material irregularities in selecting and empanelling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to the array, or by motion to quash," or by plea in abatement; that the question of the mode in which such objections are to be taken largely depends upon local statutes, but that certain rules may be regarded as generally applicable. One of these rules is that the defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for if he lies by until a bill is found, the exception may be too late; but where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement, the latter in all cases of contested fact being the proper remedy. *United States* v. *Gale*, 109 U. S. 65. Another general rule is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception. *United States* v. *Richardson*, 28 Fed. Rep. 61; *United States* v. *Reed*, 2 Blatchford, 435, 456; *United States* v. *Tallman*, 10 Blatchford, 21, 51; *State* v. *Mellor*, 13 R. I. 666; *Cox* v. *People*, 80 N. Y. 500; *People* v. *Petrea*, 92 N. Y. 128.

The original venire was issued November 18, the second

venire issued December 2, 1895. The court opened December 3, 1895, and the indictment was returned December 12, yet defendant did not file his plea in abatement until December 17. The plea does not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before; and, moreover, the plea is fatally defective in that, although it is stated that the drawing "tended to his injury and prejudice," no grounds whatever are assigned for such a conclusion, nor does the record exhibit any such.

2. That the court erred in allowing the jurors to take notes.

It appears from the bill of exceptions that one of the jurymen asked the court if he "could take notes and jot down any items on paper," and that the court responded: "Certainly, you have a right to assist your memory in any way that is consistent with your conscience." To which defendant excepted. The court subsequently admonished the jury that this was simply for the personal convenience of the juror; that he wished them to understand that their memory and recollection of the testimony were to control in arriving at a verdict; and that they should not be influenced in the least by the juror's notes.

The exception saved was to the permission to take notes and not to the use of them in the jury-room. But the record does not show that any notes were taken, and there is nothing for the exception to rest on.

3. That the court erred in refusing to allow the witness McIntyre to answer this question propounded by defendant's counsel: "Do you know what his [Agnew's] commercial rating was at that time?"

McIntyre was cashier of the First National Bank of Ocala at the time of the alleged criminal misapplication of its funds, and had testified fully, on behalf of plaintiff in error, as to his financial condition and standing, when he was asked this question. We hold the ruling of the court correct. The point of inquiry was Agnew's actual financial condition or what he knew or must be held to have known or actually and with

reason believed that it was, and his commercial rating was not relevant.

4. That the court erred in allowing the witness McIntyre to be asked on cross-examination why he resigned as cashier of the bank in June, 1894, and in permitting him to answer the question.

The criminal acts charged in the indictment were alleged to have been committed in January, February and May, 1894. McIntyre was cashier of the bank during that period and his resignation of that office was not accepted until June, 1894. The ground assigned for the objection was that the testimony was immaterial, and the court said: "That might be relevant and might not. If he resigned because he knew that Mr. Agnew's guarantee was not good for anything, that might be relevant."

The record thus continues:

"Q. Didn't you attempt to resign as cashier of that bank previous to the time when you did actually resign? A. Yes sir. I offered my resignation at the regular annual meeting of the stockholders in January, 1894. Q. I will ask you why you tendered your resignation at that time as cashier of that bank? The defendant renewed his objection to this question as immaterial; but the court overruled the objection and allowed the question to be answered; to which decision of the court the defendant excepted. A. I cannot state any one particular or special reason for tendering it. In 1893, during the time when all banks were having hard times, of course the banks here had hard times, and I just simply made up my mind then that until things got back to their normal condition again I was going to get out of that business right there. Q. So that your reason was just because you wanted to quit the banking business. A. I would not say that that was the reason. Q. What we want is the reason. A. I would state that, of course, it is very apparent I was not altogether satisfied with the business, that is my reason for giving it up; I was not satisfied. I cannot state any particular. Q. You were not satisfied with the business or the manner in which the business was conducted, which? Defendant ex-

cepted to this question. By the court: To pursue that line of questioning would be bringing rather irrelevant and general matters which might possibly influence the jury and which might not be relevant in this issue unless he can state some definite thing. Mr. Clark (district attorney): I will ask a straight question. Q. I will ask you if it is not true that you tendered your resignation and made up your mind to quit the service of the bank on account of the acts and doings of Mr. Agnew, president of the bank, similar to this bond transaction. The defendant objected to this question as immaterial and leading, but the court overruled the objection and allowed the question to be answered; to which decision of the court the defendant excepted. A. As I said, there was no one special reason that I could mention that caused my resignation. By the court: If you cannot state anything definite, the court does not want any general information or implication."

We think there was no error committed in this regard. This witness was the officer next in rank to the president. He had testified on defendant's behalf and his personal action was relevant on cross-examination as testing his testimony-in-chief. If his voluntary resignation had no connection with the conduct of his superior officer, his answer could not be injurious. If it had, then that fact tended to weaken any evidence he might have given in extenuation of the action of that officer. Besides, these answers of the witness were practically immaterial.

5. That the court erred in refusing to allow the witness Barnett to testify as to whether he considered Agnew's guarantee of $20,000 Globe Phosphate bonds, at the time he made it, good, and in striking out the testimony of the witness; and in not allowing the witness Stewart to testify as to the rating, by Dun's Commercial Agency, of Agnew at the time he gave the guarantee of $20,000.

McIntyre had testified that he had made out two deposit tickets in favor of Agnew and at his request, one dated February 12 and the other May 12, 1894, crediting him with depositing $10,000 in bonds in each instance; that the bonds referred to were Globe Phosphate bonds; that he had the

bonds in his possession when he made out the deposit slips; that the bonds were for $10,000 each; that Mr. Agnew asked him to give him credit for the bonds, $10,000 each time; that in each instance Mr. Agnew stated that "he would be personally responsible to the bank that these bonds would be all right. He would guarantee the bank both principal and interest; that he would make a written guarantee at any time I would write it out." Witness further identified a guarantee dated February 12, 1894, as written by him, and signed by Agnew in his presence, which was read in evidence.

The witness Barnett was president of the National Bank of Jacksonville, Florida, and was called as a witness on behalf of defendant. The question put to him was: "Are you sufficiently acquainted with Mr. Agnew's standing in the spring of 1894 to testify as to whether or not you considered his obligation, guarantee or indorsement at that time good for $20,000? Mr. Clark. Wait a moment. A. Yes, sir; I considered him good." The government asked that this answer be stricken out. The court said: "Any testimony that would show positively the financial condition of Mr. Agnew at that time, not in the commercial world — the opinion of what his guarantee would be taken for by others — is not a true test of what he knew himself. The opinion of others as to his standing at that time I do not think should be introduced to determine the value of that guarantee"; and sustained the motion. The court was right in this ruling. On the question of value to Agnew's knowledge, Barnett's opinion of Agnew's responsibility was irrelevant.

The witness Stewart was the agent of R. G. Dun & Co., a commercial agency, in charge at Jacksonville, Florida. Defendant offered to show that Dun's Commercial Agency rated him at that time at a certain amount of money. The court declined to admit the evidence, and correctly ruled:

"The question in this case is what was his intent, and he knew himself what that guarantee was worth, and that guarantee was worth just as much as he would be able to make it worth in a case of emergency. The question here is not how much Mr. Agnew was worth, but the question is how much

he knew himself to be worth at that time and how good he knew his guarantee was. I consider in that case that if he had good grounds to believe that he was perfectly able to comply with that guarantee in every way and according to his own financial condition at that time — had no doubt in his own mind — I will admit that such positive evidence as that might be relevant to go to the jury to show he had no intent to injure or defraud the bank, but what the opinions of the financial world were in regard to his condition is not the best evidence."

6. The tenth assignment alleged error in several distinct parts of the charge of the court, but in argument only one out of six exceptions saved thereto was relied on, namely, to the following.

The court advised the jury that in determining defendant's intent they might consider testimony tending to show that defendant, without notice to the board of directors, and without their knowledge or consent, had invested one half the bank's capital in the bonds in question, and then said: "The rule of law in regard to intent is that intent to defraud is to be inferred from wilfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank, but this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such an inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction."

Undoubtedly, in criminal cases, the burden of establishing

guilt rests on the prosecution from the beginning to the end of the trial.

But when a *prima facie* case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused.

The Circuit Court, in this part of the charge, was dealing with the intent to injure and defraud the bank, and rightly instructed the jury that, if they found certain facts, such intent was necessarily to be inferred therefrom.

This was in application of the presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent. 1 Greenl. Ev. § 18; 3 Greenl. Ev. §§ 13, 14; Jones on Ev. § 23; Bishop Cr. Proc. §§ 1100, 1101; and cases cited.

The Circuit Court, however, told the jury that the presumption of the intent to injure and defraud, if the facts were found as stated, was not conclusive, but, in substance, that its strength was such that it could only be overcome by evidence that created a reasonable doubt of its correctness; in other words, that as the presumption put the intent beyond reasonable doubt, it must prevail, unless evidence of at least equivalent weight were adduced to the contrary.

The question of the particular intent was not treated as a question of law, but as a question to be submitted to the jury, and conceding that the statement of the court that the evidence to overcome the presumption must be sufficiently strong to satisfy the jury "beyond a reasonable doubt" was open to objection for want of accuracy, we are unable to perceive that this could have tended to prejudice the defendant when the charge is considered as a whole.

For the jury were further advised that if they found the facts in question, which were again rehearsed, then the necessary inference was that the transaction was effected "with intent to injure and defraud said bank, and such inference can only be overcome by evidence satisfactory to you that there was no such intent"; that "the question of the intent is to be determined by the facts and circumstances and the surroundings at the time of the transaction"; that "the intent of the

defendant at the time he committed the transaction is the question for you to determine, and in arriving at a conclusion on that intent you will carefully weigh all of the testimony in the case"; that the presumption of innocence remains with the defendant until the jury are "satisfied of the guilt beyond a reasonable doubt"; and that "if you are satisfied beyond a reasonable doubt that the transactions as charged were committed, and at the time he committed those transactions he had an intent to defraud the bank, your verdict will be one of guilty. Unless you are satisfied beyond a reasonable doubt that he had such intent, your verdict will be not guilty." And again: "The jury must be satisfied beyond a reasonable doubt as regards the guilt of the accused before they can find a verdict of guilty. By a reasonable doubt is not meant a possible doubt, but such a doubt arising from the evidence that leaves the minds of the jury in such a state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused."

7. That the court erred in giving to the jury the following instruction: "The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt"; and in not giving the following instruction asked by defendant: "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy."

The court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language. *Ayers* v. *Watson*, 137 U. S. 584; *Grand Trunk Railway* v. *Ives*, 144 U. S. 408; *Coffin* v. *United States*, 162 U. S. 664, 672. The instruction given was quite correct and substantially covered

the instruction refused, and as to the latter the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead.

In *Coffin* v. *United States*, 156 U. S. 432, 460, this court, in discussing the distinction between the presumption of innocence and reasonable doubt, said: "The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy." But in that case the charge of the court was thought not to have given due effect to the presumption of innocence, which there was no failure in this case to state, and the giving of the instruction asked would have tended to obscure what had already been made plain.

8. That the court erred in giving the following instruction on behalf of the government:

"The crime of making false entries by an officer of a national bank with the intent to defraud, defined in the Revised Statutes of the United States, section 5209, includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association. The crime may be committed personally or by direction."

The exception was confined to the foregoing, but the instruction thus continued:

"Therefore the entry of a slip upon the books of the bank, if the matter contained in that deposit slip is not true, is a false entry. If the statement made upon the deposit slip is false, the entry of it in the bank and the books of the bank is false."

And in refusing to give the following instructions asked by defendant:

"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 truthful entry of a transaction charged as fraudulent

does not constitute a false entry within the meaning of the statute."

The instruction as given was correct, and in accordance with the rule indicated in *Coffin* v. *United States*, 162 U. S. 664. This being so, no error was committed in declining to give the others.

9. That the court erred in giving the following instruction:

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action. If, therefore, the funds, moneys or credits of the First National Bank of Ocala are shown to have been either embezzled or wilfully misapplied by the accused and converted to his own use, whereby, as a necessary, natural or legitimate consequence, the association's capital was reduced or placed beyond the control of the directors or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed."

In our opinion there was evidence tending to establish a state of case justifying the giving of this instruction, which was unexceptionable as matter of law.

10. That the court erred in refusing to give the following instruction requested by defendant:

"If the jury shall find from the evidence that on the 15th day of April, A.D. 1895, E. W. Agnew, upon receipt of the check of the Merchants' National Bank of Savannah for $3400, used that check and the proceeds of it for the payment of a debt of the First National Bank of Ocala, then they must find upon that count in the indictment that he did not fraudulently embezzle or misapply the check or the proceeds of it."

The first count of the indictment charged that Agnew,

knowing his personal account with the bank to be largely overdrawn and that he was largely indebted to the bank, caused this check for $3400, which was the property of the bank, to be entered to his personal credit on the books of the bank and thereby made it subject to his disposal, and technically the offence would not have been, in itself, condoned by any rightful application which he may have made of that particular amount of money. And while the evidence showed that the $3400 was received from the sale of stocks belonging to the bank, it also showed that Agnew never charged himself with the $3400 and credited stock account, nor paid in that sum and made that credit, but that when the bank failed the $3400 still stood as applied on Agnew's credit and still remained an asset in the stock account. Such explanation as was attempted was so unsatisfactory that we do not think the refusal of the instruction constitutes reversible error.

11. That the court erred in not giving the following instruction asked for by defendant:

"That the written guarantee introduced and filed in evidence, signed by E. W. Agnew, and conditioned for the payment of the interest and principal of the bonds of the Globe Phosphate Mining Company was upon its face a good, legal and sufficient guarantee, and that if the jury shall find from the evidence that at the time of the delivery by E. W. Agnew to the cashier of the First National Bank of Ocala of the bonds of the Globe Phosphate Mining Company in controversy he also delivered the guarantee which has been introduced in evidence, and they shall further find from the evidence that at the time said guarantee was signed and delivered that E. W. Agnew, the defendant, was solvent and thoroughly able to respond to the obligation, and that he signed and delivered the guarantee with the knowledge of his solvency and with intent to pay the same when demand was made upon him for payment, then the jury may find from the evidence that the defendant did not invest or misapply the money arising from the sale of the said bonds with intent to defraud the association or any one else."

The Phosphate bonds were put in evidence and the record

should have contained a copy of at least one of them, but it does not, and instead there is a brief statement that they were bonds of "the Globe Phosphate Mining and Manufacturing Company, Citrus County, Florida, each of the value of one thousand dollars, payable in gold coin of the United States, in ten years from date or on call, at or after the expiration of two years from date, drawing interest at eight per cent, semi-annually, in gold coin, payable on the 15th day of December and June in each year, according to tenor of coupons attached, upon presentation and surrender of said coupons respectively; default in payment of coupons and continuing default for two months, the whole becomes due; all bearing even date and of the same tenor and same term, ten years; executed in pursuance of vote of the stockholders and board of directors; secured by first-mortgage bond upon all property of even date, present and future, acquired by the company, the right to redeem after two years being optional with the company; said bonds dated 11th December, 1893; signed by John A. Bishop and Herbert A. Bishop, the original having been withdrawn by order of the court, to be returned to the receiver of the First National Bank of Ocala."

Agnew's guarantee was in these words:

"Know all men by these presents that for and in consideration of the sum of ($5) five dollars cash in hand paid by the First National Bank of Ocala and for other good and valuable consideration I hereby guarantee to the said bank the payment on demand of both principal and interest of fifteen (15) bonds of the Globe Phosphate Mining and Manufacturing Company, numbered from one (1) to five (5), both inclusive; eleven (11) to fifteen (15), both inclusive, and twenty-one (21) to twenty-five (25), both inclusive, for one thousand ($1000) dollars each, total fifteen thousand ($15,000) dollars, and bearing interest at the rate of eight (8%) per cent per annum. It is agreed and understood that I hereby guarantee the payment of the principal of these bonds, payable on demand, with accrued interest.

"This agreement and contract is to be binding on me, my heirs, executors, administrators or assigns."

"Bonds of the Globe Phosphate Mining and Manufacturing Co. Nos. 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77 and 79 are to be included in the above guarantee, and I hereby guarantee principal and interest on all of the above-described bonds."

The evidence was to the effect that five Globe Phosphate bonds, numbered from one to five, were purchased by Agnew for the bank at fifty cents on the dollar and credited at par. But Agnew testified that he purchased them for himself. It also appeared that two lots of Globe Phosphate bonds, of $10,000 each, were purchased at twenty-five cents on the dollar, and that Agnew was credited on his personal account with $10,000, in each instance, and the bonds placed in the assets of the bank; and that the bonds were subsequently sent away to be used as collateral security, and the guarantee forwarded to be put with them. The evidence further tended to show that the bonds were of little, if any, value, and that Mr. Agnew's financial condition was such as to place his guarantee in the same category. And although Agnew testified on his own behalf he did not refer to the subject of the guaranty, or his intentions and ability in regard to it, while it appeared that the credits of these bonds were never consented to nor authorized at any meeting of the directors or stockholders.

The bonds were payable in ten years with an option to the company to pay after two years, it being also provided that for default in payment of interest, which was payable semi-annually, continuing two months, the whole might become due. If the president of the bank received a personal credit of $20,000 for these bonds, under the circumstances disclosed, the court was not required to instruct as requested that from his guaranty that the bonds and interest should be paid, the jury might find that there was no intent to injure and defraud the bank in the transaction.

The true view of this branch of the case was fairly covered by the charge of the court as follows: "There is testimony tending to show that the defendant at the time he was thus depositing the bonds, gave a guarantee that the bonds were good, and that he would guarantee the payment of principal

and interest. You can take that into consideration, and such guarantee can only be considered as determining the value of those bonds at that time and the intent of the party in such transaction. . . . As I say again, gentlemen, the only difficult question for you to determine is the intent of the accused. The question of the intent is to be determined by the facts and circumstances and the surroundings at the time of the transaction; but, gentlemen, the law presumes that every party who in any way attempts anything by any guarantee or anything of that kind which is dependent upon future successful operations, takes the risk of the success, and that if a person commits an offence with the intent of temporarily injuring or defrauding another party or a banking institution, although it may be his intent at the time to finally recompense or prevent any injury resulting from such act, he is not protected by such intent to finally correct the temporary wrong deed; or, in this case, if you are satisfied that at the time he placed those bonds there he knew that they were worthless or of a very small value and had a large value charged to the bank and placed to his account — if he did that with the intent, for the time being, to injure the bank and take a wrongful advantage of the credit of the bank, no matter if at that time he had an intent to in the future remedy any injury that might come to the bank, it would not protect him in your finding or from your finding, what the intent was at that time."

We have carefully explored the evidence and considered the errors assigned, whether pressed in argument or not, and have been unable to discover any adequate ground for the reversal of the judgment.

Judgment affirmed.

Syllabus.

SCOTT *v.* DONALD.

SCOTT *v.* DONALD.

GARDNER *v.* DONALD.

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

Nos. 411, 412, 413. Argued October 21, 22, 1896. — Decided January 18, 1897.

Where a suit is brought against defendants who claim to act as officers of a State and under color of an unconstitutional statute commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, such suit is not an action against the State within the meaning of the Eleventh Amendment to the Constitution of the United States.

Although the question of the jurisdiction of the court below has not been certified to this court in the manner provided by the fifth section of the judiciary act of March 3, 1891, yet, as the case is before it in a case in which the law of a State is claimed to be in contravention of the Constitution of the United States under another clause of that statute it has jurisdiction of the entire case and of all questions involved in it.

Damages are the compensation which the law awards for an injury done; and exemplary damages are allowable, in excess of the actual loss, where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression.

The intentional, malicious and repeated interference by the defendants with the exercise of personal rights and privileges secured to the plaintiffs by the Constitution of the United States, as alleged in the complaint, constitutes a wrong and injury not the subject of compensation by a mere money standard, but fairly within the doctrine of the cases wherein exemplary damages have been allowed, as those allegations of the complaints, though denied in the answers, have been sustained.

The statute of South Carolina of January 2, 1895, entitled "an act to further declare the law in reference to, and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the State of South Carolina, and to police the same," recognizes liquors and wines as commodities which may be lawfully made, bought and sold, and which must therefore be deemed to be the subject of foreign and interstate commerce, and is an obstruction to and interference with that commerce, and must, as to those of its provisions which affect the plaintiffs, stand condemned.

That statute is not an inspection law, and is not within the scope of the act of August 8, 1890, c. 728.

Statement of the Case.

Whether those provisions of the act which direct that so-called contraband liquors may be seized without warrant by any state constable, sheriff or policeman, while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent or private person, and which subject common carriers to fine and imprisonment for carrying liquors in any package, cask, jug, box or other package, under any other than the proper name or brand known to the trade, and which forbid the bringing of any suit for damages alleged to arise by seizing and detention of liquors would be lawful in an inspection law otherwise valid, is not decided.

So far as these actions are concerned, the damages recovered were for acts committed under the alleged authority of the act of 1895, and cannot be affected by the provisions of the subsequent act of 1896, even if the invalidities of the former act were thereby remedied — a matter on which no opinion is expressed.

In the Circuit Court of the United States for the District of South Carolina, in February, 1895, two suits at law were brought by James Donald against J. M. Scott, and one by Donald against Gardner etc., wherein plaintiff sought to recover damages caused by the action of the defendants, who were state constables of the State of South Carolina, in seizing and carrying away several packages of wines and liquors belonging to the plaintiffs, and, at the time of the seizure, in the possession of railroad companies which as common carriers had brought the packages within the State.

It appeared that one of the packages, consisting of a case of domestic California wine, came by rail from Savannah, Georgia, whither it had been imported by the plaintiff; another, consisting of a case of whiskey, in bottles, made in Maryland, and imported by the plaintiff by way of the Baltimore Steam Packet line; and another, consisting of one barrel of bottled beer, made at Rochester, New York, and imported by the plaintiff into the State of South Carolina by way of the Old Dominion Steamship line.

Demurrers to the several declarations or complaints were interposed and overruled. Thereupon issues of fact were joined, and, trial by jury having been duly waived, the causes were tried and determined by the court, and resulted in findings and judgments in favor of the said plaintiff for the sum of three hundred dollars and costs in each case, respec-

tively. Writs of error from this court were then sued out and allowed.

Mr. William A. Barber, Attorney General of the State of South Carolina, for plaintiffs in error.

I. The plaintiffs in error, as state constables, were authorized by the act generally known as the dispensary law to seize the liquors seized. See sections 43, 32, 29, 33, 1 and 25.

II. The dispensary act of South Carolina is the lawful exercise of the police power of the State and is not in conflict with Article 9 of the Constitution of the United States in so far as it prohibits citizens of the State from importing within the State alcoholic liquors for their own use and consumption. The sole question is whether so much of the dispensary law of South Carolina as prohibits the importation of alcoholic liquors from other States for personal use was enacted in the legitimate exercise of the police power of the State; and, if so, it is above the Constitution and acts of Congress, and no Federal question is presented.

This leads to the inquiry, What is the police power of a State?

This honorable court has said that the police power cannot be accurately defined; and, without attempting a definition, I would say it is that great attribute of sovereignty by which a State is justified in its self-protection and self-preservation; and it implies the use of the necessary means for the protection of the correlative and reciprocal rights of the sovereign and the citizen. The present measure of the power of a sovereign State is the full measure of its rights before it joined the federation, except in so far as the provisions of the Federal Constitution or its own people have modified it. We know that the State gave up to the Union the right to regulate commerce, tax imports, declare war, proclaim peace, emit bills of credit, coin money and operate the post office. But it gave up no right based upon those fundamental principles not laid down in the Federal Constitution, and which are necessary to the protection of itself, necessary to the safety, com-

fort and well-being of society, and necessary to the protection of its citizens against the evils of intemperance, pauperism and crime. The police power is among the reserved powers of the State.

For the views of this court see *New York* v. *Miln*, 11 Pet. 102; *Barbier* v. *Connolly*, 113 U. S. 27; *Stone* v. *Mississippi*, 108 U. S. 814; *In re Rahrer*, 140 U. S. 545; *Crowley* v. *Christensen*, 137 U. S. 86; *Slaughter House cases*, 16 Wall. 36; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Foster* v. *Kansas*, 112 U. S. 201. In view of the principles laid down in these cases, there can be no doubt that the dispensary act is a police measure. In *Bartemeyer* v. *Iowa* it was held that a state law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the Constitution. In *Foster* v. *Kansas*, this doctrine was repeated.

In 1887, in the case of *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, it was held that a law of Iowa forbidding the bringing into the State from other States of intoxicating liquors without a certificate, as therein required, was a regulation of commerce among the States, and was void as being repugnant to the Constitution, such statute not being an inspection law, or a quarantine law, or a sanitary measure, and therefore not a legitimate exercise of the police power of the State.

Then came the decision of *Leisy* v. *Hardin*, 135 U. S. 100, in which it was held that a party had the right under the Interstate Commerce Acts to import intoxicating liquor into the State, and the importer had the right to sell the imported liquor in the State so long as it remained in the original package.

This case induced the passage of the act of 1890.

In *In re Rahrer*, the constitutionality of that act was assailed, but it was sustained by the court.

That act is the controlling act now, and by it Congress has provided that upon the arrival of liquors within the State, they become subject to the police power of the State, to the same extent and in the same manner as though such liquors had been produced by the State.

While this act did not add to the police power of the State, it did give expression to the will of Congress that a State could control intoxicating liquors as articles of commerce upon their arrival in the State, no matter where manufactured or from where imported, and Congress thus relinquished any power as to this article, which had been conferred by the Constitution of the United States, upon its arrival in such State.

But it is contended in this case that the dispensary law is in contravention of the Interstate Commerce Acts, because it discriminates against products of other States and against citizens of other States:

1. In that it allows dispensaries to sell intoxicating liquor, while citizens from other States are not allowed to send it into the State for sale:

2. In that it discriminates against intoxicating liquors, the product of other States, by prohibiting their introduction into the State for sale or use.

The act does authorize the sale of ales, wines and liquors by the State, and does prohibit all citizens of this State, as well as citizens of other States, from bringing them into the State for sale or use.

The act does allow the commissioner for the State to buy liquors outside the State, and does prohibit other persons from buying and bringing them into the State.

But we maintain that this is a legitimate exercise of the police power, and does not in any way regulate commerce between the States, and is not a discrimination against products or citizens of other States. It places citizens and products of this State on an equal footing with those of other States. Domestic liquors and foreign liquors are alike subject to the provisions of the law. While citizens of other States are forbidden to sell liquors within this State, the prohibition extends to citizens of this State as well; and while a citizen is prohibited from importing liquor, he is likewise prohibited from purchasing within the State any liquors not previously analyzed by the chemist and sold by the proper officers of the State.

Argument for Plaintiffs in Error.

The act may remotely affect commerce, but it does not interfere with or regulate it by discrimination or otherwise. *Welton* v. *Missouri*, 91 U. S. 275; *Brown* v. *Houston*, 114 U. S. 622; *Walling* v. *Michigan*, 116 U. S. 446; *Mobile County* v. *Kimball*, 102 U. S. 691; *Woodruff* v. *Parham*, 8 Wall. 123; *Machine Co.* v. *Gage*, 100 U. S. 676; *Hinson* v. *Lott*, 8 Wall. 148; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Sherlock* v. *Alling*, 93 U. S. 99; *Leisy* v. *Hardin*, 135 U. S. 100; *Pittsburg & Southern Coal Co.* v. *Louisiana*, 156 U. S. 590; *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *Hennington* v. *Georgia*, 163 U. S. 299; *Western Union Tel. Co.* v. *James*, 162 U. S. 650.

In the light of these cases, we submit that the dispensary law is a legitimate exercise of the police power.

We further submit:

1. The law does not discriminate against liquors the products of other States, but makes the liquors produced in this State, as well as those imported, subject to it.

Under the act of 1890, liquors imported from other States upon their arrival become subject to the police power, and if liquors manufactured in the State are put upon the same footing there is no discrimination against them on account of their extra-state origin.

2. The law does not discriminate against the citizens of other States. Citizens of this State are put on an equality with them. None of them can sell intoxicating liquors. It is true the State sells, but none of her citizens can do so.

3. The law does require her citizens to buy from dispensaries, but no citizen from other States is inhibited from doing so.

There is no discrimination in the law against citizens or products of other States, as such, and because they are citizens and products of other States; but the object is to protect the public morals, public health and public safety. It is not the intention of the law to regulate interstate commerce, but to protect the people of the State.

But it may be said that while the State sells liquors to her own citizens she cannot prohibit the introduction of liquors from other States upon the ground that they are deleterious and for the purpose of protecting her citizens from fraud and deception.

The provision in the act requiring all liquors sold by the dispensaries to undergo an analysis and their purity to be certified sufficiently answers this objection.

Then we maintain that the complainant is denied no right, privilege or immunity secured by the Constitution or laws of the United States, and no Federal question arises in this action. The simple averment in the bill that a Federal question is presented is not sufficient. *New Orleans* v. *New Orleans Water Works*, 142 U. S. 79; *Hamblin* v. *Western Land Co.*, 147 U. S. 531.

The intention of the general assembly, as is evident from the general scope and detailed provisions of the dispensary act, was to protect the public health, public morals and public peace of the State, and not to burden or regulate interstate commerce. Some of the late cases indicate a modification by this court of views expressed in earlier cases as to the extent to which state legislatures may enact police regulations. Changed conditions, industrial development and more enlightened thought in this country have necessitated progressive exercise of the police power in the solution of social and governmental problems. The dispensary act is an example of legislation in this direction. It is difficult to conceive of any law enacted in exercise of the police power that does not affect interstate commerce, and in every instance the question is, does it affect commerce to the extent of its regulation? We repeat, the dispensary act is not directed against commerce or any of its regulations, but relates to the rights, duties and liabilities of citizens, and only incidentally and remotely affects the operations of commerce. Such laws have uniformly been held valid, and upon this principle we seek to uphold the act.

III. The executive officers of the State of South Carolina are equally as anxious as the complainant herein to have the

legal issues raised in this cause finally adjudicated by this honorable court. With a view to securing a final decision, and feeling that it is just to the court as well as to parties litigant that the present method of operating the South Carolina dispensary should be fully understood, a suggestion has been submitted calling the attention of the court to the recent enactment of the general assembly of South Carolina relative to the dispensary. The dispensary system, as a solution of the liquor question, is yet in its infancy, and the state legislature in passing the act of 1896 endeavored to perfect the business details of the institution. At the same time the inspection feature of the law was materially changed. It is to this alteration particularly that we invite attention, and respectfully ask that the court, if it deem proper, consider its provisions in this respect as affecting the act approved January 2, 1895, and the order of injunction in this case. Without discussing in detail those features of the act, we submit that, as an inspection law, it is subject to the following principles:

1. That the States, in the exercise of the police power, may pass inspection laws which are not in their express words or operation a burden upon interstate commerce, by discriminating against the products or citizens of other States, and which operate equally upon products and citizens of the States themselves and citizens and products of other States. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Gibbons* v. *Ogden*, 9 Wheat. 123; *Brown* v. *Maryland*, 12 Wheat. 419; *Voight* v. *Wright*, 141 U. S. 62; *Crutcher* v. *Kentucky*, 111 U. S. 59. *Brimmer* v. *Rebman*, 138 U. S. 78; *Smith* v. *Alabama*, 124 U. S. 465; *Dent* v. *West Virginia*, 129 U. S. 114. *Plumley* v. *Massachusetts*, 155 U. S. 472.

2. That the legislature is the judge of what is against the public health, morals and safety of the State, and when in the exercise of the police power it enacts a law declaring the use of any article to be against them, it will not conflict with the ninth article of the Constitution of the United States when it discriminates against the citizens and products of other States. *Railroad Co.* v. *Husen*, 95 U. S. 465; *Crowley* v.

Christensen, 137 U. S. 86; *Plumley* v. *Massachusetts*, 155 U. S. 461.

3. That the State, in the exercise of the police power, can enact laws protecting the people from the consequences of ignorance, incapacity, fraud, disease, poverty and crime. *Dent* v. *West Virginia*, 129 U. S. 114; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78.

Mr. J. P. Kennedy Bryan for defendants in error.

Mr. Justice Shiras delivered the opinion of the court.

The records in these cases present the question of the validity, under the Constitution of the United States, of the act of the general assembly of the State of South Carolina, approved January 2, 1895, generally known as the state dispensary law, and a copy of which is in the margin.[1]

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[1] An Act to further declare the law in reference to, and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the State of South Carolina, and to police the same.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same*, That the manufacture, sale, barter or exchange, receipt, acceptance, delivery, storing and keeping in possession, within this State, of any spirituous, malt, vinous, fermented, brewed (whether lager or rice beer) or other liquors, or any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage by any person, firm or corporation; the transportation, removal, the taking from the depot or other place by consignee or other person, or the payment of freight or express or other charges, by any person, firm, association or corporation, upon any spirituous, malt, vinous, fermented, brewed (whether lager, rice or other beer) or other liquor, or any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage, except as is hereinafter provided, is hereby prohibited, under a penalty of not less than three (3) nor more than twelve (12) months at hard labor in the state penitentiary, or pay a fine of not less than one hundred dollars nor more than five hundred dollars or both fine and imprisonment, in the discretion of the court, for each offence. All such liquors, except when bought from a state officer author-

A preliminary question is raised by the proposition that these are in fact suits against the State of South Carolina, and forbidden by the Eleventh Amendment. This question is

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ized to sell the same, or in possession of one, are declared to be contraband and against the morals, good health and safety of the State, and may be seized wherever found, without warrant, and turned over to the state commissioner.

SEC. 2. The governor, the secretary of State and the comptroller general shall *ex officio* constitute the state board of control to carry out the provisions of this act. The state board of control shall elect a clerk, who shall hold his office during the pleasure of the board, and shall receive as compensation for his services a salary of eight hundred dollars per annum.

SEC. 3. That the state board of control shall, at the expiration of the term of the present commissioner, and at the expiration of every two years thereafter, appoint a commissioner, which appointment shall be submitted to the senate at its next session for its approval; said commissioner shall be believed by the state board of control to be an abstainer from intoxicants, and shall, under such rules and regulations as may be made by the state board of control, purchase all intoxicating liquors for lawful sale in this State, and furnish the same to such persons as may be designated as dispensers thereof, to be sold as hereafter prescribed in this act. Said commissioner shall reside, and have his place of business, in the city of Columbia, in this State, and hold his office two years from his appointment and until another be appointed in his stead. He shall be subject to removal for cause by the state board of control. He shall qualify and be commissioned the same as other state officers, and shall receive an annual salary of twenty-five hundred dollars, payable at the same time and in the same manner as is provided for the payment of the salaries of state officers. He shall be allowed a book-keeper, who shall be paid in the same manner a salary of twelve hundred dollars; and such other assistants as in the opinion of the board of control may be deemed necessary. He shall not sell to the county dispensers any intoxicating or fermented liquors except such as have been tested by the chemist of the South Carolina college and declared to be pure: *Provided,* That said board of control shall have authority to appoint such assistants as they may find necessary to assist the chemist of the South Carolina college in making the analyses required by this act; and the said board of control may fix such reasonable compensation, if any, as they may deem proper for the services rendered by such chemist or such assistants. The state commissioner shall deposit all amounts received by him from sales to county dispensers or others with the treasurer of the State under such rules as may be made by the state board of control to insure the faithful return of the same, and the state treasurer shall keep a separate account with said fund, from which the commissioner shall draw from time to time, upon warrants duly approved by the chairman of said board, the amount necessary to pay the expenses incurred in conducting

sufficiently disposed of by referring to the late case of *In re Tyler*, 149 U. S. 164, where the conclusion of numerous previous cases was stated to be that where a suit is brought

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the business. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by the state board of control. He shall, before entering upon the duties of his office, execute a bond to the state treasurer, with sufficient sureties, to be approved by the attorney general, in the penal sum of twenty-five thousand dollars, for the faithful performance of the duties of his office. In all purchases or sales of intoxicating liquors made by said commissioner, as contemplated in this act, the commissioner shall cause a certificate to be attached to each and every package containing said liquors when the same is shipped to him from the place of purchase or by him to the county dispensaries, certified by his official signature and seal, which certificate shall state that liquors contained in said packages have been purchased by him for sale within the State of South Carolina, or to be shipped out of the State, under the laws of said State; and without such certificate any package containing liquors which shall be shipped out of the State, or shipped from place to place within the State, or delivered to the consignee by any railroad, express company or other common carriers, or be found in the possession of any common carrier, shall be regarded as contraband and may be seized without warrant for confiscation, and such common carrier shall be liable to a penalty of five hundred dollars for each offence, to be recovered against said common carrier in any court of competent jurisdiction by summons and complaint, proceedings to be instituted by the solicitor of any circuit with whom evidence may be lodged by any officer or citizen having knowledge or information of the violation; and any person attaching or using such certificate without the authority of the commissioner, or any counterfeit certificate for the purpose of securing the transportation of any intoxicating liquors out of or within this State, in violation of law, shall, upon conviction thereof, be punished by a fine of not less than five hundred dollars and imprisonment in the penitentiary for not less than one year for each offence.

Sec. 4. Said commissioner shall make a printed monthly statement, under oath, of all liquors sold by him, enumerating the different kinds and quality of each kind, the price paid, and the terms of payment and to whom sold; also the names of the parties from whom the liquor was purchased and their places of business and dates of purchase, which statement shall be filed with the state board of control.

Sec. 5. The state commissioner shall, before shipping any liquors to dispensers, except lager beer, cause the same to be put into packages of not less than one half pint nor more than five gallons, and securely seal the same, and it shall be unlawful for the dispenser to break any of such packages or open the same for any reason whatsoever. He shall sell by the

against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover

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package only, and no person shall open the same on the premises: *Provided,* This section shall not apply to malt liquors shipped in cases or bottles thereof shipped in barrels; and such malt liquors may be sold by the county dispenser in such quantities, of not less than one pint, as he may see proper: *Provided,* The same shall not be drunk on the premises. Dispensers shall open their places of business and sell only in the daytime, under such rules as may be made by the state board of control, or by the county board of control with approval of the state board of control.

SEC. 6. It shall be the duty of the state board of control to appoint a county board of control, composed of the county supervisor *ex officio* and two other persons believed by the said board not to be addicted to the use of intoxicating liquors. The two persons so appointed shall hold their office for a term of two years, and until their successors are appointed, and shall be subject to removal for cause by the state board of control. Said county board of control shall make such rules as will be conducive to the best management of the sale of intoxicating liquors in their respective counties: *Provided,* All such rules shall be submitted to the state board and approved by them before adoption. The members of the county board of control shall qualify and be commissioned as are other county officers, without fees therefor.

SEC. 7. Applications for positions of county dispenser shall be by petition, signed and sworn to by the applicant, and filed with the county board of control at least ten days before the meeting at which the application is to be considered, which petition shall state the applicant's name, place of residence, in what business engaged, and in what business he has been engaged two years previous to filing petition; that he is a citizen of the United States and of South Carolina; that he has never been adjudged guilty of violating the law relating to intoxicating liquors, and is not a keeper of a restaurant or place of public amusement, and that he is not addicted to the use of intoxicating liquors as a beverage. This permit or renewal thereof shall issue only on condition that the applicant shall execute to the county treasurer a bond in the penal sum of three thousand dollars, with good and sufficient sureties, conditioned that he will well and truly obey the laws of the State of South Carolina, now or hereafter in force, in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages and costs that may be assessed, or recorded against him, for violations of such laws during the term for which said permit or renewal is granted, and will not sell intoxicating liquors under his permit at a price other than that fixed by state board of control. Said bond shall be for the use of the county or any person or persons who may be damaged or injured by reason of any violation on the part of the obligor of the law relating to intoxicating liquors purchased or sold during the term for

money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the State.

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which said permit, or the renewal thereof, is granted. The said bond shall be deposited with the county treasurer, and suit thereon shall be brought at any time by the solicitor or any person for whose benefit the same is given; and in case the conditions thereof, or any of them, shall be violated, the principal and sureties thereon shall also be jointly and severally liable for all civil damages, costs and judgments that may be obtained against the principal in any civil action brought by wife, child, parent, guardian, employer or other person under the provision of the law. All other moneys collected for breaches of such bond shall go into the county treasury. Said bond shall be approved by the county board of control under the rules and laws applicable to the approval of the official bonds.

SEC. 8. There may be one or more county dispensers appointed for each county, the place of business of each of whom shall be designated by the county board, but the state board must give consent before more than one dispenser can be appointed in any county; and when the county board designates a locality for a dispensary, ten days' public notice of which shall be given, it shall be competent for a majority of the voters of the township in which such dispensary is to be located to prevent its location in such township by signing a petition or petitions, addressed to the county board, requesting that no dispensary be established in that township, whereupon some other place may be designated. The county board may in its discretion locate a dispensary elsewhere than in an incorporated town in the counties of Beaufort and Horry and no others, except such as are authorized by special act of the general assembly: *Provided, however*, That any county, town or city wherein the sale of alcoholic liquors was prohibited by law prior to July 1, 1893, may secure the establishment of a dispensary within its borders in the following manner: Upon petition signed by one fourth of the qualified voters of such county, town or city wishing a dispensary therein being filed with the county supervisor or town or city council, respectively, they shall order an election submitting the question of dispensary or no dispensary to the qualified voters of such county, town or city, and shall prescribe the rules, regulations, returns, ballots and notice of such election and shall declare the result; and if a majority of the ballots cast be found and declared to be for a dispensary, then a dispensary may be established in said county, town or city: *Provided*, That dispensaries may be established in the counties of Williamsburg, Pickens and Marion and at Seneca and other towns now incorporated in Oconee County without such election on compliance with the other requirements of this act: *Provided*, That nothing in this act contained shall be so construed as to prohibit persons resident in counties which shall elect to have no dispensary from procuring liquors

It is also argued that the amounts involved in the respective suits were not sufficient to give jurisdiction to the Circuit Court. Although the question of the jurisdiction of the court below has not been certified to us in the manner provided by

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from dispensaries in other counties, or county dispensers from shipping same to their places of residence under proper labels or certificates: *Provided, further*, That nothing in this act shall be construed to repeal an act entitled "An act to allow the opening of dispensaries in Pickens and Oconee Counties," approved December 18, 1894.

SEC. 9. If the application for the position of dispenser be granted, it shall not issue until the applicant shall make and subscribe on oath, before some officer authorized by law to administer oaths, which shall be endorsed upon the bond, to the effect and tenor following: "I, —— ——, do solemnly swear (or affirm) that I will well and truly perform all and singular the condition of the within bond, and keep and perform the trusts confided in me to purchase, keep and sell intoxicating liquors. I will not sell, give or furnish to any person any intoxicating liquors otherwise than is provided by law, and especially I will not sell or furnish intoxicating liquors to any minor, intoxicated person or persons who are in the habit of becoming intoxicated, and I will make true, full and accurate returns to the county board of control on the first Monday of each month of all certificates and requests made to or received by me, as required by law, during the preceding month; and such returns shall show every sale and delivery of such liquors made by me or for me during the month embraced therein, and the true signature to every request received and granted; and such returns shall show all the liquors sold or delivered to any and every person as returned." Upon taking said oath and filing bond as hereinbefore provided, the county board of control shall issue to him a permit authorizing him to keep and sell intoxicating liquors as in this act provided, and every permit so granted shall specify the building, giving the street and number or location, in which intoxicating liquors may be sold by virtue of the same, and the length of time in which the same shall be in force, which in no case shall exceed twelve months. Permits granted under this act shall be deemed trusts reposed in the recipients thereof, not as a matter of right, but of confidence, and may be revoked upon sufficient showing by order of the county board of control; and upon the removal of any county dispenser, or upon demand of the county board of control, he shall immediately turn over to the county board of control all liquors and other property in his possession belonging to the State or county. Said county board of control shall be charged with the duty of prosecuting the county dispenser or any of his employés who may violate any of the provisions of this act. On the death, resignation or removal of a county dispenser or expiration of his term of office, the county board shall appoint his successor.

SEC. 10. The county board of control shall use as their office the office of the county supervisor of their county, and shall elect one of their num-

the fifth section of the judiciary act of March 3, 1891, yet, as the case is before us, in a case in which the law of a State is claimed to be in contravention of the Constitution of the

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ber as chairman and another as clerk of the said county board of control. The county board shall preserve as a part of the records and files of their office all petitions, bonds and other papers pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. The county board of control shall designate or provide a suitable place in which to sell the liquors. The members of the county board of control shall meet once a month or oftener, on the call of the chairman, and each member of the board shall receive a per diem of two dollars and five cents mileage each way, but they shall not receive compensation for more than thirty days in any one year except in the county of Charleston, where they shall not receive compensation for more than sixty days in any one year, and in Barnwell County not more than fifty days in any one year. They shall, upon the approval of the state board of control, employ such assistants for the county dispenser as may be necessary. The dispenser and his assistants shall receive such compensation as the state board of control may determine. All profits, after paying all expenses of the county dispensary, shall be paid, one half to the county treasury and one half to the municipal corporation in which it may be located, such settlements to be made quarterly: *Provided*, That if the authorities of any town or city, in the judgment of the state board of control, do not enforce this law, the state board may withhold the part going to the said town or city and use it to pay state constables or else turn it into the county treasury. All moneys received by the county dispenser belonging to the State shall be forwarded on Monday of each week to the state commissioner, and at the same time the county dispenser shall forward to the state board of control a duplicate statement of the remittance so made to the state commissioner. On the same day of each week the county dispenser shall deposit with the county treasurer the portion of all the moneys received by him belonging to the county and to the municipal authorities in which the dispensary is located. The county treasurer shall give his receipt therefor and hold the same until the quarterly settlement hereinbefore provided for is had. The quarterly settlement herein provided for shall be made on the fourth Monday in the months of December, March, June and September in each year. Such settlement shall be made in the presence of the county auditor, who shall make a memorandum of the items thereof, and forward the same to the state board of control. The mayor or intendant of the city or town in which the dispensary is located shall also attend such settlement: *Provided*, That in counties where dispensaries other than incorporated cities or towns, the county shall get all profits that would otherwise go to such cities and towns.

Sec. 11. Before selling or delivering any intoxicating liquors to any

United States, under another clause of that statute, we have jurisdiction of the entire case and of all questions involved in it. *Horner* v. *United States*, 143 U. S. 570; *Carey* v. *Houston*

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person, a request must be presented to the county dispenser, printed or written in ink, dated of the true date, stating that he or she is of age and the residence of the signer, for whom or whose use it is required, the quantity and kind required, and his or her true name, and the request shall be signed by the applicant in his own true name and signature, attested by the county dispenser or his clerk who receives and files the request. But the request shall be refused if the county dispenser filling it personally knows the person applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicating liquors to an excess; or if the applicant is not so personally known to said county dispenser, before filing said order or delivering said liquor, he shall require the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors to excess.

SEC. 12. Requests for purchase of liquor shall be made upon blanks furnished by the county auditor, in packages of one hundred each, to the county dispensers, from time to time as the same shall be needed, and shall be numbered consecutively by the auditor. The blanks aforesaid shall be furnished to the county auditor by the state board of control, in uniform books, like bank checks, and the date of delivery shall be endorsed by the county auditor on each book and receipt taken therefor and preserved in his office. The dispenser shall preserve the application in the original form and book, except the filing of the blanks therein, until returned to the county auditor. When return thereof is made the county auditor shall endorse thereon the date of return, and file and preserve the same, to be used in the quarterly settlements between such dispenser and the county treasurer. All unused or mutilated blanks shall be returned or accounted for before other blanks are issued to such county dispenser.

SEC. 13. On or before the tenth day of each month each dispenser shall make full returns to the county auditors of all requests filed by him and his clerks during the preceding month upon blanks to be furnished by the state board of control for that purpose, and accompany the same with an oath, duly taken and subscribed before the county auditor or notary public, which shall be in the following form, to wit: "I, ——, being duly sworn, state on oath that the requests for liquors herewith returned are all that were received and filled at my place of business under my permit during the month of ——, 189-; that I have carefully preserved the same, and that they were filled up, signed and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kind of liquors required, and that no liquors have been sold or dispensed under my permit during said month except as shown by the requests herewith returned; and that I have faithfully observed and complied with

& Texas Central Railway, 150 U. S. 170, 181; *Chappell* v. *United States*, 160 U. S. 499.

Our inspection of these records does not satisfy us that this objection is well founded. The declaration or complaint

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the provisions of my bond and oath taken by me, thereon endorsed, and with all the laws relating to my duties in the premises."

SEC. 14. Upon failure of any dispenser to make returns to the auditor as herein required, it shall be the duty of said auditor to report such failure to the state board of control, and the said state board of control shall immediately order the county board to summon said delinquent dispenser to appear before them and show cause why his permit should not be revoked; and if the cause shall not be shown to the satisfaction of the county board of control, they shall immediately annul said permit and give public notice thereof; and the circuit solicitor shall proceed to enforce the penalties prescribed in this act for such violation against said county dispenser at the next succeeding term of court in the county in which such permit is held; and any dispenser who shall sell or dispose of any intoxicating liquors after his permit shall have been revoked shall, upon conviction thereof, be fined not less than five hundred (500) dollars and be imprisoned for six months. If any dispenser or his clerk shall purchase any intoxicating liquors from any other person except the state commissioner, or if he, or they, or any person or persons in his or their employ, or by his or their direction, shall sell or offer for sale any liquors other than such as have been purchased from the state commissioner, or shall adulterate, or cause to be adulterated, any intoxicating, spirituous or malt liquors which he or they may keep for sale under this act, by mixing with same coloring matter or any drug or ingredient whatever, or shall mix the same with other liquors of different kind or quality, or with water, or shall sell or expose for sale such liquors so adulterated, knowing it to be such, or shall change the label upon any box, bottle or package, he or they shall be guilty of a misdemeanor and be fined in a sum of not less than two hundred dollars or imprisonment for not less than six months. If any county dispenser shall misappropriate, misuse or otherwise wrongfully dispose of any moneys or other property belonging to the State, county, or municipality, he shall, upon conviction, be punished as in case of breach of trust with fraudulent intent.

SEC. 15. No person, firm, association or corporation shall manufacture for sale, or keep for sale, exchange, barter or dispense any liquors containing alcohol, for any purpose whatsoever, otherwise than is provided in this act. Any person, firm, association or corporation desiring or intending to manufacture or distill any liquors containing alcohol within this State shall first obtain from the state board of control a permit or license so to do, and it shall be unlawful for any such person, firm, association or corporation to manufacture or distill any liquors containing alcohol within this State without having such permit or license. Any violations of the terms of the permit or license shall authorize and warrant the seizure of the product on

alleges in each case that the plaintiff has been injured and damaged in the sum of six thousand dollars and demands judgment for that amount. It is urged that, as the value of the goods and chattels taken was alleged and shown to be but

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hand at any distillery or place where liquors containing alcohol are manufactured: *Provided*, The United States has no lien or claim upon the same. And in the application for a permit or license to manufacture liquors containing alcohol, the applicant shall give the State full power, upon any violation of this act, to seize and take possession of any product on hand at the distillery or place where such applicant shall manufacture such liquors, and shall authorize the State to pay the United States government tax upon the same if unpaid, and to dispose thereof as provided herein for contraband goods. Dispensers as herein provided shall alone be authorized to sell and dispense liquors containing alcohol, and all permits must be procured by such dispensers as herein provided from the county board of control: *Provided*, That the manufacturers of distilled, malt or vinous liquors who are doing business in the State shall be allowed to sell to no person in this State except the state commissioner and to parties outside the State, and the state commissioner shall purchase his supplies from the brewers and distillers in this State when their product reaches the standard required by this act: *Provided*, Such supplies can be purchased as cheaply from such brewers and distillers in this State as elsewhere: *And provided further*, That the state commissioner shall have the right, and he is hereby empowered, to purchase malt liquors from breweries of this State, and also from breweries outside of this State, who may have agents representing them in this State. Every package, barrel or bottle of such liquor shipped beyond the limits of this State shall have thereon the certificate of the state commissioner allowing same, otherwise it shall be liable to confiscation, and the railroad carrying it shall be punished as in section three: *And provided*, That any person shall have the right to make wine for his or her own use from grapes or other fruits. The inspector appointed by the state board of control, as herein provided, shall have the right to enter and examine, at any and all times not forbidden by the United States laws, any distillery, brewery or place where liquors containing alcohol are manufactured within this State. Any manufacturer, distiller or brewer who may refuse to allow the inspector to enter and examine his place of business and its appurtenances at such times as the inspector may deem proper shall forfeit his permit or license.

SEC. 16. Every dispenser shall keep a strict account of all liquors received by him from the state commissioner in a book kept for that purpose, which shall be subject at all times to the inspection of the circuit solicitor, any peace officer or grand juror of the county, or of any other citizen, and such book shall show the amount and kind of liquors procured, the date of receipt and amount sold, and the amount on hand of each kind for each month. Such book shall be produced by the party keeping the

comparatively a few dollars, and as the recovery in each case was only in the sum of three hundred dollars, we are obliged to infer that the damages alleged and demanded were without

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same, to be used as evidence on trial of any prosecution against him on notice duly served that the same will be required as evidence.

SEC. 17. The payment of the United States special tax as a liquor seller, or notice of any kind in any place of resort, or in any store or shop indicating that alcoholic liquors are there sold, kept or given away, shall be held to be *prima facie* evidence that the person or persons paying said tax and the parties displaying such notices are acting in violation of this act; and unless said person or parties are selling under permit as prescribed by this act they shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for a term of not less than three months nor more than twelve months. Conviction in the United States courts of illicit sales of liquor shall be taken as *prima facie* evidence of violation of the provisions of this act, and any distiller or manufacturer of liquors containing alcohol so convicted in the United States courts shall, by reason of such conviction, forfeit the permit or license granted him by the state board of control in addition to the other penalties herein provided.

SEC. 18. Licensed druggists conducting drug stores and manufacturers of proprietary medicines are hereby authorized to purchase of dispensers of the counties of their residence intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage. The dispensers shall not charge such licensed druggists more than ten per cent net profit for liquors so sold. Such purchaser shall keep a record of the uses to which the same are devoted, giving the kind and quantity so used, and quarterly they shall make and file with the county auditor and with the county board of control sworn reports, giving a full and true statement of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted, and giving the name of the dispenser from whom the same was purchased, and the dates and quantities so purchased, together with an invoice of each kind still in stock and kept for such compoundings. If said licensed druggist shall sell, barter, give away or exchange or in any manner dispose of said liquors for any purpose other than authorized by this section, he shall upon conviction forfeit his license and be liable to all penalties, prosecutions and proceedings at law and in equity provided against persons selling without permit, and upon such conviction the clerk of the court shall, within ten days after such judgment or order, transmit to the board of pharmaceutical examiners the certified record thereof, upon receipt of which the said board shall strike the name of the said druggist from the list of pharmacists and revoke his certificate: *Provided*, That nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form or device, which may be used as a beverage which is intoxicating in its character: *And provided*

just foundation, and in the nature of a fraud upon the jurisdiction of the court.

The declarations contain allegations which, if true, bring

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further, That the state commissioner shall be authorized to sell to manufacturing chemists and wholesale druggists alcohol by the barrel at cost.

SEC. 19. If any person shall make any false or fictitious signature or sign any name other than his or her own to any paper required to be signed by this act, without being authorized so to do, or make any false statement in any paper, request or application signed to procure liquors under this act, the person so offending shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than twenty-five dollars, or be imprisoned not more than thirty days.

SEC. 20. If any dispenser, or his clerk, shall make false oath touching any matter required to be sworn to under the provisions of this act, the person so offending shall, upon conviction, be punished as provided by law for perjury. If any county dispenser shall purchase or procure any intoxicating liquors from other person than the state commissioner, or make any false return to the county auditor, or use any request for liquors for more than one sale, in any such case he shall be deemed guilty of a misdemeanor, and upon conviction, be punished by a fine of five hundred dollars or six months' imprisonment.

SEC. 21. Every person who shall directly or indirectly keep or maintain by himself, or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining any club room or other place in which any intoxicating liquors are received or kept for use, barter or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever, and every person who shall receive, barter, sell, assist or abet another in receiving, bartering or selling, any alcoholic liquors so received or kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for a term of not less than three months nor more than twelve months: *Provided*, That the state board of control shall have the power, upon a proper showing and under such rules as they may adopt, to exempt hotels where tourists or health seekers resort from being considered nuisances or as violating this act by reason of any manager of such hotels dispensing liquors bought from the dispensary, by the bottle, either night or day, but before any such exemption shall be granted the state board of control shall require the manager of such hotel to give a good and sufficient bond, in the penal sum of three thousand dollars, conditioned for the observance of all the rules, regulations and restrictions prescribed and imposed by the said board and with all the requirements of this act, and it shall be lawful for any constable or officer thus employed under this act to enter such hotel and search it at any time, day or night, without a warrant, for contraband liquors.

the cases within the well-settled doctrine that exemplary damages may in certain cases be assessed. After alleging that the plaintiff, in importing for his own use the articles men-

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SEC. 22. All places where alcoholic liquors are sold, bartered or given away in violation of this act, or where persons are permitted to resort for the purpose of drinking alcoholic liquors as a beverage, or where alcoholic liquors are kept for sale, barter or delivery in violation of this act, are hereby declared to be common nuisances, and any person may go before any trial justice in the county and swear out an arrest warrant on personal knowledge or on information and belief, charging said nuisance, giving the names of witnesses against the keeper or manager of such place and his aids and assistants, if any, and such trial justice shall direct such arrest warrant either to the sheriff of the county or to any special constable, commanding said defendant to be arrested and brought before him to be dealt with according to law, and at the same time shall issue a search warrant in which the premises in question shall be particularly described, commanding such sheriff or constable to thoroughly search the premises in question and to seize all alcoholic liquors found thereon, and dispose of them as provided in section 33, and to seize all vessels, bar fixtures, screens, bottles, glasses and appurtenances apparently used or suitable for use in retailing liquors, to make a complete inventory thereof, and deposit the same with the sheriff. That under the arrest warrant the defendant shall be arrested and brought before such trial justice, and the case shall be disposed of as in case of other crimes beyond his jurisdiction, except that when he commits or binds over the parties for trial to the next term of court of general sessions for the county, he shall make out every paper in the case in duplicate and file one with the clerk of the court for the county, and immediately transmit the other to the solicitor of the circuit, whereupon said solicitor shall at once apply to the circuit judge at chambers within that circuit for an order restraining the defendants, their servants or agents, from keeping, receiving, bartering, selling or giving away any alcoholic liquors until the further order of the court. Such circuit judge is hereby authorized, empowered and required to grant the said restraining order without requiring a bond or undertaking upon the hearing or receipt by him of said papers from the court of the said trial justice by the hands of the solicitor; and any violation of said restraining order before the trial of the case shall be deemed a contempt of court and punished as such by said judge or court, or any other circuit judge, as for the violation of an order of injunction. Upon conviction of said defendants of maintaining said nuisance at the trial, they or any of them shall be deemed guilty of a misdemeanor, punishable by imprisonment in the state penitentiary for a term of not less than three months, or a fine of not less than two hundred dollars, or by both, in the discretion of the court, and the restraining order shall be made perpetual. The articles covered by the inventory, which were retained by the sheriff, shall be forfeited to the State and sold and the net proceeds sent to the state com-

tioned, were in the exercise of his legal rights guaranteed by the Constitution of the United States, it is averred, in the several declarations, that the defendants were notified that

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missioner, and the sheriff shall forthwith proceed to dispose of the alcoholic liquors covered by said inventory as provided for in this act as when other liquors are seized. The finding of such alcoholic liquors on such premises, with satisfactory evidence that the same was being disposed of contrary to this act, shall be *prima facie* evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officers in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending. No suit shall lie for damages alleged to arise by seizure and detention of liquors under this act. Any person violating the terms of any restraining order granted in such proceedings shall be punished for contempt by a fine of not less than two hundred dollars nor more than one thousand dollars, and by imprisonment in the state penitentiary not less than ninety days nor more than one year. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this act, the court, or, in vacation, the judge thereof, shall have power to try summarily and punish the party or parties guilty, as required by law. The affidavits upon which the attachment for contempt issues shall make a *prima facie* case for the State. The accused may plead in the same manner as to an indictment in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both. The defendant shall not necessarily be discharged upon his denial of the fact stated in the moving papers. The clerk of the court shall, upon the application of either party, issue subpœnas for witnesses, and except as above set forth the practice in such contempt proceedings shall conform as nearly as may to the practice in the Court of Common Pleas. That when any solicitor neglects or refuses to perform any duty or to take any steps required of him by any of the provisions of the preceding section or by any of the provisions of this act, the attorney general, on his own motion, or by the request of the governor, shall in person or by his assistant proceed to the locality and perform such neglected duty and take such steps as are necessary in the place instead of such solicitor, and at his discretion to cause a prosecution to be instituted, not only in the matter so neglected, but also a prosecution against the solicitor for malfeasance or misfeasance in office or for official misconduct or for other charges justified by facts and to pursue the prosecution to the extent of a conviction and dismissal from office of any such solicitor. And in such event the attorney general shall be, and is hereby, authorized and empowered to appoint one or more additional assistants, who shall each have while actually employed the same compensation, to be paid from the litigation fund of the attorney general.

SEC. 23. The state commissioner, under rules and regulations provided by the state board of control, may enter into contracts with responsible

any seizure of said goods, under any pretence of authority, would be a grievous trespass and in disregard of constitutional rights, for which they would be held responsible; that the

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grape-growers in this State for the sale of domestic wines through the dispensary, so as to encourage grape-growing in this State, and in furtherance of this object not more than ten per cent profit to the dispensary over the expenses of bottling, labelling, freighting, etc., shall be charged for the handling of such wines. The manager of every registered distillery of liquor in this State shall report quarterly to the state commissioner, showing the number of gallons of each kind of liquor on hand, manufactured or disposed of during the quarter; and if the said report fail to correspond with the return of said distiller to the United States internal revenue collector of this State, or it is shown that said manager has disposed of liquor contrary to this act, said distillery shall be deemed to be a common nuisance, and the said manager and his aiders and assistants and the premises shall be proceeded against as in this act provided as to places where liquors are sold contrary to this act.

SEC. 24. In all places where liquors are unlawfully kept or stored, the same not being in an open house or exposed to view, and a search being necessary, upon affidavit to that effect, or on information and belief that contraband liquor is in such place, a search warrant may be issued by a justice, judge or trial justice, or mayor or intendant of a city or town, to whom application is made, empowering a constable, or any person who may be deputized, to enter the said place by daytime or in the night-time and to search and examine the said premises for the purpose of seizing the said contraband liquors therein concealed, kept or stored, which said liquor when so seized shall be disposed as hereinafter provided.

SEC. 25. That any of the liquors set forth in section one (1) of this act, which are contraband, may be seized and taken without warrant by any state constable, sheriff or policeman, while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent, private person, firm, corporation or association, and reported to the state commissioner at once, who shall dispose of the same as hereinafter provided: *Provided*, That liquors purchased outside the State, owned and conveyed as personal baggage, shall be exempt from seizure when the quantity does not exceed one gallon.

SEC. 26. That the possession of said illicit liquors is hereby prohibited and declared unlawful, and any obligation, note of indebtedness, contracted in their sale or transportation is declared to be absolutely null and void, nor shall any action or suit for the recovery of the same be entertained in any court in this State.

SEC. 27. That the proceeding against liquor so illegally kept, stored, sold, delivered, transported or being transported shall be considered a proceeding *in rem*, unless otherwise herein provided, elsewhere than at his or her residence.

defendants, notwithstanding such notice, and claiming to act as constables of the State of South Carolina, forcibly seized and carried away the said packages; and that, in committing

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SEC. 28. That the carriage, transportation, possession, removal, sale, delivery or acceptance of any of the said liquors or liquids in any package, cask, jug, box or other package, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks, packages or boxes containing the same, or the causing of such carriage, transportation, possession, removal, sale, delivery or acceptance, shall work the forfeiture of said liquors or liquids and casks or packages, and the person or persons so offending, knowingly, be subject to pay a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment for the term of not less than six months nor more than one year, and the wrongful name, address, mark, stamp or style on such liquor when seized shall be considered evidence *prima facie* of guilt. The books and way bills of the common carrier may be examined to trace said liquor to the shipper, who shall be liable, upon conviction, in a like penalty.

SEC. 29. That all constables, deputy constables, sheriffs, trial justices or municipal policemen shall have the right, power and authority, and it shall be their duty, whenever they are informed or suspect that any such suspicious package in possession of a common carrier contains alcoholic liquors or liquids, to detain the same for examination for the term of twenty-four hours without any warrant or process, whatever. Any constable, deputy constable, sheriff or trial justice who shall neglect or refuse to perform the duties required by this act shall be subject to suspension by the governor. Any sheriff or trial justice seizing any alcoholic liquors or liquids, as required by this section, shall be paid one half the value of such liquor or liquids so soon as the same shall have been received at the state dispensary, approved and disposed of according to law.

SEC. 30. That any interference by any person with, obstruction or resistance of, or abusive language to, any officer or person in the discharge of the duties herein enjoined, or the use of abusive language by any such officer or person to any other person or persons, shall be deemed a misdemeanor, and the person or persons so offending shall, upon conviction, be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisoned for a term of not less than three months nor more than twelve months.

SEC. 31. In all cases of seizure of any goods, wares or merchandise hereafter or heretofore made as being subject to forfeiture under any provision of this act or the former act, which, in the opinion of the officer or person making the seizure, are of the appraised value of fifty dollars or more, the said officer or person shall proceed as follows: First. He shall cause a list containing a particular description of the goods, wares or merchandise seized to be prepared in duplicate and an appraisement thereof to be made

the said unlawful acts, the said defendants acted knowingly, wilfully and maliciously, and with intent to oppress and humiliate and intimidate the plaintiff, and make him afraid

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by three sworn appraisers to be selected by him, who shall be respectable and disinterested citizens of the State of South Carolina residing within the county wherein the seizure was made. Said list and appraisement shall be properly attested by the said officer or person and the said appraisers, for which service each of the said appraisers shall be allowed the sum of one dollar per day, not exceeding five days, to be paid by the state commissioner. Second. If the said goods are believed by the officer making the seizure to be of less value than fifty dollars, no appraisement shall be made. The said officer or person shall proceed to publish a notice for three weeks, in writing, at three places in the county where the seizure was made, describing the articles and stating the time and place and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice. Third. Any person claiming the liquors so seized as contraband and the vessels containing the same, within the time specified in the notice, may file with the state commissioner a claim stating his interest in the articles seized, and may execute a bond to the state commissioner in the penal sum of five hundred dollars, with sureties, to be approved by the said state commissioner, conditioned that in the case of condemnation of the articles so seized the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bonds to the state commissioner he shall transmit the same with the duplicate list or description of the goods seized to the solicitor of the circuit in which such seizure was made and the said solicitor shall prosecute the case to secure the forfeiture of said contraband liquors or liquids in the court having jurisdiction. Fourth. If no claim is interposed and no bond given within the time above specified, such liquors shall be forfeited without further proceedings, and the state commissioner shall have the said liquors tested by the state chemist, and if pure shall sell the same through the state dispensary as though purchased by him. If not pure, he shall sell the same beyond the State and deposit the proceeds to the credit of the state commissioner: *Provided*, That in seizures in quantities less in value than fifty dollars of such illicit liquor or liquors, the same may be advertised with other quantities at Columbia by the state commissioner and disposed of as hereinbefore provided: *Provided, further*, That the claimants of such liquors may give bond in one hundred dollars as when the value is fifty dollars or over, and shall bear the burden of showing before a trial justice that he has complied with the law and that the liquor is not liable to seizure.

Sec. 32. That all fermented, distilled or other liquors or liquids containing alcohol, transported into this State or remaining herein for use, sale, consumption, storage or other disposition, shall, upon introduction and

to rely upon the Constitution and laws of the United States and the judicial power thereof for his protection in the rights, privileges and immunities secured to him by the Con-

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arrival in this State, be subject to the operation and effect of this law to the same extent and in the same manner as though such liquors or liquids had been produced in this State.

SEC. 33. That no person, except as provided in this act, shall bring into this State or transport from place to place within this State, by wagon, cart or other vehicle, or by any other means or mode of carriage, any liquor or liquids containing alcohol, under a penalty of one hundred dollars or imprisonment for thirty days for each offence, upon conviction thereof, as for a misdemeanor. Any servant, agent or employé of any persons, corporations or associations, doing business in this State as common carrier, or any person whatever (except an officer seizing or examining the same), who shall remove any intoxicating liquors from any railroad car, vessel or other vehicle of transportation at any place other than the usual and established stations, wharves, depots or places of business of such common carriers within some incorporated city or town where there is a dispensary, or who shall aid in or consent to such removal, or attempt to remove, shall upon conviction be sentenced to pay a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment for a term of not less than three months nor more than twelve months: *Provided*, That said penalty shall not apply to any liquor in transit when changed from car to car to facilitate transportation across the State: *Provided*, That this section does not apply to liquors purchased from a dispensary and bearing the proper label or certificate. All liquors in this State, except dispensary liquors and those passing through this State, consigned to points beyond this State, shall be deemed contraband, and may be seized in transit without warrant. And any steamboat, sailing vessel, railroad, express company or other common carrier transporting or bringing into this State for sale or use therein, except by the dispensary, shall suffer a penalty of five hundred dollars and costs for each offence, to be recovered by the solicitor of the circuit, or the attorney general, by an action brought therefor in any court of competent jurisdiction. The state constable, sheriff, municipal police or any lawful constable may enter any railroad car, or express car, or depot, or steamboat, or other vessel, without warrant and make search for such contraband liquors, and may examine the waybills and freight books of said common carriers, and any one interfering with or resisting such officers shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment for a term of not less than three months nor more than twelve months.

SEC. 34. That any person detected openly or in the act of violating any of the provisions of this act shall be liable to arrest without warrant: *Provided*, A warrant shall be procured within a reasonable time thereafter.

SEC. 35. That violations of any of the sections of this act where pun-

stitution and laws of the United States; and that the defendants well knew when they made said seizures and committed said trespasses that said acts were unlawful and forbidden by

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ishment upon conviction is not especially provided for, the person or persons or corporations so convicted shall be punished in the discretion of the court trying the same. All alcoholic liquors other than domestic wine, and in quantity more than five gallons, which do not have on the packages in which they are contained the label and certificates going to show that they have been purchased from a state officer authorized to sell them are hereby declared contraband, and on seizure will be forfeited to the State as provided in section 31: *Provided*, That this section shall not apply to liquor held by the owners of registered stills. Persons having more than five gallons of liquor which they wish to keep for their own use may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the state commissioner and applying for certificates to affix thereto. After sixty days from the approval of this act any liquor found in the State not having such certificates may be seized and confiscated. Persons having more than they wish to use may obtain certificates to ship beyond the limits of the State. Any persons affixing or causing to be affixed to any package containing alcoholic liquor any imitation stamp or other printed or engraved label or device than those furnished by the state commissioner shall, for each offence, be liable to a penalty of ten days' imprisonment or twenty-five dollars fine.

SEC. 36. Every person who dispossesses or rescues from a constable or other officer, or attempts so to do, any alcoholic liquor taken or detained by such officer charged with the enforcement of this law, shall, upon conviction, be imprisoned not less than three months nor more than twelve months, or pay a fine of not less than one hundred dollars nor more than five hundred dollars.

SEC. 37. Any person handling contraband liquor in the night-time, or delivering the same, shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment for not less than three months, nor more than twelve months, or by a fine of not less than one hundred dollars nor more than five hundred dollars.

SEC. 38. Any wagon, cart, boat or other conveyance transporting liquors at night, other than regular passenger or freight steamers and railway cars, shall be liable to seizure and confiscation, and to that end the officer shall cause the same to be duly advertised and sold and the proceeds sent to the state commissioner.

SEC. 39. Every dispenser when he sells a package containing liquor shall put a cross-mark in ink on the label or certificate thereon, extending from the top to the bottom and from side to side. When any liquor is seized because it has not the necessary certificates and labels required by this act, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed and that the whiskey is not contraband.

the laws and Constitution of the United States, but that they so acted, trusting and believing that they would be shielded and protected from all harm by their official superiors in the

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SEC. 40. That any railroad, steamboat, express company or other common carrier, shall incur a penalty of treble the invoice price of any alcoholic liquors lost or stolen in transit to or from the dispensary, whether shipped as released or not, such penalty to be recovered by action in any court of competent jurisdiction.

SEC. 41. That it shall be unlawful for any persons to take or to solicit orders, or to receive money from other persons, for the purchase or shipment of any alcoholic liquors for or to such other persons in this State, except for liquors to be purchased and shipped from the dispensary, and any person violating this section, upon conviction, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for a term of not less than three months nor more than twelve months, or by a fine of not less than one hundred dollars nor more than five hundred dollars.

SEC. 42. It shall be the duty of sheriffs, deputy sheriffs and constables having notice of the violation of any of the provisions of this act to notify the circuit solicitor of the fact of such violation, and to furnish him the names of any witness within their knowledge by whom such violation can be proven. If any such officer or solicitor shall wilfully fail to comply with the provisions of this section, he shall, upon conviction, be fined in a sum not less than one hundred dollars nor more than five hundred dollars, and such conviction shall work a forfeiture of the office held by such person, and the court before whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge the forfeiture of his said office.

SEC. 43. The governor shall have authority to appoint one or more state constables, at a salary of two dollars per day when on duty, and two chief constables, at three dollars each per day and expenses, to see that this act is enforced, the same to be charged to the expense account of the state commissioner, except as otherwise provided in this act.

SEC. 44. That chapter I, title VII, of the Code of Civil Procedure of this State, entitled "Of provisional remedies in civil actions," shall not apply to any officer or person having duties to perform under this act, and in no case shall an action lie against any such officer or person for damages to person or property as provided in said chapter.

SEC. 45. That when any bill of indictment shall have been given out by any solicitor or by the attorney general or an assistant attorney general to any grand jury in any county of this State at any term of the court of general sessions therein charging any person or persons with any violation of any of the provisions of the statutes of this State relating to spirituous, alcoholic, malt or intoxicating liquors, such grand jury shall in the opinion of such prosecuting officer, from prejudice, caprice, undue influence or improper cause, refuse to find a true bill thereon, it shall be then and there

State of South Carolina; and that they made such seizures and committed such trespasses wilfully and maliciously, with the purpose and intent to trample on the plaintiff's rights under the law and to do him all the injury in the power of the defendants.

These allegations must, for the purpose of disposing of the present question, be accepted by us as true or, at least, as susceptible of proof.

Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss, where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression. While some courts and text-writers have questioned the soundness of this doctrine, it has been accepted in England, in most of the States of this Union, and has received the sanction of this court.

In the case of *Wilkes* v. *Wood*, Lofft, 19, which was an action of trespass for breaking into the plaintiff's house and seizing his papers, under color of a general warrant by a secretary of State, Chief Justice Pratt, in charging the jury, and in replying to the contention of the solicitor general that damages nominal or merely compensatory were all that could be allowed, said: "Notwithstanding what the solicitor gen-

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competent for such prosecuting officer to move for, and for the presiding judge to grant at his discretion, a change of venue and place of hearing and trial at such stage of the proceedings when such judge is satisfied with the showing of such prosecuting officer, to be made on the minutes of the court or upon affidavit, that a fair and impartial consideration cannot be had before such grand jury.

SEC. 46. That whenever in this act it is provided that process shall issue upon an affidavit based on information and belief, the affidavit shall contain a statement setting forth the sources of information, the facts and grounds of belief upon which the affiant bases his belief: *Provided*, That it shall not be necessary to set forth the sources of information, the facts and grounds of belief in the affidavit upon which a warrant of arrest shall issue, but it shall only be necessary in cases of search warrants.

SEC. 47. That this act shall be a public act, and shall go into effect immediately upon its approval by the governor, and that all acts or parts of acts inconsistent with this act be, and are hereby, repealed.

Approved January 2d, A.D. 1895.

eral has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." The jury found a verdict with a thousand pounds damages.

In the case of *Huckle* v. *Money*, 2 Wilson, 205, there was a motion for a new trial on the ground that the jury had allowed excessive damages. It was proved on the trial that the plaintiff was a journeyman printer, and was taken in custody by the defendant, under the general warrant of a secretary of State, upon suspicion of having printed a certain libellous paper; that the defendant kept him in custody about six hours, but used him very civilly by treating him with beefsteaks and beer, so that he suffered very little or no damages. The jury gave him a verdict in three hundred pounds damages. In disposing of the motion, the Lord Chief Justice Pratt said: "That if the jury had been confined by their oath to consider the mere personal injury only, perhaps twenty pounds damages would have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial. . . . I cannot say what damages I should have given if I had been upon the jury, but I directed and told them they were not bound to any certain damages. Upon the whole I am of opinion the damages are not excessive, and that it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages."

In *Day* v. *Woodworth*, 13 How. 371, which was an action of trespass charging the defendants with tearing down and destroying the plaintiff's mill dam, this court, through Mr. Justice Grier, said:

"It is a well-established principle of the common law that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common, as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard, and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

"In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the particular circumstances of each case."

Philadelphia, Wilmington & Baltimore Railroad v. *Quigley*, 21 How. 202, 213, was a case wherein a railroad company was responsible in an action for the publication of a libel; and although this court reversed the Circuit Court for allowing the jury to give exemplary damages, because there was no evidence that the injury was inflicted maliciously or wantonly, yet the case of *Day* v. *Woodworth*, 13 How. 363, was cited with approval as recognizing the power of a jury in certain

actions of tort to assess against the tort-feasor punitive or exemplary damages, and as laying down the law that whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person.

This was likewise recognized as well-settled doctrine in the case of *Lake Shore Railway* v. *Prentice*, 147 U. S. 107.

The intentional, malicious and repeated interference by the defendants with the exercise of personal rights and privileges secured to the plaintiff by the Constitution of the United States, as alleged in the complaint, constitutes, as we think, a wrong and injury not the subject of compensation by a mere money standard, but fairly within the doctrine of the cases wherein exemplary damages have been allowed. Those allegations of the complaints, though denied in the answers, have been sustained by the tribunal — in these cases the court, a jury having been waived — which had to pass upon the issues of fact.

That the amount of the recovery in each case fell short of the sum of two thousand dollars did not withdraw the cases from the jurisdiction of the court. As the declarations alleged damages in the sum of six thousand dollars, and as a jury would be at liberty to find any amount not in excess of that sum, the jurisdiction, having once validly attached, would not be defeated by the fact that the recoveries were for sums less than two thousand dollars. As said in the case of *Day* v. *Woodworth*, above cited, "The amount has always been left to the discretion of the jury, as the degree of the punishment to be then inflicted must depend on the particular circumstances of each case."

Barry v. *Edmunds*, 116 U. S. 550, was a fully considered case, and it was there held that a suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts, where made to appear on the record, create a legal certainty of that conclusion; that where

exemplary damages beyond the sum necessary to give a Circuit Court of the United States jurisdiction are claimed in an action for a malicious trespass, the court should not dismiss the case for want of jurisdiction simply because the record shows that the actual injury caused to the plaintiff by the trespass was less than the jurisdictional amount, and that it is settled in this court that in an action for a trespass accompanied with malice the plaintiff may recover exemplary damages in excess of the amount of his injuries, if the *ad damnum* is properly laid.

Our inquiries thus far have proceeded on the assumption that the injuries complained of were inflicted in the enforcement of an unconstitutional law of the State. Sustaining the jurisdiction of the Circuit Court on that assumption, we are now brought to the more important and difficult question whether the so called dispensary law of the State of South Carolina is, indeed, as to some or all of its parts, invalid, as being in conflict with the Constitution of the United States and acts of Congress made thereunder? Is that statute a lawful exercise of the police power of the State?

In the present discussion we do not deem it necessary or desirable to review the numerous cases in which this court has had occasion to consider similar questions. We shall find it sufficient to apply to the case before us the conclusions announced in several very recent cases.

The difficulty of the subject is shown in the frequent and elaborate dissents in many of the cases. Still, it can be safely said that the differences of opinion thus manifested have not been so much upon fundamental principles, as upon questions of the construction and meaning of the various state statutes that have been under consideration. Those statutes have covered almost innumerable subjects; such as the exclusion from the State of contagious or infectious diseases, or of criminals, paupers and others likely to become a burden or public charge; regulations requiring railroad companies to fence their roads; forbidding the manufacture and sale of oleomargarine; the prohibition of Sunday labor, even by railroad companies partly engaged in interstate commerce, etc.

But the particular state laws that have been most frequently considered, and have occasioned the most discussion, have been those that have sought to regulate or forbid the importation, manufacture and sale of intoxicating liquors. And the law, whose validity we are now to consider, is one of that class.

The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief. So long, however, as state legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles.

We cheerfully concede that the law in question was passed in the *bona fide* exercise of the police power. We disclaim any imputation to the law-makers of South Carolina of a design, under the guise of a domestic regulation, to interfere with the rights and privileges of either her own citizens or those of her sister States, which are secured to them by the Constitution and laws of the United States.

But, as we have had more than one occasion to observe, our willingness to believe that this statute was enacted in good faith, and to protect the people of the State from the evils of unrestricted importation, manufacture and sale of ardent spirits, cannot control the final determination whether the statute, in some of its provisions, is not repugnant to the Constitution of the United States. As was said in *Mugler* v. *Kansas*, 123 U. S. 623, 661: "If a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

It is important to observe that the statute before us does not purport to prohibit either the importation, the manufac-

ture, the sale or the use of intoxicating liquors. The first section does, indeed, make it penal to manufacture, sell, barter, deliver, store or keep in possession any spirituous, malt, vinous, fermented, brewed or other liquors, which contain alcohol, and are used as a beverage, and declares all such liquors to be contraband and against the morals, good health and safety of the State, and authorizes them to be seized wherever found, without warrant, and turned over to the state commissioner; yet those enactments are not absolute, but are made subject to the subsequent provisions of the act. When those subsequent provisions are examined, we find that, so far from the importation, manufacture and sale of such liquors being prohibited, those operations are turned over to state functionaries, by whom alone, or under whose direction, they are to be carried on.

Thus section three provides for the appointment of a state commissioner, who is required to purchase all intoxicating liquors for lawful sale in the State, and to furnish the same to such persons as may be designated as dispensers thereof, to be sold as thereafter provided in the act. Such commissioner is directed, before shipping the liquor to county dispensaries, to cause the same to be put up in sealed packages of not less than one half pint nor more than five gallons, in which packages they shall be sold by county dispensers.

The fifteenth section enacts that "any person, firm, association or corporation desiring or intending to manufacture or distill any liquors containing alcohol within the State, shall first obtain from the state board a permit or license to do so," and said section further provides "that manufacturers of distilled, malt or vinous liquors who are doing business within this State shall be allowed to sell to no person in this State except the state commissioner and to parties outside the State, and the state commissioner shall purchase his supplies from the brewers and distillers in this State when their product reaches the standard required by this act: *Provided*, Such supplies can be purchased as cheaply from such brewers and distillers in this State as elsewhere." So, too, the twenty-third section provides that "the state commissioner may enter into

contracts with responsible grape-growers in this State for the sale of domestic wines through the dispensary, so as to encourage grape-growing in this State, and in furtherance of this subject not more than ten per cent profit to the dispensary over the expense of bottling, labelling, freighting, etc., shall be charged for the handling of such wines." But there is no such limitation of charge in the case of imported wines. And in cases of seizure of contraband liquors, the thirty-first section provides that "the state commissioner shall have the same tested by the state chemist, and if pure shall sell the same through the state dispensary as though purchased by him; and if not pure he shall sell the same beyond the State; and deposit the proceeds to the credit of the state commissioner."

In view of these and similar provisions, it is indisputable that whatever else may be said of this act, it was not intended to prohibit the manufacture, sale and use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which may be lawfully made, bought and sold, and must therefore be deemed to be the subject of foreign and interstate commerce.

It is sought to defend the act, as an inspection act, within the meaning of that provision of the Constitution of the United States which permits the States to impose excise duties as far as they may be absolutely necessary for executing their inspection laws.

The act does, indeed, contain provisions looking to the ascertainment of the purity of liquors, and to that extent may be said to be in the nature of an inspection law. But those provisions, such as they are, do not redeem the act from the charge of being an obstruction and interference with foreign and interstate commerce. This aspect of the question has been several times considered by this court in cases where similar attempts were made to sustain state statutes as legitimate inspection laws.

In *Railroad Co.* v. *Husen*, 95 U. S. 465, the validity of an act of the State of Missouri, which forbade the introduction into the State of any Texan or Mexican cattle between the

months of March and December of each and every year, was considered.

It was contended on behalf of the law that it was valid as a quarantine or inspection law, as its purpose was to prevent the introduction of cattle afflicted with contagious diseases. But the court pointed out that no provision was made for the actual inspection of the cattle, so as to secure the rejection of those that were diseased, but that all importation of cattle, whether sound or diseased, was forbidden for long periods; and it was held that the statute was void as a plain intrusion upon the exclusive domain of Congress.

Walling v. *Michigan*, 116 U. S. 446, 459, 460, was a case wherein was brought into question the validity of a statute of the State of Michigan, which imposed a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling liquors, to be shipped into the State; and it was held that a discriminating tax imposed by a State, operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power confirmed by the Constitution upon the Congress of the United States. Answering the argument upon which the law had been sustained by the Supreme Court of the State, this court, through Mr. Justice Bradley, said: "It is suggested by the learned judge who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby."

Opinion of the Court.

In 1886 the legislature of the State of Iowa passed an act forbidding any common carrier from bringing within that State, for any person or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor was to be transported or was consigned for transportation, certifying that the consignee or person to whom said liquor was to be transported, conveyed or delivered, was authorized to sell intoxicating liquor in said county. This statute was declared invalid in the case of *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, 493, this court saying, through Mr. Justice Matthews: "The statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the State from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States. . . . And here is the limit between the sovereign power of the state and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State and that which does belong to commerce is within the jurisdiction of the United States. . . . The same process of legislation and reasoning adopted by the State and its courts would bring within the police power any article of consumption that a State might wish to exclude, whether to that which was drank or to food and clothing."

In *Leisy* v. *Hardin*, 135 U. S. 100, it was recognized that ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in

which a right of traffic exists, and that being thus articles of commerce, a State cannot, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State, nor when imported prohibit their sale by the importer; and, accordingly, it was held that a statute of the State of Iowa, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the State, was, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

In *Minnesota* v. *Barber*, 136 U. S. 313, 326, 328, the facts so closely resemble those shown by the record now under consideration, and the principles stated in the opinion are so applicable, that we shall state them with some particularity.

A statute of the State of Minnesota, entitled "An act for the protection of the public health by providing for inspection, before slaughter, of cattle, sheep and swine designed for slaughter for human food," in its first section prohibited the sale of any fresh beef, veal, mutton, lamb or pork for human food in the State, except as subsequently provided in the act. Boards of inspectors were there provided for, whose duty it should be to inspect all cattle, sheep and swine slaughtered for human food. It was made a matter of fine or imprisonment for any one to sell or expose for sale for human food any fresh beef, mutton, lamb or pork which had not been so inspected.

This court, in an opinion delivered by Mr. Justice Harlan, while conceding that the statute was enacted in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, held that, as the necessary effect of the act was to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, mutton, veal or pork, from animals slaughtered outside of the State, and to compel the

people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, such legislation was void as constituting a discrimination against the products and business of other States in favor of the products and business of Minnesota, and as depriving the people of Minnesota of the right to bring into that State, for the purposes of sale and use, sound and healthy meat, wherever such meat may have come into existence. It was said:

"A law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the products of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork — articles that are used in every part of this country to support human life — shall not be sold at all for human food within its limits, unless the animal from which such meat is taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State. . . . It is, however, contended, in behalf of the State, that there is in fact no interference by this statute, with the bringing of cattle, sheep and swine into Minnesota from other States, nor any discrimination against the products and business of other States for the reason — such is the argument — that the statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States. To this we answer, that a

statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States including the people of the State enacting such statute. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Case of the State Freight Tax*, 15 Wall. 232. The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or affect commerce with other States, as involved in the transportation into that State, for the purposes of sale there, of all fresh beef, veal, mutton, lamb or pork, however free from disease may have been the animals from which it was taken."

The same reasoning prevailed in *Brimmer* v. *Rebman*, 138 U. S. 78, wherein an act of the State of Virginia, which declared it to be unlawful to offer for sale, within the limits of that State, any beef, veal or mutton from animals slaughtered one hundred miles or more from the place at which it is offered for sale, unless it has been previously inspected and approved by local inspectors, was held void, as being in restraint of commerce between the States, and as imposing a discriminating tax upon the products and industries of some States in favor of the products and industries of Virginia; and wherein it was said "that the statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but, by its necessary operation, is a regulation of commerce, beyond the power of the State to establish."

After the decision in *Leisy* v. *Hardin*, and, perhaps, in pursuance of some observations contained therein, Congress passed the act of August 8, 1890, 26 Stat. 313, c. 728, enacting "that all fermented, distilled or other intoxicating liquors, or liquids transported into any State or Territory, or remaining therein

for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." This law was approved as valid, in the case of *In re Rahrer*, 140 U. S. 545, and a provision of the constitution of Kansas, which provided that the manufacture and sale of intoxicating liquors shall be forever prohibited in that State, except for medicinal, scientific and mechanical purposes, and an act passed in enforcement thereof, making penal the manufacture, sale or barter of any spirituous, malt, vinous, fermented or other intoxicating liquors, were held to be efficacious, and that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature.

In *Plumley* v. *Massachusetts*, 155 U. S. 461, 471, and in *Emmert* v. *Missouri*, 156 U. S. 296, in the first of which the validity of a state law forbidding the manufacture and sale of imitation butter, and in the second the validity of an act compelling itinerant pedlers to take out licenses, were sustained, the scope and effect of the case of *Leisy* v. *Hardin* and of the act of Congress of August 8, 1890, were considered and a full review of the cases heretofore cited was gone into and their principles elaborately discussed.

In the light of these cases the act of South Carolina of January 2, 1895, must, as to those of its provisions which affect the plaintiff in the present suits, stand condemned.

It is not an inspection law. The prohibition of the importation of the wines and liquors of other States by citizens of South Carolina for their own use is made absolute, and does not depend on the purity or impurity of the articles. Only the state functionaries are permitted to import into the State, and thus those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities. To empower a

state chemist to pass upon what the law calls the "alcoholic purity" of such importations by chemical analysis can scarcely come within any definition of a reasonable inspection law.

It is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors, as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that "all fermented, distilled or intoxicating liquors transported into any State or Territory, remaining therein for use, consumption, sale or storage therein, should, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise," evidently equality or uniformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful.

Whether those provisions of the act which direct that so called contraband liquors may be seized without warrant by any state constable, sheriff or policeman, while in transit or after arrival, whether in possession of a common carrier,

depot agent, express agent or private person, and which subject common carriers to fine and imprisonment for carrying liquors in any package, cask, jug, box or other package, under any other than the proper name or brand known to the trade, and which forbid the bringing of any suit for damages alleged to arise by seizing and detention of liquors under the act, would be lawful in an inspection law otherwise valid, we do not find it necessary to now consider. It was pressed on us, in the argument, that it is not competent for a State, in the exercise of its police power, to monopolize the traffic in intoxicating liquors, and thus put itself in competition with the citizens of the other States.

This phase of the subject is novel and interesting, but we do not think it necessary for us now to consider it. It is sufficient for the present cases to hold, as we do, that when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States.

There has been filed in the record a suggestion by the attorney general of the State of South Carolina that, since the trials of these cases in the court below, there has been passed by the general assembly of that State a further act approved by the governor on March 6, 1896, which act it is submitted, supersedes and repeals parts of the act which has been under consideration in these cases; and we are asked to consider the provisions of the more recent act.

So far as these actions at law are concerned, it is, of course, obvious that the damages recovered were for acts committed under the alleged authority of the act of 1895, and cannot be affected by the provisions of the act of 1896, even if the invalidities of the former act were thereby remedied — a matter on which we express no opinion.

The judgments of the Circuit Court are

Affirmed.

Mr. Justice Brown dissenting.

I am unable to concur in the opinion of the court holding the South Carolina dispensary law to be unconstitutional, as applied to the facts of this case. While I see no reason to question the propriety of our rulings in the cases analyzed in the opinion, of *Railroad Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313; and *Brimmer* v. *Rebman*, 138 U. S. 78, they do not seem to me to have any considerable bearing upon the question in controversy, in view of the recent legislation by Congress upon the subject of intoxicating liquors.

In *Leisy* v. *Hardin*, 135 U. S. 100, this court in April, 1890, overruling the prior case of *Peirce* v. *New Hampshire*, 5 How. 504, held that a state statute prohibiting the sale of intoxicating liquors, except for certain purposes, and under license from a county court, was, when applied to a sale by an importer of liquors brought from another State in the original packages, unconstitutional and void, as repugnant to the power of Congress to regulate commerce. Following closely upon this decision, and probably in consequence of it, Congress, upon August 8 of the same year, enacted what is popularly known as the "Wilson bill," and declared that all such liquors transported into any State, or remaining there for use, consumption, sale or storage, should, upon arrival be "subject to the operation and effect of the laws of such State, enacted in the exercise of its police powers," to the same extent as if they had been produced in such State.

The effect of this enactment seems to me to withdraw intoxicating liquors from the operation of the commerce clause of the Constitution, and to permit the traffic in them to be regulated in such manner as the several States, in the exercise of their police powers, shall deem best for the general interests of the public. The act is not limited in its operation, as the majority opinion seems to assume, to state laws forbidding the importation, manufacture and sale of such liquors; but declares that they shall be subject, upon their arrival within the State, to the operation of *all* its laws enacted in the exercise

of its police powers. Adopting the very language of the act of Congress, section 32 of the dispensary law provides: "That all fermented, distilled or other liquors or liquids containing alcohol, transported into this State or remaining herein for use, sale, consumption, storage or other disposition, shall, upon introduction and arrival in this State, be subject to the operation and effect of this law, to the same extent and in the same manner as though such liquors or liquids had been produced in the State."

We cannot fail to recognize the growing sentiment in this country in favor of some restrictions upon the sale of ardent spirits, and whether such restrictions shall take the form of a license tax upon dealers, a total prohibition of all manufacture or sale whatever, or the assumption by the state government of the power to supply all liquors to its inhabitants, is a matter exclusively for the States to decide.

The first section of the dispensary law of South Carolina declares that the manufacture, sale, receipt, acceptance or keeping in possession of alcoholic liquors, except when bought from a state officer authorized to sell the same, are declared to be contraband, and against the morals, good health and safety of the State, and may be seized wherever found without warrant. Now, as Congress has expressly declared that such articles shall, upon their arrival in the State, become subject to its laws to the same extent as if they had been originally produced there, and, as the dispensary act does not declare them contraband as imported liquors, or because they were imported, but because they were not bought from a state officer authorized to sell the same, and as the law makes no discrimination in that particular between imported and domestic liquors, it is impossible for me to see why Congress has not directly authorized the action that was taken by the state officers in seizing these liquors. The power to declare intoxicating liquors to be contraband and to prohibit their manufacture and sale *in toto* was affirmed by this court in *Mugler* v. *Kansas*, 123 U. S. 623, and if the provision requiring them to be bought of the state dispensary be valid, it applies as well to imported as to domestic liquors.

But, as I understand, the court bases to a certain extent its opinion of the unconstitutionality of this act upon the fact that the traffic in intoxicating liquors is not absolutely prohibited, but is monopolized by the State itself through the agency of a state commissioner, who is required (§ 3) to "purchase all intoxicating liquors for lawful sale" in the State, and to "furnish the same to such persons as may be designated as dispensers thereof," to be sold as thereafter provided in the act. Conceding this to be so, I am unable to see that any provision of the Federal Constitution is thereby infringed. The Constitution does, indeed, require of each State a republican form of government, and, in the tenth section of the first article, imposes certain limitations upon state action, none of which have any relevancy to the subject under consideration. Except as restricted by the provisions of this section, the several state legislatures possess, so far as any interference by the Federal government is concerned, full legislative powers, and, with respect to the subject of intoxicating liquors, are, since the passage of the "Wilson bill," untrammelled by the Federal Constitution.

Granting that the act gives the State itself a monopoly of all traffic in such liquors, it is not a monopoly in the ordinary or odious sense of the term, where one individual or corporation is given the right to manufacture or trade which is not open to others, but a monopoly for the benefit of the whole people of the State, the profits of which, if any, are enjoyed by the whole people; in short, a monopoly in the same sense in which the Post Office Department, and the right to carry the mails, is a monopoly of the Federal government. *Lowenstein* v. *Evans*, 69 Fed. Rep. 908.

The only objections to the dispensary law which strike me as being of any force are the provisions of the fifteenth and twenty-third sections, requiring the state commissioner to purchase his supplies from the brewers and distillers in the State; but even this provision, though perhaps unwise, is subject to two conditions: first, that their product shall reach the standard required by the act; and, second, that such supplies can be purchased as cheaply from such brewers and

distillers in this State as elsewhere. As this restriction is practically no restriction at all, and only incorporates in the statute exactly what the law would imply without it, I see no valid objection to it.

But even if it were conceded that this particular provision of the law were inoperative, and might be so declared in a case properly raising that question, it is not of the essence of the law, but a mere incident to the power of the commissioner, and surely should not have the sweeping effect of rendering the whole law unconstitutional and void. The main object of the act is to preserve the health and morals of the people by securing to them pure liquors, prohibiting individual dealings in such liquors, and requiring all such traffic to be carried on through the agencies of the State. Such methods of dealing with this traffic are by no means unknown abroad. Indeed, I understand the act to be but the reproduction in this country of what is known as the Gothenberg system.

It is entirely well settled that the unconstitutionality of a particular provision will not invalidate an entire statute, unless such provision embodies the main purpose of the statute, or is so connected with such purpose that it is inseparable from it, or, unless the court can see that the legislature would not have passed the act without such provision. This doctrine has been repeatedly affirmed by this court. *Bank of Hamilton* v. *Dudley*, 2 Pet. 492; *Austin* v. *The Aldermen*, 7 Wall. 694; *Packet Co.* v. *Keokuk*, 95 U. S. 80. Indeed, in *Tiernan* v. *Rinker*, 102 U. S. 123, this court held an act of the legislature of Texas, taxing intoxicating liquors, to be inoperative only so far as it discriminated against imported wines or beers; and that as defendant was also engaged in selling other liquors, an injunction was properly refused. That the provision that the commissioner in purchasing the liquors shall give preference to those of domestic manufacture is separable from the main purpose of the act seems to me too clear for argument. That the legislature would have passed the act without this provision is conclusively shown by the fact that, in a general amendment and reënactment of this law, made in 1896, this provision was omitted.

While the power of courts to declare an act of legislation to be unconstitutional undoubtedly exists, it is one of great delicacy, particularly when brought to bear upon the legislative acts of another sovereignty. In one of the early cases decided by this court, *Fletcher* v. *Peck*, 6 Cranch, 87, 128, it was said by Chief Justice Marshall: "But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Still more explicit is the language of Chief Justice Waite in the *Sinking Fund cases*, 99 U. S. 700, 718: "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

I regard these words as particularly applicable to the dealings by this court with the proceedings of a state legislature, and that their right to determine what is for the best interests of their people should be carefully respected, except where it comes in manifest conflict with the dominant law. Especially should everything be avoided which carries the suggestion of a vexatious interference with state action. The manifest dangers to the future of the country, which lurk in the inflexibility of the Federal Constitution, can only be averted by carefully distinguishing between such laws as practically concern the inhabitants of a particular State only, and are intended *bona fide* for their welfare, and such as are a mere subterfuge for an unlawful discrimination, and cannot be carried into effect without doing palpable injustice to citizens of other States. It should not be overlooked in this connec-

tion that the complaints in this case emanate from a citizen of South Carolina, who seeks to defy the law of his own State, and puts forward as his excuse the injustice done the citizens of other States who make no complaint of her action in this particular. If a State cannot prohibit her own citizens from importing liquors, as well as buying them at home, the "Wilson bill" is set at nought, and the prohibitory laws of the several States rendered inoperative in a vital particular. The fact that these liquors were imported for complainant's own use and consumption, instead of for sale, raises no question under the Federal Constitution. Both are under the ban of the statute.

I am unable to see wherein that section of the dispensary act of South Carolina, which authorized the seizure made in this case, conflicts in any particular with the Federal Constitution.

MR. JUSTICE BREWER did not hear the argument and took no part in the decision of these cases.

SCOTT v. DONALD.

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

No. 410. Argued October 21, 22, 1896. — Decided January 18, 1897.

Where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State; or for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or for a *mandamus* in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the Eleventh Amendment to the Constitution, an action against the State.

Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State when to execute it would be to violate rights and privileges of the complainant that had been guar-

Statement of the Case.

anteed by the Constitution and would do irreparable damage and injury to him.

In re Tyler, 149 U. S. 164, affirmed and followed on these points.

It was alleged in the bill, and there was evidence to show, that the complainant intended to import for his own use, from time to time as he might need the same, ales, wines and liquors, the products of other States, of the value exceeding two thousand dollars, which were threatened to be seized by the state constables, claiming to act under the dispensary law; and the agreed statement of facts contained the following statements: "Previous to filing of bill and temporary injunction granted in this case the state constables seized, intended and threatened to seize in future, all intoxicating liquors whatsoever coming into the State from other States and foreign countries, and to carry out in full all the provisions of the dispensary law of January 2, 1895; and the value of the right of importation of ales, wines and other liquors, products of other States and countries, is of the value of two thousand dollars and upwards; and the difference in the price to the consumer, like the plaintiff, of such liquor bought at the state dispensary of South Carolina and bought out of the State is about fifty to seventy-five per cent in favor of imported liquors." *Held*, that such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars; and that it cannot be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail.

The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit — a community of interest growing out of the nature and condition of the right in dispute.

The decree is also objectionable because it enjoins persons not parties to the suit; as this is not a case where the defendants named represent those not named; and there is not alleged any conspiracy between the parties defendant and other unknown parties; but the acts complained of are tortious, and do not grow out of any common action or agreement between constables and sheriffs of the State of South Carolina.

In the Circuit Court of the United States for the district of South Carolina, on April 25, 1895, James Donald, a citizen of the United States and of the State of South Carolina, in his own behalf and on behalf of all other persons in the State of South Carolina, as importers for their own use and consumers of the wines, ales and spirituous liquors, the products of other States and foreign countries, filed a bill in equity against J. M. Scott,

M. T. Holley, E. C. Beach and R. M. Gardner, claiming to act as constables of the State of South Carolina, and all other persons whomsoever claiming to act as such constables or as county sheriffs, municipal policemen or executive officers, or in any capacity whatever, under or by virtue of an act of the general assembly of the State of South Carolina, approved January 2, 1895, and generally known as the "dispensary law."

The bill alleged that the defendants named had, on several occasions, seized and carried away packages of wines and liquors belonging to the plaintiff, being products of the States of New York, Maryland and California respectively, and imported by the plaintiff for his own use and consumption, and not intended for sale, barter or exchange by the plaintiff within the State of South Carolina; and that the defendants claimed, in so doing, to act by virtue of the said act of January 2, 1895, which act was alleged by the plaintiff to be void and unconstitutional, and to furnish no protection to the said defendants in their said acts of trespass and seizure. The bill further alleged that the plaintiff had brought several actions at law against the said defendants in the Circuit Court of the United States for damages caused by the said unlawful acts, which said suits were still pending; that notwithstanding the bringing of said suits the said defendants, and others, constables of the State of South Carolina, have continued to seize and carry away ales, wines and spirituous liquors of the plaintiff and of other persons in the State of South Carolina, imported from other States and foreign countries, and threaten to continue so to do. The bill further alleges that protection of the plaintiff's rights by actions at law involved a multiplicity of suits against said constables, and that by said dispensary act the remedy of replevin was denied to the plaintiff in the courts of South Carolina; and that all said constables were wholly irresponsible financially and unable to respond in damages, and that the plaintiff's constitutional rights, privileges and immunities were now being and are threatened to be continually invaded and grossly violated without redress, and to his irreparable injury. The bill avers that the said

right to import wines and spirituous liquors for his own use and consumption is of the money value of upwards of two thousand dollars, and also that the value of said articles intended to be imported from other States and foreign countries by this plaintiff for his own use and consumption, from time to time, and which are threatened to be seized by said constables, exceeds the sum of two thousand dollars.

The plaintiff prayed for a preliminary and a final injunction, restraining the defendants named, and all other persons claiming to act as constables, and all sheriffs, policemen and other officers, acting or claiming to act under said dispensary act, from seizing and carrying away wines or spirituous liquors imported or brought into the State of South Carolina for his own use or consumption, and from forcibly entering or attempting to search the dwelling house of the plaintiff for any such articles, and from hindering and preventing the plaintiff or any other person from importing, holding, possessing and using the said liquors so imported.

After argument a preliminary injunction was issued on May 9, 1895. The plaintiff had leave to amend his bill by adding the averment that the other said persons on behalf of whom he sues, to wit, importers for their own use and consumers in the State of South Carolina of such ales, wines and spirituous liquors as aforesaid, are too numerous to make parties complainant to the bill, and that some of them are unknown.

Subsequently the defendants pleaded to the jurisdiction of the court, 1st, because the suit is in effect a suit against the State; 2d, because the bill presents no question arising under the Constitution or laws of the United States; 3d, because the bill presents no case upon which the jurisdiction of a court of equity can be founded, there being plain and adequate remedies at law for the injuries complained of; and, 4th, because plaintiff hath not made or stated in his bill a case to entitle him to the relief prayed for. They also answered admitting some and denying others of the allegations of the bill. A replication was filed. Afterwards an agreed statement of facts was filed. Among the facts so stated was the fact that,

in the several actions at law mentioned in the bill, final judgments against the defendants had upon trial been obtained; that notwithstanding said recoveries and notwithstanding the pendency of this bill, other seizures of wines and liquors imported by the plaintiff and by other persons named had been made; that the plaintiff testified that he intends to import for his own use, from time to time, as he may need the same, ales, wines and liquors, the products of other States, of the value exceeding $2000, which are threatened to be seized by the state constables, claiming to act under the dispensary law; that the value of the right of importation of ales, wines and other liquors, products of other States and countries, is of the value of $2000 and upwards; that the difference in the price to the consumer, like the plaintiff, of such liquor bought at the state dispensary of South Carolina, and that bought out of the State, is about 50 to 75 per cent in favor of imported liquors; that the defendants, state constables, who have made the seizures, are all insolvent and financially irresponsible, except Chief Constable Holley, who had not personally made any seizure of plaintiff's liquors, except the first seizure.

The case came on to be heard on the pleadings and the agreed statement of facts, and thereupon the injunction theretofore granted was made perpetual. An assignment of errors was filed and an appeal was allowed to this court. The case was argued here with Nos. 411, 412 and 413, *ante*, 58.

Mr. William A. Barber, Attorney General of the State of South Carolina, for appellants.

Mr. J. P. Kennedy Bryan for appellee.

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

Having, in the cases at law, in which the opinion has just been delivered, and for reasons therein given, reached the conclusion that the dispensary law of South Carolina, approved January 2, 1895, is so far unconstitutional and void that this

plaintiff can maintain an action at law against these defendants for seizing his liquors, we are called upon now to consider whether there is a valid remedy by way of injunction to restrain executive officers from continued and repeated acts of trespass in seizing and carrying away, and confiscating for the use of the State the property of the complainant so imported.

The bill prays for an injunction on the several grounds of irreparable damage; that the acts complained of prevent the exercise by the complainant of his right to import without molestation lawful commodities, the products of other States; to avoid multiplicity of suits; and the want of adequate remedies at law.

The objections to proceedings against state officers by injunction are that it is, in effect, proceeding against the State itself, and that it interferes with the official discretion vested in the officers. The answer to such objections is found in a long line of decisions of this court: *Osborn* v. *The United States Bank*, 9 Wheat. 738; *Dodge* v. *Woolsey*, 18 How. 331; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Cummings* v. *National Bank*, 101 U. S. 153; *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 112 U. S. 609; *Virginia Coupon cases*, 114 U. S. 269, 295, 315; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Belknap* v. *Schild*, 161 U. S. 10, 18.

In re Tyler, 149 U. S. 164, was a case where the receiver of the South Carolina Railway Company filed a bill in equity in the Circuit Court of the United States against the treasurers and sheriffs, eighteen in number, in the counties through which the railroads in his possession passed, alleging that the treasurers were about to issue tax executions and the sheriffs about to levy and seize thereunder property of the railway company for the taxes for the fiscal year beginning November 1, 1890. The bill alleged that the taxes for that fiscal year were unconstitutional and illegal in part upon various grounds; that the levy and sale of the road would cause irreparable injury; that there was no adequate remedy at law; that a multiplicity of suits would be necessary to protect his rights if he sued at law; and prayed for an injunction against the issue and levy of the tax warrants in question. After

answer and full hearing, the court issued an injunction restraining M. V. Tyler, sheriff of Aiken County, his deputies and agents, from further intermeddling, interfering with, keeping and holding the personal property distrained upon by him belonging to the petitioner, as receiver, and ordering that the said property should be restored to the custody of the receiver. It is being shown subsequently by affidavits that Tyler refused to comply with the injunction and continued to hold and detain said property, the court adjudged him guilty of contempt, imposed a fine upon him, and committed him to the custody of the marshal of the court until he should pay said fine or purge himself of his contempt. A petition for a writ of *habeas corpus* was filed in this court, and, upon the hearing of the cause, it was mainly argued, on behalf of the petitioner, that the proceedings in the Circuit Court were substantially a suit against the State of South Carolina, and that by its mandatory injunction upon its officers the court divested the State of its possession.

This court denied the writ, and, speaking through the Chief Justice, thus expressed the conclusion reached in the previous cases, many of which were cited in the argument :

"The object of this petition was to protect the property, but even if it were to be regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to add that, in our judgment, it would not be obnoxious to the objection of being a suit against the State. It is unnecessary to retravel the ground so often traversed by this court in exposition and application of the Eleventh Amendment. The subject was but recently considered in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, in which Mr. Justice Lamar, delivering the opinion of the court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State; or for compensation for damages; or, in a proper case, for an

injunction to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the State.

"And while it is conceded that the principle stated by Chief Justice Marshall in the leading case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that the 'Eleventh Amendment is limited to those suits in which a State is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this court; yet it was also rightly declared that the general doctrine there announced, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the Constitution and would do irreparable damage and injury to him, has never been departed from."

Suppose it established that the objections just mentioned fail, it is suggested that jurisdiction did not exist in the Circuit Court because the value in controversy did not exceed the sum of two thousand dollars. It is alleged in the bill, and there was evidence to show, that the complainant intends to import for his own use, from time to time as he may need the same, ales, wines and liquors, the products of other States, of the value exceeding two thousand dollars, which are threatened to be seized by the state constables, claiming to act under the dispensary law. And the agreed statement of facts contains the following statements: "Previous to filing of bill and temporary injunction granted in this case the state constables seized, intended and threatened to seize in future, all intoxicating liquors whatsoever coming into the State from other States and foreign countries, and to carry out in full all the provisions of the dispensary law of January 2, 1895; and the value of the right of importation of ales, wines and other liquors, products of other States and countries, is of the value of two thousand dollars and upwards; and the difference in the price to the consumer, like the plaintiff, of such liquor

bought at the state dispensary of South Carolina and bought out of the State is about fifty to seventy-five per cent in favor of imported liquors."

Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail.

But while we think that the complainant was entitled to an injunction against those defendants who had despoiled him of his property, and who were threatening to continue so to do, we are unable to wholly approve the decree entered in this case.

The theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it. It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous, but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction. We prefer to accept, in this respect, the views expressed by Mr. Justice Nelson, in the case of *Cutting* v. *Gilbert*, 5 Blatchford, 259, 261. There a bill had been filed by several bankers, as well for themselves as all others in the same interest, against the assessor and collector of a certain tax under the ninety-ninth section of the Internal Revenue Act of June 30, 1864, seeking to restrain the collection of such tax as illegal, and the learned justice disposed of the question in the following language:

"This is a bill of peace to quiet the rights of parties, and to put an end to further litigation. The bill is founded on the idea that all persons in business as brokers, or who are bankers doing business as brokers, charged with the tax in question, have such a unity or joinder of interest in contesting it, that all may join in the bill for that purpose; and that as the

parties are so numerous as to make it inconvenient to join all of them, a determinate number may appear in the name of themselves and for the rest. I have not been able to concur in this view. The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit; such as the case of disputes between the lord of a manor and his tenants; or where several tenants of a manor claim the profits of a fair; or between the tenants of one manor and those of another; or in a suit to settle a general fine to be paid by all the copyhold tenants of a manor, in order to prevent a multiplicity of suits. In all these and the like instances given in the books, there is a community of interest growing out of the nature and condition of the right in dispute; for, although there may not be any privity between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceedings. . . . In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved, which alone cannot lay a foundation for the joinder of parties. There is scarcely a suit at law, or in equity, which settles a principle or applies a principle to a given state of facts, or in which a general statute is interpreted, that does not involve a question in which other parties are interested, as, for instance, the doctrine of trusts, and the statutes of descents, of frauds, of wills and the like; yet no lawyer would contend that such an interest would justify a joinder of parties as plaintiffs, in a case arising under the law of trusts, or under any of the statutes mentioned. The same may be said of questions arising under the revenue laws, such as the tariff and the excise laws, and which are the subject of litigation in the courts almost daily. Large classes of persons, other than the parties to the suit, are interested in the questions involved and determined. To allow them to be made parties to the suit would confound the established order of judicial proceedings, and lead to endless perplexity and confusion."

Similar views prevailed in the case of *Baker* v. *City of Portland*, 5 Sawyer, 566, where it was held by District Judge Deady, Mr. Justice Field concurring, that any number of persons who may from time to time be engaged in making street improvements under several and distinct contracts with a city are not therefore a class of persons having a common interest in the subject of street improvements, concerning which any one or more may sue for the whole.

The decree is also objectionable because it enjoins persons not parties to the suit. This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious, and do not grow out of any common action or agreement between constables and sheriffs of the State of South Carolina. We have, indeed, a right to presume that such officers, though not named in this suit, will, when advised that certain provisions of the act in question have been pronounced unconstitutional by the court to which the Constitution of the United States refers such questions, voluntarily refrain from enforcing such provisions; but we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction. *Fellows* v. *Fellows*, 4 John. Chan. 25, citing *Iveson* v. *Harris*, 7 Ves. 257.

The decree of the court below should therefore be amended by being restricted to the parties named as plaintiff and defendants in the bill, and this is directed to be done, and it is otherwise

Affirmed.

Mr. Justice Brown dissented, for the reason given by him in his dissent in *Scott* v. *Donald*, *ante*, 102.

Mr. Justice Brewer did not hear the argument and took no part in the decision of this case.

MISSOURI *v.* IOWA.

ORIGINAL.

No. 6. Original. Report filed December 14, 1896. — Decree entered January 18, 1897.

The report of the commissioners appointed February 3, 1896, 160 U. S. 688, to find and re-mark the boundary line between the States of Missouri and Iowa, is confirmed; and it is ordered that that boundary line be as delineated and set forth in said report.

Mr. R. F. Walker, Attorney General of the State of Missouri, for that State.

Mr. Milton Remley, Attorney General of the State of Iowa, for that State.

Mr. Chief Justice Fuller announced the decree of the court.

This cause coming on to be heard on the application of the State of Missouri, the State of Iowa consenting thereto, for decree on the report of James Harding, Peter A. Dey and Dwight C. Morgan, commissioners appointed by decretal order herein on February 3, 1896, to find and re-mark with proper and durable monuments such portions of the proper boundary line between the States of Missouri and Iowa, as run, marked and located by Hendershott and Minor, commissioners of this court, under the orders and decrees of this court of February 13, 1849, and January 3, 1851, as have become obliterated, especially between the fiftieth and fifty-fifth mile posts on the same; and it appearing that a difference of opinion has arisen in respect of certain allowances to be included in the expenses incurred in re-marking said boundary line, it is ordered by the court that Commissioner Morgan be allowed his per diem for forty-six days' services, and that the account of expenses attached to said report be completed by the addition of that per diem in favor of said commissioner, and that said report as so completed in that particular be and the same is hereby in all things confirmed, as follows:

Decree of the Court.

"To the honorable the Supreme Court of the United States:

"The undersigned, commissioners, appointed by the decree of your honorable court dated February 3, 1896, to find and re-mark with proper and durable monuments such portions of the boundary line between the States of Missouri and Iowa, run, marked and located by Hendershott and Minor in accordance with decree of your honorable court dated Jan. 3, 1851, as have become obliterated, especially between the fiftieth and fifty-fifth mile posts on said line, etc., respectfully submit the following report:

"On the 27th day of February last the commissioners met in the city of Chicago and fully discussed matters pertinent to the proper performance of the duties imposed upon them. Construing the decree as applying to all portions of the boundary line in question, the commissioners decided to advertise in newspapers published in counties in Missouri and Iowa adjacent to the boundary for information regarding such parts of said line as were in dispute or had become obliterated. This was done and considerable information elicited, but as the officials of one of the States interested declined to authorize the work necessary in retracing the line, excepting where directed in the decree, nothing was done beyond the finding and re-marking 'with proper and durable monuments' such portions of the line as was necessary for its proper relocation between the 40th and 60th mile points, as shown hereinafter.

"After careful consideration it was decided to apply to Gen'l W. W. Duffield, superintendent U. S. Coast and Geodetic Survey, for a detail from his corps of assistants to perform all field-work necessary in carrying out the instructions of the court. It was decided that the employment of expert officers of the Geodetic Survey corps for the services required would result more satisfactorily to the States concerned than would the selection of any private parties, as the high professional attainments of these officers and their freedom from any possible bias regarding the boundary line to be established were ample guarantees for the entire reliability and impartiality of any work done by them.

"Correspondence was accordingly had with Gen'l Duffield,

who consented to detail two of his assistants, and also to supply them with a complete outfit of all instruments and appliances necessary in the prosecution of the proposed work. This offer was at once accepted. A meeting was afterwards had in St. Louis March 11th, ult., when it was decided to meet at Lineville, Iowa, a point immediately upon the boundary line between Missouri and Iowa, for the purpose of personal investigation as to the proper point or points at which to commence operations. Two of the commissioners accordingly met at Lineville on March 18th, ult., and spent three days in the examination of the boundary line and of points on said line claimed to have been established by Hendershott and Minor in 1850. The first step taken was to decide regarding the proper points between which our work of relocation of that part of the line designated in the decree of your honorable court, namely, from the 50th to the 55th mile points on the Hendershott and Minor line, should be commenced. It appeared to us that the cast-iron monuments placed by Hendershott and Minor at intervals of ten miles would naturally be more reliable than any traditional points, and the first investigations were made as regarding the 40th, 50th and 60th mile points, these being originally marked by Hendershott and Minor with iron monuments as stated. After careful examination and much inquiry the commissioners were satisfied that the monuments marking the 40th and 60th mile points were in their original positions. As regarded the monument at the 50th mile point, whilst no positive evidence could be had as to its removal from its original position, the rumors and statements were such as to render its reliability a matter of doubt, and it was, therefore, determined to use the monuments at the 40th and 60th mile points as fixed points between which to relocate the boundary line.

"It was subsequently arranged for the commissioners to meet at Davis City, Iowa, a point on the Chicago, Burlington & Quincy railroad adjacent to the 40th mile point, where it was proposed to commence work. Gen'l Duffield was accordingly notified, and on Wednesday, April 8th, ult., the commissioners reached Davis City and met Messrs. W. C. Hodgkins

(in charge of work) and A. L. Baldwin, of the U. S. Geodetic Survey corps, detailed as per arrangements made with Gen'l Duffield. These gentlemen brought with them a very complete outfit of instruments of the best description used in geodetic work, including all necessary equipment for astronomical observations as well as field-work. We proceeded to the 40th mile point on the afternoon of April 8th, ult., and arranged for the commencement of work the following day. On April 9th, ult., a party for field-work having been organized and the necessary teams and wagons hired, the entire party proceeded to Pleasanton, Iowa, a point situated immediately on the boundary line just east of the 45th mile point. Pleasanton and Lineville subsequently became the bases of operation, our parties changing from one of these points to the other as the necessities of the work required.

"Work was commenced at the 40th mile point, as arranged. It soon became quite evident that the actual boundary line as indicated by points shown and satisfactorily identified differed from the line as would be established by the field-notes of the Hendershott and Minor survey. In order that the relative positions of the actual mile points between the 40th and 60th mile points could be properly determined, and also their true relation to the theoretical points as found in accordance with the courses and distances shown in Hendershott's report, it was deemed necessary to establish a chord or base line twenty miles in length between the 40th and 60th iron monuments to which all points actually found and definitely located or shown and claimed as being upon the boundary line could be referred and from which all points finally determined could be accurately located. For the details of the actual field-work and its results we respectfully refer to the accompanying report of Mr. W. C. Hodgkins, in charge of party (Appendix A). It is proper here to state that the field-work, done as it was in accordance with the precise methods of the U. S. Geodetic Surveys, was necessarily very slow and tedious, but its accuracy, in our opinion, cannot be questioned. The measurement of the twenty-mile base line involved a very great amount of labor, whilst the computations necessary in the

exact reduction of the measurements were also very laborious. Complete topographical notes were also taken for the entire work, but the commissioners have deemed it unnecessary to have maps prepared, as their preparation would involve a considerable expense without any corresponding benefit. The very unfavorable weather during a great portion of May and a part of June interfered seriously with the prosecution of the field-work, causing a delay of from two to three weeks.

"Careful examination was made in every instance for the precise location of the original Hendershott and Minor mile points, but out of twenty-one of these points included in the survey only nine, including three iron monuments, could be satisfactorily identified. The 42d, 43d, 44th, 49th, 54th and 58th mile points were identified and located by evidence entirely satisfactory to the commissioners. As regards the 50th mile point (iron monument), concerning the reliability of which doubt had existed, the commissioners are satisfied that it is very little, if at all, out of its original position — its relation to the 49th mile point (which was clearly identified as Hendershott's original point) as determined by the base line confirming our judgment. After the work of relocation had commenced and preliminary work on the twenty-mile base well advanced, statements were made to the commissioners to the effect that the iron monument at the 60th mile point had at one time been moved from its original position. This being a matter of importance — the monument in question being considered as a fixed point in establishing the base line — an inquiry was had regarding it and a considerable amount of testimony heard. This testimony was very conflicting, but after its careful consideration and the prolongation of the base line some four miles eastward of the 60th mile point the commissioners were satisfied that the monument was occupying its original position.

"The location of the 52d mile point was more difficult and involved a much more extended investigation than for any point established by the commissioners. It was claimed and strongly urged that the original 52d mile point as established by Hendershott and Minor was at a point witnessed by two

trees — an elm and an oak — which trees, as well as a point established from them in accordance with Hendershott and Minor field-notes, were shown. The field-notes regarding this point and also the 53d mile point are as follows:

(Chains.)

"'80.00 Set 52d mile post.
Bearings, elm 18 inches diameter, N. 87¼° E. 10½ links; burr oak 12 inches diameter, S. 22° W. 28 links.'

(Continuing:)

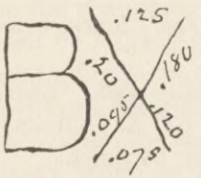
"'N. 88° 47 E.'

(Chains.)

"' 0.30 A pond 250 links wide; direction of its length, N. & S.
5.00 Prairie.
15.00 Timber.
30.00 Field (Stokes') fence, nearly N. & S.
57.50 Left field.
80.00 Set 53d mile post. Bearings, black oak 8″ diameter, S. 53° E. 15 links; black oak 6″ diameter, N. 53° E. 64 links.'

"The trees shown and claimed as being the original witness trees for Hendershott and Minor's 52d mile point agree very well with the field-notes as regards their distance from the 51st mile point, and also as to their relative positions to each other. The distances and bearings of these trees from the point shown and claimed as the original Hendershott mile point also agree with the field-notes closely. Beyond these coincidences, however, there is, in our judgment, nothing whatsoever to warrant a conclusion that they were ever marked as witness trees by Hendershott and Minor. In their report (10th Howard, pages 15 and 16) they state: 'In timber the number of the mile is marked on the witness trees with the letter appropriate to each State, there being one tree marked on each side of the line whenever possible. The foot of each witness tree is marked with the letters "B L."' The oak tree shown and claimed to be a witness tree for the 52d

mile point had a large 'blaze' on its trunk about five feet from the ground. Nothing whatever could be ascertained by the commissioners to in any manner indicate what, if any, marking had been inscribed on the blaze, nor could any information be had concerning such marking. At the foot of this tree, facing N. 45° E., is to be seen a blaze on which is plainly discernible the letters 'B X.' The blaze on the trunk of the tree faced directly east, whilst the point to which it is claimed to refer is but 22° east of north from the tree. It is the universal custom of surveyors in marking witness trees, so far as the experience of the commissioners goes, to make such marks so as to face as nearly as possible the point witnessed. The 'B X' mark faces certainly 25° east, and the blaze on trunk of tree 68° east of the point claimed to be witnessed. Measurements of the 'X' mark at base of tree are as follows, in tenths of one foot:



"The mark inclining to the left extends above the letter 'B' and is quite close to the upper curved line. The mark inclining to the right runs closely to the lower part of the 'B.' It would have been quite as practicable to have cut a letter 'L' as an 'X' on the blaze found at foot of this tree, and the commissioners were not prepared to accept this letter 'X' as an 'L' without stronger corroborative evidence than they could obtain. This tree, if marked by Hendershott and Minor, must have been so marked forty-six years ago. A section of the tree at a point eight feet above the ground, the tree being very uniform in size, from three feet above the ground for eight to nine feet above, was cut and sent to Prof. McBride, botanical expert at the University of Iowa, for his opinion (as expert) as to its age, &c.

"In a letter from him to Commissioner Dey, May 19th, 1896, he states;

"'I judge that the tree when felled was 70 years old. Its history runs about as follows: 59 years ago it received an injury (blaze?) of which a scar persists. The tree at the time was about 11 years (11–16) old, and not to exceed, bark included, 3¼ inches thick. I say about 11 years, for it takes some years not recorded on the section for a tree to attain six feet in height. 25 years later the tree had added about 2½ inches to its radius. The next 17 years a little more than one inch to the radius, making the diameter of the wood (bark not counted) about 8¼ to 8½ inches. Since this another inch of wood has been added to the radius. Calling this 17 years, (it is more rather than less, as the annual increment is constantly smaller,) we have the total since the scar, 59 years.'

"This oak tree, as shown by Prof. McBride, at a point where section examined by him was cut, was 8¼ to 8½ inches in diameter when 53 to 58 years old. Being 70 to 75 years old, it would have been 24 to 29 years old in 1850, and its diameter where blaze was found could not have exceeded 5 inches. As the blaze shows a face of fully eight inches, it is evident it could not have been cut on a tree with a diameter of only five inches. The diameter of this tree at base, where 'B X' mark was found, is now 15 inches. Applying the proportionate growth of tree as shown by Prof. McBride, and its diameter at base could not have exceeded 8.5 inches 46 years ago, and its size was not sufficient to have received the blaze now shown.

"Regarding the elm tree, also claimed to be a witness tree for the original Hendershott 52d mile point. This tree also has a large blaze about four feet from the ground. Nothing whatever was shown to prove that it ever had any mark upon it (prior to the time of a private survey made in 1893) other than the characters 'S 28.' The letter 'S,' if it ever existed, is now totally obliterated. The figure '2' is still plainly discernible, and a part of the upper portion of a figure '8' to the right of the '2' can also be traced. Nothing was shown to prove that it was ever marked at its base with the letters 'B L,' as it should have been were it a Hendershott witness

tree. Diligent search had evidently been made at some time for this mark, as is plainly evidenced by the chopping at its base, and had the proper marks ever been found it is quite certain the fact would have been in evidence before the commissioners.

"The Hendershott notes show that at 30 links eastward of the 52d mile point the bank of a pond was reached, and that the pond itself was 250 links in width, making a distance of 280 links from the 52d mile point to the east bank of pond. The bank of this pond directly east of the 52d mile point, claimed to be witnessed by the 'elm and oak,' has evidently moved eastward to some extent since 1850, as shown by present conditions. Measurements made by the commissioners show that 280 links eastward from the point claimed as the Hendershott 52d mile point reach a point 59 links east of the present bank of the pond. Thirty chains east of their 52d mile point, as seen by their notes, the Hendershott line crossed the 'Stokes' field fence. The line of this fence is still plainly visible. A line straight from the 52d mile point, claimed to be witnessed by the 'elm and oak,' to the 54th mile point will pass at least 70 feet south of the 'Stokes' fence line, as noted by Hendershott. For more than thirty years, and after the establishing of the boundary line by Hendershott and Minor, it is claimed a road was maintained and worked as a Missouri road between the 52d and 54th mile points, and that until within the past five years this fact was never questioned. It is claimed that the line recognized by parties living on both sides of the boundary as being the Hendershott line since his survey and until within the past few years is now plainly shown for a very considerable distance between the 52d and 53d mile points by the line of what is known as the 'Fugate' fence line. It is claimed this fence was put up by one Fugate, the owner of land in and a resident of Iowa (and who was also a surveyor), and who, living as he did close to the line and present when the Hendershott survey was made, probably knew where the true line was and placed his fence on that line. This line very closely agrees with a line running directly from Sullivan's 52d mile point to the 54th mile point,

the last named having been satisfactorily identified and located by the commissioners. It is claimed to be improbable that Fugate placed his fence north of the proper line.

"The commissioners most carefully considered all the conditions relating to the point claimed to be the Hendershott 52d mile point and witnessed by the 'elm and oak,' but the more the matter was weighed the stronger became their conclusion that the trees mentioned could not have been the witness trees as claimed. Coincidences of position constitute their claim. It is proper here to state that within a short distance to the north of the 52d mile point as established by the commissioners are the stumps of an elm and burr oak which agree as well as do the other elm and oak as to distance from the 51st mile point, better as to topographical conditions, and are very similar as to the relative position required by the field-notes for the witnesses to the 52d mile point. The commissioners have no idea that these stumps referred to were those of Hendershott's witness trees, but make this statement to show that coincidences such as shown by the 'elm and oak' are not impossible. To have crossed the 'Stokes' fence, in a distance of 30 chains, starting from the supposititious 52d mile point claimed to be witnessed by the elm and oak, an angle of at least 2° to the left would have been necessary, and also another angle to the right equally great in order to run directly to the 54th mile point. Hendershott's notes make no mention of any such angles. The angle recorded as having been made at the 52d mile point was 29′ to the north, the course having been changed, according to the Hendershott notes, from N. 89° 16′ E. to N. 88° 47′ E. We are satisfied, from personal investigation and from points found and referred to our base line, that the original Sullivan line can be readily traced from his 51st mile point to his 52d mile point, and we believe it very probable that the Hendershott line between the 52d and 54th mile points is nearly identical with the Sullivan line. Whilst we did not adopt the Sullivan line between the points named, very good reasons could have been given for doing so. The Hendershott notes make no mention of Sullivan's line after leaving his 49th mile

point until his 54th mile point was reached. They make no mention of finding Sullivan's 52d mile point or of any trees on his line; but they say in their report (page 4, 10th Howard Report) that they 'discovered abundant blazes and many witness trees which enabled us to find and re-mark the said (Sullivan) line as directed by the court.' Also on page 7, same report, it is stated: '*But in heavy bodies of timber no difficulty was experienced in discovering evidences of the precise location of the* (Sullivan) *line, not only by blazes, but by line and witness trees.*' (Italics are ours.) And on the same page, 'The general topography of the country, and especially the crossing of the streams, greatly facilitated us in following the line, and in some instances, when confirmed by the old blazes, enabled us to establish it with sufficient certainty.' Commencing some ten chains east of the 51st mile point, the country through which the boundary line passes was and is heavily timbered, and, as before stated, the Sullivan line in the timber is at this time readily to be found. The inference that the Hendershott line eastward from the 51st mile was nearly identical with the Sullivan line is quite as strong as the contrary, notwithstanding no mention is made by Hendershott of the Sullivan line after leaving a point 6.20 chains east of the 49th mile point until reaching the 54th mile point.

"The Sullivan line, between the 51st and 52d mile points, as shown by his field-notes, crossed the east fork of Grand River (now called Weldon) three times. This line now, by reason of changes in the bed of the stream, will cross the Weldon five times. With the exception of the 'elm and oak,' there were no traditional or apparent evidences claimed as indicating the original location of the Hendershott and Minor 52d mile point. A line run eastward with the bearings given by the Hendershott notes from their 51st mile point would pass at least 40 feet south of the point indicated by the 'elm and oak.' A line run eastward, as per the Hendershott notes, from the point claimed as the Hendershott and Minor 52d mile point would pass at least 90 feet south of their 54th mile point. The commissioners carefully considered all the comparatively authentic traces of the Hendershott line, together

with the topographical conditions given in the notes of the survey. Between the 53d and 54th mile points were found evidences of the Hendershott line, which were satisfactory, and the line established by us was run from the 54th mile point, which, as before stated, was identified, directly to the 52d mile point and passing through the points found between the 53d and 54th mile points. The Hendershott notes show a line direct from the 52d to the 54th mile point.

"The line, as finally established and marked by us, between the 52d and 53d mile points is north of the boundary line as claimed for Iowa and south of that line as claimed by Missouri, and, as it happens, very nearly equally divides the narrow territory in dispute, although there was no intention to compromise the difference. We are satisfied that the line, as established by us between the 53d and 54th mile points, is very nearly, if not identical with, the original Hendershott line and in accordance with the marks of that survey. The same line was produced to the 52d mile point, notwithstanding it passes considerably south of the plainly indicated Sullivan line. The 52d mile point, as established and marked by us, was placed as nearly as possible in accordance with the notes of the Hendershott survey, evidenced by the width of the pond and also its distance from the 'Stokes' fence line.

"The field-notes of the Hendershott and Minor survey show as follows:

"At 6.30 chains eastward from the Hendershott 42d mile point Sullivan's 42d mile point was found and course changed at that point from N. 88° 53′ E. to N. 89° 06′ E.

"6.37 chains eastward of Hendershott's 43d mile point Sullivan's 43d mile point was found and course changed at that point from N. 89° 16′ E. to N. 89° 47′ E.

"7.00 chains eastward of Hendershott's 44th mile point Sullivan's 44th mile point was found and course changed at that point from N. 89° 47′ E. to N. 89° 9′ E.

"6.20 chains eastward from Hendershott's 49th mile point Sullivan's 49th mile point was found and course changed at that point from N. 89° 9′ E. to N. 89° 16′ E.

"4.07 chains eastward of Hendershott's 54th mile point

Sullivan's 54th mile point was found and course changed at that point from N. 89° 16′ E. to N. 89° 2′ E.

"2.53 chains eastward of Hendershott's 58th mile point Sullivan's 58th mile point was found and course changed at that point from N. 89° 2′ E. to N. 89° 27′ E.

"In each instance it will be seen that the Hendershott courses are changed at the Sullivan mile points. The decree of your honorable court made January 3, 1851, declared that the line should be direct between each Hendershott mile point, and it is evident that the actual courses between the points referred to above are not in accordance with the recorded courses. It was found by reference to our base line in all cases where the field-notes show a straight line between such points that when the distance recorded as a straight line was two or more miles the line is actually a curve. The ordinates measured from the base line do not show any regular rate of curvature, and the curves themselves swing to the south and then to the north, the base line crossing the boundary line three times in twenty miles. The greatest distance of base line from boundary line is at the 55th mile point, which is about 247 feet north of base. The 46th mile point is 160 feet south and the 60th mile point 153 feet south of base.

"It is difficult to account for the discrepancies found between the recorded line as shown in Hendershott's notes and the line actually found. It is quite possible that the irregularities either grew out of the inaccuracy of the solar compass used on the survey or an inaccurate use of the instrument itself.

"We were surprised at the facility with which the Sullivan line could at the time of our survey be traced for considerable distances along the twenty miles of line included in our operations. Of twenty-one mile points from the 40th to the 60th, inclusive, Sullivan had witness trees for fifteen. Some of these witness trees can now be found, and also well defined line trees mentioned by him. On Hendershott's line only eight mile points out of the twenty-one referred to were witnessed by trees. Had the care shown by Sullivan in marking his line been exercised by Hendershott and Minor the line of the latter would have been much more fully

and satisfactorily defined. The hurried manner in which the work of the Hendershott survey was performed (151 miles of relocation, in addition to random lines, having been accomplished in 30 days) may in some measure account for the great lack of witness trees and other evidences necessary for an actual location of the boundary line of 1850. We are inclined to the opinion that, so far as regards the twenty miles mentioned, the Sullivan line can be as readily relocated as can the Hendershott line.

"The decree of your honorable court requires that the line relocated by us shall be marked with durable monuments. Twenty-one mile points included in the line relocated, being from the 40th to the 60th mile, inclusive, are now marked as required. The 40th, 50th and 60th miles are marked with the cast-iron monuments originally placed by Hendershott and Minor, in 1850. Mile points intermediate are marked with stone monuments. These are of the best quality of Missouri red granite, are twelve inches square, and from 6′ 2″ to 6′ 6″ in length. The stones stand 2′ above ground (this portion being hammer-dressed) and are well finished in every particular. On the north side of each stone is plainly cut the word 'Iowa,' on the south side the word 'Missouri,' on the east side the words 'State line,' and on the west the figures denoting the number of the mile point.

"The iron monuments were reset so as to show about 18 inches above ground. The granite monuments were set with great care, their apices being exactly on the line. They were well rammed when placed in ground and will need no witness trees. Their weight averages 1050 pounds each, and we think they can safely be pronounced both durable and permanent. The amount paid for them includes all freight charges and expenses of delivery and setting.

"Attached hereto (Appendix 'B') is a statement of the expenses consequent upon the relocation and marking that portion of the boundary line between the 40th and 60th mile points, which statement is respectfully submitted for the action of your honorable body.

"Attached hereto (Appendix 'C') is a photograph of the

section of the oak tree examined and reported on by Prof. McBride.

"JAMES HARDING,
"*Comm'r for Missouri.*
"PETER A. DEY,
"*Comm'r for Iowa.*
"DWIGHT C. MORGAN,
"*Of Illinois.*

"Chicago, Ill., Sep. 18, 1896."

"APPENDIX A.
"U. S. COAST AND GEODETIC SURVEY,
"SALINA, KANSAS, *June* 20th, 1896.

"Gen. James Harding, Hon. Peter A. Dey, Dwight C. Morgan, Esq., commissioners in the matter of the boundary line between the States of Missouri and Iowa.

"DEAR SIRS: I have the honor to submit the following report upon the operations conducted under my direction for the purpose of enabling you to locate and mark by 'durable monuments,' as required by the decree of the Supreme Court of the United States dated February 3rd, 1896, that portion of the boundary line between the States of Missouri and Iowa which lies between the fortieth and sixtieth mile posts east of the old north-west corner of Missouri, as marked in 1850 by H. B. Hendershott and W. G. Minor, commissioners.

"It appears unnecessary for me to make any mention in this report of the antecedent circumstances leading up to this survey, as you are well acquainted with them, and will, no doubt, take occasion to allude to them in your own report to the Supreme Court.

"I therefore pass at once to my own work.

"Your board having applied to General W. W. Duffield, superintendent of the U. S. Coast and Geodetic Survey, for the detail of an officer to make the necessary surveys, I was selected for that duty, and Mr. A. L. Baldwin, also of the C. & G. Survey, was assigned to the party as assistant observer.

"In compliance with the request of your board, received through Mr. Morgan, we met you on April 8th, 1896, at Davis

City, Iowa. A preliminary inspection of the western portion of the field of work was made on that day and the organization of the party was completed by engaging laborers and teams.

"On the following day the whole party was transferred to the village of Pleasanton, Iowa, that place being centrally located for the western half of the work, as it is directly on the boundary and just east of the forty-fifth mile post.

"A partial examination of the line, as identified by more or less reliable traditions current in its neighborhood, made it evident that its course in many places deviated widely from the description given in the field-notes attached to the report of the former commission. (Howard's Reports, Supreme Court U. S., vol. X.)

"Not only do the bearings differ from those recorded in that report, but portions of the line which are there called straight were found to be curved or composed of broken lines.

"Under these conditions it seemed inexpedient to attempt to reproduce upon the ground the courses and distances of the former survey.

"Such an attempt would undoubtedly have led to serious confusion, and would have furnished little information of real value, while the labor of making the necessary corrections would have been excessive.

"In place of that undesirable plan I adopted, with your approval, the method of measuring a base line straight across the country for the twenty miles to be surveyed.

"All of the old points which were recovered and all new points which it became necessary to locate upon the ground were directly referred to the base line, which, from a mathematical point of view, is the axis of abscissæ in a system of rectangular coördinates.

"It seems scarcely necessary to mention the advantages which this method affords in point of simplicity and accuracy of work, but it may do no harm to allude very briefly to a few of them.

"Thus the relative positions and bearings of different portions of the boundary can be readily found with far greater precision than would otherwise be easily practicable.

"Moreover, in this system of work each point of the boun-

dary is fixed independently of every other point, all being directly referred to the base line. This characteristic permits any desired local correction to be made at any point without necessarily affecting points on either side, a feature which I consider very essential in work of this character. The base line was so selected as to lie along the general direction of the boundary, which in fact crosses it three times, eleven of the twenty-one monuments being north of the base and the other ten south of it.

"This statement well illustrates both the irregularity of the boundary and the fact that the base line is very close to the general direction of the line.

"Another important consideration in the selection of the base line was to make it pass through the towns of Pleasanton and Lineville without meeting obstructions and without damaging private property.

"This was successfully accomplished, and in the whole course of the line remarkably little tree-cutting was needful. The base line was ranged out with an eight-inch theodolite, the standards of which were high enough to permit the telescope to transit. The telescope was of excellent quality and was provided with an eye-piece micrometer, by means of which slight deviations from the straight line could be measured and corrected.

"As the work of locating the base line advanced eastward the party was moved to Lineville, Iowa, which town is situated just north of the boundary line and between the fifty-sixth and fifty-seventh mile posts, and thenceforward operations were conducted from either Lineville or Pleasanton, as was found more convenient from time to time.

"As soon as the line was opened, and even before the final adjustment of its eastern terminus, the linear measurement was begun by Mr. Baldwin, with the assistance of the commissioners, working westward from the east end of the base, near the sixty-mile monument.

"When about five and one-half miles had been so measured I was ready to take personal charge of the measurement, and began at the west end of the base, near the forty-mile monument, working thence eastward to a junction with the line above mentioned.

"The system of measurement employed was that ordinarily used in the Coast and Geodetic Survey for direct measures not requiring the base apparatus.

"A narrow steel tape, twenty-five metres in length between end marks, was stretched under a tension of ten kilogrammes, as indicated by a spring balance attached to one end of the tape. The successive tape-lengths were marked on stakes driven into the ground.

"As the tape necessarily follows very closely the inclination of the ground, the horizontal distance will be less than the measured distance, and the correction for slope must be computed for each tape-length, the difference of height between the ends being determined by spirit-level. The very irregular profile of this line made these differences of height unusually great, and correspondingly increased the amount of correction.

"A small correction for catenary is also necessary when the tape swings clear of the ground, the 'sag' of the tape slightly decreasing the distance between its ends. Further, as all metallic measures vary in length with changes of temperature, it is necessary to apply a correction for such variations, the length of the tape being known at the temperature of zero, Centigrade.

"Temperatures were accordingly noted at frequent intervals, usually at every fourth tape.

"The direct measurement was completed on May 8th, although the eastern part of the line had still to be levelled.

"The computations were at once taken in hand and the resulting distances were furnished you as rapidly as possible.

"These results, for present purposes and as compared with ordinary measures, may be considered practically exact, and they show that the chain used by the surveyors of 1850 was too long, probably from the combined effects of abrasion and of high temperature.

"The distances between such of the old points as were recovered are nearly always too great. The ratio of excess is not constant, as, indeed, would hardly be expected, but shows a tendency to increase in going from west to east.

"A marked exception to this rule of excess in distance is found in the fifty-second mile. The eastern end of this mile

was not recovered, but was found with reasonable certainty from various considerations, while the reputed point at the western end was recovered. The mile so determined is noticeably less than a statute mile. The western part of this mile traverses a very steep, rough, and wooded country, while its eastern part crossed the Weldon River three times in 1850.

"These natural difficulties in the way of accurate measurement probably caused the shortage in this particular mile.

"In my own work I found it desirable to avoid the direct measurement of this mile, which is even more unfavorable now than in 1850, the Weldon having changed its course sufficiently to cross the base line five times at present.

"For this purpose a branch base about seven-eighths of a mile in length was measured on the flat ground east of the Weldon, and the distance across the broken section was then obtained with great precision by triangulation. The distances across the Grand River and Little River were also obtained by triangulation.

"Whenever in the course of the measurement we passed a point which it was desirable to refer to the base line, the point at which its rectangular ordinate met the base line was noted and the length of the ordinate itself was measured. The relative positions of these various points thus became known, including not only such of the mile points as could be identified, but also numerous objects commonly reputed to mark the boundary, as fences, trees, stones, etc.

"As far as possible in connection with the measurement, notes were made to provide material for a topographic sketch of the strip of country traversed by the boundary.

"As stated above, the measurement was completed on May 8th. As rapidly as the reductions were computed the places for the mile stones were marked on the ground from the fortieth to the forty-ninth.

"The weather, which up to that time had been generally favorable, now became very wet. The frequent and heavy rains seriously interfered with the work, and rendered progress across the country very slow, the roads being nearly impassable and the fords quite so. On May 18th the exigencies of the regular work of the Coast and Geodetic Survey com-

pelled the detachment of Mr. A. L. Baldwin, who had rendered energetic and efficient assistance in the work.

"On the same day I moved from Pleasanton to Lineville to resume work on the eastern part of the line. In the intervals between rains I completed the levels, and, after computing the distances, marked the places for the mile posts, a work in regard to which further details will be given below. The topographic notes were also completed.

"In order to furnish as much information as possible in regard to this portion of the boundary line, observations for the approximate determination of the latitude and longitude and of the astronomical azimuth or bearing of the base line were made at Pleasanton and at Lineville.

"Bad weather interfered with the observations at Pleasanton, and at Lineville the lack of time and unfavorable local conditions somewhat affected the precision of the results, which answer, however, the purpose desired. Latitude and azimuth were obtained by observations on Polaris (*a* Ursæ Minoris) with the theodolite. Time was obtained by sextant observations of the sun, using a mercurial horizon and the method of equal altitudes. For longitude the local time was compared with the railroad telegraphic time signals. It remains for me only to state briefly the old points which were recovered and the conditions which, under your decisions, governed the location of those points which were not identified by local marks.

"The fortieth, the fiftieth and the sixtieth mile points were found marked by the iron monuments placed there by Commissioners Hendershott and Minor in 1850. There was some dispute as to whether No. 60 was in its original position or not, but the weight of evidence and the continuity of the traditional line on either side of it indicated pretty conclusively that it had never been disturbed.

"The remaining points were originally marked by stakes, sometimes witnessed.

"No. 42, while not directly identified by marks, was satisfactorily recovered by means of a 'line tree' four chains W. and by topographical notes at crossing of Grand River, as shown in original record.

"No. 44 was restored by measurement from the two witness trees, the decaying stumps of both of which were found.

"No. 49 was also identified by the stumps of both witness trees.

"No. 51 was marked by a 'mound and pit,' which have been accepted for years as the true marks.

"No. 54 was marked by a stone, and was further identified by one witness tree.

"No. 58 was recovered by traces of the stakes in addition to the remains of the witness tree, and the point established by J. C. Sullivan in 1816 was also found a little further east, and also the stump of an elm tree, noted as a 'line tree' in both Sullivan and Hendershott notes, being 4.10 chains W. of Hendershott's 58th mile point. The remaining points were located in the following manner:

"No. 41 was placed midway on line between 40 and 42.

"No. 43 was so placed as to preserve the relations with 42 and 44 required by the field-notes of 1850, and after being so located was found to agree with the stump of the witness tree on the Iowa side of the line.

"No. 45 was placed in the middle of the street bounding Pleasanton on the south, which middle line is shown as the boundary on the official plat of the town on file at the county-seat, and at the proper distance along the line averaging to the 49th mile.

"No. 46 was similarly located on the line passing from 45 through a stone pointed out by tradition as marking the line.

"No. 47 was placed at the proper distance on a line drawn straight from 49 westward through a witnessed section corner between 47 and 48.

"No. 48 was placed on the same line midway between 47 and 49.

"No. 52 was located at a point west of the pond or lake in the Weldon bottom agreeing with the topographic description given by the former commissioners and on a line agreeing as closely as possible with all of the apparently authentic traces of the line surveyed in 1850.

"No. 53 was placed a mile west of 54 on the straight line between 52 and 54.

"No. 55 was placed a mile east of 54 on the extension of the line drawn from 54 through a witnessed stone at the corner common to Wayne and Decatur Counties, Iowa.

"Nos. 56 and 57 were placed at mile distances on the straight line drawn from 55 through an iron pin at the southwest corner of the streets surrounding the public square at Lineville, which pin was universally accepted as a point marking the boundary. Unsuccessful search was also made for the remains of a wooden post which formerly stood a little further east.

"No. 59 was placed midway between 58 and 60, in the manner required by the field-notes of 1850.

"While this work was in progress many of the inhabitants along the line asked that additional points, intermediate between the mile points, might be furnished them, and with your approval this was done.

"In accordance with the decree of the Supreme Court dated January 3rd, 1851, such points were always placed on the straight line between the adjacent mile posts. The final observations were made on the afternoon of June 13th, and the instruments were then packed, and on the 15th were shipped to Washington.

"I left Lineville on June 15th, also, to resume my regular duties in the Coast and Geodetic Survey.

"In closing this report permit me to express my appreciation of the uniform courtesy and consideration shown my assistant and myself by all the members of the commission, and my hope that our earnest labors in this interesting work have proved satisfactory in methods and results, and that they may be instrumental in permanently settling this controversy.

"The appended pages give in summarized form the results of the observations and measurements, as well as the mathematical formulæ employed.

"Respectfully submitted.

"W. C. Hodgkins,

"*Assistant, Coast & Geodetic Survey, Chief of Party.*"

"Appendix A.

"The following table gives the bearings and distances between the successive mile posts of the Missouri-Iowa boundary

from the fortieth to the sixtieth mile east of the initial point as the said mile posts were relocated and marked by James Harding, Peter A. Dey and Dwight C. Morgan, commissioners, in 1896.

"The distances are given to the nearest tenth of a metre and to the nearest half foot, and the bearings or azimuths to the nearest quarter minute.

"The azimuth is reckoned from the south point as zero in the direction of west, north, and east successively — *i.e.*, 90° means due west, 270° due east, etc.

"The convergence of the meridians is $44\frac{1}{2}$ seconds for each mile. The bearings going west, or back azimuths, are therefore in each case three-fourths of a minute greater than the eastern or direct azimuths.

"Mile.	Azimuth.	Back azimuth.	Distance.	
			Metres.	*Feet.*
40 to 41	268° 57¾′	88° 58½′	1,610.1	5,282½
41 to 42	268 58½	88 59¼	1,610.1	5,282½
42 to 43	269 20½	89 21¼	1,610.1	5,282½
43 to 44	269 58¾	89 59½	1,603.8	5,261½
44 to 45	269 52¾	89 53½	1,616.7	5,304
45 to 46	269 51	89 51¾	1,610.2	5,283
46 to 47	269 11	89 11¾	1,610.1	5,282½
47 to 48	268 55½	88 56¼	1,610.1	5,282½
48 to 49	268 56¼	88 57	1,612.7	5,291
49 to 50	269 16¾	89 17½	1,608.3	5,276½
50 to 51	269 04½	89 05¼	1,613.3	5,293
51 to 52	268 10¼	88 11	1,595.8	5,235½
52 to 53	268 17¾	88 18½	1,626.1	5,335
53 to 54	268 18½	88 19¼	1,613.2	5,292½
54 to 55	268 57½	88 58¼	1,611.5	5,287
55 to 56	269 33	89 33¾	1,611.5	5,287
56 to 57	269 33¾	89 34½	1,611.5	5,287
57 to 58	270 48	90 48¾	1,612.0	5,289
58 to 59	270 36¾	90 37½	1,613.8	5,294½
59 to 60	270 39	90 39¾	1,613.8	5,294½

Decree of the Court.

"*Offsets from Base Line.*

	M.			M.		
"Mon't No.	40, 3.3 =	11	ft. N.	"Mon't No. 51, 23.7 =	78	ft. S.
" "	41, 8.8 =	29	" "	" " 52, 7.6 =	25	" N.
" "	42, 14.3 =	47	" "	" " 53, 36.2 =	119	" "
" "	43, 9.8 =	32	" "	" " 54, 64.8 =	$212\frac{1}{2}$	" "
" "	44, 12.1 =	40	" S.	" " 55, 75.4 =	247	" "
" "	45, 31.0 =	102	" "	" " 56, 69.5 =	228	" "
" "	46, 48.7 =	160	" "	" " 57, 63.7 =	209	" "
" "	47, 47.3 =	155	" "	" " 58, 23.4 =	77	" "
" "	48, 38.3 =	$125\frac{1}{2}$	" "	" " 59, 11.3 =	37	" S.
" "	49, 29.4 =	$96\frac{1}{2}$	" "	" " 60, 46.6 =	153	" "
" "	50, 29.6 =	97	" "			

"*Note on the Reduction and Results of the Astronomical Observations at Lineville, Iowa.*

"For latitude the observed altitudes of Polaris were reduced by the method and table given on page 534 of the American Ephemeris, with the result:

"Approximate latitude = 40° 34′.6.

Comparisons of local mean time, obtained by sextant observations of the sun, with railroad time signals, gave the following result:

"Approximate longitude (W. of Greenwich) = 93° 32′.

"For azimuth the observations of Polaris were reduced by the formula

$$\tan A = \frac{\sin t}{\cos \phi \tan \delta - \sin \phi \cos t},$$

in which the letters have the following significations:

A = the azimuth of the star at the instant of observation.
t = the hour angle " " "
δ = the declination " " "
ϕ = the latitude of the place.

"Resulting azimuth of base line = 89° 21′ 49″ east of north.

"These results transferred to the monuments at each end of this 20-mile section give the following:

	Lat.	Long.	Azimuth.
40-mile mon't.....	40° 34′.4	93° 51′	269° 14′ 49″
60-mile mon't.....	40 34 .6	93 28	89 29 40

the azimuth at each point being the bearing of the straight line joining the two points."

"APPENDIX C.

(One-third natural size.)

Photograph of a section of the oak tree at the Fifty-second mile point, supposed to be witness tree in the Iowa-Missouri boundary. The dark line indicates the size of the stem fifty years ago.

"APPENDIX B.

"*Account of Expenses Incident to the Relocation and Remarking the Boundary Line between the States of Missouri and Iowa from the 40th to the 60th Mile Point, under Decree of the Supreme Court of the United States, February 5, 1896.*

"Pay of engineers:		
W. C. Hodgkins, (U. S. Geodetic Survey Corps,) 74 days @ $5.00	$370 00	
A. L. Baldwin, (U. S. Geodetic Survey Corps,) 41 days @ $5.00	205 00	
Transportation from Washington, D. C.	77 75	
" to Salina, Kansas	41 14	
Freight on instruments returned to Washington	8 32	
		702 21
Pay of one assistant (14 days @ $2.50) and laborers		190 50
Subsistence of parties in field		421 75
Hire of teams and drivers and feed for teams		342 25
Paid for eighteen granite monuments in place		922 00
Miscellaneous expenses paid, (telegrams, township plats, signal materials, clerical work and typewriting, repairs of instruments, storage, &c., &c.)		171 60
Advertising, Missouri and Iowa		133 30
Commissioners:		
James Harding, comm. for Missouri, 78 days @ $10.00	780 00	
James Harding, travelling expenses	161 85	
		941 85
Peter A. Dey, comm. for Iowa, 60 days @ $10.00	600 00	
Peter A. Dey, travelling expenses	189 47	
		789 47
Dwight C. Morgan, comm. 46 days @ $10.00	460 00	
Dwight C. Morgan, travelling expenses	198 63	
		658 63
Total		$5,273 56"

And it is ordered, adjudged and decreed that the boundary line between said States of Missouri and Iowa in controversy herein be, and it is hereby, established and declared to be, as delineated and set forth in said report.

It is further ordered, adjudged and decreed that the compensation and expenses of the commissioners and the expenditures attendant upon the discharge of their duties be, and they are hereby, allowed at the sum of five thousand two hundred and seventy-three dollars and fifty-six cents ($5,273.56), in accordance with their report as confirmed as aforesaid, and that said charges and expenses with the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further

Ordered, adjudged and decreed that the clerk of this court forthwith transmit to the Chief Magistrates of the States of Missouri and Iowa copies of this decree, duly authenticated under the seal of this court.

HUSSMAN *v.* DURHAM.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 66. Argued and submitted January 5, 1897. — Decided January 18, 1897.

In 1858, C. located a bounty land warrant issued to L. under the act of March 3, 1855, c. 207, taking a certificate of location, which was recorded in the office of the recorder in the county in which the land was situated. No patent was issued. In 1864, under authority of the act of June 23, 1860, c. 203, but without notice to C., the Secretary of the Interior cancelled that warrant. It was admitted that the assignment upon it, purporting to be that of L., was a forgery. On the records of the land department up to 1886 it appeared that a full and equitable title to the land had passed to C., and in that year D. having obtained conveyances from C., applied to the land department for leave to purchase on payment of the regular price and his application was granted. Meanwhile the land had been sold for non-payment of state taxes, and the tax title had passed into H. D. commenced suit against H. to quiet title, and the Supreme Court of Iowa sustained the decree of the trial court in his favor. *Held*,

Statement of the Case.

(1) That as the Supreme Court of the State held that the equitable title apparently conveyed by the proceedings in the United States Land Office in 1858 was of no effect, and the tax titles based thereon of no validity, it was apparent that a right claimed under the authority of the United States was denied, and, therefore, this court had jurisdiction;

(2) That, though a formal certificate of location was issued in 1858, there was then in fact no payment for the land and the government received nothing until 1888; that during these intervening years whatever might have appeared upon the face of the record the legal and the equitable title both remained in the government; that the land was, therefore, not subject to state taxation; that tax sales and tax deeds issued during that time were void; that the defendant took nothing by such deeds; that no estoppel can be invoked against the plaintiff; that his title dates from the time of payment in 1888; that the defendant does not hold under him and has no tax title arising subsequently thereto; and that there was no error in the decision of the Supreme Court of the State.

This case comes up on error to the Supreme Court of the State of Iowa. The facts are these: On May 19, 1858, Robert Craig located bounty land warrant No. 27,911, issued to William Long under the act of Congress of March 3, 1855, c. 207, 10 Stat. 701, upon the land in controversy, and obtained from the proper land officer a certificate of location. This certificate was recorded in the office of the recorder of Carroll County, the county in which the land is situated. No patent was issued thereon. On February 1, 1864, the Secretary of the Interior cancelled the land warrant under authority of an act of Congress, of date June 23, 1860, c. 203, 12 Stat. 90. This act provided that whenever it should appear that any land warrant was lost or destroyed, whether the same had been sold or assigned by the warrantee or not, the Secretary of the Interior should cause a new warrant to be issued, which new warrant should have all the force and effect of the original, and upon such action the original warrant was to be deemed and held to be null and void, and any assignment thereof fraudulent; and further, that "no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration." The second section authorized the Secretary

to prescribe such rules and regulations as might be appropriate for carrying the act into effect. It was alleged in the petition filed in this case that the assignment on the warrant purporting to be that of Long, the warrantee, was a forgery, and this allegation was admitted by the defendant. The action of the Secretary was taken without, so far as appears, any notice to Robert Craig. Nothing was done either in the local land office or in the land department at Washington to formally cancel the certificate of location. Up to the year 1886 the records of the land department showed on their face a full equitable title passing to Robert Craig by virtue of his certificate of location and payment therefor in a land warrant. During these years the land was subjected to taxation by the officers of Carroll County, Iowa, and was sold for non-payment of taxes; and the titles under such tax sales passed to Bernhard Hussman, defendant below.

In 1886 William H. Durham, plaintiff below, having obtained conveyances from Craig, applied to the land department for leave to purchase the land upon payment of the regular price. This application was granted under authority of Rule 41 of the Department of the Interior, published on July 20, 1875, which reads as follows:

"When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issuance of a patent by filing in the office for the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash or any kind of scrip legally applicable to the class of lands embraced in the entry."

The money, $150, was paid by Durham in 1888, and a patent issued of date October 3, 1889, to Robert Craig, his heirs and assigns. It recited a payment by "F. M. Hunter, trustee for Robert Craig," and was delivered to said trustee, to be held until the rights of these parties could be judicially determined. Thereupon Durham commenced this suit in the District Court of Carroll County, Iowa, to quiet his title as against the defendant, holding the tax titles. The District Court entered

a decree in his favor, which was affirmed by the Supreme Court. *Durham* v. *Hussman*, 88 Iowa, 29.

Mr. C. C. Cole for plaintiff in error.

Mr. C. C. Nourse, for defendant in error, submitted on his brief.

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

A motion to dismiss was submitted by the defendant in error, but as the Supreme Court of the State held that the equitable title apparently conveyed by the proceedings in the United States Land Office in 1858 was of no effect, and the tax titles based thereon of no validity, it is apparent that a right claimed under the authority of the United States was denied, and, therefore, this court has jurisdiction.

On the merits of the case we remark that while it is undoubtedly true that when the full equitable title has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to state taxation, *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; yet until such equitable title has passed and while the land is still subject to the control of the government it is beyond the reach of the State's power to tax. *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444; *Tucker* v. *Ferguson*, 22 Wall. 527, 572; *Colorado Company* v. *Commissioners*, 95 U. S. 259. Therefore the validity of the tax titles held by plaintiff in error depends upon the question whether the equitable title to the land had passed from the government to Craig.

We remark, in the second place, that under such a tax law as exists in Iowa there is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from but is antagonistic to the former. The holder of the latter is not a privy in estate with the holder of the former. Neither owes any duty to the other, nor is

estopped from making any claim as against the other. *Hefner* v. *Northwestern Insurance Co.*, 123 U. S. 747, 751; *Turner* v. *Smith*, 14 Wall. 553; *Crum* v. *Cotting*, 22 Iowa, 411; Burroughs on Taxation, 346.

Neither can it be said that on the issue of a patent the title by relation always dates as of the time when the certificate of location was issued. A title by relation extends no further backwards than to the inception of the equitable right. If no equitable right passed by the surrender of the land warrant and the certificate of location in 1858, but only by the payment of the money in 1888, the legal title created by the issue of the patent has no relation back of this later day. In other words, the United States does not part with its rights until it has actually received payment, and if by mistake, inadvertence or fraud a certificate of location (which is equivalent to a receipt) is issued when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid. These views have been recognized in Iowa, as elsewhere. Thus in *Reynolds* v. *Plymouth County*, 55 Iowa, 90, it appeared that certain forged and counterfeit agricultural college scrip was located upon a tract of land, and that, after the issue of the certificate of location and before any patent, state taxes were assessed and levied thereon. Thereafter the forgery was discovered, the locator substituted genuine scrip or money, and a patent was issued. The court held that the taxes thus assessed and levied during the interval between the original illegal entry and location and the subsequent substitution of genuine scrip or money were invalid, saying: "In order to protect a title, or to attain the ends of justice, the courts will, under the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands. But this doctrine cannot be invoked to burden the holder of a title, and require him, in violation of justice, to pay taxes when he held neither the equity nor title of the lands." A similar doctrine was announced in *Calder* v. *Keegan*, 30 Wisconsin, 126. See also *Gibson* v. *Chouteau*, 13 Wall. 92,

in which this court, on page 101, said: "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder."

It is, however, said by counsel for plaintiff in error that, as it does not appear that any notice was given to Craig, the finding of the Secretary of the Interior that the assignment was a forgery, and the order directing the cancellation cannot be regarded as binding upon Craig or affecting the rights vested in him by the surrender of the land warrant and the issue of the location certificate. In other words, as in this respect the Secretary of the Interior is a tribunal with limited and special jurisdiction, proof of notice to the parties interested is essential to sustain the validity of any adjudication. Not questioning the proposition of law, as thus stated, there are two sufficient answers to its applicability to the present case: First, as Craig and those claiming under him thereafter dealt with the government upon the assumption that the adjudication was binding, one who is not in privity with them cannot challenge their acceptance of that adjudication; and, secondly, on the record the parties hereto have admitted that the assignment of the warrant by Long to Craig was a forgery. Craig, therefore, had no title to the warrant, and this formal surrender by him of the instrument was an invalid act, neither defeating the title of Long, nor releasing the government from its promise to convey to Long, or his genuine assignee, the specified number of acres.

The case, therefore, stands in this way: Confessedly, though a formal certificate of location was issued in 1858, there was then in fact no payment for the land and the government received nothing until 1888. During these intervening years

whatever might have appeared upon the face of the record the legal and the equitable title both remained in the government. The land was, therefore, not subject to state taxation. Tax sales and tax deeds issued during that time were void. The defendant took nothing by such deeds. No estoppel can be invoked against the plaintiff. His title dates from the time of payment in 1888. The defendant does not hold under him and has no tax title arising subsequently thereto.

With respect to the suggestion of counsel that it is a hardship that one who has changed wild land into a farm and greatly improved it should, after the lapse of many years, be deprived of the benefit of those improvements by reason of an undisclosed defect in the record title, it is sufficient to say that there is nothing in this record to indicate that the defendant ever made any improvements or expended a dollar otherwise than in paying for the tax title. We cannot, of course, take the intimation of counsel in the brief as evidence of a fact not appearing on the record. Further, so far as the money paid for taxes is concerned, it is familiar law that a purchaser of a tax title takes all the chances. There is no warranty on the part of the State. Beyond this, the statutes of Iowa contemplate a return of taxes when it is disclosed that the land was not subject to taxation. 1 McClain's Rev. Stat. 1888, § 1387, p. 353. We see no error in the decision of the Supreme Court of Iowa, and it is, therefore,

Affirmed.

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

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 133. Submitted November 3, 1896. — Decided January 18, 1897.

The act of the legislature of Texas of April 5, 1889, which provides that "any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway

company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue," operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit.

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground — something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained.

On April 5, 1889, the legislature of the State of Texas passed this act:

"Section 1. *Be it enacted by the legislature of the State of Texas*, That after the time when this act shall take effect, any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claims for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing

it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue." Sayles' Supplement to Texas Civil Statutes, p. 768, Art. 4266*a*.

On October 9, 1890, defendant in error commenced this action before a justice of the peace, to recover $50 for a colt killed by the railway company. The complaint alleged presentation and non-payment, as required by the act, and demanded $10 attorney fee. The company answered admitting everything except the claim for the attorney's fee. The case passed, after judgment in favor of the plaintiff for the amount claimed and an attorney's fee of $10, through the District Court and the Court of Civil Appeals, to the Supreme Court of the State, by which, on May 10, 1894, the judgment against the company was affirmed. 87 Texas, 19. To reverse such judgment the company sued out this writ of error.

Mr. E. D. Kenna and *Mr. J. W. Terry* for plaintiff in error.

No appearance for defendant in error.

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

The single question in this case is the constitutionality of the act allowing attorney's fees. The contention is that it operates to deprive the railroad companies of property with-

out due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases.

We have not been favored with any argument or brief from the defendant in error. Doubtless he believed, and justly, that nothing could be added to the arguments so fully and strongly made in support of the constitutionality of this law in the respective opinions of the two highest courts of the State.

The Supreme Court of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

It is true the amount of the attorney's fee which may be charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question

of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action.

It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway* v. *Herrick*, 127 U. S. 210; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Charlotte & Columbia Railroad* v. *Gibbes*, 142 U. S. 386; *Covington & Lexington Turnpike Company* v. *Sandford*, 164 U. S. 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, *Hayes* v. *Missouri*, 120 U. S. 68; *Railroad Company* v. *Mackey*, 127 U. S. 205; *Walston* v. *Nevin*, 128 U. S. 578; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Giozza* v. *Tiernan*, 148 U. S. 657; *Columbia Southern Railway* v. *Wright*, 151 U. S. 470; *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380; *St. Louis & San Francisco Railway* v. *Mathews*, 165 U. S. 1; yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

As well said by Black, J., in *State* v. *Loomis*, 115 Missouri, 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regula-

tions. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

In *Vanzant* v. *Waddel*, 2 Yerger, 260, 270, Catron, J., (afterwards Mr. Justice Catron of this court,) speaking for the Supreme Court of Tennessee, declared: "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In *Dibrell* v. *Morris' Heirs*, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary."

In *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, the question was presented as to the power of the State to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the court, by Mr. Justice Bradley, saying, on page 237: "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

It is, of course, proper that every debtor should pay his

debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored.

It may be said that certain corporations are chartered for charitable, educational or religious purposes, and abundant reason for not visiting them with a penalty for the non-payment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations and others like them are exempt. Further, the penalty is imposed not upon all corporations charged with the *quasi* public duty of transportation, but only upon those charged with a particular form of that duty. So the classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties.

But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are

engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties — duties arising out of the peculiar business in which they are engaged — is a just classification, and not one within the prohibition of the Fourteenth Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged — a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the State, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the State and with a view to enforce just and reasonable police regulations.

While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the State has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the State.

But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of

railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties — duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained.

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident,

that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

Questions of this character have been frequently presented to the courts, and it is well to notice a few of the decisions. In Alabama a statute provided that a railroad corporation, or any complainant against it, taking an appeal from a judgment of a justice of the peace in a suit for damages to live stock, and failing to sustain such appeal, should be liable for a reasonable attorney's fee incurred by reason thereof. Code Alabama, 1876, § 1715. This statute was less obnoxious to the charge of discrimination than the one before us, in that it gave the same right to the corporation as to its adversary, and it was limited to cases in which an appeal was taken from a judgment already rendered by a competent judicial officer; yet the Supreme Court of that State, *South & North Alabama Railroad* v. *Morris*, 64 Alabama, 193, 199, held it in conflict with both the state and the Fourteenth Amendment to the United States Constitution, saying: "Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial and discriminatory legislation, which secures this right to

some favored class or classes and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions." And again: "The section of the code under consideration (1715) prescribes a regulation of a peculiar and discriminative character in reference to certain appeals from justices of the peace. It is not general in its provisions or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee not to exceed twenty dollars. A law which would require all farmers who raise cotton to pay such a fee in cases where cotton was the subject-matter of litigation and the owners of this staple were parties to the suit would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians or merchants or ministers of the gospel would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights of every state constitution of the various commonwealths of the American Government."

In Mississippi an act somewhat similar in its nature, Laws Miss. 1882, p. 110, was adjudged unconstitutional, *Chicago, St. Louis &c. Railroad* v. *Moss*, 60 Mississippi, 641, the court saying, on page 646: "The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances."

In Michigan a statute was passed, Laws Michigan, 1885, c. 234, authorizing the taxing of an attorney's fee of twenty-five dollars in actions against a railroad company for damages for

cattle killed, and the Supreme Court of that State held it unconstitutional, *Wilder* v. *Chicago & West Michigan Railway*, 70 Michigan, 382, saying on page 384: "Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25, if it fails to successfully maintain its defence. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of $10 in the justice's court, but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25; for it is nothing more or less than a penalty. Calling it an 'attorney's fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist." *Lafferty* v. *Chicago & West Michigan Railway*, 71 Michigan, 35.

So, in Arkansas, an act was passed providing that when stock was killed by a railroad company the owner might demand an appraisement, and that if the appraised value was not paid within a certain time and an action was brought an attorney's fee for the plaintiff might be taxed and collected, but it was held by the Supreme Court, *St. Louis &c. Railway* v. *Williams*, 49 Arkansas, 492, that such legislation could not be sustained. It was construed to be an act imposing a pen-

alty for a failure to abide by an award of appraisers and contesting its validity in the courts. It is worthy of note that in the same volume is found a decision by the same court, sustaining a statute allowing an attorney's fee in actions for the recovery of overcharges by railroads, *Dow* v. *Beidelman*, 49 Arkansas, 455; but the statute had prescribed the rates of charge for the carriage of passengers by railroads, had forbidden an overcharge, and it was as a penalty for failure to comply with such police regulations that the allowance of an attorney's fee was sustained. See also *Jolliffe* v. *Brown*, Supreme Court of Washington, 14 Wash. 155, in which, it appearing that there was no statutory obligation on railroad companies to fence their right of way, a statute allowing attorney's fees in actions to recover damages for stock killed, was declared to be unconstitutional; and *Grand Rapids Chair Co.* v. *Runnels*, 77 Michigan, 104, in which an act authorizing an attorney's fee to be taxed in entering judgments for personal services was set aside.

Besides these cases involving attorney's fees are others in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against equality of right. In *San Antonio &c. Railway* v. *Wilson*, 19 S. W. Rep. 910, the Court of Appeals of Texas held that a statute providing that in the event of a railroad company's refusing to pay its indebtedness to an employé within twenty days after demand, he could recover as damages twenty per cent in addition to the amount due, was class legislation and unconstitutional. In the course of the opinion, after referring to those statutes allowing double damages for stock killed, the court observed: "But when we consider the relations of railway companies to their own servants, both as to contracts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons." In *Atchison & Nebraska Railroad* v. *Baty*, 6 Nebraska, 37, there was presented for consideration a statute which gave to the owner of live stock accidentally killed or destroyed on a railroad track

double its value, and it was held that the statute was void. *Millet* v. *People*, 117 Illinois, 294, in which an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner, was held invalid as beyond the power of the legislature to single out certain individuals and impose upon them burdens not imposed upon all. *Frorer* v. *People*, 141 Illinois, 171, where an act which prohibited persons engaged in mining or manufacturing from keeping a store for furnishing supplies to their employés was held in conflict with the constitution. *Braceville Coal Co.* v. *People*, 147 Illinois, 66, where a like ruling was made in respect to a statute requiring certain specified corporations to pay the wages of their employés weekly. *Eden* v. *People*, 161 Illinois, 296, which set aside a statute forbidding barbers, and barbers only, to keep open their shops or work at their trade on Sundays. *Durkee* v. *Janesville*, 28 Wisconsin, 464, in which an act providing that no costs should be recovered against the city in an action commenced to set aside any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with the rule of equality in that suitors in all other cases were entitled to recover their costs, the court saying, on page 471, that "it is obvious there can be no certain remedy in the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision." *Janesville* v. *Carpenter*, 77 Wisconsin, 288, in which a statute authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature, was likewise held to be void, as discriminating and class legislation, in

violation of the spirit of the Constitution, and contrary to public justice.

In *State* v. *Goodwill*, 33 West Va. 179, the Supreme Court of Appeals of West Virginia held unconstitutional a statute which prohibited persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the act; and on the same day in *State* v. *Fire Creek Coal & Coke Co.*, 33 West Va. 188, the same court also set aside another statute which prohibited persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling any merchandise or supplies to their employés at a greater per cent of profit than they sell to others not employed by them. In *Park* v. *The Free Press Co.*, 72 Michigan, 560, it was held that an act limiting the recovery in suits brought for libel in certain cases to actual damages, as defined in the act, was not within the scope of constitutional legislation. In *Pearson* v. *Portland*, 69 Maine, 278, a statute, which provided that no damages for injury to person or property caused by a defect in the highway, could be recovered of any city or town by any person who, at the time the damage was done, was a resident of any country where damage done under similar circumstances was not by the laws of that country recoverable, was held to conflict with the equality clause of the Fourteenth Amendment of the United States Constitution.

It must not be understood that by citing we endorse all these decisions. Our purpose is rather to show the extent to which the courts of the various States have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification —

and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained. The judgment of the Supreme Court of Texas is, therefore,

Reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Gray, with whom concurred Mr. Chief Justice Fuller and Mr. Justice White, dissenting.

The Chief Justice, Mr. Justice White and myself are unable to concur in this judgment. The grounds of our dissent may be briefly stated.

Costs in civil actions at law are the creature of statute. From early times, there have been statutes making different rules as to costs, according to the nature of the issue, and the amount involved; and sometimes allowing costs to the prevailing party when plaintiff, and not when defendant. The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, and the right to costs as depending upon the nature of the suit, upon the amount or value of the thing sued for or recovered, or upon other circumstances, is and always has been within the regulation and control of the legislature, exercising its discretionary power, not oppressively to either party, but as the best interests of the litigants and of the public may appear to it to demand. Bac. Ab., Costs, *passim*; *Postan* v. *Stanway*, 5 East, 261; *Green* v. *Liter*, 8 Cranch, 229, 242; *Kneass* v. *Schuylkill Bank*, 4 Wash. C. C. 106; *Lowe* v. *Kansas*, 163 U. S. 81.

The statute of the State of Texas, now in question, does but enact that any person having a valid *bona fide* claim, not exceeding fifty dollars, against a railroad corporation, for personal services or damages, or for overcharges on freight, or for destruction or injury of stock by its trains, and presenting the claim, verified by his affidavit, to the corporation, and, if it is not paid within thirty days, suing thereon in the proper court, and finally obtaining judgment for the full amount thereof in that court, or in any court to which the suit may be appealed, shall be entitled to recover, in addition to other

costs, a reasonable attorney's fee (if he has employed an attorney) not exceeding ten dollars, to be assessed and awarded by the court or jury trying the issue. Texas Gen. Laws of 1889, c. 107, p. 131; Sayles's Supplement, art 4266*a*, p. 768. In other words, if an honest claim, of not more than fifty dollars, and coming within one of those classes of small claims which most commonly arise between individuals and railroad corporations, is not promptly paid when presented under oath, and the claimant is thereby compelled to resort to a suit, the corporation, if ultimately cast in the suit, must pay to the successful plaintiff a very moderate attorney's fee, as part of the costs of the litigation.

The legislature of a State must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied, from observation and experience, that railroad corporations within the State were accustomed, beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and the means of the claimants, by prolonged litigation and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in a suit upon such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand. Whether such a state of things as above supposed did in fact exist, and whether, for that or other reasons, sound policy required the allowance of such a fee to either party, or to the plaintiff only, were questions to be determined by the legislature, when dealing with the subject of costs, except in so far as it saw fit to commit the matter to the decision of the courts.

The constitutionality of statutes allowing plaintiffs only to recover an attorney's fee, as part of the judgment, in particular classes of actions selected by the legislature, appears to have been upheld by the courts of most of the States in which it has been challenged. *Kansas Pacific Railway* v. *Mower*, 16 Kansas, 573, 582; *Same* v. *Yanz*, 16 Kansas, 583; *Peoria &c.*

Railway v. *Duggan*, 109 Illinois, 537; *Vogel* v. *Pekoc*, 157 Illinois, 339; *Dow* v. *Beidelman*, 49 Arkansas, 455; *Perkins* v. *St. Louis &c. Railway*, 103 Missouri, 52; *Burlington &c. Railway* v. *Dey*, 82 Iowa, 312, 340; *Wortman* v. *Kleinschmidt*, 12 Montana, 316; *Gulf, Colorado & Santa Fé Railroad* v. *Ellis*, 87 Texas, 19; *Cameron* v. *Chicago &c. Railway*, 63 Minn. 384.

It is to be regretted that so important a precedent, as this case may afford, for interference by the national judiciary with the legislation of the several States on little questions of costs, should be established upon argument *ex parte* in behalf of the railroad corporation, without any argument for the original plaintiff. But it is hardly surprising that the owner of a claim for fifty dollars only, having been compelled to follow up, through all the courts of the State, the contest over this ten dollar fee, should at last have become discouraged, and unwilling to undergo the expense of employing counsel to maintain his rights before this court.

CLARKE *v.* McDADE.[1]

ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA.

No. 158. Submitted January 13, 1897. — Decided January 25, 1897.

A general statement that the decision of a state court is against the constitutional rights of the objecting party, or against the Fourteenth Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question, even where the judgment is a final one within Rev. Stat. § 709.

In these cases there was no final judgment, such as is provided for in Rev. Stat. § 709, and there does not appear to have arisen any Federal question whatever.

[1] With this case were submitted No. 159, Clarke *v.* McDade, No. 165, Clarke *v.* McDade, No. 160, Clarke *v.* Mott, and No. 161, Clarke *v.* Mott, all error to the Superior Court of the city and county of San Francisco. The opinion of this court is entitled in all the cases.

THE case is stated in the opinion.

Mr. A. C. Searle, for plaintiff in error, submitted on his brief, on which were *Miss Clara S. Foltz* and the plaintiff in error.

No appearance for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The records in the above numbers, 158 and 159, relate to proceedings in *habeas corpus*. Those records are printed. Numbers 161 and 165 also relate to proceedings in *habeas corpus*. The records in those cases are not printed. Number 160 relates to a writ of error in what is termed in the record "an action."

All the records now before us, both printed and unprinted, are such a mass of confusion as to render it difficult to determine what has been done in the court below. The records relating to the proceedings taken upon *habeas corpus* show applications for that writ to various judges of the Superior Court of the city and county of San Francisco, State of California. From a perusal of the series of papers variously denominated orders, objections, demurrers, motions to vacate, answers, specifications of errors and petitions for reversal, which are mixed up in inextricable confusion, we are able to gather that the plaintiff in error, Clarke, was proceeded against in the Superior Court of San Francisco as an alleged insolvent, and that such court after a hearing adjudged that he was insolvent; that he appealed from the adjudication and his appeal was heard in the Supreme Court of California, which court affirmed the adjudication and remitted the record to the Superior Court of San Francisco. These facts are discovered from the perusal of a paper appearing to be an order signed by one of the judges of the Superior Court, which shows that there had been an appeal, and that the remittitur had come down to that court affirming its judgment adjudging Clarke an insolvent.

The order containing such recitals then directs the insolvent to file an inventory of his property, and it is signed by one of the judges of the court. An appeal was taken from the order, but no disposition of it appears to have been made, so far as the record shows. He failed to obey the order by filing the inventory as directed, and an order to show cause why he should not be punished for contempt having been made, he appeared and offered various objections to such adjudication. He was finally adjudged guilty of the contempt charged, and was committed to the jail in San Francisco until he should obey the order of the court and file an inventory as directed. After his commitment to the jail he commenced a series of proceedings by *habeas corpus* to obtain his release. It is the decision of the judge rendered in each proceeding of which he complains. He applied to one judge of the Superior Court after another for the writ which was granted him, and when the writ was served and the petitioner produced in obedience to the writ, after a hearing, the writ was discharged and the petitioner was remanded by the judge who granted the writ. This was repeated three or four times before different judges with the same result. He also applied to Judge Morrow, United States District Judge for a writ of *habeas corpus*, and that writ was applied for after he had applied to the state judge for the same kind of a writ which had been allowed, but before a decision was given by the state judge in that particular proceeding, and upon a hearing before the state judge upon the return of the writ sued out by himself, he objected that the judge had no right to hear the case, as he had applied to a United States District Judge for a writ of *habeas corpus*, and that under the provisions of Rev. Stat. §§ 763, 766, there was no power in the state judge to proceed with the hearing upon a return of the writ.

It does not appear what (if any) action was taken by the Federal judge on the application for the *habeas corpus*, and it is upon the decisions made by the state judges on these various applications for writs of *habeas corpus* that the questions arise which plaintiff in error claims that this court has the jurisdiction to decide.

All his objections to the proceedings are to be found in documents set forth in the records signed by himself, and which he describes as specifications of error and prayers for reversal. In these specifications he sets up numerous objections to the order adjudging him an insolvent and to the order adjudging him in contempt, and to the alleged refusal of the various judges to admit him to bail pending an examination of his case under the writs issued. What these various decisions were can only be determined from these specifications of error and other descriptions and allegations contained in affidavits and alleged answers to petitions signed by the plaintiff in error.

He objects that the order adjudging him an insolvent, as well as various of the other orders made by the court, were not signed by the clerk and sealed with the seal of the court assuming to grant them; that they were not served by the sheriff; that he was denied a trial by jury upon the question of insolvency and upon the question of contempt; that he was denied bail; and, generally, that the Fourteenth Amendment was violated in his person, and that all of the various orders were made in violation of the Revised Statutes, §§ 1979, 763, 766.

There is not one judgment of any court to be found in the record. There is a statement in each of the records relating to the *habeas corpus* proceedings following the writ and return thereto, as follows: "Court order, October 26, 1893. Writ dismissed; prisoner remanded. Register 2 of Departments 1 to 10, page 249."

In one of the records four petitions for writs of *habeas corpus* are contained one after the other, and no action shown in regard to any petition excepting at the end of the fourth there is a statement similar to that which is above set forth as to the dismissal of the writ.

There is no record of any appeal being taken to any state appellate tribunal or of any review being had or attempted of the various so called court orders remanding the prisoner after a hearing upon the returns to the various writs, but the writs of error from this court are directed to the judges of the Su-

perior Court of the city and county of San Francisco, and they have been allowed by one of the judges of that court.

The fatal objection appears in each case that the so called court-orders made upon the returns to the several writs of *habeas corpus*, which were granted by a judge and returnable before him, do not constitute that final judgment or decree in a suit in the highest court of a State in which a decision in the suit could be had which may be reviewed on writ of error from this court under section 709 of the Revised Statutes of the United States. If these various orders did constitute such a final judgment, it does not appear in the record that any question arose in such a manner as would give this court jurisdiction to review the same under the above named section.

A general statement that the decision of a court is against the constitutional rights of the objecting party or against the Fourteenth Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question even where the judgment is a final one within the section of the Revised Statutes above mentioned. There must be at least some color of a Federal question. *Hamblin* v. *Western Land Co.*, 147 U. S. 531.

In No. 160 of the above records, entitled *C. W. Mott and others* v. *Alfred Clarke*, in the Superior Court of the city and county of San Francisco, Department 10, the record opens with what is termed "specifications of error and prayer for reversal," in which it is stated that the action was commenced on the 2d of October, 1891, by filing a petition in the court, and that on the same day a mutilated portion of an attachment bond was filed in the same case, but that the bond was never approved by the judge, and that on the 6th of October, 1891, the respondent, Alfred Clarke, filed and served an objection to the bond, which objection is set forth. Then it is stated that no other bond was ever filed. An order to show cause then follows, ordering Clarke to show cause why he should not be adjudged an insolvent debtor, and restraining his transfer of any property in the meantime. This order is signed by one of the judges of the Superior Court. It would

appear that the order was served on the respondent personally and after such service it was filed, and was not served upon him after filing. The respondent thereafter objected to the jurisdiction of the court on the ground of absence of summons. The objection was overruled, subsequent proceedings were had, and on May 18, 1892, the respondent was adjudged an insolvent. The respondent claims that in the above proceedings he has been deprived of liberty and property without due process of law, and denied by the State the equal protection of the laws. He specifies the errors on which he will rely:

"(1) That the judgment complained of is null and void for want of jurisdiction and the court never obtained jurisdiction of his person, and therefore he has not been accorded due process of law.

"(2) That said judgment is made in violation of the fourteenth article, United States Constitution, and section 1979 of Revised Statutes of United States.

"Wherefore respondent prays that the said judgment may be reversed.

"This paper is made and filed *nunc pro tunc* as of May 10, 1894, by leave of court for good cause shown.

"(Signed) ALFRED CLARKE,
"Respondent and Plaintiff in Error."

It is then stated that the foregoing bill of exceptions is allowed and authenticated as and for the transcript on writ of error from the United States Supreme Court to the Superior Court as provided by law. It is signed by a judge of the Superior Court. Upon such a record a writ of error is allowed, and the citation and return of the judges of the foregoing matters follows.

This is everything that is in the record. No pleadings, no judgment other than an allegation in what is called a bill of exceptions of an adjudication in insolvency, and the recital in such bill, of objections taken of the character above set forth, and from this proceeding in insolvency before one of the judges of the Superior Court of San Francisco the plaintiff in error sues out a writ of error from this court and claims the

right to review the proceedings (whatever they were) of the Superior Court of San Francisco County. The same objection (among others) applies to this that we have stated in regard to the other records.

There is no final judgment, such as is provided for in section 709 of the Revised Statutes of the United States, and there does not appear to have arisen any Federal question whatever.

We have carefully looked through these entire records, notwithstanding the mass of confusion which appears in all of them. We find nothing which shows that we have jurisdiction in the cases, and for these reasons the various writs of error must be

Dismissed.

UNITED STATES *v.* BARNETTE.

APPEAL FROM THE COURT OF CLAIMS.

No. 325. Submitted December 21, 1896. — Decided January 25, 1897.

A lieutenant in the Navy, assigned by order of the Secretary of the Navy to duty as executive officer of a vessel of the United States, furnished by the Secretary of the Navy to the State of New York as a school ship, is entitled to sea pay, as well while the vessel is attached to a wharf in the harbor of New York, as while she is on a cruise, and although this service is called, in the Secretary's order for his detail, "employment on shore duty," and notwithstanding he is receiving pay from the State as instructor in its nautical school upon the vessel.

This was a claim by a lieutenant in the Navy of the United States for sea pay while on board the St. Mary's in the harbor of New York. The facts found by the Court of Claims were in substance as follows:

The St. Mary's was a sailing vessel owned and employed by the United States; and had been furnished for educational purposes by the Secretary of the Navy, upon the application of the Governor of the State of New York, under the act of Congress of June 20, 1874, c. 339, which is copied in the

margin.[1] The command of the vessel was always retained in an officer of the United States Navy. The nautical school upon this vessel was established by the board of education of the city of New York, under the statute of the State of New York of July 1, 1882, c. 410, the material provisions of which are likewise copied in the margin.[2] The object of the nauti-

[1] An act to encourage the establishment of public marine schools.

The Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the Governor of the State, a suitable vessel of the Navy, with all her apparel, charts, books and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each or any of the ports of New York, Boston, Philadelphia, Baltimore, Norfolk and San Francisco, upon the condition that there shall be maintained at such port a school, or branch of a school, for the instruction of youths in navigation, seamanship, marine enginery, and all matters pertaining to the proper construction, equipment and sailing of vessels, or any particular branch thereof. And the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of, or instructors in, such schools: Provided, that if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy, and the officers so detailed recalled: And provided further, that no person shall be sentenced to, or received at, such schools as a punishment or commutation of punishment for crime. 18 Stat. 121.

[2] SEC. 1068. The board of education are authorized and directed to provide and maintain a nautical school in said city, for the education and training of pupils in the science and practice of navigation; to furnish accommodations for said school, and make all needful rules and regulations therefor, and for the number and compensation of instructors and others employed therein; to prescribe the government and discipline thereof, and the terms and conditions upon which pupils shall be received and instructed therein and discharged therefrom, and provide in all things for the good management of said nautical school. And the said board shall have power to purchase the books, apparatus, stationery and other things necessary or expedient to enable said school to be properly and successfully conducted; and may cause the said school, or the pupils, or part of the pupils thereof, to go on board vessels in the harbor of New York, and take cruises in or from said harbor, for the purpose of obtaining a practical knowledge in navigation and of the duties of mariners. And the said board are hereby authorized to apply to the United States Gov-

cal school is to instruct young men in maritime matters, so as to fit them for any service connected with maritime life, leaving them free to go into the Navy, or into the merchant marine. The instruction is in seamanship, navigation, sail-making and everything pertaining to a seaman's life.

The claimant, on January 1, 1891, reported to the commander of the St. Mary's, for duty as executive officer on board of her, and there served as such until October 24, 1893, (the date of filing this petition,) in obedience to an order signed by the Secretary of the Navy, dated December 30, 1890, and in the usual form of orders assigning officers to duty on school ships, as follows:

"Navy Department, Washington, December 30, 1890. Sir: You are detached from the Minnesota on the 31st instant, and will report to Commander A. S. Crowninshield on the same day for duty as executive on board the nautical school ship St. Mary's as the relief of Lieut. C. C. Cornwell. This employment on shore duty is required by the public interests, and such service will continue until the 31st of December, 1893, unless it is otherwise ordered."

Throughout the claimant's service on the St. Mary's, he received no orders, except from her commander, an officer of the Navy; and through him his junior officers received the orders of the commander. Her complement of officers was the commander, the executive officer, a lieutenant, an ensign and a surgeon. Her crew consisted of twenty-two

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ernment for the requisite use of vessels and supplies for the purpose above mentioned.

SEC. 1070. The board of education shall appoint annually at least three of their number, who shall, subject to the control, supervision and approbation of the board, constitute an executive committee for the care, government and management of such nautical school, under rules and regulations so prescribed, and whose duty it shall be, among other things, to recommend the rules and regulations which they deem necessary and proper for such school.

SEC. 1071. After the establishment and organization of the said school, the expenses thereof, and of carrying out the provisions of this chapter, shall be defrayed from the moneys raised by law for the support of common schools in the city and county of New York. 2 New York Laws of 1882, p. 300.

men of different grades and ranks, all employed by the city of New York. Her commander was required by the regulations of the Navy to report semi-annually to the Secretary of the Navy upon the conduct and professional ability of his subordinate officers, and upon the efficacy of the men.

The St. Mary's, each year, went upon a cruise, lasting from about the middle of May to some time in October; and during the rest of the year was attached to a dock in the harbor of New York. While she was not cruising, the claimant lived on board, and was on duty on board every day, wearing his uniform, and doing the same duty, and subject to the same regulations, as while the ship was on the high seas; and in the matter of quarters, mess and uniform, there was no difference, whether the vessel was under sail, or lying at anchor, or tied to a wharf. The claimant's duties as executive officer were the care and preservation of the ship, looking after the crew, and attending to the details of the organization and police of the ship.

The claimant also acted as instructor of the pupils of the nautical school on board the St. Mary's; and was paid for his services in that capacity by the board of education of the city of New York.

In the routine of the Navy Department, officers are usually assigned alternately to sea and shore duty for periods of about three years each. For two and a half years prior to December 31, 1890, the claimant had been attached to the United States steamship Galena, on a cruise, performing sea duty and receiving sea pay.

The claimant had been in the Navy since 1872; and during his service on the St. Mary's was entitled to $2600 a year while on sea duty, and $2200 while on shore duty. The accounting officers of the United States allowed him sea pay while the St. Mary's was on a cruise, but only shore pay while she was lying at a wharf in the harbor of New York.

The Court of Claims held that he was entitled to sea pay during the whole time of his service on the St. Mary's, and gave judgment accordingly in his favor for $780.25. 30 C. Cl. 197. The United States appealed to this court.

Mr. Assistant Attorney General Dodge and *Mr. Assistant Attorney Gorman* for appellants.

Mr. John S. Blair and *Mr. Charles Abert* for appellee.

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

By the statute of the United States, the officers of the Navy receive higher pay "when at sea," than when "on shore duty," or "on leave, or waiting orders"; and the pay of the claimant, being in the second five years of his service as lieutenant, was "when at sea, $2600; on shore duty, $2200; on leave, or waiting orders, $1800." Rev. Stat. § 1556. And by § 1571, "no service shall be regarded as sea service, except such as shall be performed at sea, under the orders of a Department, and in vessels employed by authority of law."

To constitute sea service, then, three things, and three only, are necessary. The service must be performed "at sea"; "under the orders of a Department"; and "in vessels employed by authority of law."

In order to come within the phrase "at sea," as used in this statute, it is not necessary that the vessel upon which the service is performed should be upon the high seas. It is enough that she is waterborne, even if at anchor in a bay, or port or harbor, and not in condition presently to go to sea. It has accordingly been adjudged by this court that a vessel is "at sea," within the meaning of the statute, although she is used as a training ship, anchored in a bay, and not in a condition to be taken out to sea, beyond the main land; or is used as a receiving ship, at anchor in port at a navy yard, communicating with the shore by a rope, and having a roof built over her deck, and not technically in commission for sea service. *United States* v. *Symonds*, 120 U. S. 46; *United States* v. *Bishop*, 120 U. S. 51; *United States* v. *Strong*, 125 U. S. 656. The claimant, while the St. Mary's was not on a cruise, but anchored at and tied to a wharf in the harbor of New York, lived on board of her, wore his uniform, and was subject to

the same regulations, as while she was upon the high seas; and was therefore "at sea," so far as affected his rate of pay, during the whole period of his service as her executive officer. The fact that this service was called, in the order of the Secretary of the Navy assigning him to duty upon this vessel, "employment on shore duty," is immaterial. The material question is whether the service was, in fact, performed at sea, and not on shore; and not upon the name by which the Secretary of the Navy was pleased to designate it. As was said by this court in *United States* v. *Symonds*, above cited, "Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service." 120 U. S. 49.

The service of the claimant was clearly performed "under the orders of a Department." It was in obedience to an order of the Department of the Navy, that he reported to the commander of the St. Mary's, and served as her executive officer; and, throughout his service upon her, he received no orders, except from her commander, himself an officer in the Navy. As was well said by Judge Nott, now Chief Justice of the Court of Claims, in delivering the opinion of that court in the case at bar, "The order which placed the St. Mary's on duty as a school ship, and, to a certain extent, at the disposal of the board of education, did not transfer the vessel to any other authority than that of the United States. Possession, control, discipline and authority were all retained by the Government. The officers doubtless carried out the directions of the board of education; but they did not do so because they were the orders of the board of education, but because they were sent by the Secretary of the Navy to New York to do so." 30 C. Cl. 207.

It is no less clear that the St. Mary's was one of the "vessels employed by authority of law" by the United States. The Court of Claims has distinctly found, as a fact, that she was "a sailing vessel owned and employed by the United States."

Both the furnishing of the St. Mary's by the Secretary of the Navy to the State of New York for a ship to maintain a nautical school upon, and the detail of the claimant as executive officer of the vessel while she was used for that purpose, were pursuant to the powers expressly conferred upon the President of the United States and the Secretary of the Navy by the act of Congress, entitled "An act to encourage the establishment of public marine schools." Act of June 20, 1874, c. 339; 18 Stat. 121.

The duties of executive officer of the St. Mary's having been performed by the claimant as a lieutenant in the Navy of the United States, at sea, under the orders of the Department of the Navy, and in a vessel employed by the United States by authority of law, he was entitled, during the whole period of his service, whether the vessel was attached to a wharf, or was sailing on a cruise, to the rate of pay which the statute allowed to him "when at sea," notwithstanding that during the same period he also received pay from the State of New York for the performance of the distinct, but quite consistent, duties of instructor in its nautical school upon this vessel, the performance of which, indeed, by naval officers, was manifestly contemplated and intended by the act of Congress, and by the orders of the Secretary of the Navy.

Judgment affirmed.

Mr. Justice Field and Mr. Justice Brewer took no part in the consideration and decision of this case.

JONES *v.* BRIM.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 621. Submitted January 11, 1897. — Decided February 1, 1897.

Section 2087 of the Compiled Laws of Utah, which provides that "Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway," is not in conflict with the Constitution of the United States.

Opinion of the Court.

THIS action was originally instituted in June, 1893, before a justice of the peace in the then Territory of Utah, to recover the sum of ten dollars for damages alleged to have resulted from destroying the banks on the side of and from rolling rocks into and upon a public highway situated on a hillside, caused by a band of sheep owned by the defendant while being driven upon such highway.

The Supreme Court of the Territory, on review of the judgment of a District Court in favor of the defendant, held that the statute upon which the cause of action was founded was valid, adjudged that the petition stated a cause of action, and remanded the cause to the District Court. 11 Utah, 200. Subsequently, the Supreme Court of the State affirmed a judgment of the District Court, which had been entered for the amount claimed. 41 Pac. Rep. 282. The defendant sued out this writ of error.

Mr. Franklin S. Richards and *Mr. Joseph T. Richards* for plaintiff in error.

Mr. Parley L. Williams for defendant in error.

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

The sole question presented for our consideration is whether section 2087 of the Compiled Laws of Utah (vol. 1, p. 743) is in conflict with the Constitution of the United States. The section reads as follows:

"SEC. 2087. Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway."

Plaintiff in error claims that the law in question deprives the class of persons mentioned in it of their property without due process of law, and denies to them the equal protection of the laws; and that, consequently, its provisions contravene that portion of the first section of the Fourteenth Amendment

to the Constitution of the United States, which provides that "No State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The denial of the equal protection of the laws is asserted to consist in an unjust and illegal discrimination against persons who "drive herds of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside," by making them liable for damage done by them in using the highway, while all other persons are permitted to use it without liability.

We premise that the clause of the Fourteenth Amendment of the Constitution referred to was undoubtedly intended to prohibit an arbitrary deprivation of life or liberty, or arbitrary spoliation of property. *Barbier* v. *Connoly*, 113 U. S. 27. But it does not limit, nor was it designed to limit, the subjects upon which the police power of a State may be lawfully exerted. *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 26, 29. Embraced within the police powers of a State is the establishment, maintenance and control of public highways. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661. The legislation in question would clearly seem, therefore, to come within the narrowest definition of the police power, and be properly classed as a reasonable regulation incident to the right to establish and maintain such highways. The statute is analogous in principle to the one considered in the case of *St. Louis & San Francisco Railway Co.* v. *Mathews*, 165 U. S. 1, decided at this term, wherein it was held that a law of Missouri was valid which made every railroad corporation owning or operating a railroad in the State absolutely responsible in damages for the property of any person injured or destroyed by fire communicated by its locomotive engines. That decision was based upon the right of a State, in the exercise of its police power, to classify occupations with relation to their peculiar liability to cause injury to property, from the dangerous nature of the implements employed in the business. The legislation here in question undoubtedly proceeds upon this theory. The stat-

ute was manifestly not designed to impose a liability upon the owners of herds for damage occasioned by the mere passage of a drove of animals over a hillside road. If these herds were kept in the road, the banks would not be caved or rocks rolled into the travelled way. The damage contemplated must, therefore, be occasioned by animals going outside the beaten roadway. In effect, the legislature declared that the passage of droves or herds of animals over a hillside highway was so likely, if great precautions were not observed, to result in damage to the road, that where this damage followed such driving, there ought to be no controversy over the existence or non-existence of negligence, but that there should be an absolute legal presumption to that effect resulting from the fact of having driven the herd. The confusion of thought involved in the reasoning of the plaintiff in error not only results from failing to consider that the statute simply creates a conclusive presumption of negligence from a particular state of facts, but also is caused by treating the law as one imposing a liability on the owners of herds when liability does not also exist as to others. It is reasonable to infer that the lawmaker contemplated that if only a few animals were driven over a road and damage resulted from their being allowed to leave the road and go upon the sides, so as to cause injury, there would be no practical difficulty in establishing the want of due care on the part of those in charge of the animals driven, and, therefore, there was no necessity in such case of creating a conclusive presumption of negligence, whilst, on the other hand, the driving of a herd might require such a degree of care and leave room to so much question as to whether due care had been taken that where damage resulted the conclusive presumption of neglect should be entailed.

It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is after all but an illustration of the power to classify. When the statute is properly understood, therefore, the argument of the plaintiff in error amounts to an assertion that the whole subject of the probative force

to arise by operation of law, from any specified state of facts, is, in every sense, by the effect of the Fourteenth Amendment, removed from the jurisdiction of the local authorities.

The statute being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny to the defendant the equal protection of the laws. *Lowe* v. *Kansas*, 163 U. S. 81, 88; *Duncan* v. *Missouri*, 152 U. S. 377. So, also, as the statute clearly specifies the condition under which the presumption of neglect arises and provides for the ascertainment of liability by judicial proceedings, there is no foundation for the assertion that the enforcement of such ascertained liability constitutes a taking of property without due process of law.

Judgment affirmed.

ADDINGTON *v.* UNITED STATES.

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

No. 579. Submitted December 15, 1896. — Decided February 1, 1897.

The refusal of the trial court to grant a new trial cannot be assigned for error in this court.

In the trial of a person for murder the court in substance instructed the jury that while manslaughter was the intentional taking of human life, the distinguishing trait between it and murder was the absence of malice; that manslaughter sprang from a gross provocation, which rendered the party temporarily incapable of the cool reflection which would otherwise make the act murder, and that while the law did not wholly excuse the offence in such case, it reduced it from murder to manslaughter. *Held*, that this, being for the benefit of the accused, was not error of which he could complain.

An instruction in such case that if the circumstances were such as to produce upon the mind of the accused, as a reasonably prudent man, the impression that he could save his own life or protect himself from serious bodily harm only by taking the life of his assailant, he was justified by the law in resorting to such means, unless he went to where the deceased was for the purpose of provoking a difficulty in order that he might slay his adversary, is not error.

Opinion of the Court.

THE case is stated in the opinion.

Mr. C. L. Addington, plaintiff in error, in person.

Mr. Solicitor General for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, C. L. Addington, and one T. D. Buchannon, "late of the Choctaw Nation, Red River County, Indian Territory," were charged by indictment in the Circuit Court of the United States for the Eastern District of Texas with the crime of having, on the 28th day of June, 1895, in said county, killed and murdered one Oscar Hodges, "a white person, and not an Indian, nor a citizen of the Indian Territory, nor a citizen of any Indian nation or tribe."

The defendants pleaded separately not guilty. Buchannon was found not guilty, and Addington was found guilty of murder as charged in the indictment. A motion by Addington for a new trial having been made and overruled, the accused was sentenced to suffer death by hanging.

Addington subsequently moved in arrest of judgment upon various grounds, and that motion was overruled.

1. The first ten assignments of error are based upon a bill of exceptions setting out simply the grounds upon which the accused asked that a new trial be granted to him. It is only necessary to say that the refusal of the court to grant a new trial cannot be assigned for error in this court. *Blitz* v. *United States*, 153 U. S. 308, 312.

2. The eleventh assignment of error relates to the instruction given upon the subject of manslaughter. That instruction was in these words: "Manslaughter, as applied to a case of this character, is the intentional taking of human life, but the distinguishing trait between manslaughter and murder is the absence of malice; it must spring from a gross provocation, and of such character as to temporarily render the party incapable of that cool reflection that otherwise makes it murder. Of course, the defendant intends to do what he does, but he

must be laboring at the time he performs the act under intense mental excitement such as would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder. In that state of case the law does not wholly excuse the offence; but the law, in its charity for the imperfections and weakness of human nature, reduces it from murder to manslaughter."

The statutes of the United States provide that any person who, within any of the places or upon any of the waters described in section fifty-three hundred and thirty-nine, "unlawfully and wilfully, but without malice, strikes, stabs, wounds or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Rev. Stat. § 5341.

The accused contends that, under this statute, the taking of human life without malice, even though it be intentional, is not manslaughter unless the act be done "unlawfully and wilfully"; and that the instruction given was erroneous in that it did not instruct the jury that before they could convict of manslaughter it must appear from the evidence that the killing was not only intentional, but was unlawful and wilful.

The only purpose of the court in this part of its charge was to bring out the distinction between murder and manslaughter, and to inform the jury that they could not find the accused guilty of murder if the killing, although intentional, was without malice. This was for the benefit and not to the prejudice of the accused.

But it is said that the accused may have killed his adversary in self-defence. The court did not overlook this part of the case. It further instructed the jury: "The homicide becomes justifiable when the party that is charged with taking human life has been unlawfully assaulted himself by his adversary, and is placed in a position of peril where his life is about to be taken, or serious bodily harm is about to be done him, or, from the acts of his adversary, it reasonably indicates to the defendant, or would reasonably indicate to

the mind of any other person situated as the defendant was, an intention, coupled with the ability, upon the part of his adversary, to take his life or do him serious bodily harm; in that state of the case it is his duty to avoid the threatened danger if he can, but he is authorized to use all reasonable means at his command to avert the threatened danger, and, if necessary, he is authorized to go to the extent of taking human life in his own proper self-defence."

If this instruction stood alone, there might be some ground to contend that it was inconsistent with the right of self-defence, as defined in *Beard's case*, 158 U. S. 550. But the court further said: "If you believe from the testimony that the said Addington was attacked by said Hodges without having produced the occasion for the assault, and that the acts of Hodges then showed to the mind of Mr. Addington, situated as he was, a present intention upon the part of Hodges either to take his life or do him serious bodily harm, or that it would have produced that impression upon the mind of any reasonably prudent person situated as Addington was that Hodges was then about to kill him or do him serious bodily harm, and you further believe that the means he used were the only reasonable means at his command to avert the threatened danger, and that he only fired in his own actual self-defence, not actuated by malice, and did not go there for the purpose of provoking this difficulty for the purpose of killing Hodges, you will find the defendant not guilty as charged in this indictment." This instruction is not liable to the objection that it recognized Addington's right to take the life of his adversary only upon its appearing that he was in fact in actual danger of losing his own life or of receiving serious bodily harm. On the contrary, the court said, in substance, that if the circumstances were such as to produce upon the mind of Addington, as a reasonably prudent man, the impression that he could save his own life, or protect himself from serious bodily harm, only by taking the life of his assailant, he was justified by the law in resorting to such means, unless he went to where the deceased was for the purpose of provoking a difficulty in

order that he might slay his adversary. In so instructing the jury no error was committed.

We find no error of law in the record to the prejudice of the accused, and the judgment must, therefore, be

Affirmed.

EGAN *v.* HART.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 63. Submitted October 27, 1896. — Decided February 1, 1897.

On error to a state court in a chancery case (as also in a case at law), when the facts are found by the court below this court is concluded by such findings.

On error to a state court the opinion of that court is to be treated as part of the record, and it may be examined in order to ascertain the questions presented, as may also be the entire record, if necessary to throw light on the findings.

The finding by the trial court, sustained by the Supreme Court of the State that the stream across which the dam complained of was erected, was a non-navigable stream, was a finding of fact which is conclusive here, and affords ground broad enough on which to maintain the judgment below, independent of any Federal question; and this court is consequently without jurisdiction.

THE case is stated in the opinion.

Mr. J. C. Egan, *Mr. Fred Thatcher* and *Mr. C. J. Boatner* for plaintiffs in error.

Mr. A. H. Leonard for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiffs in error, by original and supplemental petitions, sued in order to perpetually enjoin the building, by the board of state engineers of the State of Louisiana, of a dam across an alleged stream, designated as Bayou Pierre. It was averred that the construction would permanently impair the

value of certain real property to the plaintiff belonging, situated in the vicinage of the proposed work; that it was a purely private undertaking which the board of state engineers was not authorized to do at public expense, and that the dike, if carried out, would obstruct the navigation of Bayou Pierre, and would therefore violate the laws of the United States. The State of Louisiana, by intervention, and the defendants, by answers, traversed the averments of the petitions. There was judgment in the trial court rejecting the plaintiffs' demand, which was, on appeal, affirmed by the Supreme Court of the State of Louisiana. 45 La. Ann. 1358. To the decree of affirmance this writ of error is prosecuted.

The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a state court, this court cannot reëxamine the evidence, and when the facts are found below is concluded by such finding. *Dower* v. *Richards*, 151 U. S. 658; *Bartlett* v. *Lockwood*, 160 U. S. 357; *Stanley* v. *Schwalby*, 162 U. S. 255, 278. True it is that in *Dower* v. *Richards* the court (referring to the dictum in *Republican River Bridge Co.* v. *Kansas Pacific Railway*, 92 U. S. 315, 317) treated as open for further consideration the question whether in chancery cases the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in *Dower* v. *Richards*, and in the subsequent cases above referred to.

It is likewise settled that on error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the questions presented, and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record. *Crossley* v. *New Orleans*,

108 U. S. 105; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477.

Turning to the opinion of the Supreme Court of Louisiana, it is obvious that it held not only that under the law of Louisiana the board of state engineers was competent to undertake the work in question, and any damage resulting to the plaintiff thereby was *absque injuria*, but that it also rested its decree upon three propositions, two of fact and one of law, viz.: First, that the construction of the dam was a public work jointly undertaken by the government of the United States and the board of state engineers of the State of Louisiana. Second, that the stream across which the dam was to be erected was not navigable, and was hence subject to state control. Third, that even if navigable, as the stream was wholly within the State of Louisiana, it was hence exclusively under the dominion of the state law. The findings of the court on these subjects were thus expressed:

"Speaking of the nature of the work, the district judge says: 'It is a public work, planned and located by state authority, and is a part of a system of levees ordered by the State for the prevention of overflows. It is the initial point of a line of levees, the propriety, location and construction of which have been determined by the State, acting through the state board of engineers, its accredited and duly authorized agents. It begins on the highlands on the west bank of the bayou and extends thence across the bayou to Hart's Island, and from there to Dixie plantation, on Red River.'

"The United States government has contributed four thousand dollars — a sum equal to the price of Hart's contract with the State — toward the cost of construction of the line of levees of which the dam in question is a part. Manifestly the claim that such a work undertaken by the State, with the aid of the general government, is the work of private persons for private and selfish motives is absolutely without foundation.

* * * * *

"As to plaintiffs' contention that Bayou Pierre is a navi-

gable stream, we have carefully considered the voluminous testimony on that part of the case, and we are clear that the upper part of Bayou Pierre, in which the dam in question is situated, is not navigable, and that the navigation of even the lower part of Bayou Pierre, a considerable distance below the dam, is attended with many obstacles and difficulties. On this point the district judge says: 'From Grande Ecore, where it (Bayou Pierre) enters Red River, to a point some miles below its junction with Tone's Bayou, a stream flowing out of the river, Bayou Pierre has been frequently navigated by steamboats. But from the point of junction to the dam in question it has never been navigated and is unnavigable. Between these two points it is nothing but a high-water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water.' We fully concur in this finding. Besides, Bayou Pierre is wholly within the State, and the authority of the legislature over it is complete. *Hamilton* v. *R. R. Co.*, 34 An. 975; *Boykin* v. *Shaffer*, 13 An. 129."

Now, the foregoing findings, by the trial court, approved and affirmed by the Supreme Court of Louisiana, that is, the non-navigability of the stream, and the concurrent participation of the United States and the State in the building of the dam, are purely questions of fact, and, therefore, as we have said, are conclusive.

It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any Federal question, then we are without jurisdiction, although the state court may have also decided such a question. *Eustis* v. *Bolles*, 150 U. S. 361; *N. Y. & N. E. Railroad* v. *Woodruff*, 153 U. S. 689; *Hammond* v. *Conn. Mut. Life Ins. Co.*, 150 U. S. 633.

The claim is that the court below erroneously decided a

Federal question, which it is asserted is absolutely necessary to maintain its decree independently of the conclusions by it expressed on the foregoing propositions of fact. This argument is deduced from that portion of the decision below which held that even if the stream was navigable it was nevertheless competent for the state authority to obstruct or entirely close it, because, being wholly within the State, it was under its exclusive jurisdiction and authority. Such power, it is argued, if ever possessed by the State, depended solely on the absence of Congressional legislation, asserting the reserved authority of the general government over all navigable streams, including even those wholly within a State, and therefore ceased to exist from the enactment by Congress of the law of September 19, 1890, c. 907, 26 Stat. 426, 454. By the statute relied on Congress forbade the construction of "any bridge . . . or other works over or in any . . . navigable waters of the United States under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill or in any manner alter or modify the course, location, condition or capacity of the channel of said navigable waters of the United States, unless approved by the Secretary of War." But by its plain terms this statute relates solely to navigable waters, and one of the propositions of fact found by the Supreme Court of the State is that the stream in question was not navigable. The necessary effect, therefore, of accepting this finding is to take the case out of the reach of the law relied on, and this causes the question of fact, that is, non-navigability, to be wholly and adequately sufficient to maintain the judgment without reference to the statute in question.

It is sought to avoid this inevitable conclusion by contending that the fact found below is not that the stream was non-navigable, but only that it was so at the particular place where the dike was proposed to be built. Non-navigability at the particular place, it is argued, does not exclude the implication that the impeding of the water at that point would

obstruct the flow of water and injure the navigable stream below the dam, thereby bringing the case directly under the terms of the statute. But this construction of the finding below is entirely too narrow. An examination of the record and a consideration of the entire context of the opinion of the Supreme Court of the State makes it clear that the whole controversy below was whether the dam, if erected at the particular place in question, would affect or injure the navigability of the stream below, and that the finding of fact that the stream was not navigable at the point where the dam was to be erected, was substantially a conclusion that the erection of the dam bore no relation to and would have no effect in obstructing the navigation of the stream known as Bayou Pierre below the dam, and which stream the court recognized as being navigable in a qualified sense. The record discloses that Bayou Pierre leaves the Red River a short distance below the city of Shreveport, and, after a long and meandering course, reënters the Red River just above the town of Grande Ecore. The proposed dam crosses Bayou Pierre a short distance from the point where it leaves Red River. Below the point of the dam a stream, known as Tone's Bayou, which also flows out of the Red River, empties into and forms a junction with Bayou Pierre. The portion of the bayou which the court found to be occasionally navigable was that below the junction of Tone's Bayou. As to the portion above the junction of Tone's and Bayou Pierre, that is, in the direction of the dam, the finding of fact is as follows: "Between these two points it is nothing but a high-water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being navigable just as a ditch could be if it were dug deep and wide enough and kept supplied with a sufficiency of water." The obvious effect of this finding is that the qualified navigability existing in Bayou Pierre below the inflow into that stream of the water from Tone's Bayou, is wholly uninfluenced by water leaving Red River by way

of the upper mouth of Bayou Pierre. Indeed, the finding amounts to saying that the stream formed by the junction of Bayou Pierre and Tone's Bayou is a new and in reality a distinct and different stream (although called by the same name) from the stream above the junction, and in which it is proposed to erect the dam. From these considerations it obviously results that the expression of opinion *arguendo* by the state court as to the power of the State of Louisiana to control a navigable stream wholly within its borders, even if erroneous, was unnecessary to the decision of the cause, and that the decree by that court rendered is adequately sustained by the conclusion of fact as to the non-navigability of the stream. This being the case, it is unnecessary to consider whether the finding that the work of building the dam was concurrently carried on by the State and the United States is not also sufficient to sustain the decree below, since it practically determines that the dam was being constructed in conformity to the act of Congress.

Dismissed for want of jurisdiction.

ADAMS EXPRESS COMPANY *v.* OHIO STATE AUDITOR.[1]

APPEAL FROM THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 337. Argued December 10, 11, 1896. — Decided February 1, 1897.

The decision of the Supreme Court of Ohio entertaining jurisdiction of this case, and delivering a considered opinion, *State* v. *Jones*, 51 Ohio St.

[1] The docket title of this case is "Henry Sanford, President of the Adams Express Company, Appellant, *v.* Ebenezer W. Poe, Auditor of the State of Ohio, *et al.*" The opinion of the court is entitled in this case and in No. 338, Henry Sanford, President of the Adams Express Company, Appellant, *v.* Ebenezer W. Poe, Auditor of the State of Ohio, *et al.*; No. 339, James C. Fargo, President of the American Express Company, Appellant, *v.* Ebenezer W. Poe, Auditor, etc., *et al.*; No. 340, Thomas C. Platt, President of the United States Express Company, Appellant, *v.* Ebenezer W. Poe, Auditor,

Syllabus.

492, adjudging the Nichols law to be valid under the constitution of that State, will not be reviewed by this court.

Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution.

The property of corporations engaged in interstate commerce, situated in the several States through which their lines or business extends, may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up aggregate value; and a proportion of the whole fairly and properly ascertained may be taxed by the particular State, without violating any Federal restriction.

While there is an undoubted distinction between the property of railroad and telegraph companies and that of express companies, there is the same unity in the use of the entire property for the specific purposes, and there are the same elements of value, arising from such use.

The classification of express companies with railroad and telegraph companies, as subject to the unit rule, does not deny the equal protection of the laws; as that provision in the Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, and was not intended to compel a State to adopt an iron rule of equal taxation.

The statute of the State of Ohio of April 27, 1893, 90 Laws Ohio, 330, (amended May 10, 1894, 91 Laws Ohio, 220,) created a board of appraisers and assessors, and required each telegraph, telephone and express company doing business within the State to make returns of the number of shares of its capital, the par value and market value thereof, its entire real and personal property, and where located and the value thereof as assessed for taxation, its gross receipts for the year of business wherever done and of the business done in the State of Ohio, giving the receipts of each office in the State, and the whole length of the line of rail and water routes over which it did business within and without the State. It required the board of assessors to

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etc., *et al.*; *Appeals from the United States Circuit Court of Appeals for the Sixth Circuit;* and in No. 398, Clarence A. Seward, Vice-President of the Adams Express Company, Appellant, *v.* Ebenezer W. Poe, Auditor of the State of Ohio; No. 399, James C. Fargo, President of the American Express Company, Appellant, *v.* Ebenezer W. Poe, Auditor of the State of Ohio; and No. 400, Thomas C. Platt, President of the United States Express Company, Appellant, *v.* Ebenezer W. Poe, Auditor of the State of Ohio; *Appeals from the Circuit Court of the United States for the Southern District of Ohio.*

Statement of the Case.

"proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." *Held,*

(1) That, assuming that the proportion of capital employed in each of the several States through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it does so only indirectly; and that the taxation is essentially a property tax, and, as such, not an interference with interstate commerce;

(2) That the property so taxed has its actual situs in the State and is, therefore, subject to its jurisdiction; and that the distribution among the several counties is a matter of regulation by the state legislature;

(3) That this was not taking of property without due process of law, either by reason of its assessment as within the jurisdiction of the taxing authorities, or of its classification as subject to the unit rule.

(4) That the valuation by the assessors cannot be overthrown simply by showing that it was otherwise than as determined by them.

THESE are cases involving the constitutionality of certain laws of the State of Ohio providing for the taxation of telegraph, telephone and express companies, and the validity of assessments of express companies thereunder.

The general assembly of Ohio passed, April 27, 1893, 90 Ohio Laws, 330, an act to amend and supplement §§ 2777, 2778, 2779 and 2780 of the Revised Statutes of that State (commonly styled "The Nichols Law"), which was amended May 10, 1894. The law created a state board of appraisers and assessors, consisting of the auditor of State, treasurer of State and attorney general, which was charged with the duty of assessing the property in Ohio of telegraph, telephone and express companies. By the act as amended, between the first and thirty-first days of May annually each telegraph, telephone and express company, doing business in Ohio, was

required to file a return with the auditor of State, setting forth among other things the number of shares of its capital stock; the par value and market value (or, if there be no market value, then the actual value) of its shares at the date of the return; a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation. Telegraph and telephone companies were required to return, also, the whole length of their lines, and the length of so much of their lines as is without and is within the State of Ohio, including the lines controlled and used, under lease or otherwise. Express companies were required to include in the return a statement of their entire gross receipts, from whatever source derived, for the year ending the first day of May, of business wherever done; and of the business done in the State of Ohio, giving the receipts of each office in the State; also the whole length of the lines of rail and water routes over which the companies did business, within and without the State. Provision was made in the law for the organization of the board, for the appointing of one of its members as secretary and the keeping of full minutes of its proceedings. The board was required to meet in the month of June and assess the value of the property of these companies in Ohio. The rule to be followed by the board in making the assessment was that "in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

As to telegraph and telephone companies, the board was required to apportion the valuation among the several counties through which the lines ran, in the proportion that the length of the lines in the respective counties bore to the

entire length in the State; in the case of express companies, the apportionment was to be made among the several counties in which they did business, in the proportion that the gross receipts in each county bore to the gross receipts in the State.

The amount thus apportioned was to be certified to the county auditor, and placed by him on the duplicate "to be assessed, and the taxes thereon collected the same as taxes assessed and collected on other personal property," the rate of taxation to be the same as that on other property in the local taxing district.

The valuation of all the real estate of the companies, situated in Ohio, was required to be deducted from the total valuation, as fixed by the board.

Provisions were made for hearings and for the correction of erroneous and excessive valuations, as follows:

"At any time, after the meeting of the board on the first Monday in June, and before the assessment of the property of any company is determined, any company or person interested shall have the right, on written application, to appear before the board and be heard in the matter of the valuation of the property of any company for taxation. After the assessment of the property of any company for taxation by the board, and before the certification by the auditor of State of the apportioned valuation to the several counties, as provided in section 2780, the board may, on the application of any interested person or company, or on its own motion, correct the assessment or valuation of the property of any company, in such manner as will, in its judgment, make the valuation thereof just and equal. The provisions of section 167 of the Revised Statutes shall apply to the correction of any error or over-valuation in the assessment of property for taxation by the state board of appraisers and assessors, and to the remission of taxes and penalties illegally assessed thereon."

Section 167 of the Revised Statutes, referred to, reads thus:

"SECTION 167. He [the auditor of State] may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may

accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may, from time to time, correct any error in any assessment of property for taxation or in the duplicate of taxes in any county; provided that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor and attorney general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

Instead of distributing the valuation as under the act of 1893, the state board by the act of 1894 was to certify it to the auditor of State, whose duty it was made to apportion and certify the valuation among the counties.

In No. 337 the taxes for 1893 were involved; and in Nos. 338, 339 and 340, the taxes for 1894. These are appeals from the Circuit Court of Appeals for the Sixth Circuit. In Nos. 398, 399 and 400 the taxes for 1895 were involved. These are appeals from decrees of the Circuit Court for the Southern District of Ohio.

The original suits were brought in the Circuit Court to enjoin the certification of the apportioned valuations to the county auditors, as to 1893, against the state board; as to 1894 and 1895, against the auditor of State.

The Circuit Court, Taft, J., on April 23, 1894, after a preliminary opinion, filed opinions in the case of the *Western Union Telegraph Company* against the *State Board*, 61 Fed. Rep. 449, and in No. 337, *Adams Express Co.* v. *Poe*, 61 Fed. Rep. 470, holding the Nichols law to be invalid under the constitution of Ohio. On the first of May following the Supreme Court of Ohio decided that the Nichols law was constitutional and valid. *State* v. *Jones*, 51 Ohio St. 492.

Thereupon the Circuit Court reversed its ruling, and accepted the decision of the Supreme Court of the State, and Judge Taft filed a further opinion holding that the assessments were valid. 64 Fed. Rep. 9.

In all the cases the final decrees of the Circuit Court dis-

solved the temporary injunctions which had been granted, sustained demurrers and dismissed the bills.

The Circuit Court of Appeals affirmed the cases taken to it on appeal. 37 U. S. App. 378, 399; 69 Fed. Rep. 546, 557.

The proceedings of the state board in making the assessments for 1895 and certain correspondence are set forth in the records as if exhibits to the bills. The action of the board, relative to express companies, is thus given:

"The board having given each express company doing business in Ohio, whose property in Ohio is hereinafter assessed, opportunity to appear and be heard personally by the board, and having heard all companies which desired to be heard through their officers, agents or counsel, and having carefully considered the facts set out in the returns, schedules and supplementary statements of such companies and all evidences of value and all matters bearing upon the question of the value of the property of the companies which, in the judgment of the board, would assist it in arriving at the true value, in money, of the entire property of each of said companies within the State of Ohio, on motion, the state board of appraisers and assessors unanimously fix and determine the values of the property of express companies hereinafter named in Ohio to be taxed therein at the amounts set out in the following table:

The Adams Express Company.....	$533,095.80
The American Express Company.....	499,373.60
The United States Express Company...	488,264.70"

This valuation was made July 24, 1895. On the second of August, counsel for the companies wrote the auditor requesting to be advised of the assessments when made, in order that they might apply for a correction. On the seventh of August the secretary of the board informed counsel of the assessments. On August 10, counsel wrote asking "upon what calculation, if any, the apparently precise amounts of the assessments, especially in the case of express companies, are based and how the figures are arrived at."

The auditor replied for the board that "the method pursued

by the state board of appraisers and assessors this year in assessing the property in Ohio of the Western Union Telegraph Company and the express companies you represent is not different from that followed in former years, which has been sustained by the courts, and is set forth in the records of the board."

Attention was called to certain data lacking in the companies' returns, and counsel were informed that opportunity would be afforded for a hearing on September 2 at 10 o'clock A.M.; but the three bills involving these assessments were filed August 14, 1895. Subsequently returns were filed as of May 1, 1895, showing: As to the Adams Express Company. Number of shares: 120,000. Market value: $140 to $150. Taxable value of real estate owned in Ohio: $25,170. Value of personal property, including moneys and credits, owned by company in Ohio: $42,065. Total value of real estate owned outside of Ohio: $3,005,157.52. Total value of personal property owned outside of Ohio: $1,117,426.05. Entire gross receipts from whatever source received within the State for the year: $282,181. Whole length of lines of rail and water routes over which the company was doing business: 29,647 miles. Length without the State: 27,518 miles. Within the State: 2129 miles.

As to the United States Express Company. Number of shares: 100,000. Par value: $100. Market value: $40. Taxable value of real estate owned in Ohio: $22,190. Value of personal property, including moneys and credits, owned in Ohio: $28,438. Entire gross receipts from whatever source derived within the State: $358,519. Length of lines within the State over which the company was doing business: 3011 miles.

As to the American Express Company. Number of interests: 180,000. Par value: $100. Market value: $112. Taxable value of real estate in Ohio: $58,660. Value of personal property, including moneys and credits, in Ohio, $23,430. Total value real estate outside of Ohio: $4,891,259. Total value of personal property outside of Ohio: $1,661,759. Gross receipts within the State: $275,446. Whole length of lines: 35,295 miles. Length within the State: 1731 miles.

The companies made no return of their entire gross receipts of business wherever done, nor of the terms of their contracts or arrangements for transportation.

These returns stated and the bills repeated that aside from the real estate mentioned the companies had no property in the State of Ohio "except certain horses, wagons, harness, trucks, safes and office fixtures located at different points," and that their actual value was given. That "the business of the company in the State consists in carrying packages on passenger and express trains, steamboats and stages in the care and custody of its employés who accompany the packages. The express company has no ownership of nor interest in these means of conveyance, and simply pays to the railroad companies and the owners of the steamboats and stage coaches for the passage of messengers and their accompanying packages. The horses, wagons and trucks are used by it in the collection and delivery of these packages. There is no peculiarity about this property; it is of an ordinary kind, whose true value in money must be measured by the ordinary standards, and is easily ascertained and determined."

Each of the bills in Nos. 398, 399 and 400 alleged that the scheme of taxation contemplated by the act, "while professing to provide for taxation of property in the State of Ohio, does not, in fact, do so, inasmuch as it directs the state board of appraisers, in determining the value of the property of express companies in said State for the purpose of taxation, to be 'guided by the value of said property as determined by the value of the entire capital stock of said company . . . in the proportion which the same (viz., the property of the companies within the State) bears to the entire property of said companies, as determined by the value of the capital stock thereof'"; that "the value of the capital stock or shares of said company and of express companies generally is determined not so much by the value of the property and appliances which they use in carrying on their business, as by the skill, diligence, fidelity and success with which they conduct their business. Said company employs many thousands of men who are constantly engaged in carrying express pack-

ages, many of them of great value, from one part of the country to another, and its income and the value of its shares are largely the result of their efforts, fidelity and integrity and of skilful management and supervision of the business. Said company furthermore owns real and personal property of great value aside from the appliances of its express business, which is not held or taxable in the State of Ohio, and some of which is not taxable at all, all of which, however, together with the business connections of the company and the reputation and good will which it has earned in the course of more than fifty years of public service, enter largely into the value of its capital shares"; that the market price of the company's shares does not "afford any fair, reasonable or just method of estimating the value of its property or fixing the basis of value for the purpose of taxation, because the market price is speculative and variable, depending upon financial conditions not at all connected with this company, its business, or its property; and your orator insists that said scheme of taxation is unfair, illegal, unjust and unequal and is a regulation of and a tax upon interstate commerce and a taking of its property without due process of law"; that the act and the assessments made thereunder are in contravention of the Constitution of the United States because the act provides for the assessment of, and the assessments embrace, property not situated within the jurisdiction of the State of Ohio, and the property of the companies is, therefore, taken without due process of law; and that the scheme as a special one imposes an illegal burden on interstate commerce, and denies the equal protection of the laws.

Mr. Lawrence Maxwell, Jr., for the express companies. (*Mr. Clarence A. Seward* for the Adams Express Company; *Mr. James C. Carter* for the American Express Company; and *Mr. Frank H. Platt* for the United States Express Company were on his brief.)

It has been decided by this court that express companies "have no tangible property, of any consequence, subject to

taxation under the general laws." *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 354.

Plaintiffs assign for error that the Circuit Court erred in sustaining the demurrers to the bills and in dismissing the bills, insisting especially that the assessments complained of are not in fact assessments against the plaintiffs in respect of their property held or owned by them in the State of Ohio, or within the taxing jurisdiction of that State, but that the assessments are really an attempt, under the guise of taxing the plaintiffs' property within the State, to enforce against them the payment of a tax upon their business, which is largely interstate commerce, or for the privilege of doing such business in the State of Ohio, by placing a fictitious and artificial value upon their property; and that the assessments, and the statute of Ohio purporting to authorize them, are therefore in contravention of the Constitution of the United States, especially the interstate commerce clause of Art. 1, Sec. 8, of Art. 4, Sec. 2 and of Art. 14, Sec. 1.

We do not concede that the assessments complained of in the bills are authorized by the Nichols law, or that the Supreme Court of Ohio would justify them if they were before that court. But the Circuit Court and the Circuit Court of Appeals held that the assessments complained of had been made in pursuance of a definite rule or principle of appraisement, recognized and established by the Nichols law, as construed by the Supreme Court of Ohio. Our argument, therefore, is addressed to the question whether that rule is valid under the Federal Constitution.

I. The cases raise a Federal question, viz., whether the rule of assessment prescribed by the Ohio statute, and adopted by the state board, for the taxation of express companies contravenes the Federal Constitution.

Taking the allegations of the bills in connection with the returns made by the express companies to the state board, and the transcript of the proceedings of the state board upon those returns, it is manifest that what the board did, and what the demurrers to the bills admit that they did, was not to assess the defendants on the basis of the market value of

such of their tangible property as was found within the State of Ohio, and on their moneys and credits in the State, but to treat the companies as owning dividend producing plants, whose value is represented by the market value of their shares, and to assign a portion of that value to the State of Ohio, as being property subject to taxation in that State. The basis of the apportionment made by the board to Ohio is not disclosed; it was evidently hap-hazard and arbitrary; but that is not material now. The point is that the state board deliberately and intentionally followed a certain rule and principle of assessment, being the rule prescribed by the statute of the State, as construed by its supreme court, and the validity of that rule is therefore raised by the record, and presents a Federal question.

II. If the Nichols law justifies the assessments complained of, it contravenes the interstate commerce clause of the Federal Constitution; because the assessments, while purporting to be upon the property of the plaintiffs within the State, are, in fact, levied upon the plaintiffs' business (which is largely interstate commerce), by placing a fictitious and artificial value upon their property.

Under the interstate commerce clause of the Federal Constitution it is not competent for a State to tax a non-resident person or corporation engaged in interstate commerce, upon their occupation or business. The State's power of taxation, in such cases, is limited to a tax upon such of the property of the person or corporation, as is found within the taxing jurisdiction of the State, and that property must be taxed without discrimination. It is just as much a violation of this rule of the Federal Constitution to levy a tax ostensibly on property, but really on business, by ascribing an artificial or fictitious value to the property, as to make the levy directly and in terms upon business.

III. The rule for the assessment of express companies, prescribed by the Nichols law, discriminates against the property of express, telegraph and telephone companies, on account of its mere ownership, as compared with all other property in the State, and therefore denies to those companies the equal

protection of the law, in contravention of the Fourteenth Amendment of the Federal Constitution.

I do not deny the power of the legislature to classify property. But the power to classify is not arbitrary. It must be classification in fact, and not discrimination. Property cannot be classified in respect to mere ownership. The same kind and character of property devoted to the same uses, within the same taxing districts, cannot be taxed by one rule against one class of persons and by a different rule against another class. But that is precisely what the Nichols law attempts to do.

The classification of railroad and telegraph property as unit property is not a classification according to ownership, but according to intrinsic differences in the character, use and situation of such property, and the difficulty attending the ascertainment of its value otherwise than as a unit. These considerations make the separate classification of such property not merely convenient, but necessary, as well as natural and reasonable. But the property owned by express companies within the State of Ohio is not different in its character, uses or situations from other similar property within the State, nor is there any greater difficulty in ascertaining its value for purposes of taxation.

IV. The Nichols law is in contravention of the Fourteenth Amendment, for the further reason that it taxes property not within the taxing jurisdiction of the State of Ohio.

It has been held more than once in this court that the power of a State to tax the property of nonresidents is limited to such of their property as is found within the State; in other words, that a State cannot tax lands lying beyond its borders, nor personal property domiciled in another State. *Hays* v. *Pacific Steamship Co.*, 17 How. 596, 599; *Railroad Co.* v. *Jackson*, 7 Wall. 262, 267, 268; *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430, 432; *Railroad Co.* v. *Pennsylvania*, 15 Wall. 300; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206, 210.

The ground upon which this immunity is secured, under the Federal Constitution, has not been clearly stated in all the

cases. The earlier ones arose prior to the adoption of the Fourteenth Amendment, but we submit, that it is depriving a person of property without due process of law, in contravention of the Fourteenth Amendment, for a State to tax property not within its jurisdiction.

V. There is no necessary or proper relation between the value of the property of an express company and the value of its capital shares.

VI. If the rule of assessment, applied by the state board against the plaintiffs, contravenes the Federal Constitution, it is immaterial whether that rule is prescribed by the statute, or whether it is adopted, independent of the statute, by the board itself.

Mr. Thomas McDougall for appellees. *Mr. F. S. Monnett*, Attorney General of the State of Ohio, was on his brief.

I. The constitutionality of this law under the Ohio constitution is settled by the decision of the Ohio Supreme Court. *State ex rel.* v. *Jones, Auditor*, 51 Ohio St. 492.

II. The only question raised by appellants which is before this court is whether the law violates the Federal Constitution.

If the law violates the Federal Constitution, then the demurrers were erroneously sustained. If the law does not violate the Federal Constitution, then the only other question raised by the appellants is the difference of opinion between them and the board of appraisers as to the value of their property. The appellants are not entitled to have this court consider any question of difference of opinion as to the value of their property as assessed by the board for taxation merely by asserting that such action violates the Federal Constitution, unless it appears that the law under which the valuation was made does violate that Constitution. These cases are to be heard on demurrer, and if this court decides that the action complained of does not violate the Federal Constitution, it will thereby decide that the bills do not sufficiently allege such violation, that the facts set up in the bills do not show

such violation; in other words, that facts which would raise a Federal question are not alleged, and that there is no such Federal question in the cases.

III. The act does not deny to the appellants due process of law, nor equal protection of the laws.

The pleadings, together with the law itself, show the following facts with reference to this subject:

1. The law itself states the times of the sessions of the board. The returns made by the companies are the statements of their cases to the boards, and they may appear if they so desire to make oral statement. Upon application, any of the companies affected has the right to appear before the board prior to the determination of the assessment, to be heard on the question of the valuation of its property for taxation. It appears from the pleadings, as a matter of fact, that the companies were present, and were heard in the matter of the valuation of their property for taxation.

2. After the valuation of the property of any company for taxation, and before the certification by the auditor of State of the apportioned valuations to the several counties, the board may, upon the application of any interested person, or on its own motion, correct the assessment.

3. If the board refuses to correct the assessment regarded by the company as erroneous, it may appeal, under section 167, Revised Statutes of Ohio, to a board composed of the governor of the State, the auditor of State, and the attorney general.

4. By section 5848, Revised Statutes of Ohio, the illegal levy and collection of taxes may be enjoined; and further, if compelled to pay the tax, complainants may sue to recover it back.

It cannot be questioned that these provisions and remedies, under the decisions of this court, and of the Ohio Supreme Court, constitute due process and equal protection of the laws. *State* v. *Jones*, 51 Ohio St. 492; *Davidson* v. *New Orleans*, 96 U. S. 97; *State Railroad Tax cases*, 92 U. S. 575; *McMillen* v. *Anderson*, 95 U. S. 37; *Kentucky Railroad Tax cases*, 115 U. S. 321; *Pittsburgh, Cincinnati &c. Railway* v. *Backus*,

154 U. S. 421; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Missouri Railway Co.* v. *Mackey*, 127 U. S. 205.

IV. The law does not violate the Constitution of the United States by interfering with interstate commerce.

The law simply provides a method for the valuation of property for taxation, and the tax laid upon the valuation made is a tax on the property of the companies in Ohio, and is not a tax upon interstate commerce. The details of that method are all directed toward ascertaining the value in money of the property in Ohio. The tax imposed is not a license tax, nor a tax on a business or occupation, nor on transportation through the State, nor upon receipts from business done outside of Ohio, nor upon property outside of Ohio. The tax imposed upon the valuation made under the law is simply a tax on the property of the companies within the State of Ohio. Such a tax is not an interference with interstate commerce in the sense in which such an interference is prohibited by the Federal Constitution. *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439, and cases cited.

(*a*) The property of a corporation may be fairly valued as a unit for purposes of taxation.

This has been decided so often, and so definitely, that it would hardly seem to need additional argument. It is contended by counsel for appellants that the property of the companies included under this law should be valued item by item, and that the aggregate of value of the different items, taken separately, is the value of the property of the companies for taxation. The State of Ohio claims, on the contrary, that the real value of the property of the corporations under discussion cannot be ascertained by simply valuing the items of real and personal property taken separately, and finding the total. The entire property of any one of these corporations as a unit, and used for a specific purpose, and in a certain place, has a value to the corporation, by reason of its unity and the use to which it is put, which is much greater than the value of the mere items of property taken separately.

Taken together, it constitutes a plant, a machine, which has a value by reason of the assembling of its parts, the place where it is located, and the use to which it is put. This is the basis of its selling value. This fixes the selling value of its stock. This evidences the actual money invested, and which if not so invested would be taxed as money.

(*b*) How shall the amount of property in Ohio be apportioned?

In the case of a telegraph company, the proportion which the mileage in Ohio bears to the mileage of the whole company, represents a fair proportion of the capital used in Ohio; and in the case of an express company, the proportionate length of the routes traversed by the company in Ohio to the entire routes traversed by the company, represents the fair proportion of the corporate capital or property used in Ohio. There may be exceptional circumstances, such as the existence of a large amount of real estate or some other specified property at the home office, which increases the proportion of the entire property to be found in that State, and decreases the proportion to be found in all other States. But this fact or facts should be brought to the attention of the board, and they are authorized to make due allowance for it, and it will be presumed that they did make full allowance for it.

It is thus seen that there is no tax laid on the property outside of the State, but such property is merely brought to the attention of the board for the purpose of aiding it in arriving at the value of the property as a whole in order to reach the value of the portion of the property used in the State. It is clear, also, that it is not the profits of the business that are being taxed; the profits of the business are not a subject of inquiry. The profitableness of the use of the property may contribute to the value of the property for taxation, but the profits themselves are not taxed; they are not even known to the board.

It has been decided by the courts over and over again, that this method of valuing property is a fair one; that it constitutes a *bona fide* valuation of property for taxation; that it is, in effect as well as in name, a property tax; that it is not

a tax on the business, or the earnings or the profits of the companies, but on their property; that the property of these corporations may be valued as a unit upon the basis of the value of their capital stock, and other evidence, and that the proportion of the entire valuation thus made, belonging to any one State, may be estimated on the mileage basis as above described. *State* v. *Jones*, 51 Ohio St. 492; *State Railroad Tax cases*, 92 U. S. 575; *Western Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439; *Western Un. Tel. Co.* v. *Taggart*, 163 U. S. 1.

Mr. John K. Richards for appellees. *Mr. F. S. Monnett*, Attorney General of the State of Ohio, and *Mr. John L. Lott*, Assistant Attorney General of that State, were on his brief.

I. Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

II. The Nichols law is based upon the essential difference existing between the property of telegraph, telephone and express companies, and other property. The property of these companies is in nature and use a unit, and to be justly valued, so that the companies may bear their fair share of the public burdens, must be treated for assessment purposes as a unit.

An express company owns horses, wagons, pouches, office furniture, safes and other implements for carrying on the transportation business; but it also owns leases of transportation facilities and capital and money to operate lines extending throughout the country. A part of this property has a situs in the towns where there are offices, a part is carried to and fro throughout the State on the lines over which the express company operates. The property is used together in one business, that of transportation, and is valuable because it is so used. An express company is akin to a railroad company. It operates over a large territory, or its property would not have the value it does. To operate lines extending over a

large territory requires a considerable capital, and this capital is of such a character that it can only be ascertained and valued as a unit and cannot be reached and assessed by local officers.

III. Because of these inherent differences, it is not only proper, but wise for the State to classify the property of these companies for taxation. Such classification does not violate the constitution of Ohio and is in accord with the legislative policy of the State. There are separate provisions for the valuation of the property of individuals, of merchants, of manufacturers, of unincorporated banks, of incorporated banks, of corporations in general, of railroads, of insurance companies. The end of the law is equality of burdens, which can only be reached through classification.

IV. The property of an express company constitutes a plant for transportation purposes. The assessment of the Ohio property did not exceed a fair proportion of the value of this plant, taking into consideration the value of the capital stock and other facts, whatever basis of apportionment may be taken. In fact, no rule of appraisement aside from that laid down in the Nichols law was adopted; the result presents the best judgment of the board, in the light of the law and all the facts before it. If the assessment be erroneous, it is in consequence of a mistake of judgment, which the court will neither review nor correct.

V. There is no denial of the equal protection of the law. The Federal cases recognize the right of a State to classify property for taxation, and use such methods of valuation as, in the judgment of the legislature, will result in an equality of burdens. *Barbier* v. *Connolly*, 113 U. S. 27; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Charlotte, Columbia &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *State Railroad Tax cases*, 92 U. S. 575; *Kentucky Railroad Tax cases*, 115 U. S. 321.

VI. Due process of law is provided by the Nichols act, both in itself and when taken in connection with other stat-

utes. There are provisions for notice, for statements, for hearings, for review and correction of erroneous and excessive valuations, and for contesting assessments. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *State Railroad Tax cases, ubi sup.; McMillen* v. *Anderson*, 95 U. S. 37; *Kentucky Railroad Tax cases, ubi sup.; Spencer* v. *Merchant*, 125 U. S. 345; *Palmer* v. *McMahon*, 133 U. S. 660.

VII. In the absence of an allegation of fraud, the action of the board in fixing the valuation is conclusive, and the court will not review its judgment to determine whether its valuation is or is not excessive. Courts do not constitute themselves taxing authorities to determine on evidence the value of property for taxation.

Mr. James C. Carter for the American Express Company, appellant.

Inasmuch as the State of Ohio had the rightful power to impose a tax upon the property of the express companies actually situated within its territory, if there is any invalidity in the assessments under notice it must be found in the manner in which they were laid.

What the State of Ohio assumed to do was to tax property, not because of its ownership by citizens of the State, but irrespective of citizenship and on account of its situs within the State. Nor did it assume to impose a specific tax, but a tax determinable by value. This property of the express companies was ordinary movable personal property, the actual value of which in money was easily determinable in the ordinary way. The method actually employed was this: The board required from the companies, and received (at least from the American Express Company) statements showing the value of its whole property, of that part actually situated in Ohio, the nominal amount of its capital stock, and its actual value as determined by the selling price of its shares. If the board had taken the actual value of the property in Ohio, it would have assessed it, the personalty (for the year 1895, and

the difference between that and the other years is not material) at $23,430. The omissions to return some small items might slightly swell the amount. It utterly dismissed the actual value thus ascertained by the ordinary method, and proceeded with an attempt to ascertain what the value of it would be if it were treated as a certain fractional part of a supposed "unit profit-producing plant"; and to this end it assumed that the real value of the whole of this plant was determined by the value of the whole capital stock according to its selling price. Having thus ascertained the value of the whole unit plant, the problem remained to ascertain how much of that unit plant was in Ohio, and this was solved by the assumption that, as the actual value in Ohio of the specific personal property therein situated, valued according to the ordinary method, was to the value of the whole property of the company valued in like manner, so was the value of the part of the unit plant in Ohio to the whole value of the unit plant as determined by the whole value of the capital stock.

In this way property really of the value of $23,400 was valued and assessed for taxation for the year 1895 at $499,377.60!

The case, as thus stated, hardly leaves room for argument, for argument would assume that the error is not obvious and flagrant, whereas it is so obvious and flagrant that it scarcely seems worth while to inquire into the nature of the error. The valuations declared by the board of assessors are — must be — either purely capricious and arbitrary, in which case the error is plain, or the result of applying some test of valuation which has no just or reasonable relation to value, in which case the error is equally plain.

I. The laws under which the assessments were made required this mode of valuation, and we are entitled — indeed bound in the absence of evidence to the contrary — to assume that the officers followed the law. But, whatever the Supreme Court of Ohio or the Circuit Court of Appeals may have thought as to whether the board was bound to regard the value of the entire capital stock as alone determining the value of the entire property, neither pretends that it was not

the principal test prescribed by the statute; and a law which makes a wholly erroneous test in the valuation of property the principal one, is just as invalid as if it made it the only one.

II. These proceedings were in conflict with those provisions of the Federal Constitution which forbid the taking of property without due process of law. The property to be assessed was wholly, or chiefly, personal chattels, such as horses, wagons, etc. They were specific things belonging to the company having an actual situs in Ohio and taxable by that State. The State proposed to value them, not as specific things, but as a part of a distinct whole, embracing these and many other things with them. Their value was easily ascertainable, in the ordinary method, by finding their market value, or the cost at which they could be produced and reproduced. The law required this ordinary mode to be ignored and a value to be placed upon them which should be determined by the value of the capital stock, a thing which had no relation whatever to their value; for nothing is more certain than that the value of this property would be precisely the same — could be bought for the same price — be sold for the same price — be produced and reproduced for the same price — whether the capital stock of the company was 50 per cent below, or 100 per cent above par.

Under this method of valuation, whether the horses were lame or sound, or old or young, whether the wagons and harness were old or new, was of little consequence; but any valuable franchises which the company might possess which increased the profits of its business in other States, however remote, every favorable contract with railroad companies which increased the profits of its business, immediately added to the value of every horse, wagon and harness in Ohio. And if a debt due to the company from a debtor in Ohio of $1000 was included in its property there it became subject to valuation for the purposes of taxation at more than $15,000!

Is this "a taking of property" without due process of law? Certainly it is, unless the requirement of "due process of law" can in all instances be satisfied by a mere statutory enactment.

We are not called upon at the present stage of constitutional jurisprudence to go into argument to show that this cannot be done. The safeguard which forbids the taking of property without due process of law is a protection against legislation. It cannot be met and overcome by a mere exercise of the power which it was erected to control.

Exact equality and justice is not possible in any system of taxation and no one expects it. There are many methods which may be employed and opinions differ concerning which is the best, and among these the legislature has an uncontrolled discretion. But one thing is essential to any method, and this is that it should have an eye to equality and uniformity. Without this, statutory enactments to compel the payment by the citizen of money in the name of taxes are mere arbitrary exactions; indeed their proper name is robbery, and they are none the less robbery because clothed with the exterior form of law.

The opinion seems to have been entertained in the Circuit Court of Appeal, and in the Supreme Court of Ohio, that the question whether the safeguard of due process of law was satisfied amounted simply to the question whether the property owner had under the law opportunity to appear before the assessing board and be heard. No greater error could be committed. Opportunity to appear and be heard is useful only when it affords a means of correcting injustice. It is valuable only when the party can appeal effectively to truth and justice. But of what use is it when the so-called law itself commands the injustice to be done? An appeal to the legal enactment is to no purpose in such a case.

Where the legislative power is arbitrary and unlimited, there is, of course, no protection against it to be found in the constitutional safeguard of the Fourteenth Amendment that no person shall be deprived of life, liberty and property without due process of law. But it has been more than once declared, with the approval of this court, that under our American systems there is no room for the exercise of arbitrary power.

The objection that men differ as to what these fundamental principles are cannot be listened to. It questions the existence of the principles, and thus utterly destroys constitutional gov-

ernment. We have no other ground for saying that a judicial proceeding, which denies to the defendant an opportunity to be heard, is unconstitutional, except that it violates the fundamental principles of reason and justice. But it is not true that civilized and enlightened men differ as to these principles. Upon all material points they are agreed. Were they not thus agreed constitutional government would be impossible. They are agreed, in the main, upon all the dictates of right reason, and so far as they are not agreed, so far our constitutional systems are imperfect, as all human institutions are.

In the application, indeed, of fundamental principles of reason and justice to legal enactments there are wide differences of opinion, and the difficulty thus occasioned is surmounted, so far as it can be, by the rule that laws are not to be pronounced unconstitutional except when they are clearly violative of such principles.

III. The laws in question are very clearly in violation of the constitution of the State of Ohio, and for this reason invalid.

IV. The laws in question impose taxes on property beyond the territorial jurisdiction of Ohio and are invalid for this reason.

V. The laws authorizing the assessments are invalid as an invasion of the constitutional guaranty of the equal protection of the laws.

VI. The laws under which these assessments were made are invalid also for the reason that they impose a burden upon interstate commerce.

There is no constitutional provision in terms forbidding the States to impose burdens by way of taxation upon interstate commerce. The prohibition is a necessary implication arising from the fact that the subject-matter is one placed exclusively under the sovereign control of Congress, and the imposition of burdens upon it by the States, whether by taxation or otherwise, would be a denial of that sovereignty and a false assumption by the States of a power over it, which, if it existed, might be so exercised as to destroy it.

There is one necessary exception to the rule that the States

cannot tax interstate commerce. Inasmuch as the existence of the States is necessary to the existence of interstate commerce, that ordinary system of taxation which is necessary to the existence of the States, namely, taxation upon all the property within them, must be permitted, and the property employed in interstate commerce is not to be exempted. This exception is, indeed, rather apparent than real; for where no burden can be put upon property employed in interstate commerce without being at the same time put upon all other property, interstate commerce is not really burdened. Were it not subject to taxation in this form the effect would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it was exempted.

But a tax in any other form cannot be thus equalized over all private interests, and, if allowed, would be, or might easily be made to be, an especial burden.

The taxes levied by these Ohio laws are taxes directly depending upon the market value of the shares of the stockholders. That market value depends directly upon the present profits of the business and the fair expectation concerning its permanency. It is, very precisely, a capitalization of all the property and every advantage whether by way of franchise, contract privilege or skill possessed by the company. Among these advantages is the fact that the privilege of carrying it on is derived from and controlled by another sovereign government. A tax, therefore, upon a capitalization of all these elements is a tax upon the occupation itself, which it is certain that the States have no right to impose.

The practical test is conclusive. The question is whether the taxes are a burden. Every one can see that if all the States should impose taxes similar to those we are dealing with (and if one State can do it all may), the business would be immediately destroyed. No express company could stand such an aggregate of taxation.

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

No difference material to the determination of the controversy exists between the cases, and as matter of convenience the statement refers to the amended act and the records in Nos. 398, 399 and 400.

The contention that the act in question is invalid because repugnant to the constitution of the State of Ohio has been disposed of by the decision of the highest tribunal of that State sustaining its validity. *State* v. *Jones*, 51 Ohio St. 492. These cases fall within no recognized exception to the general rule that the construction by the state courts of last resort of state constitutions and statutes will ordinarily be accepted by this court as controlling.

It is suggested that the decision of the Supreme Court of Ohio should not be followed because the case in which it was announced did not involve a genuine controversy but was prepared for the purpose of obtaining an adjudication, and, under the circumstances, ought not to have been considered by that court. But it was for that tribunal to pass on this question, and, as it entertained jurisdiction and delivered a considered opinion which appears in the official reports of the court as its judgment of the validity of the Nichols law under the constitution of the State of Ohio, it is not within our province to review its determination in that regard.

This brings us to the only inquiry which it concerns us to examine.

The legislation in question is claimed to be repugnant to the Constitution of the United States because in violation of the commerce clause of that instrument, and because operating to deprive appellants of their property without due process of law, and of the equal protection of the laws.

We assume that the assessments complained of were made in pursuance of the definite rule or principle of appraisement recognized and established by the Nichols law, as construed by the Supreme Court of Ohio, and the question is whether the law prescribing that rule is valid under the Federal Constitution.

The principal contention is that the rule contravenes the commerce clause because the assessments, while purporting to

be on the property of complainants within the State, are in fact levied on their business, which is largely interstate commerce.

Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688.

As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State, without violating any Federal restriction. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S. 40; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217; *Pittsburgh, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421; *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18. The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but

included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State, is in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421; or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, *Western Un. Tel. Co.* v. *Taggart*, 163 U. S. 1.

Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use.

The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated.

No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car

companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case — resulting from the very nature of the business.

The same party may own a manufacturing establishment in one State and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store or *vice versa*, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different States is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

It is this which enabled the companies represented here to charge and receive within the State of Ohio for the year ending May 1, 1895, $282,181, $358,519 and $275,446, respectively, on the basis, according to their respective returns, of $42,065, $28,438 and $23,430, of personal property owned in that State, returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities.

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it that $23,430 worth of horses, wagons, safes

and pouches produces $275,446 in a single year? Or $28,438 worth, $358,519? The answer is obvious.

Reliance seems to be placed by counsel on the observation of Mr. Justice Lamar, in *Pacific Express Company* v. *Seibert*, 142 U. S. 339, 354, that "express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted." But the reference was to the legislation of the State of Missouri, and the scheme of taxation under consideration here was not involved in any manner.

The method of assessment provided by the Nichols law was as follows: "The said board shall proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

And this provision was thus construed by the Supreme Court of Ohio in *State* v. *Jones*:

"The board, in determining the value of the company's property in this State for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock, thus making the respective values equivalents of each other. But, taking the market value of the entire capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this State. The statute does not bind the board to find the value

of the entire property of the company equal to that of the entire capital stock."

The court further said:

"But the property of a corporation may be regarded in the aggregate, as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated not in parts, but taken as a whole. If the market value — perhaps the closest approximation to the true value in money — of the corporate property as a whole, were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property. Should all the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. Besides, while the amount of the capital stock may be limited by the charter and the laws governing it, the real and personal property of the corporation may be constantly augmented, and may keep pace with any increase in the value of the capital stock. The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well understood relation between the two that not only is the value of the capital stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock. . . .

"If by reason of the good will of the concern, or the skill, experience and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the Constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed some-

what to good will, franchise, skilful management of the property or any other legitimate agency.

"It will, we think, be conceded that the earning capacity of real estate owned by the individuals may be considered in fixing its value for taxation. Take an office building on a prominent street in one of our large cities. It will not be doubted, that by care in the selection of tenants, and in the preservation of the reputation of the building, by superior elevator service, by vigilance in guarding and protecting the property, by the exercise of skill and knowledge in the general management of the premises, a good will of the establishment will be promoted, which will tend to an extra increase in the earning capacity and value of the building. For the purpose of taxation, it would be none the less the true value in money of the building, because contributed to by the operative causes that gave rise to the good will. We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property — why the selling value of the capital stock, as affected by the good will of the business, should be excluded from the consideration of the board of appraisers and assessors under the Nichols law, charged with the valuation of corporate property in this State, especially as the capital stock, when paid up, practically represents at least an equal value of the corporate property."

Similar views were expressed by the Circuit Court of Appeals, *Sanford* v. *Poe*, 37 U. S. App. 378, 395, Judge Lurton, delivering the opinion, saying:

"The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the State, nor from points within the State to points in other States, nor from points in other States to points within the State. It purports to provide for a tax upon property within the State of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from the same liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument. . . .

"Neither does the fact that the property of the express com-

panies was valued as a unit profit-producing plant violate any Federal restriction upon the taxing power of a State within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rails and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the State of Ohio had a right to tax the property within the State, and to assess it at its true cash value, there is no Federal restriction which will prevent such property from being 'assessed at the value which it has, as used, and by reason of its use.' . . .

"That an express company owns no line of railway and operates no railroad does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business."

The line of reasoning thus pursued is in accordance with the decisions of this court already cited. Assuming the proportion of capital employed in each of several States through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce.

Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the State and for that reason amounting to a taking of property without due process of law. The property taxed has its actual situs in the State and is, therefore, subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the state legislature. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *State Railroad Tax cases*, 92 U. S. 575; *Delaware Railroad Tax*, 18 Wall. 206; *Erie Railroad* v. *Pennsylvania*, 21 Wall. 492; *Columbus Southern Railway* v. *Wright*, 151 U. S. 470.

In *Pullman's Palace Car Co.* v. *Pennsylvania*, the rule is considered that personal property may be separated from its owner and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax; and the distinction between ships and vessels and other personal property is pointed out. The authorities are largely examined and need not be gone over again.

There is here no attempt to tax property having a situs outside of the State, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used.

Special circumstances might exist, as indicated in *Pittsburgh, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421, 443, which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis.

The States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute.

It is not contended that notice of the time and place of the meetings of the board was not afforded or that the companies were denied the opportunity to appear and submit such proofs, explanations, suggestions and arguments with reference to the assessment as they desired.

We are, also, unable to conclude that the classification of express companies with railroad and telegraph companies as subject to the unit rule, denies the equal protection of the laws. That provision in the Fourteenth Amendment "was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways," nor was that amendment "intended to compel a State to adopt an iron rule of equal taxation." *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232.

In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351, in which a tax on gross receipts of express companies in the State of Missouri was sustained, Mr. Justice Lamar, speaking for the court, well says:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

And see *Kentucky Railroad Tax cases*, 115 U. S. 321; *Home Insurance Co.* v. *New York*, 134 U. S. 594.

The policy pursued in Ohio is to classify property for taxation, when the nature of the property, or its use, or the nature of the business engaged in, requires classification, in the judgment of the legislature, in order to secure equality of burden; and property of different sorts is classified under various statutory provisions for the purposes of assessment and taxation. The state constitution requires all property to be taxed by a uniform rule and according to its true value in money, and it was held by the Supreme Court of Ohio in *State* v. *Jones* that the Nichols law did not violate that requirement.

In *Wagoner* v. *Loomis*, 37 Ohio St. 571, it was ruled that: "Statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes

and agencies, are not necessarily in conflict with the provisions of the constitution which require all property to be taxed by a uniform rule and according to its true value in money." And the court said: "A faithful execution of the different provisions of the statutes would place upon the duplicate for taxation all the taxable property of the State, whether bank stocks or other personal property or real estate, according to its true value in money; and the equality required by the constitution has no other test."

The constitutional test was held to be complied with, whatever the mode, if the result of the assessment was that the property was assessed at its true value in money.

Considering, as we do, that the unit rule may be applied to express companies without disregarding any other Federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws.

We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that "whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." *Pittsburgh, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 434; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1.

Decrees affirmed.

Mr. Justice White, with whom concurred Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Brown, dissenting.

Not being able to concur in the opinion and judgment of the court in the foregoing cases, I am impelled, by what I conceive to be the serious nature of the questions involved, to state the reasons for my dissent.

It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory and within the territory and jurisdiction of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most obvious conceptions of government. This rule, common to all jurisdictions, is peculiarly applicable to the several States of the Union, as they are by the Constitution confined within the orbit of their lawful authority, which they cannot transcend without destroying the legitimate powers of each other, and, therefore, without violating the Constitution of the United States.

This limitation upon the taxing power was early declared by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, where it was said (p. 429):

"All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

In *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596, a tax imposed upon twelve steamships belonging to the company, which, while engaged in lawful trade and commerce between the port of San Francisco and ports and territories without the State, were temporarily within the jurisdiction of California, was held illegal. This court, by Mr. Justice Nelson, declared that the vessels were not properly abiding within the limits of California, so as to become incorporated with the other personal property of that State; that their situs was at the home port where the vessels belonged and where the owners were liable to be taxed for the capital invested and where the tax had been paid.

In *St. Louis* v. *Ferry Co.*, 11 Wall. 423, the validity of a tax assessed by the city of St. Louis upon the boats of a ferry company, an Illinois corporation, as property within the city of St. Louis, was considered. This court held that Illinois was the home port of the boats, that they were beyond the jurisdiction of the authorities by which the taxes were assessed,

and that the validity of the taxes could not be maintained. It was observed (p. 430):

"Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *State Tax on Foreign-held Bonds*, 15 Wall. 300, a tax laid by the State of Pennsylvania on the interest paid by the railroad company on its bonds, was held to be a tax upon the bonds, the property not of the debtor company but of its creditors, and that so far as such bonds were held by non-residents of the State, they were property beyond its jurisdiction. It was declared that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which the taxing power can be legitimately exercised, and that "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State." Of the act there under consideration, the court said (p. 321):

"It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected or may be subjected to taxation upon an estimate of its full value."

In *Morgan* v. *Parham*, 16 Wall. 471, it was adjudged, upon the authority of the *Hays case*, *supra*, that the State of Alabama could not lawfully tax a vessel registered in New York, but employed in commerce between Mobile in that State and New Orleans in Louisiana. The situs of the ves-

sel was held to be at the home port in New York, where its owner was liable to be taxed for its value.

The circumstance that the steamer might not actually have been taxed in New York during the years for which the taxes in controversy were levied was held to be unimportant. The court said (p. 478):

"Whether the steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose."

In *The Delaware Railroad Tax case*, 18 Wall. 206, this court, in considering an objection interposed to a taxing act, that it imposed taxes upon property beyond the jurisdiction of the State, observed (p. 229): "If such be the fact, the tax to that extent is invalid, for the power of taxation of every State is necessarily confined to subjects within its jurisdiction."

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, at pages 206–209, Mr. Justice Field reviews the cases just cited. The Gloucester Ferry Company was a New Jersey corporation, and operated a ferry between Gloucester, New Jersey, and Philadelphia. The State of Pennsylvania laid a tax on the appraised value of the capital stock of the ferry company, which owned no property in Pennsylvania except the lease of a slip or dock, where its ferryboats put up in plying across the river, between the two States.

In this court it was sought in argument to support the tax in question by advancing the theory of "a homogeneous unit." The counsel said (p. 201):

"The tax is upon the capital stock of the corporation, 'not in separate parcels, as representing distinct properties, but as a homogeneous unit, partaking of the nature of personalty,' and taxable where its corporate functions are exercised or its business done. The franchise itself may constitute the material part of all its property, since not only its wharves and slips, but also its boats, might be leased, and, in that case, the tax would be measured by the value of the franchise represented by the extent of its exercise within the State, and not by its tangible property situated there. The extent of its property

subject to the taxing power is immaterial. Its franchise would be worthless without the leasehold interest owned by it in the city of Philadelphia. The value of its franchise depends upon that leasehold, and it will, therefore, not do to say that it has no property within the jurisdiction of the taxing power. It does not seem necessary to inquire further as to an ownership of property within the jurisdiction of Pennsylvania."

But this court, speaking through Mr. Justice Field, completely answered the argument, as follows (p. 205):

"If by reason of landing or receiving passengers and freight at wharves, or other places in a State, they can be taxed by the State on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede and even destroy such commerce with the citizens of the State. If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interests of the State would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect; they require security."

Of the *Gloucester Ferry case*, it was observed by this court in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 344, that "It is hardly necessary to add that the tax on the capital stock of the New Jersey company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce."

In *Erie Railroad* v. *Pennsylvania*, 153 U. S. 628, 646, this court denied the power of the State of Pennsylvania to require a foreign railroad company doing business within its borders to deduct therefrom when paying interest upon its obligations in New York the amount of a tax assessed by the State upon the bonds and moneyed capital owned by the residents of Pennsylvania. The money in the hands of the company in New York was held to be property beyond the jurisdiction of Pennsylvania. The court said that: "No principle is better settled than that the power of a State, even its power of taxa-

tion, in respect to property, is limited to such as is within its jurisdiction."

This inherent want of power in every government to transcend its jurisdiction is subject, as already stated, to an additional limitation as to the several States of the Union, resulting from those provisions of the Constitution of the United States which, in so far as they restrict the power of the States, necessarily create limitations to which they are all subject and from which they cannot depart without a violation of the Constitution. It will not be necessary to allude to every special restriction on the power of the States resulting from the Constitution, but it will suffice for my present purpose to refer to one only, the necessary existence of which has often been recognized to have been one of the most cogent motives leading to the adoption of the Constitution, and upon the enforcement of which it has often been declared the perpetuity of our institutions depends, to wit, the inhibition resulting from the provision of the Constitution of the United States conferring on Congress power to regulate interstate commerce.

Under the interstate commerce clause of the Constitution, as held by this court, speaking through Mr. Justice Bradley, in *Leloup* v. *Mobile*, 127 U. S. 640, 648, "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." The following cases were referred to as supporting the proposition thus enunciated: *Case of State Freight Tax*, 15 Wall. 232; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Mobile* v. *Kimball*, 102 U. S. 691; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460; *Moran* v. *New Orleans*, 112 U. S. 69; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Walling* v. *Michigan*, 116 U. S. 446; *Picard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash &c. Railway Co.* v. *Illi-*

nois, 118 U. S. 557; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411.

The following cases, since decided, enforced the same principle: *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Lyng* v. *Michigan*, 135 U. S. 161; *McCall* v. *California*, 136 U. S. 104; and *Crutcher* v. *Kentucky*, 141 U. S. 47.

These authorities were reviewed by this court in *Brennan* v. *Titusville*, 153 U. S. 289, where, speaking through Mr. Justice Brewer, it was held that a municipal corporation could not lawfully tax a non-resident manufacturer of goods for the privilege of endeavoring to sell his goods by means of an agent sent into the State to solicit orders therefor. This court there said (p. 303): "This tax is a direct charge and burden upon the business; and if a State may lawfully exact it, it may increase the amount of this exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

The question then arises, does the tax imposed by the State of Ohio upon express companies violate either of the two elementary propositions to which I have just referred?

Under the law of Ohio express companies are taxed in three forms: First, their real estate is assessed for state, county and municipal purposes in the same manner as is real estate within the State belonging to other companies and persons; second, such companies are also taxed upon their gross receipts derived from business done within the State, 91 Ohio Laws, 237; and, third, they are additionally assessed by a state board. 90 Ohio Laws, 330, as amended by 91 Ohio Laws, 220. It is the assessment resulting from the last of these provisions which is involved in the cases now under consideration.

In compliance with the law the companies returned to the state board a statement for the year 1893, showing, first, the amount of capital stock and its par and market value; second, a detailed account of the entire real and personal property of the companies and its assessed valué; and, third, their entire gross receipts during the taxing year for business done within the State of Ohio. For the years 1894 and 1895 the statements, under the requirements of the amendatory statute of May 10, 1894, 91 Ohio Laws, 220, exhibited, first, the number of shares of capital stock and its par and market value; second, a detailed statement of the real estate owned in Ohio and its assessed value; third, a full and correct inventory of the personal property, including moneys and credits owned in Ohio and the value thereof; fourth, the total value of the real and personal property owned and situate outside of Ohio; fifth, the entire gross receipts of the company, from whatever source derived, of business wherever done for the taxing year; and, sixth, the gross receipts of each company in Ohio, from whatever source derived.

It is proper here to notice that while the gross receipts in Ohio of express companies was required to be stated, there was no direction that mention should be made of the sum of the payments properly chargeable against such gross receipts, to wit, disbursements to railroad companies or individuals for transportation facilities, wages of its army of employés, care and maintenance of its horses, and other operating expenses.

Although the assessment on the real estate and on the gross receipts may be relevant to some aspects of the controversy now examined, I eliminate them from consideration, as the direct issue here presented concerns the taxation asserted to be only upon the personal property.

The value of the personal property within the State of Ohio returned by the express companies was averred in each bill, and was conceded by the demurrer to have been correct. The valuation thus returned and the amount of the assessment levied on such personal property by the state board is shown in the following table:

Assessment for 1893.

	Value as returned, and as alleged in the bills.	Value assessed by state board.
Adams Express Co.....	$53,080 74	$460,033 08
American Express Co.....	27,300 00	400,576 45
United States Express Co.....	26,318 00	397,300 00

Assessment for 1894.

Adams Express Co.....	$41,102 60	$543,569 00
American Express Co.....	21,795 00	446,142 00
United States Express Co.....	26,333 00	481,348 00

Assessment for 1895.

Adams Express Co.....	$42,065 00	$533,095 80
American Express Co.....	23,430 00	499,373 60
United States Express Co.....	28,438 00	488,264 70

It thus appears that for the year 1893, property possessing an actual value of but $106,698.74 was assessed as being worth $1,257,909.53; in 1894 property valued at $89,230.60 was assessed at $1,471,059.00; and for 1895 property worth but $93,933.00 was assessed at $1,520,734.10; a total valuation during three years of property worth only $289,862.34 at $4,249,702.63.

In addition to this enormous taxation, the real estate and the gross receipts of the companies have also been taxed for all state, county and municipal purposes. It cannot, I submit, be asserted with reason that the nearly four millions of excess on the assessment of the tangible property laid by the state board resulted from assessing only the actual intrinsic value of such property, since to so contend would be not only beyond all reason, but would also be destructive of the admission by the demurrer that the companies possessed no other personal property within the State of Ohio but that returned by them, and that its actual and intrinsic value was correctly set forth. The assessment, therefore, must necessarily have taken into consideration some other property, or some element of value other than the real intrinsic worth of the property assessed.

The fact of the vast excess of the valuation over and above the admitted value of the property is not, however, the only mode by which it is conclusively demonstrated that the assessment resulted from the consideration and estimate by the state board of sources of value extrinsic to the property assessed. One of the assessments in controversy was made under the Ohio law of April 27, 1893, and the others under the law of May 10, 1894, and although there is some difference between the two statutes, they both, as I have already said, substantially require express companies to make return of their real and personal property within the State, the value thereof, the number of shares of their capital stock, their market value, and a statement of the gross receipts for business done within the State of Ohio during the taxing year from whatever source derived. Considering the obligation thus imposed to report the total value of the stock of the companies and all their gross earnings, as also the total routes over which their agents travelled, etc., and putting these things in connection with the extraordinary amount by which the valuation exceeds the actual value of the property assessed, it leaves no reasonable doubt that the sources of reported value, which were entirely outside of the territory and beyond the jurisdiction of the State of Ohio, were by some process of calculation added to the intrinsic value of the property within the State, thereby assessing not only the property within the State, but a proportion also of all the property situated without its territorial boundaries.

The fact that it was by this method that the sum of the personal property liable for taxation was fixed by the board, results clearly and unmistakably from the opinion of the Supreme Court of the State of Ohio in *State* v. *Jones*, 51 Ohio St. 492, in which case the court sustained the validity of the taxes here questioned. The Supreme Court of Ohio therein declared that the state board, whose duty it was to assess express companies, was "not *required*[1] to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of

[1] The italics here and elsewhere in this quotation are mine.

its entire capital stock, thus making the respective values equivalents of each other. But, taking the market value of the entire capital stock as a datum, the board is only to be guided thereby in ascertaining the true value in money of the company's property *in this State.* The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock." Although the requirement in so many words, to assess property outside the State, is thus said not to be found in the statute, yet that it in substance so provides is acknowledged; for, adds the Ohio court, "the property of a corporation may be regarded in the aggregate *as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated, not in parts, but taken as a whole.* If the market value — perhaps the closest approximation to the true value in money — of the corporate property as a whole were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property. . . . The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well-understood relation between the two, that not only is the value of the capital stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock. . . . If, by reason of the good will of the concern, or the skill, experience and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, *considered as an entire plant,* acquires a greater market value than it otherwise would have had, *it cannot properly be said not to be its true value in money* within the meaning of the Constitution, because good will and other elements indirectly entered into its value. . . . We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property — why the selling value of the capital stock, as affected by the good will of the business, should be excluded from the consideration of the board of appraisers and assessors under the Nichols law,

charged with the valuation of corporate property in this State, especially as the capital stock when paid up practically represents, at least, an equal value of the corporate property."

Now, this language is susceptible only of one meaning, that is, that in assessing the actual intrinsic value of tangible property of express companies in the State of Ohio it was the duty of the assessing board to add to such value a proportionate estimate of the capital stock, so as thereby to assess not only the tangible property within the State, but also along with such property a part of the entire capital stock of the corporation, without reference to its domicil, and equally without reference to the situation of the property and assets owned by the company from which alone its capital stock derives value. In other words, although actual property situated in States other than Ohio may not be assessed in that State, yet that it may take all the value of the property in other States and add such portion thereof, as it sees fit, to the assessment in Ohio, and that this process of taxation of property in other States, in violation of the Constitution, becomes legal provided only it is called taxation of property within the State.

I submit that great principles of government rest upon solid foundations of truth and justice, and are not to be set at naught and evaded by the mere confusion of words. In considering a question of taxation in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, to which case I shall hereafter refer, this court said (p. 698): "The substance and not the shadow determine the validity of the exercise of the power." It seems to me that to maintain the tax levied by the State of Ohio this ruling must be reversed, and the doctrine be announced that the shadow is of more consequence than the substance. Such result would appear to inevitably flow from the holding referred to, now affirmed by the court. Nothing, I submit, can be plainer than the fact that the value of the capital stock of a corporation represents all its property, franchises, good will — indeed, everything owned by it wherever situated. I reiterate, therefore, that the rule which recognizes that for the purpose of assessing tangible property in one State you may take its full worth and then add to the value

of such property a proportion of the total capital stock, is a rule whereby it is announced that the sum of all the property, or an arbitrary part thereof, situated in other States, may be joined to the valuation of property in one State for the purpose of increasing the taxation within that State. What difference can there be between an actual assessment by Ohio of property situated in New York, Pennsylvania, Massachusetts or in any of the other States of the Union, and the taking by Ohio of an aliquot part of the value of all the property situated in such other States and adding it, for the purpose of assessment, to the value of property in Ohio? The recognition of this method breaks down both of the well-settled and elementary rules to which I have in the outset adverted.

First, the rule which forbids one State to extend its power of taxation beyond its jurisdiction to property in another State. If the express companies are domiciled in New York, and have millions of property there situated and subject to taxation, all of which give value to their capital stock and hence enter into the sum of its worth, how can it be that to tax a proportion of the value of all that property is not taxing the property itself? This proportion of the capital stock added to the inherent value of the property in the State of Ohio is, therefore, an actual taxation by the State of Ohio of property situated in the State of New York.

It seems to me that not only the illegality but the injustice of this taxation by the State of Ohio on these express companies which is now upheld, is clear. Let me suppose that the bonds, stocks, other investments and elements, which representing the capital of the companies, and therefore producing the resultant value of such capital stock, are situated in the States of New York, Pennsylvania and Massachusetts. These items thus making up the value of the capital stock being so situated in such States are, of course, entirely and wholly at their full value assessable in those States. The attribution of an aliquot share of the value of the capital stock to the State of Ohio, and the consequent right of that State to tax such value, in no way deprives the States of New York, Pennsylvania and Massachusetts of their right to assess

the property within their borders for its full value. But as attributing to the State of Ohio a proportion of such property gives that State the right to tax the proportion allotted, it follows by an inevitable deduction that the recognition of the right here claimed practically subjects the property in the States of New York, Pennsylvania and Massachusetts to double taxation, unless those States voluntarily forego the inherent power of taxation vested in them to levy a tax upon all the property within their respective jurisdictions. Certainly the States of New York, Massachusetts and Pennsylvania would, if they were independent sovereignties, removed from the jurisdiction of the Constitution of the United States, be driven to protect, by retaliatory legislation, their citizens, as was the case between the States prior to the adoption of the Constitution. But having entered into the Union, these States are bereft of all such relief, and must thus look for the protection of their citizens to the remedies afforded by the Constitution itself. The rule now announced allows Ohio to exercise an authority in violation of the Constitution, and thereby strips not only the citizens of the other States but those States themselves of all redress by depriving them of the safeguards which it was the avowed purpose of the Constitution to secure.

Second, as to the interstate commerce clause. It is clear that the recognition of a right to take an aliquot proportion of the value of property in one State and add it to the intrinsic value of property in another State and there assess it, is in substance an absolute denial and overthrow of all the great principles announced from the beginning, and enforced by the many decisions of this court, on the subject of interstate commerce. This results from the fact that the necessary consequence of the ruling in this case is this, that a corporation — and there is no distinction, in principle in the particular here considered, between a corporation and an individual — cannot go from one State into another State of the Union for the purpose of there engaging in interstate commerce business without subjecting itself to the certainty of having a proportion of all its property situated in the other States added to the sum of property,

however small, which it may carry into the State to which it goes, for the purposes of taxation therein. Under this system, not only is an appalling penalty imposed for going from one State into another State, but the carrying on of interstate commerce itself becomes hampered and loaded with a burden threatening its absolute destruction.

The contradiction involved in the proposition is well illustrated by the legislation and decisions of the State of Ohio. Thus, as I have said, in addition to the tax imposed on express companies, which is here considered, the law of the State of Ohio, besides assessing their real estate, also imposes a tax on the gross receipts of such companies for business done within the State. In order to save the tax here in question, the law by which this last tax is imposed is careful to provide that nothing in the imposition of the tax therein provided, that is, the tax on gross receipts, shall be construed as impairing the right to the tax on tangible property already provided for (the tax here in question). Now, in passing upon the validity of this tax on gross receipts, the Supreme Court of Ohio treats it as not a double tax, because the previous tax is considered as one on tangible property. *Adams Exp. Co.* v. *Ohio*, 44 Northeastern Rep. 506. We have, therefore, both the legislature and the court of last resort of the State of Ohio upholding the enormous valuation put upon the personal property for the purposes of the tax now before us, on the theory that such valuation includes an aliquot part of the capital stock and necessarily, therefore, also an equal portion of all the property and earnings of the company, both in and out of the State, and yet we have the same legislature and the same tribunal upholding the tax on gross receipts on the ground that the tax first provided is purely a tax upon tangible property. Thus the departure from the pathway of principle is marked in this instance, as it is always marked, by confusion and injustice.

The wound which the ruling announced, if I correctly apprehend it, inflicts on the Constitution, is equally as severe upon the unquestioned rights of the States as it is upon the lawful authority of the United States, because whilst submit-

ting the States and their citizens to injustice and wrong committed by another State, it at the same time greatly weakens or destroys the efficacy of the interstate commerce clause of the Constitution.

But the contention is that however sound, as an original question, may be the reasoning upon which the tax is assailed, its validity is not now open to question, because the theory by which the State of Ohio added the value of property outside of the State to the intrinsic amount of property actually within the State for the purposes of taxation is asserted to be concluded by many adjudications of this court. The cases relied on to establish this proposition are cited in the opinion of the court. I submit that the statement made by this court in *Pacific Express Company* v. *Seibert*, 142 U. S. 339, is a sufficient answer to this contention as regards all the cases relied on decided prior to that case. The *Seibert case* involved the question of the validity of a law of the State of Missouri imposing a tax upon the gross receipts of an express company in addition to the ordinary tax upon its tangible property. The court, finding the tax to be only on the business of the company within the State, held it not to be a tax on interstate commerce, and therefore valid. The court, through Mr. Justice Lamar, in speaking of the right of a State to classify express companies for the purpose of taxation, resulting from the fact that such companies were normally only owners of a small amount of tangible property in one State, said (p. 354):

"On the other hand, express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation."

The argument here advanced in favor of the tax, therefore, simply is that what this court said could not be done in a decision rendered in January, 1892, had theretofore been settled to the contrary by a line of adjudications. But the answer to

the contention in favor of the tax does not rest alone upon this view. All the cases relied upon and referred to in argument were considered and interpreted in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688. It becomes unnecessary, therefore, to review the prior cases in detail and analyze their reasoning, since this duty was effectually performed by this court in the opinion announced in the *Postal Telegraph case*. The significance of the ruling in that case and the controlling nature of the principles which the opinion there rendered inculcated can better be understood by considering the controversy which that case determined, and the aspect in which it was necessarily presented to this court for adjudication. The case involved the validity of a tax imposed by the State of Mississippi on a telegraph company. The tax in the mere form of its imposition was undoubtedly on the occupation and business of the company, and, therefore, was an unlawful burden on interstate commerce, as the company was engaged in such commerce. The controversy came to this court on error from the Supreme Court of the State of Mississippi. The attention of that court, in determining the issue presented to it, was called to all the previous decisions of this court. Considering these previous adjudications, the Mississippi court said that there was undoubtedly language in opinions of this court which seemed to support the validity of the tax there questioned, and there was also undoubtedly language in other lines of adjudication which seemed clearly to render the tax void under the Constitution of the United States. In view of the apparent conflict in the cases decided by this court, the Mississippi court, in its opinion, marshalled the authorities upon both sides, and expressed its hesitancy and diffidence in reaching a conclusion. The *Postal Telegraph case*, therefore, pointedly called the attention of this court to all the previous cases and accentuated the arguments on both sides of the issue presented, and rendered it absolutely necessary for this court to construe and interpret all the previous adjudications. In this condition of things, in deciding the case and holding the tax valid, although in form a tax upon interstate commerce, this court said (p. 695):

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

And again (p. 696):

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439, 445."

Referring to the opinion of the Supreme Court of Mississippi, which directly involved all the issues presented by this case, the court said (p. 697):

"And in the case at bar the Supreme Court, in its examination of the liability of plaintiff in error for the taxes in question, said: 'It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county and municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax.' This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power."

And summing the whole up, the court concluded (p. 700):

"We are of opinion that it was within the power of the State to levy a charge upon this company in the form of a franchise tax, but arrived at with reference to the value of its property within the State and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the State in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

This construction of the previous cases decided by this court elucidates and makes plain the fact that they proceeded upon and were intended to enforce the rule that the validity of a state tax would be determined by the substantial results of the burden imposed, and not by the mere form which it assumed, and although the form of the imposition might seem to bring the tax within the reach of the inhibition against levying a charge upon property beyond the jurisdiction of the State, or within the prohibitions of the Constitution of the United States

forbidding the laying of burdens on interstate commerce, this court would not interfere therewith provided the exaction in substance amounted to no more than the sum of the taxation which the State might lawfully impose upon the property actually within its jurisdiction, and provided that in reality the burden laid by the State was not an interference with interstate commerce. This explanation and this rule were the answer given to the question directly presented as to the significance and interpretation of the previous decisions now cited as authority for the proposition that it is within the power of a State not only to tax at will property beyond its jurisdiction, but also to substantially destroy interstate commerce by heaping direct and onerous burdens thereon. Such explanation and ruling were also reiterated in the recent decision in *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, where, at page 18, it is clearly intimated that a taxing law could not be upheld which in its necessary operation was shown to be oppressive and unconstitutional.

Testing the tax in controversy by the rule laid down in the *Postal Telegraph case*, it becomes in reason impossible to conclude otherwise than that it is both in form and substance taxation by the State of Ohio of property beyond its jurisdiction, and that it also is an imposition by that State of a burden on interstate commerce. It cannot with fairness be argued that the amount of the tax is only such sum as would have resulted from a levy upon the property actually in the State, when the record admits that the aggregate value of such property for the taxing years of 1893, 1894 and 1895 amounted only to two hundred and odd thousand dollars, while the assessment exceeds this amount by nearly four millions of dollars. It cannot be said that this vast excess does not embrace property situated outside of Ohio, when both the text of the statute of that State and such text as expounded by the Supreme Court of the State clearly show that the sum of the excess is arrived at by adding to the property in the State the value of property situated outside thereof. Nor can it be contended that the tax here involved is not a tax on interstate commerce, in view of the fact that, from the nature of the criteria of value adopted,

an aliquot part of the avails and receipts of the company of every kind is added to the taxing value in the State of Ohio, although that State had also imposed a tax upon the gross receipts from business of a purely state nature.

But, dismissing absolutely from consideration the authoritative construction of all the prior decisions of this court, announced in *Postal Telegraph Company* v. *Adams*, and conceding for the sake of argument that the previous adjudications now relied on are unexplained by that case, and that they substantially hold that there is a so-called unit rule properly applicable to the assessment for taxation of the continuous lines of telegraph and railroad companies, such concession does not in reason admit the validity of the method adopted by the State of Ohio for assessing the tangible personal property of express companies. Before proceeding to discuss this proposition, however, I call attention to the fact that I intentionally refrain from placing a sleeping car company in the same category with telegraph and railroad companies, because the decision in the case of the *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, was not founded upon the theory, nor did it purport to assert that the property or plant of a sleeping car company was a unit, and that of necessity a part of such property may be measured by a rule applicable to continuous lines of road. In that decision the court merely emphasized the holding that the tax was one laid upon one hundred cars of the company, possessing an actual situs in Pennsylvania. In the statement of the case (p. 20) the decision of the Supreme Court of Pennsylvania was quoted verbatim, in which it was declared that the tax on the capital stock of the Pullman company was in reality but a tax on its property; that the coaches of the company were such property, and that the fact that the coaches might also be operated in other States would simply reduce the value of the property in Pennsylvania justly subject to taxation there. This court practically adopted the views so expressed by the state court. When, however, it was said (p. 26) that the method of assessment, to wit, taking a proportion of the capital stock ascertained on the mileage basis, as the value of one hundred sleeping cars

was a just and equitable method, such statement was made with reference to the facts held to exist in the case before the court. What were those facts? The taxes demanded covered a period of eleven years, and, excluding interest from the time when payable and the attorney general's commission for collecting, aggregated but $16,321.89. 107 Penn. St. 156, 158. Surely, this court might well say that a rule of taxation which operated to assess on one hundred sleeping cars a tax of less than $1500 per annum was, in the absence of any showing to the contrary, just and equitable to the company. No such showing was made. The objection advanced by counsel to the method of taxation was, not that the results produced were inequitable, but that (theoretically, not practically) the method adopted was improper. Indeed, the facts of that case caused the ruling there made to be but an example of the principle subsequently explicitly announced in *Postal Telegraph Company* v. *Adams*, *ubi supra*.

It is, I submit, undeniable that if there be such a unit rule applicable to the continuous lines of telegraph and railroad companies, its existence pushes the power of state taxation, as to these particular kinds of property, at least to the confines of the Constitution, and therefore if under the rule of *stare decisis* the cases which announce it should be followed, they should not be extended. The mere ownership, however, by an express company of personal property within a State presents no case for the application of a unit rule. What unity can there be between the horses and wagons of an express company in Ohio with those belonging to the same company situated in the State of New York? The conception of the unity of railroad and telegraph lines is necessarily predicated upon the physical connection of such property. To apply a rule based upon this condition to the isolated ownership by an express company of movable property in many States, in reality declares that a mere metaphysical or intellectual relation between property situated in one State and property found in another creates as between such property a close relation for the purpose of taxation. But this theory by an enormous stride at once advances the unit rule beyond every

constitutional barrier, and causes such rule or theory to embrace property between which there is and cannot in the nature of things be any real union or relation whatever. If mere intellectual union between property be thus adopted, as a rule of taxation, then all the restrictions upon the power of a State to tax property arising from the fact that the situs of such property is beyond its jurisdiction, as well as of the restraints arising from the interstate commerce clause of the Constitution, are destroyed. Certainly, the mere fact that the same owner has movable property in one State and movable property in another State, does not from the fact of the one ownership create a link of continuity between the property for the purpose of taxation. The fact that if the movable property situated in one State earns profits, and the movable property in the other likewise so earns, and that these profits go to the common owner, does not create such unity for the purpose of taxation so as to make the property assessable in each State. This court has effectually determined that where a corporation is engaged in interstate business, no one of the States has the power to tax the receipts of such company derived from interstate commerce business, and that the power of the States as to taxation on earnings is limited to those derived from the business done within the State. This line of concluded authority is illustrated and referred to in the recent opinion in *Osborne* v. *Florida*, 164 U. S. 650, decided at this term. It is, therefore, manifest that where property owned in common, belonging to the same person and situated in different States, contributes to earnings, and the proceeds of these earnings go into the treasury of the owner, and lie side by side therein, that the fact that there is a common owner, that there is a common business, and that all the results of the business are in immediate contact in the common treasury, gives no power to the State to tax the whole, but only to levy on that which comes from the state business alone. How, I submit, can it now be announced that there is an imaginary unity between personal property widely separated because that property has a common owner, without, at the same time, reversing the settled

adjudications of this court on the subject of the power of a State to tax the earnings from interstate commerce?

But a few illustrations will serve at once to make clear what I submit is the impossibility in reason of declaring that as a legal fact or fiction property is unified, when between such property there is no unity or physical relation whatever.

Take, for example, the case of *Brennan* v. *Titusville*, *supra*. Of what value is the ruling in that case, that a manufacturer cannot be compelled to pay a license for the doing, through his agent, of the business of interstate commerce by selling his goods in a State into which such agent enters for that purpose, if the mere fact that the agent takes into the State a thousand dollars worth of goods, creates a supposed intellectual union between those goods and the vast stock and capital of the manufacturer located in another State, so as to enable the attribution of an aliquot part of the wealth of the manufacturer to the goods in the custody of the agent for the purpose of taxation? Would it not be as true in such case to say that the capital and wealth of the manufacturer facilitates and increases the capacity of the agent to transact business and adds value to the property the agent has for sale, as to say that the horses and wagons of an express company in New York and its capital there facilitate and aid the agents of such company and add value to the tangible property employed by such agents in transacting business in Ohio? It certainly cannot, I submit, with reason be said that there is not the same unity between the operations of a manufacturer who makes his goods in one State and sells them in another as there is between the operations of an express company. The sale of the manufactured goods is as essentially necessary to the profits of the manufacturer as is the manufacture of the goods themselves. No profit can result from the one without the other, and to attribute a supposed unity to the business of an express company, and to deny such unity to that of a manufacturer, is, as I understand it, to declare that there is a difference when there is no possible difference.

If the rule contended for by the State of Ohio be true, why would it not apply to a corporation, partnership or individual

engaged in the dry goods business or any other business having branches in various States? Would it not be as proper to say of such agencies, as it is of the agencies of express companies, that there is an intellectual unity of earnings between the main establishment and all such agencies, and therefore a right to assess goods found in an agency with relation to the capital and wealth of the original house and all the other branches situated in other States? Take the case of a merchant carrying on a general commercial business in one State and having connections of confidence and credit with another merchant of great capital in another State. If this rule be true, can it not also be said that such merchant derives advantages in his business from the sum of the capital in other States which may be availed of to extend his credit and his capacity to do business, and that therefore his tangible property must be valued accordingly? Suppose bankers in Boston, Philadelphia and New York of great wealth, owning stocks and bonds of various kinds, send representatives to New Orleans with a limited sum of money there to commence business. These representatives rent offices and buy office furniture. Is it not absolutely certain that the business of those individuals would be largely out of proportion to the actual capital possessed by them, because of the fact that reflexly and indirectly their business and credit is supported by the home offices? In this situation, the assessor comes for their tax return. He finds noted thereon only a limited sum of money and the value of the office furniture. What is to prevent that official under the rule of supposed metaphysical or intellectual unity between property from saying: "It is true you have but a small tangible capital, and your office furniture is only worth $250, but the value of property is in its use, and as you have various elements of wealth situated in the cities named, I will assess your property because of its use at a million dollars"? Such conduct would be exactly in accord with the power of taxation which it is here claimed the State of Ohio possesses, and which, as I understand it, the court now upholds. To give the illustrations, I submit, is to point to the confusion, injustice and impossibility of such a rule.

Nor, in conclusion, I submit is there any force in the argument advanced at bar that we have entered a new era requiring new and progressive adjudications, and that unless this court admits the power of the State of Ohio to tax to be as claimed, it will enable aggregations of capital to escape just taxation by the several States. This assertion, at best, but suggests that unless constitutional safeguards be overthrown, harm will come and wrong will be done. In its last analysis the claim is but a protestation that our institutions are a failure, that time has proven that the Constitution should not have been adopted, and that this court should now recognize that fact and shape its adjudications accordingly. The claim is as unsound as the fictitious assertion of expediency by which it is sought to be supported. If it be true that by the present enforcement of the Constitution and laws property will escape taxation, the remedy must come not from violating the Constitution but from upholding it.

Within the power lodged in Congress to regulate commerce between the States ample authority exists to enact the necessary legislation to prevent the just relations between the States, and the regulation of such commerce from becoming the pretext for avoiding the proper burdens of either State or national taxation. As the necessity arises such apt powers will doubtless be brought into operation. The recognition of the right of taxation exerted by the State of Ohio in these cases must, if followed in other States, not only reproduce the illegality and injustice here shown, but greatly increase it, as every new imposition will be a new levy on property already taxed, and result in an additional burden on interstate commerce. If the principles by which such results are brought about be recognized as lawful under the Constitution, not only will Congress be deprived of all power to protect the citizens of the respective States and the States themselves from these conditions, but it will also be rendered impotent to devise under the power to regulate commerce any just and fair regulation to prevent the interstate commerce clause from being made a shield for avoiding taxation and to cause property engaged in such commerce to be subjected to just and

uniform taxation on the part of the several States. Thus, by holding that the States possess the power claimed in this case to exist, not only will a wrong be committed, but that wrong will be permanently and without remedy engrafted into our constitutional system.

I am authorized to say that MR. JUSTICE FIELD, MR. JUSTICE HARLAN and MR. JUSTICE BROWN concur in this dissent.

AMERICAN EXPRESS COMPANY *v.* INDIANA.

ADAMS EXPRESS COMPANY *v.* INDIANA.

UNITED STATES EXPRESS COMPANY *v.* INDIANA.

ERROR TO THE CIRCUIT COURT OF MARION COUNTY, INDIANA.

Nos. 469, 470, 471. Argued December 10, 11, 1896. — Decided February 1, 1897.

Adams Express Co. v. *Ohio*, *ante* 194, followed, and held to govern this case.

THE case is stated in the opinion.

Mr. Lawrence Maxwell for the express companies. *Mr. Clarence A. Seward* for the Adams Express Company, and *Mr. Frank H. Platt* for the United States Express Company, were on his brief.

Mr. Attorney General and *Mr. William A. Ketcham*, Attorney General of the State of Indiana, for defendant in error. *Mr. Alonzo Greene Smith*, *Mr. Merrill Moores* and *Mr. Leon O. Bailey* were on their brief.

Mr. James C. Carter for the American Express Company.

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

Dissenting Opinion: White, Field, Harlan, Brown, JJ.

These were three actions instituted by the State of Indiana, in the Circuit Court of Marion County in that State, against the American Express Company, the Adams Express Company and the United States Express Company, to recover unpaid taxes for the years 1893 and 1894.

The defendants filed answers, setting up, among other defences, that the act under which the taxes were assessed was invalid because in contravention of the Constitution of the United States.

The causes were consolidated and tried by the Circuit Court, which made a special finding of facts and stated conclusions of law thereon in favor of the defendants, and entered judgment accordingly. The consolidated cause having been carried on appeal to the Supreme Court of the State, the judgment below was reversed, and the cause remanded, with instructions to restate the conclusions of law and to enter judgment against the defendant in each case as specifically directed. 42 N. E. Rep. 483. This was done, and from the judgments so entered writs of error were sued out from this court.

The legislation of the State of Indiana, the validity of which is attacked in these cases, so far corresponds with that of the State of Ohio, that the questions presented upon this record are the same, in effect, as those considered in *Adams Express Co.* v. *Ohio State Auditor*, and other cases, just decided, 165 U. S. 194, and require no reëxamination.

For the reasons there given the judgments are

Affirmed.

Mr. Justice White dissenting.

Mr. Justice Field, Mr. Justice Harlan, Mr. Justice Brown and myself dissent from the judgment of the court in these cases. As there is no substantial difference between the legal questions presented in the Ohio cases and those in the present cases, the reasons stated in the dissent announced in the former are relevant here, and are referred to as furnishing the reasons for this dissent.

ROSENCRANS v. UNITED STATES.

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

No. 522. Submitted January 11, 1897. — Decided February 1, 1897.

Under the act of July 20, 1892, c. 208, the grand jury in the southern division of the District of Montana had jurisdiction to find the indictment which forms the subject of discussion in this case; and, after such indictment had been found, the court had authority to remit it to the other division for trial.

Where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation.

The indictment of a person employed in the postal service for secreting, embezzling or destroying a cheque or draft in a letter delivered to him as such agent need not give a full description of the cheque or draft; but it is sufficient to say that, the instrument having been destroyed, the grand jury is unable to give any further description than is found in the indictment.

THE act of February 22, 1889, c. 180, 25 Stat. 676, 682, admitting Montana into the Union, provided that the State should constitute one judicial district, and that the sessions of the Circuit and District Courts of the United States should be held at Helena, in Lewis and Clarke County, that being the capital of the State. On July 20, 1892, the following act (c. 208) was passed, 27 Stat. 252:

"That the territory embraced within the following counties in the District of Montana, to wit: Beaverhead County, Madison County and the county of Silver Bow shall hereafter constitute and be known as the southern division of the District of Montana, and regular terms of the Circuit and District Courts of the United States for said district may be held at Butte City, Montana, on the first Tuesday in February and the first Tuesday in September of each year; and the said courts so sitting at Butte shall have and exercise the same jurisdiction and authority in all civil actions, pleas or pro-

ceedings, and in all prosecutions, informations, indictments, or other criminal or penal proceedings conferred by the general laws on the District and Circuit Courts of the United States; and where one or more defendants in any civil cause shall reside in said division, and one or more defendants to such cause shall reside out of said division, but in said district, then the plaintiff may institute his action either in the court having jurisdiction over the latter or in the said division. That this act shall not affect the jurisdiction, power and authority of the court as to actions, prosecutions and proceedings already begun and pending in said district, but the same will proceed as though this act had not been passed, except that the court shall have power, which it may exercise at discretion, to transfer to the court in said division such of said pending actions, prosecutions and proceedings as might properly be begun therein under the provisions of this act."

On March 18, 1895, an indictment in five counts was presented in the Circuit Court, charging the defendant with violating section 5467 of the Revised Statutes, which reads:

"Any person employed in any department of the postal service who shall secrete, embezzle or destroy any letter, packet, bag or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier or other person employed in any department of the postal service, . . . and which shall contain any . . . draft, cheque, warrant, . . . or any other article of value, or writing representing the same, . . . shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

The fourth count, upon which alone the defendant was found guilty, charged that on the 13th day of July, 1894, "in the State and District of Montana and within the jurisdiction of this court," the defendant, "a person employed in the postal service of the United States, to wit, a railway postal clerk, . . . and in the discharge of the duties of that position on the Great Northern Railway, between the station of

Havre, in the county of Choteau, and the station of Kalispell, in the county of Flathead, in said State of Montana," did destroy a registered letter and the contents thereof, which letter had "come into his possession as such railway postal clerk, and which was intended to be and was then and there being conveyed by United States mail, and which said registered letter had been deposited in the mail at the United States post office at Sacramento," directed to "Mrs. Emilie Heistans Greitzer, Gasthaus etzel b. Einsedeln Ct. Schwizz, Schweizerland, which said registered letter contained a draft for fifty francs, D. O. Mills & Co., No. d.08250, on Paris, France (a more particular description of which is to the grand jurors aforesaid unknown)."

The term of the Circuit Court for the District of Montana, at which the grand jury was empanelled and at which this indictment was presented, was held at the city of Butte, in the southern division of the district. Thereafter, the defendant having been arrested, on motion of the United States District Attorney, the indictment was remitted for trial to the term of court to be held at Helena, in Lewis and Clarke County, in the other division of the district. No objections to this transfer were made by the defendant. Trial being had, the jury found the defendant guilty, as heretofore stated, under the fourth count. A motion in arrest, in which for the first time the question of jurisdiction was raised, having been made and overruled, the defendant was sentenced to imprisonment for the term of one year; whereupon this writ of error was sued out.

Mr. Thomas H. Carter and *Mr. S. S. Burdett* for plaintiff in error.

Mr. Solicitor General for defendants in error.

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

Counsel for defendant state that the main question for determination is one of jurisdiction: First, of the grand jury

in the southern division of the District of Montana to find the indictment; and, second, whether such indictment, having been found, the court had authority to remit it to the other division for trial.

It is insisted that the Circuit Court for the southern division had jurisdiction under the act of 1892 of only such offences as were committed within the limits of the division; that therefore the grand jury had no authority to find an indictment for an offence such as this, apparently committed in the other division. The solution of this question depends upon the construction to be given to the act of 1892. By § 563, Rev. Stat., the District Courts are given jurisdiction "of all crimes and offences cognizable under the authority of the United States, committed within their respective districts." By § 629, par. 20, the Circuit Courts have "concurrent jurisdiction with the District Courts of crimes and offences cognizable therein."

These statutes declare the general rule, that jurisdiction is coextensive with district. That being the general rule, no mere multiplication of places at which courts are to be held or mere creation of divisions nullifies it. Indeed, the place of trial has no necessary connection with the matter of territorial jurisdiction. By § 581, Rev. Stat., it is provided that "a special term of any District Court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require." And by § 729, that "the trial of offences punishable with death shall be had in the county where the offence was committed, where it can be done without great inconvenience." Jurisdiction in the trial courts being thus bounded by district, we find many acts, some increasing in a district the places of trial, and others in terms subdividing the district into divisions. The former have no effect on the matter of jurisdiction. Some of these latter acts specifically limit the jurisdiction in criminal actions of the courts held in a division to the territory within that division; as, for instance, in respect to Alabama act of May 2, 1884, c. 38, 23 Stat. 18, Louisiana act of August 8, 1888, c. 789, 25 Stat. 388, Michigan

act of June 19, 1878, c. 326, 20 Stat. 175, Ohio act of June 8, 1878, c. 169, 20 Stat. 101; act of February 4, 1880, c. 18, 21 Stat. 63, Tennessee act of June 11, 1880, c. 203, 21 Stat. 175, Texas act of March 1, 1889, c. 333, 25 Stat. 783, 786; while, on the other hand, some contain no such provision, as in the case of Minnesota, act of April 26, 1890, c. 167, 26 Stat. 72, *Post* v. *United States*, 161 U. S. 583, 585, though this was changed by the subsequent act of July 12, 1894, c. 132, 28 Stat. 102; *Post* v. *United States*, 161 U. S. 583.

In the light of this legislation, with its diversity of provision, we are called upon to construe the act of 1892, creating the southern division of the District of Montana. The first part of the section simply creates the division and defines its limits. This is followed by the general declaration that the courts so sitting in Butte, the place at the southern division in which they are to be held, "shall have and exercise the same jurisdiction and authority in all civil actions, pleas or proceedings, and in all prosecutions, informations, indictments or other criminal or penal proceedings conferred by the general laws upon the Circuit and District Courts of the United States." If the section stopped here there would be no question. The mere creation of a division does not disturb the general jurisdiction over the district. And, in addition, the language just quoted makes an affirmative grant to the courts when sitting at Butte, of all the jurisdiction, civil and criminal, vested in the Circuit and District Courts; that is, a jurisdiction coextensive with the district. The latter part of the section causes all the doubt in respect to the matter. In that are found two provisions, one that, where one or more of the defendants in any civil cause reside in one division and one or more in another, the plaintiff may institute his action in either division. This of course has no bearing on the question of jurisdiction in criminal cases. The second, that the act should not affect the jurisdiction of the court as to actions, prosecutions and proceedings already begun; that they should proceed where they were commenced, with a proviso that the court might in its discretion transfer all such actions, etc., as might properly be begun in the new division to the court in that division.

This language is broad enough to include criminal actions. Too much stress should not be placed on the word "properly." The creation of divisions and the multiplication of places of trial are for the convenience of litigants, bringing the trial nearer to them and their witnesses. There is a manifest propriety, even when no jurisdictional necessity, in conducting criminal prosecutions as near to the place of the offence as possible. The idea of the vicinage is familiar to criminal law. And all that Congress may have intended by this second provision was to make it clear that the court should have the power to transfer to this new division any pending proceeding which might with more convenience and therefore propriety be prosecuted at the place at which in the new division the sessions of the court were to be held. It must, however, be conceded that these provisions do carry some implication that a distribution has been made of territorial jurisdiction between the courts of the two divisions, and the question we have to determine is whether this implication is sufficient to create a distribution which the statute has not in terms made. It may be said, and with force, that there is no need of the last half of the section; that it is superfluous, unless upon the assumption that there has been a distribution of jurisdiction, civil or criminal or both, coextensive with the territories of the two divisions, and yet can it be adjudged that Congress has created such distribution when it has not in terms directed it, simply because some expressions in the statute imply its existence? The question is a difficult one, and yet we think the true rule of construction is this: When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. Especially is this rule to control when it appears that Congress in some cases has made express provision for effecting a

change. This does not conflict with the doctrine stated in *In re Bonner*, 151 U. S. 242, 256, that the jurisdiction of a court in criminal cases cannot "be enlarged by any mere inferences from the law or doubtful construction of its terms." It is rather the converse of that, for the effort is to destroy a jurisdiction otherwise clearly existing, by mere inferences and doubtful construction.

This may be a case of mere omission, but it is an omission which the courts cannot supply. We cannot assume that because Congress in creating some divisions distributed jurisdiction it meant, in creating other divisions, to also so distribute it, and when we find that in some cases of division it distributed the jurisdiction and in other cases not, we are not justified in assuming that in this case it intended a distribution which it did not in terms make simply because of the use of language which somewhat implies that a distribution had already been made.

So far as the mere transfer of the place of trial from one division to another, it would seem, in the absence of express prohibition, to be within the competency of the court having full jurisdiction over the entire district, and certainly presents no ground of error when it is not at the time challenged, and the trial proceeds without objection.

These considerations also show that there is no force in the objection that the indictment does not specify the place at which the grand jury that found it was sitting, and also as to the certainty of the venue.

The only remaining question is in reference to the description of the draft which was in the letter destroyed. It is insisted that this is not sufficient. This objection cannot be sustained. The gravamen of the charge is the destruction of the letter. It is an offence against the postal laws of the United States, and while the letter must contain a draft, cheque or some other thing of value or supposed value in order to bring the case within the compass of this statute, yet it is unnecessary to describe this draft, cheque, etc., with the same precision as if forgery or some other crime directed against the instrument itself was charged. A full description

of the cheque or draft being unessential, it is clearly sufficient when the grand jury say that the instrument having been destroyed they are unable to give any further description than such as is found in this indictment, for that, as will be seen, contains some matters of description and identification. There being no other questions presented in the record, and in these appearing no error, the judgment of the Circuit Court is

Affirmed.

Mr. Justice Gray and Mr. Justice White dissented.

THE VALENCIA.[1]

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

No. 51. Submitted May 7, 1896. — Decided February 1, 1897.

One furnishing supplies or making repairs on the order simply of a person acquiring the control and possession of a vessel under a charter party requiring him to provide and pay for all the coals, etc., cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, and he fails to make the inquiry, and chooses to act on a mere belief that the vessel will be liable for his claim.

The case is stated in the opinion.

Mr. Frederic R. Coudert and *Mr. Joseph Kling* for appellants.

Mr. William W. Goodrich and *Mr. John A. Deady* for appellees.

Mr. Justice Harlan delivered the opinion of the court.

This case is before us upon a question certified by the

[1] The docket title of this case is "The Steamship Valencia, her tackle, etc. William G. Boulton *et al.*, Claimants, *v.* William H. Ziegler *et al.*"

United States Circuit Court of Appeals for the Second Circuit under the act of March 3, 1891, c. 517, 26 Stat. 826.

The facts out of which the question arises are as follows: Upon orders given by the New York Steamship Company, a New Jersey corporation engaged in business at the city of New York, the libellants at different times, at that port, furnished and delivered coal on board of the steamship Valencia for its specific use. The vessel was registered at Wilmington, North Carolina, but was owned by citizens of New York. The coal was necessary to enable it to make a series of regular trips from New York to and from the ports of Maine. In some instances the orders for the coal were sent direct by mail; in others, through a broker, either by the general manager of the company or by the superintendent of the dock. The libellants began to supply the coal on the 30th day of April, 1890, and furnished, from time to time down to and including July 5th, six cargoes, bills for which were sent to the office of the steamship company in the city of New York, and were paid by it.

None of the coal was delivered by the order of the master or by his procurement or with his expressed consent.

The corporation operated the steamship under a charter requiring it "to provide and pay for all the coals," etc. The libellants were not aware of the existence of the charter at the time they furnished the coal, nor did they know where the ship hailed from, whether she was foreign or domestic, nor what was her credit. They were at the time without knowledge of the ownership of the vessel or of the relations between it and the New York Steamship Company, except that that company "appeared to be directing its operation." They made no inquiry as to the solvency of the steamship company, or as to the ownership or nationality of the vessel, but, in the belief that the ship was responsible for supplies furnished, delivered the coal as above stated, charging the same on its books to "S. S. Valencia and owners, New York," in some cases "city," in others "Pier 49, E. R., New York."

No fact proved in the case warranted the inference that

either the master or the charterer agreed to pledge the credit of the vessel for the coal.

By the laws of New York (c. 482 of 1862) it is provided: "§ 1. Whenever a debt amounting to fifty dollars or upwards as to a seagoing or ocean-bound vessel . . . shall be contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them, within this State for either of the following purposes: 1st. On account of work done or materials or other articles furnished in this State for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel; 2d. For such provisions and stores furnished within this State as may be fit and proper for the use of such vessel at the time the same were furnished, . . . such debt shall be a lien upon such vessel, her tackle, apparel and furniture," etc. No lien was filed under the statute of the State.

Libellants insisted that for other supplies of coal of the aggregate value of $1608.75, furnished in the months of June, July and August, they were entitled to a maritime lien on the ship. The District Court having sustained their claim, an appeal was prosecuted to the Circuit Court of Appeals.

The question certified to this court is: Whether, upon the above facts, the libellants obtained a maritime lien on the steamship for the supplies thus furnished and not paid for.

In *The Kate*, decided at the present term — in which case the libellant claimed a maritime lien on a vessel for coal furnished upon the order of a charterer who was bound by the charter party to provide and pay for all coal required by the vessel — this court said: "The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had at the time in his hands funds which his duty required that he should apply in the purchase of needed sup-

plies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts." Again: "If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less is one recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them." 164 U. S. 458, 469, 470.

The libellants contend that although the coal was furnished on the order of the charterer, and not on that of the master, they have a maritime lien on the vessel to secure their claim, and cite in support of that view, *The Grapeshot*, 9 Wall. 129, *The Lulu*, 10 Wall. 192, 196, *The Kalorama*, 10 Wall. 204, 210, 213, 214, and *The Patapsco*, 13 Wall. 329.

In *The Grapeshot*, it was said, among other things, that "where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit"; in *The Lulu*, that "experience shows that ships and vessels employed in commerce and navigation often need repairs and supplies in course of a voyage, when the owners of the same are absent, and at times and places when and where the master may be without funds, and may find it impracticable to communicate seasonably with the owners of the vessel upon the subject," and that "contracts for repairs and supplies, under such circumstances, may be made by the

master to enable the vessel to proceed on her voyage, and if the repairs and supplies were necessary for that purpose, and were made and furnished to a foreign vessel or to a vessel of the United States in a port other than the port of the State where the vessel belongs, the *prima facie* presumption is that the repairs and supplies were made and furnished on the credit of the vessel, unless the contrary appears from the evidence in the case"; and in *The Kalorama* — in which case all the advances were made at the request of the master, in the absence of the owner, or by the owner in person when he was present, and with the understanding that they were made on the credit of the vessel — that "the necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, unless it is shown that the master had funds or that the owner had sufficient credit, and that the repairers, furnishers and lenders of the money knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel."

These were cases of supplies furnished on the order of the master, and what was said by this court must, therefore, be taken in the light of the principle, that as the master of the ship stands in the position of agent or representative of the owners, the latter "are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use," *The Aurora*, 1 Wheat. 96, 101; or, as expressed in *The St. Jago de Cuba*, 9 Wheat. 409, 416, the law maritime, in order that the ship may get on, "attaches the power of pledging or subjecting the vessel to material men, to the office of shipmaster; and considers the owner as vesting him with those powers by the mere act of constituting him shipmaster." Upon this ground, as was said in *The J. E. Rumbell*, 148 U. S. 1, 9, maritime liens or privileges for necessary advances

made or supplies furnished in good faith to the master in a foreign port, to keep a vessel fit for sea, "are preferred to a prior mortgage, or to a forfeiture to the United States for a precedent violation of the navigation laws." The relations of the master to the vessel and its owners, as well as to shippers of cargo, are such that his power and duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, were held in *Ralli* v. *Troop*, 157 U. S. 386, 400–1, to appertain to him "*magister navis*, as the person intrusted with the command and safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him or succeeds to his authority."

In the case of *The Patapsco* it appeared that the supplies were furnished to the vessel in a foreign port. This court, recognizing the case to be an embarrassing one and not free from difficulty, proceeded on the ground that, as according to the weight of the evidence the supplies were furnished on the credit of the ship, and not on that of the company which used it, and which was notoriously insolvent, there was a lien on the vessel that should not be displaced except upon affirmative proof that the credit was given to the company to the exclusion of the vessel. Nothing, however, was said in that case to justify the contention that a lien will arise for necessary supplies furnished a vessel, in a foreign port, on the order of a charterer, if the libellant at the time knew, or by reasonable diligence could have ascertained, that it was being run under a charter that obliged the charterer to provide and pay for all needed supplies. That case turned largely upon its special facts, and was so presented to this court as to restrict its inquiry to the single point whether the coal was furnished to the Patapsco on the credit of the vessel or of the owners. In point of fact, the Patapsco was run under a charter party by the Commercial Steamboat Company, a corporation of Rhode Island. But that corporation owned and operated steamers of its own on the same line in which the Patapsco was employed; and the court in examining the case seemed to have

treated that company as the owner of all the vessels used on its line. This is apparent from the opinion, which states that "whether the coal was furnished on the credit of the vessel or of the owners is the only point of inquiry in this case."

Nor is there anything in *The Guy*, 9 Wall. 758, which bears directly on the question now presented. The opinion was very brief and stated nothing more than that upon the facts established that case was governed by the principles announced in *The Grapeshot*, decided at the same term. According to the reporter's statement of the facts it was a case of repairs ordered by one claiming to be the proprietor and agent of the company operating the vessel, and who "seemed to have been the owner." It was substantially the case of necessary repairs made pursuant to an agreement or understanding with the owner that they were made on the credit of the vessel, the owner himself being known to be insolvent and unworthy of credit.

In the present case, the question of lien or no lien on the vessel arises under circumstances not disclosed or discussed in any of the cases upon which libellants rely. Although the libellants were not aware of the existence of the charter party under which the Valencia was employed, it must be assumed upon the facts certified that by reasonable diligence they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libellants knew that the steamship company had an office in the city of New York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters or in reference to the solvency or credit of that company. It is true that libellants delivered the coal in the belief that the vessel, whether a foreign or a domestic one, or by whomsoever owned, would be responsible for the value of such coal. But such a belief is not sufficient in itself to give a maritime lien. If that belief was founded upon the supposition that

the steamship company owned the vessel, no lien would exist, because in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made "on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." *The St. Jago de Cuba*, 9 Wheat. 409, 416, 417. And if the belief that the vessel would be responsible for the supplies was founded on the supposition that it was run under a charter party, then the libellants are to be taken as having furnished the coal at the request of the owner *pro hac vice*, *Stephenson* v. *The Francis*, 21 Fed. Rep. 715, 717, *The Samuel Marshall*, 54 Fed. Rep. 397, 399, without any express agreement for a lien, and in the absence of any circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred. In the present case, we are informed by the record that there was no express agreement for a lien, and that nothing occurred to warrant the inference that either the master or the charterer agreed to pledge the credit of the vessel for the coal.

In *Beinecke* v. *Steamship Secret*, 3 Fed. Rep. 665, 667, United States District Court for the Southern District of New York, which was a suit against a vessel owned by a foreign corporation having an office and transacting business in New York, and with good credit there, but operated by Murray, Ferris & Co., a New York firm, under a charter party requiring the charterers to furnish all supplies, Judge Choate said: "They [the libellants] knew they were dealing with New York parties, and not with the foreign owner or the master, who presumably represents the owner; and they were put upon inquiry as to the interest and relation of Murray, Ferris & Co. to the vessel, and are chargeable with the facts they might have ascertained on such inquiry. They could easily have learned that Murray, Ferris & Co. had no right or power to bind the owners or the vessel for the supplies, and that they were, in fact, the owners, so far as concerned parties supplying the ship." So, in *The Norman*, 28 Fed. Rep. 383, 384, Judge McKennan said: "But Murray, Ferris & Co. [the

charterers] were residents of New York, at which port the vessel was lying when the coal was furnished, and they furnished it directly, without the intervention of the official representative of the vessel. They were owners *pro hac vice*, because they had possession of the vessel, and she was at their "sole disposal" until the end of the charter. These facts repel the implication that the coal was furnished upon the credit of the vessel, but warrant the inference that it was furnished upon the personal credit of the charterers and ostensible owners. At least they were sufficient to put the libellant upon inquiry as to the actual relations of Murray, Ferris & Co. to the vessel, and their obligations under the charter party; and this must have resulted in the knowledge that the act of the charterers could not, under the circumstances, impose a lien upon the vessel." In *The Samuel Marshall*, 49 Fed. Rep. 754, 757, affirmed in 6 U. S. App. 389, Judge Severens said: "If the vessel is then in the use, possession and control of others than the owner, a presumption arises that such others are liable to pay the charges incident to the employment; and if the party furnishing the supplies knew, or should have known, the facts in regard to the use and control of the vessel, there is the same reason for the presumption against the credit being given to the vessel, when the charterer or other person standing in a similar relation to the vessel resides at the port of supply, as in cases where the owner operating the vessel on his own account resides at such port, and 'where there is the same reason there should be the same law.'" See also *The Suliote*, 23 Fed. Rep. 919; *The Pirate*, 32 Fed. Rep. 486; *The Glenmont*, 34 Fed. Rep. 402; *The Golden Gate*, 1 Newberry, 308.

Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine. We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control and possession of a vessel under such a charter party can-

not acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.

For the reasons stated the question certified to this court is answered in the negative.

PIM *v.* ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 180. Argued January 27, 1897. — Decided February 1, 1897.

No Federal right was set up in this case until after the final decision of the case by the Supreme Court of Missouri; and then by a petition for rehearing. *Held*, that the claim of a Federal right came too late, so far as the revisory power of this court is concerned.

THE case is stated in the opinion.

Mr. Leverett Bell (with whom was *Mr. Henry B. Davis* on the brief) for plaintiff in error.

Mr. W. C. Marshall appeared for defendant in error, but the court declined to hear further argument.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action for the recovery of certain real estate in the city of St. Louis of the possession of which the plaintiff in error, who was the plaintiff below, alleged that she was illegally and wrongfully deprived by the defendants. The city denied the plaintiff's claim, and relied upon continuous adverse possession for ten years prior to the accruing of the plaintiff's cause of action.

We held at the present term in *Chicago & Northwestern*

Railway v. *Chicago*, 164 U. S. 454, 457, as had frequently before been adjudged, that this court could not review the final judgment of the highest court of the State, alleged to have denied a right protected by the Constitution of the United States, unless such right was specially set up or claimed in the state court by the party against whom the judgment was rendered. Rev. Stat. § 709.

It is contended on this writ of error that the judgment below deprived the plaintiff in error of her property without due process of law, and that this result was accomplished by applying to the case a certain statute of limitations of Missouri as construed and enforced by the highest court of that State.

Upon inspecting the record, we find that no Federal right was set up or claimed, in any form, until after the final decision of the case by the Supreme Court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged Federal question, indeed without any allusion to it. The claim of a Federal right came too late, so far as the revisory power of this court is concerned. *Loeber* v. *Schroeder*, 149 U. S. 580, 585; *Sayward* v. *Denny*, 158 U. S. 180, 183.

It is contended that the cases of *Huntington* v. *Attrill*, 146 U. S. 657, *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380, and *Scott* v. *McNeal*, 154 U. S. 34, recognized some exceptions to this general rule. But an examination of the first and last named of those cases, as reported, will show that a Federal right was specially claimed in and was passed upon by the state court. In *Marchant* v. *Pennsylvania Railroad* it does not distinctly appear from the opinion of the court that the Federal right alleged to have been violated was specially claimed in the state court. But the record of that case shows not only that such was the fact, but that the jurisdiction of this court in that case was beyond question.

The writ of error must be dismissed for want of jurisdiction.

ROBERTSON *v.* BALDWIN.[1]

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

No. 334. Argued December 15, 1896. — Decided January 25, 1897.

Section 4598 of the Revised Statutes is not unconstitutional by reason of its authorizing justices of the peace to issue warrants to apprehend deserting seamen, and deliver them up to the master of their vessel.

The judicial power of the United States is defined by the Constitution, and does not prevent Congress from authorizing state officers to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power, rather than a part of it.

Section 4598 and 4599, in so far as they require seamen to carry out the contracts contained in their shipping articles, are not in conflict with the Thirteenth Amendment forbidding slavery and involuntary servitude; and it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to such contracts.

The contract of a sailor has always been treated as an exceptional one, and involving to a certain extent the surrender of his personal liberty during the life of the contract.

This was an appeal from a judgment of the District Court for the Northern District of California, rendered August 5, 1895, dismissing a writ of *habeas corpus* issued upon the petition of Robert Robertson, P. H. Olsen, John Bradley and Morris Hansen.

The petition set forth, in substance, that the petitioners were unlawfully restrained of their liberty by Barry Baldwin, marshal for the Northern District of California, in the county jail of Alameda County, by virtue of an order of commitment made by a United States commissioner, committing them for trial upon a charge of disobedience of the lawful orders of the master of the American barkantine Arago; that such com-

[1] The docket title of this case is "Robert Robertson, P. H. Olsen, John Bradley and Morris Hansen *v.* The United States and Barry Baldwin, individually and as marshal of the United States in and for the Northern District of California."

mitment was made without reasonable or probable cause, in this: That at the time of the commission of the alleged offence, petitioners were held on board the Arago against their will and by force, having been theretofore placed on board said vessel by the marshal for the District of Oregon, under the provisions of Rev. Stat. § 4596, subdivision 1, and §§ 4598, 4599, the master claiming the right to hold petitioners by virtue of these acts; that §§ 4598 and 4599 are unconstitutional and in violation of Section 1 of Article III of, and of the Fifth Amendment to, the Constitution; that § 4598 was also repealed by Congress on June 7, 1872, 17 Stat. 262, and that the first subdivision of § 4596 is in violation of the Thirteenth Amendment, in that it compels involuntary servitude.

The record was somewhat meagre, but it sufficiently appeared that the petitioners had shipped on board the Arago at San Francisco for a voyage to Knappton in the State of Washington; thence to Valparaiso; and thence to such other foreign ports as the master might direct, and return to a port of discharge in the United States; that they had each signed shipping articles to perform the duties of seamen during the course of the voyage; but, becoming dissatisfied with their employment, they left the vessel at Astoria, in the State of Oregon, and were subsequently arrested under the provisions of Rev. Stat. §§ 4596 to 4599, taken before a justice of the peace, and by him committed to jail until the Arago was ready for sea (some sixteen days), when they were taken from the jail by the marshal and placed on board the Arago against their will; that they refused to "turn to" in obedience to the orders of the master, were arrested at San Francisco, charged with refusing to work in violation of Rev. Stat. § 4596; were subsequently examined before a commissioner of the Circuit Court, and by him held to answer such charge before the District Court for the Northern District of California.

Shortly thereafter they sued out this writ of *habeas corpus*, which, upon a hearing before the District Court, was dismissed, and an order made remanding the prisoners to the custody of the marshal.

Whereupon petitioners appealed to this court.

Mr. Jackson H. Ralston for appellants. *Mr. James G. Maguire* and *Mr. H. W. Hutton* were with him on the brief.

Mr. Solicitor General for appellees.

Mr. Justice Brown delivered the opinion of the court.

Upon what ground the court below dismissed the writ, and remanded the petitioners, does not appear, but the record raises two questions of some importance. *First*, as to the constitutionality of Rev. Stat. §§ 4598 and 4599, in so far as they confer jurisdiction upon justices of the peace to apprehend deserting seamen, and return them to their vessel; *Second*, as to the conflict of the same sections and also § 4596 with the Thirteenth Amendment to the Constitution, abolishing slavery and involuntary servitude.

Section 4598, which was taken from § 7 of the act of July 20, 1790, c. 29, 1 Stat. 131, 134, reads as follows:

"Sec. 4598. If any seaman who shall have signed a contract to perform a voyage shall, at any port or place, desert, or shall absent himself from such vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter, and bring him before such justice; and if it then appears that he has signed a contract within the intent and meaning of this title, and that the voyage agreed for is not finished, or altered, or the contract otherwise dissolved, and that such seaman has deserted the vessel, or absented himself without leave, the justice shall commit him to the house of correction or common jail of the city, town or place, to remain there until the vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman."

Sec. 4599, which was taken from § 53 of the Shipping Commissioners' Act of June 7, 1872, c. 322, 17 Stat. 262, 274, authorizes the apprehension of deserting seamen, with or without the assistance of the local public officers or constables, and without a warrant, and their conveyance before any court of justice or magistrate of the State to be dealt with according to law.

Sec. 4596, which is also taken from the same act, provides punishment by imprisonment for desertion, refusal to join the vessel, or absence without leave.

1. The first proposition, that Congress has no authority under the Constitution to vest judicial power in the courts or judicial officers of the several States, originated in an observation of Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330, to the effect that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." This was repeated in *Houston* v. *Moore*, 5 Wheat. 1, 27; and the same general doctrine has received the approval of the courts of several of the States. *United States* v. *Lathrop*, 17 Johns. 4; *Ely* v. *Peck*, 7 Connecticut, 239; *United States* v. *Campbell*, 6 Hall's Law Jour. 113 [Ohio Com. Pleas]. These were all actions for penalties, however, wherein the courts held to the familiar doctrine that the courts of one sovereignty will not enforce the penal laws of another. *Huntington* v. *Attrill*, 146 U. S. 657, 672. In *Commonwealth* v. *Feely*, 1 Va. Cases, 321, it was held by the General Court of Virginia in 1813 that the state courts could not take jurisdiction of an indictment for a crime committed against an act of Congress.

In *Ex parte Knowles*, 5 California, 300, it was also held that Congress had no power to confer jurisdiction upon the courts of a State to naturalize aliens, although, if such power be recognized by the legislature of a State, it may be exercised by the courts of such State of competent jurisdiction.

In *State* v. *Rutter*, 12 Niles' Register, 115, 231, it was held in 1817 by Judges Bland and Hanson of Maryland that Congress had no power to authorize justices of the peace to issue warrants for the apprehension of offenders against the laws of

the United States. A directly contrary view, however, was taken by Judge Cheves of South Carolina in *Ex parte Rhodes*, 12 Niles' Reg. 264.

The general principle announced by these cases is derived from the third article of the Constitution, the first section of which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," the judges of which courts "shall hold their offices during good behavior," etc.; and by the second section, "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects."

The better opinion is that the second section was intended as a constitutional definition of the judicial power, *Chisholm* v. *Georgia*, 2 Dall. 419, 475, which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of "cases" in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself. This was the view taken by the Supreme Court of Alabama in *Ex parte Gist*, 26 Alabama, 156, wherein the authority of justices of the peace and other such officers to arrest and commit for a violation of the criminal law of the United States

was held to be no part of the judicial power within the third article of the Constitution. And in the case of *Prigg* v. *Pennsylvania*, 16 Pet. 539, it was said that, as to the authority conferred on state magistrates to arrest fugitive slaves and deliver them to their owners, under the act of February 12, 1793, while a difference of opinion existed, and might still exist upon this point in different states, whether state magistrates were bound to act under it, no doubt was entertained by this court that state magistrates might, if they chose, exercise the authority, unless prohibited by state legislation. See also *Moore* v. *Illinois*, 14 How. 13; *In re Kaine*, 14 How. 103.

We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel is not within the definition of the "judicial power" as defined by the Constitution, and may be lawfully conferred upon state officers. That the authority is a most convenient one to entrust to such officers cannot be denied, as seamen frequently leave their vessels in small places, where there are no Federal judicial officers, and where a justice of the peace may usually be found, with authority to issue warrants under the state laws.

2. The question whether sections 4598 and 4599 conflict with the Thirteenth Amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of

another during the continuance of the contract; — not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823, 4 Geo. IV, c. 34, § 3, it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors and possibly some others, nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people

to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion, *United States* v. *Ball*, 163 U. S. 662, 672; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon or by statutory enactment. *Brown* v. *Walker*, 161 U. S. 591, and cases cited. Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words "involuntary servitude" were said in the *Slaughter-house cases*, 16 Wall. 36, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

From the earliest historical period the contract of the sailor

has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained — as Molloy forcibly expresses it, "to rot in her neglected brine." Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles.

Even by the maritime law of the ancient Rhodians, which is supposed to antedate the birth of Christ by about 900 years, according to Pardessus, (Lois Maritimes, vol. 1, page 250,) if the master or the sailors absented themselves by night, and the vessel were lost or damaged, they were bound to respond in the amount of the loss.

In the compilation of maritime laws, known as the Consulate of the Sea, it was also provided that a sailor should not go ashore without permission, upon the penalty of being obliged to pay any damage occasioned by his absence, and, in default of his being able to respond, of being thrust in prison until he had paid all such damage. Chapters 121, 124; 2 Pardessus, 146, 147, 148.

A like provision is found in the Rules of Oleron, promulgated in the reign of Henry III, by which, Art. V, the seamen were forbidden to leave the ship without the master's consent. "If they do and by that means she happens to be lost or damnified, they shall be answerable for the damage." 1 Pet. Ad'my, xi. A similar prohibition is found in article seventeen of the laws of Wisbuy. 1 Pet. Ad. lxxiii.

The laws of the towns belonging to the Hanseatic League, first enacted and promulgated in 1597, were still more explicit and severe. No seaman might go ashore without the consent

of the master or other officer, and if he remained longer than the time allowed, was condemned to pay a fine or suffer an imprisonment (Arts. 22 and 23); and by article forty if a seaman went ashore without leave, and the ship happened to receive any damage, "he shall be kept in prison upon bread and water for one year," and if any seaman died or perished for the want of the assistance of the absent seaman, the latter was subject to corporal punishment; and, by article forty-three, "if an officer or seaman quits a ship and conceals himself; if afterwards he is apprehended, he shall be delivered up to justice to be punished; he shall be stigmatized in the face with the first letter of the name of the town to which he belongs." 1 Pet. Ad. cii.

By the Marine Ordinance of Louis XIV, which was in existence at the time the Constitution was adopted (Title Third, Art. III), "if a seaman leaves a master without a discharge in writing before the voyage is begun, he may be taken up and imprisoned wherever he can be found, and compelled to restore what he has received, and serve out the time for which he had engaged himself for nothing; and if he leaves the ship after the voyage is begun, he may be punished corporally." Art. V: "After the ship is laded, the seamen shall not go ashore without leave from the master, under pain of five livres for the first fault; and may be punished corporally if they commit a second."

The present commercial code of France, however, makes no express provision upon the subject; but by the general mercantile law of Germany, Art. 532, "the master can cause any seaman, who, after having been engaged, neglects to enter upon or continue to do his duties, to be forcibly compelled to perform the same."

By the Dutch code, Art. 402, "the master, or his representative, can call in the public force against those who refuse to come on board, who absent themselves from the ship without leave, and refuse to perform to the end of the service for which they were engaged."

Nearly all of the ancient commercial codes either make provision for payment of damages by seamen who absent

themselves from their ships without leave, or for their imprisonment, or forcible conveyance on board. Some of the modern commercial codes of Europe and South America make similar provisions. (Argentine Code, Art. 1154.) Others, including the French and Spanish codes, are silent upon the subject.

Turning now to the country from which we have inherited most immediately our maritime laws and customs, we find that Malynes, the earliest English writer upon the Law Merchant, who wrote in 1622, says in his *Lex Mercatoria* (vol. I, chap. 23), that "mariners in a strange port, should not leave the ship without the master's license, or fastening her with four ropes, or else the loss falls upon them. . . . In a strange country, the one half of the company, at least, ought to remain on shipboard, and the rest who go on land should keep sobriety and abstain from suspected places, or else should be punished in body and purse; like as he who absents himself when the ship is ready to sail. Yea, if he give out himself worthier than he is in his calling, he shall lose his hire; half to the admiral, and the other half to the master." Molloy, one of the most satisfactory of early English writers upon the subject, states that if seamen depart from a ship without leave or license of the master, and any disaster happens, they must answer, quoting Art. V of the Rules of Oleron in support of his proposition.

There appears to have been no legislation directly upon the subject until 1729, when the act of 2 Geo. II, c. 36, was enacted "for the better regulation and government of seamen in the merchants' service." This act not only provided for the forfeiture of wages in case of desertion, but for the apprehension of seamen deserting or absenting themselves, upon warrants to be issued by justices of the peace, and, in case of their refusal, to proceed upon the voyage, for their committal to the house of correction at hard labor. Indeed, this seems to have furnished a model upon which the act of Congress of July 20, 1790 (1 Stat. 131), for the government and regulation of seamen in the merchants' service, was constructed. The provisions of this act were substantially repeated by the

act of 1791 (31 Geo. III, c. 39), and were subsequently added to and amended by acts of 5 & 6 Wm. IV, c. 19, and 7 & 8 Victoria, c. 112.

The modern law of England is full and explicit upon the duties and responsibilities of seamen. By the Merchants' Shipping Act of 1854, 17 & 18 Victoria, c. 104, section 243, a seaman guilty of desertion might be summarily punished by imprisonment, by forfeiture of his clothes and effects, and all or any part of his wages. Similar punishment was meted out to him for neglecting or refusing to join his ship, or to proceed to sea, or for absence without leave at any time. By section 246, "whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice neglects, or refuses to join, or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve," the master was authorized to call upon the police officers or constables to apprehend him without warrant and take him before a magistrate who, by article 247, was authorized to order him to be conveyed on board for the purpose of proceeding on the voyage.

The provision for imprisonment for desertion seems to have been repealed by the Merchants' Seamen (Payment of Wages and Rating) Act of 1880, 43 & 44 Vict. c. 16; but the tenth section of that act retained the provision authorizing the master to call upon the police officers or constables to convey deserting seamen on board their vessels.

This act, however, appears to have been found too lenient, since, in 1894, the whole subject was reconsidered and covered in the new Merchants' Shipping Act, 57 & 58 Vict. c. 60, of 748 sections, section 221 of which provides not only for the forfeiture of wages in case of desertion, but for imprisonment with or without hard labor, except in cases arising in the United Kingdom. The provision for the arrest of the deserting seaman, and his conveyance on board the ship, is, however, retained both within and without the kingdom. §§ 222, 223. This is believed to be the latest legislation on the subject in England.

The earliest American legislation, which we have been able

to find, is an act of the Colonial General Court of Massachusetts, passed about 1668, wherein it was enacted that any mariner who departs and leaves a voyage upon which he has entered, shall forfeit all his wages, and shall be further punished by imprisonment or otherwise, as the case may be circumstanced; and if he shall have received any considerable part of his wages, and shall run away, he shall be pursued as a disobedient runaway servant. Mass. Col. Laws, (ed. 1889) 251, 256.

The provision of Rev. Stat. § 4598, under which these proceedings were taken, was first enacted by Congress in 1790. 1 Stat. 131, § 7. This act provided for the apprehension of deserters and their delivery on board the vessel, but apparently made no provision for imprisonment as a punishment for desertion; but by the Shipping Commissioners' Act of 1872, c. 322, 17 Stat. 243, 273, § 51, now incorporated into the Revised Statutes as section 4596, the court is authorized to add to forfeiture of wages for desertion imprisonment for a period of not more than three months, and for absence without leave imprisonment for not more than one month. In this act and the amendments thereto very careful provisions are made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence. At the same time discipline is more stringently enforced by additional punishments for desertion, absence without leave, disobedience, insubordination and barratry. Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense which minors and wards are entitled to the protection of their parents and guardians: "*quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares.*" The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.

In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country

for more than sixty years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts.

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Harlan dissenting.

The appellants shipped on the American barkantine Arago, having previously signed articles whereby they undertook to perform the duties of seamen during a voyage of that vessel from San Francisco (quoting from the record) "to Knappton, State of Washington, and thence to Valparaiso, and thence to such other foreign ports as the master may direct, and return to a port of discharge in the United States." The vessel was engaged in a purely private business.

As stated in the opinion of the court, the appellants left the vessel at Astoria, Oregon, without the consent of the master, having become dissatisfied with their employment. The grounds of such dissatisfaction are not stated.

Upon the application of the master, a justice of the peace at Astoria, Oregon, proceeding under sections 4596 to 4599 of the Revised Statutes of the United States, issued a warrant for the arrest of the appellants. They were seized, somewhat as runaway slaves were in the days of slavery, and committed to jail without bail, "until the Arago was ready for sea." After remaining in jail some sixteen days, they were taken by the marshal and placed on board the Arago against their will. While on board they refused to "turn to" or to work in obedience to the orders of the master. Upon the arrival of the barkantine at San Francisco they were arrested for having refused to work on the vessel, and committed for trial upon that charge.

If the placing of the appellants on board the Arago at Astoria against their will was illegal, then their refusal to work while thus forcibly held on the vessel could not be a criminal offence, and their detention and subsequent arrest

for refusing to work while the vessel was going from Astoria to San Francisco were without authority of law. The question therefore is, whether the appellants, having left the vessel at Astoria, no matter for what cause, could lawfully be required against their will to return to it, and to render personal services for the master.

The government justifies the proceedings taken against the appellants at Astoria by sections 4596, 4598 and 4599 of the Revised Statutes of the United States.

By section 4596 it is provided:

"SEC. 4596. Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service, commits any of the following offences, he shall be punishable as follows: First. For desertion, by imprisonment for not more than three months, and by forfeiture of all or any part of the clothes or effects he leaves on board, and of all or any part of the wages or emoluments which he has then earned. Second. For neglecting and refusing, without reasonable cause, to join his vessel, or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel sailing from any port, either at the commencement or during the progress of any voyage; or for absence at any time without leave, and without sufficient reason, from his vessel, or from his duty, not amounting to desertion, or not treated as such by the master; by imprisonment for not more than one month, and also, at the discretion of the court, by forfeiture of his wages, of not more than two days' pay, and, for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute. Third. For quitting the vessel without leave after her arrival at her port of delivery, and before she is placed in security, by forfeiture out of his wages of not more than one month's pay. Fourth. For wilful disobedience to any lawful command, by imprisonment for not more than two months, and also, at the discretion of the court, by forfeiture out of his wages of not more than four days' pay. Fifth. For continued wilful disobedience to lawful commands, or continued wilful neglect of duty, by im-

prisonment for not more than six months, and also, at the discretion of the court, by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of either a sum not more than twelve days' pay, or sufficient to defray any expenses which have been properly incurred in hiring a substitute. Sixth. For assaulting any master or mate, by imprisonment for not more than two years. Seventh. For combining with any others of the crew to disobey lawful commands, or to neglect duty, or to impede navigation of the vessel, or the progress of the voyage, by imprisonment for not more than twelve months. . . ."

These provisions are brought forward from the act of June 7, 1872, c. 322, § 51. 17 Stat. 273.

Section 4598 provides:

"SEC. 4598. If any seaman who shall have signed a contract to perform a voyage shall, at any port or place, desert, or shall absent himself from such vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter, and bring him before such justice; and if it then appears that he has signed a contract within the intent and meaning of this title, and that the voyage agreed for is not finished, or altered, or the contract otherwise dissolved, and that such seaman has deserted the vessel, or absented himself without leave, the justice shall commit him to the house of correction or common jail of the city, town or place, to remain there until the vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman."

This section is the same as section 7 of the act of July 20, 1790, c. 29. 1 Stat. 134.

By section 4599 — which is substantially the same as section 53 of the above act of June 7, 1872 — it is provided:

"SEC. 4599. Whenever, either at the commencement of or during any voyage, any seaman or apprentice neglects or re-

fuses to join, or deserts from or refuses to proceed to sea in, any vessel in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate, or the owner or consignee, or shipping commissioner, may, in any place in the United States, with or without the assistance of the local public officers or constables, who are hereby directed to give their assistance if required, and also at any place out of the United States, if and so far as the laws in force at such place will permit, apprehend him without first procuring a warrant; and may thereupon, in any case, and shall in case he so requires and it is practicable, convey him before any court of justice or magistrate of any State, city, town or county, within the United States, authorized to take cognizance of offences of like degree and kind, to be dealt with according to the provisions of law governing such cases; and may, for the purpose of conveying him before such court or magistrate, detain him in custody for a period not exceeding twenty-four hours, or may, if he does not so require, or if there is no such court at or near the place, at once convey him on board. If such apprehension appears to the court or magistrate before whom the case is brought to have been made on improper or on insufficient grounds, the master, mate, consignee or shipping commissioner who makes the same, or causes the same to be made, shall be liable to a penalty of not more than one hundred dollars; but such penalty, if inflicted, shall be a bar to any action for false imprisonment."

The decision just made proceeds upon the broad ground that one who voluntarily engages to serve upon a private vessel in the capacity of a seaman for a given term, but who, without the consent of the master, leaves the vessel when in port before the stipulated term is ended and refuses to return to it, may be arrested and held in custody until the vessel is ready to proceed on its voyage, and then delivered against his will, and if need be by actual force, on the vessel to the master.

The Thirteenth Amendment of the Constitution of the United States declares that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party

shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Slavery exists wherever the law recognizes a right of property in a human being; but slavery cannot exist in any form within the United States. The Thirteenth Amendment uprooted slavery as it once existed in this country, and destroyed all of its badges and incidents. It established freedom for all. "By its own unaided force and effect it abolished slavery and established freedom." The amendment, this court has also said, "is not a mere prohibition of state laws establishing or upholding slavery or involuntary servitude, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights cases*, 109 U. S. 3, 20.

As to involuntary servitude, it may exist in the United States; but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the Constitution. A condition of enforced service, even for a limited period, in the private business of another, is a condition of involuntary servitude.

If it be said that government may make it a criminal offence, punishable by fine or imprisonment or both, for any one to violate his private contract voluntarily made, or to refuse without sufficient reason to perform it — a proposition which cannot, I think, be sustained at this day, in this land of freedom — it would by no means follow that government could, by force applied in advance of due conviction of some crime, compel a freeman to render personal services in respect of the private business of another. The placing of a person, by force, on a vessel about to sail, is putting him in a condition of involuntary servitude, if the purpose is to compel him against his will to give his personal services in the private business in which that vessel is engaged. The personal liberty of individuals, it has been well said, "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. c. 1, p. 134.

Can the decision of the court be sustained under the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States? That power cannot be exerted except with due regard to other provisions of the Constitution, particularly those embodying the fundamental guarantees of life, liberty and property. While Congress may enact regulations for the conduct of commerce with foreign nations and among the States, and may, perhaps, prescribe punishment for the violation of such regulations, it may not, in so doing, ignore other clauses of the Constitution. For instance, a regulation of commerce cannot be sustained which, in disregard of the express injunctions of the Constitution, imposes a cruel and unusual punishment for its violation, or compels a person to testify in a criminal case against himself, or authorizes him to be put twice in jeopardy of life or limb, or denies to the accused the privilege of being confronted with the witnesses against him, or of being informed of the nature and cause of the accusation against him. And it is equally clear that no regulation of commerce established by Congress can stand if its necessary operation be either to establish slavery, or to create a condition of involuntary servitude forbidden by the Constitution.

It is said that the statute in question is sanctioned by long usage among the nations of the earth, as well as by the above act of July 20, 1790.

In considering the antiquity of regulations that restrain the personal freedom of seamen, the court refers to the laws of the ancient Rhodians, which are supposed to have antedated the Christian era. But those laws, whatever they may have been, were enacted at a time when no account was taken of man as man, when human life and human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and the pleasures of despotic rulers rather than promote the welfare of the people.

Attention has been called by the court to the laws enacted by the towns of the Hanseatic League four hundred years ago, by one of which a seaman who went ashore without leave could, in certain contingencies, be kept in prison "upon bread

and water for one year," and by another of which an officer or seaman who quit his ship and concealed himself could be apprehended and "stigmatized in the face with the first letter of the name of the town to which he belongs." Why the reference to these enactments of ancient times, enforced by or under governments possessing arbitrary power inconsistent with a state of freedom? Does any one suppose that a regulation of commerce authorizing seamen who quit their ship, without leave, to be imprisoned "upon bread and water for one year," or which required them to be "stigmatized in the face" with the letter of the town or State to which they belonged, would now receive the sanction of any court in the United States?

Reference has also been made to an act of the Colonial General Court of Massachusetts, passed in 1668, declaring that a seaman who left his vessel before its voyage was ended might be "pursued as a runaway servant." But the act referred to was passed when slavery was tolerated in Massachusetts with the assent of the government of Great Britain. It antedated the famous Declaration of Rights, promulgated in 1780, in which Massachusetts declared, among other things, that "all men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."

The effect of that Declaration was well illustrated in *Parsons* v. *Trask*, 7 Gray, 473, 478. That case involved the validity of a contract made in a foreign country in 1840 by an adult inhabitant thereof with a citizen of the United States, "to serve him, his executors and assigns" for the term of five years, "during all of which term the said servant her said master, his executors or assigns, faithfully shall serve, and that honestly and obediently in all things, as a good and dutiful servant ought to do." It was sought to enforce this contract in Massachusetts. After carefully examining the provisions of the contract, the court said: "As to the nature, then, of the service to be performed, the place where and the person

to whom it is to be rendered, and the compensation to be paid, the contract is uncertain and indefinite; indefinite and uncertain, not from any infirmity in the language of the parties, but in its substance and intent. It is, in substance and effect, a contract for servitude, with no limitation but that of time; leaving the master to determine what the service should be, and the place where and the person to whom it should be rendered. Such a contract, it is scarcely necessary to say, is against the policy of our institutions and laws. If such a sale of service could be lawfully made for five years, it might, from the same reasons, for ten, and so for the term of one's life. The door would thus be opened for a species of servitude inconsistent with the first and fundamental article of our Declaration of Rights, which, *proprio vigore*, not only abolished every vestige of slavery then existing in the Commonwealth, but rendered every form of it thereafter legally impossible. That article has always been regarded not simply as the declaration of an abstract principle, but as having the active force and conclusive authority of law." Observing that one who voluntarily subjected himself to the laws of the State must find in them the rule of restraint as well as the rule of action, the court proceeded: "Under this contract the plaintiff had no claim for the labor of the servant for the term of five years, or for any term whatever. She was under no legal obligation to remain in his service. There was no time during which her service was due to the plaintiff, and during which she was kept from such service by the acts of the defendants."

It may be here remarked that the shipping articles signed by the appellants left the term of their service uncertain, and placed no restriction whatever upon the route of the vessel after it left Valparaiso, except that it should ultimately return to some port in the United States. Under the contract of service, it was at the volition of the master to entail service upon these appellants for an indefinite period. So far as the record discloses, it was an accident that the vessel came back to San Francisco when it did. By the shipping articles, the appellants could not quit the vessel until it returned to a port of the

United States, and such return depended absolutely upon the will of the master. He had only to land at foreign ports, and keep the vessel away from the United States, in order to prevent the appellants from leaving his service.

Nor, I submit, is any light thrown upon the present question by the history of legislation in Great Britain about seamen. The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States. Referring to the difficulties confronting the convention of 1787 which framed the present Constitution of the United States, and to the profound differences between the instrument framed by it and what is called the British Constitution, Mr. Bryce, an English writer of high authority, says in his admirable work on the American Commonwealth: "The British Parliament had always been, was then, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers resides in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally, it is to-day the only and the sufficient depository of the authority of the nation; and is, therefore, within the sphere of law, irresponsible and omnipotent." Vol. 1, p. 32. No such powers have been given to or can be exercised by any legislative body organized under the American system. Absolute, arbitrary power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted to it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person. It would seem, therefore, evident that no aid in the present discussion can be derived from the legislation of Great Britain touching the rights, duties and

responsibilities of seamen employed on British vessels. If the Parliament of Great Britain, Her Britannic Majesty assenting, should establish slavery or involuntary servitude in England, the courts there would not question its authority to do so, and would have no alternative except to sustain legislation of that character. A very short act of Parliament would suffice to destroy all the guarantees of life, liberty and property now enjoyed by Englishmen. "What," Mr. Bryce says, "are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco." Parliament, he further says, "can abolish when it pleases any institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself." Vol. 1, pp. 237, 238. In this country, the will of the people as expressed in the fundamental law must be the will of courts and legislatures. No court is bound to enforce, nor is any one legally bound to obey, an act of Congress inconsistent with the Constitution. If the Thirteenth Amendment forbids such legislation in reference to seamen as is now under consideration, that is an end of the matter, and it is of no consequence whatever that government in other countries may by the application of force, or by the infliction of fines and imprisonment, compel seamen to continue in the personal service of those whom they may have agreed to serve in private business.

Is the existing statute to be sustained because its essential provisions were embodied in the act of 1790? I think not, and for the reason, if there were no other, that the Thirteenth Amendment imposes restrictions upon the powers of Congress that did not exist when that act was passed. The supreme law of the land now declares that involuntary servitude, except as a punishment for crime of which the party shall have been duly convicted, shall not exist anywhere within the United States.

The only exceptions to the general principles I have referred

to, so far as they relate to private business, arise out of statutes respecting apprentices of tender years. But statutes relating to that class rest largely upon the idea that a minor is incapable of having an absolute will of his own before reaching majority. The infant apprentice, having no will in the matter, is to be cared for and protected in such way as, in the judgment of the State, will best subserve the interests both of himself and of the public. An apprentice serving his master pursuant to terms permitted by the law cannot, in any proper sense, be said to be in a condition of involuntary servitude. Upon arriving at his majority, the infant apprentice may repudiate the contract of apprenticeship, if it extends beyond that period. 2 Parsons on Contr. 50. The word "involuntary" refers, primarily, to persons entitled, in virtue of their age, to act upon their independent judgment when disposing of their time and labor. Will any one say that a person, who has reached his majority, and who had voluntarily agreed, for a valuable consideration, to serve another as an apprentice for an indefinite period, or even for a given number of years, can be compelled, against his will, to remain in the service of the master?

It is said that the grounds upon which the legislation in question rests are the same as those existing in the cases of soldiers and sailors. Not so. The Army and Navy of the United States are engaged in the performance of public, not private, duties. Service in the army or navy of one's country according to the terms of enlistment never implies slavery or involuntary servitude, even where the soldier or sailor is required against his will to respect the terms upon which he voluntarily engaged to serve the public. Involuntary service rendered for the public, pursuant as well to the requirements of a statute as to a previous voluntary engagement, is not, in any legal sense, either slavery or involuntary servitude.

The further suggestion is made that seamen have always been treated by legislation in this country and in England as if they needed the protection of the law in the same sense that minors and wards need the protection of parents and guardians, and hence have been often described as "wards of admiralty."

Some writers say that seamen are in need of the protection of the courts, "because peculiarly exposed to the wiles of sharpers and unable to take care of themselves." 2 Parsons Shipp. & Adm. 32. Mr. Justice Story in *Harden* v. *Gordon*, 2 Mason, 541, 555, said that "every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying, and are easily overreached." Mr. Justice Thompson, in the *Brig Cadmus* v. *Matthews*, 2 Paine, 229, 240, said: "In considering the obligation of seamen, arising out of their contract in their shipping articles, according to the formula in common use, due weight ought to be given to the character and situation of this class of men. Generally ignorant and improvident, and probably very often signing the shipping articles without knowing what they contain, it is the duty of a court to watch over and protect their rights, and apply very liberal and equitable considerations to the enforcement of their contracts."

In view of these principles, I am unable to understand how the necessity for the *protection* of seamen against those who take advantage of them can be made the basis of legislation compelling them, against their will, and by force, to render personal service for others engaged in private business. Their supposed helpless condition is thus made the excuse for imposing upon them burdens that could not be imposed upon other classes without depriving them of rights that inhere in personal freedom. The Constitution furnishes no authority for any such distinction between classes of persons in this country. If prior to the adoption of the Thirteenth Amendment the arrest of a seaman and his forcible return under any circumstances to the vessel on which he had engaged to serve could have been authorized by an act of Congress, such deprivation of the liberty of a freeman cannot be justified under the Constitution as it now is. To give any other construction to the Constitution is to say that it is not made for all, and that all men in this land are not free and equal before the law, but that one class may be so far subjected to involuntary servitude

as to be compelled by force to render personal services in a purely private business with which the public has no concern whatever.

The court holds that within the meaning of the Constitution the word "involuntary" does not attach to the word "servitude" continuously and make illegal a service which was voluntary at the outset, but became involuntary before the agreed term of service was ended; consequently, "an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract; not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus," the court proceeds, "if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823, 4 Geo. IV, c. 34, it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for a personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors and apprentices, and possibly some others, nor would public opinion tolerate a statute to that effect."

It seems to me that these observations rest upon an erroneous view of the constitutional inhibition upon involuntary servitude.

Of the meaning and scope of the constitutional interdict upon slavery, no one can entertain doubt. A contract by which one person agrees to become the slave of another

would not be respected in any court, nor could it become the foundation of any claim or right, even if it were entered into without constraint being used upon the person who assumed to surrender his liberty and to become the property of another. But involuntary servitude, no matter when it arises, if it be not the result of punishment for crime of which the party has been duly convicted, is as much forbidden by the Constitution as is slavery. If that condition exists at the time the authority of the law is invoked to protect one against being forcibly compelled to render personal services for another, the court cannot refuse to act because the party seeking relief had voluntarily agreed to render such services during a given period. The voluntary contracts of individuals for personal services in private business cannot justify the existence anywhere or at any time in this country of a condition of involuntary servitude not imposed as a punishment for crime, any more than contracts creating the relation of master and slave can justify the existence and recognition of a state of slavery anywhere, or with respect to any persons, within the jurisdiction of the United States. The condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude *from the moment he is compelled against his will* to continue in such service. He may be liable in damages for the non-performance of his agreement, but to require him, against his will, to continue in the personal service of his master is to place him and keep him in a condition of involuntary servitude. It will not do to say that by "immemorial usage" seamen could be held in a condition of involuntary servitude, without having been convicted of crime. The people of the United States, by an amendment of their fundamental law, have solemnly decreed that "except as a punishment for crime, whereof the party shall have been duly convicted," involuntary servitude shall not exist in any form in this country. The adding another exception by interpretation simply, and without amending the Constitution, is, I submit, judicial legislation. It is a very serious matter when a judicial tribunal, by the construction of an act of Congress, defeats the expressed will of the

legislative branch of the government. It is a still more serious matter when the clear reading of a constitutional provision relating to the liberty of man is departed from in deference to what is called usage which has existed, for the most part, under monarchical and despotic governments.

In considering this case it is our duty to look at the consequences of any decision that may be rendered. We cannot avoid this duty by saying that it will be time enough to consider supposed cases when they arise. When such supposed cases do arise, those who seek judicial support for extraordinary remedies that encroach upon the liberty of freemen will of course refer to the principles announced in previous adjudications, and demand their application to the particular case in hand.

It is, therefore, entirely appropriate to inquire as to the necessary results of the sanction given by this court to the statute here in question. If Congress, under its power to regulate commerce with foreign nations and among the several States, can authorize the arrest of a seaman who engaged to serve upon a private vessel, and compel him by force to return to the vessel and remain during the term for which he engaged, a similar rule may be prescribed as to employés upon railroads and steamboats engaged in commerce among the States. Even if it were conceded — a concession to be made only for argument's sake — that it could be made a criminal offence, punishable by fine or imprisonment or both, for such employés to quit their employment before the expiration of the term for which they agreed to serve, it would not follow that they could be compelled, against their will and in advance of trial and conviction, to continue in such service. But the decision to-day logically leads to the conclusion that such a power exists in Congress. Again, as the legislatures of the States have all legislative power not prohibited to them, while Congress can only exercise certain enumerated powers for accomplishing specified objects, why may not the States, under the principles this day announced, compel all employés of railroads engaged in domestic commerce, and all domestic servants, and all employés in private establishments, within

their respective limits, to remain with their employers during the terms for which they were severally engaged, under the penalty of being arrested by some sheriff or constable, and forcibly returned to the service of their employers? The mere statement of these matters is sufficient to indicate the scope of the decision this day rendered.

The Thirteenth Amendment, although tolerating involuntary servitude only when imposed as a punishment for crime of which the party shall have been duly convicted, has been construed, by the decision just rendered, as if it contained an additional clause expressly excepting from its operation seamen who engage to serve on private vessels. Under this view of the Constitution, we may now look for advertisements, not for runaway servants as in the days of slavery, but for runaway seamen. In former days, overseers could stand with whip in hand over slaves, and force them to perform personal service for their masters. While, with the assent of all, that condition of things has ceased to exist, we can but be reminded of the past when it is adjudged to be consistent with the law of the land for freemen who happen to be seamen to be held in custody that they may be forced to go aboard private vessels and render personal services against their will.

In my judgment the holding of any person in custody, whether in jail or by an officer of the law, against his will, for the purpose of compelling him to render personal service to another in a private business, places the person so held in custody in a condition of involuntary servitude forbidden by the Constitution of the United States; consequently, that the statute as it now is, and under which the appellants were arrested at Astoria and placed against their will on the barkantine Arago, is null and void, and their refusal to work on such vessel after being forcibly returned to it could not be made a public offence authorizing their subsequent arrest at San Francisco.

I dissent from the opinion and judgment of the court.

Mr. Justice Gray was not present at the argument, and took no part in the decision of this case.

WESTERN UNION TELEGRAPH COMPANY *v.* INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 649. Submitted December 11, 1896. — Decided February 1, 1897.

The provision in § 11 of the act of March 6, 1893, c. 171, of the legislature of Indiana, that on the failure or refusal of a telegraph company "to pay any tax assessed against it in any county or township in the State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of Indiana by the prosecuting attorneys of the different judicial circuits of the State . . ., and the judgment in said action shall include a penalty of fifty per cent of the amount of taxes so assessed and unpaid," does not, as to the penalty clause, contravene the Constitution of the United States; and the question whether, in this case, that penalty was properly included in the judgment rendered against the telegraph company was for the determination of the state courts.

In enforcing the collection of taxes one rule may be adopted in respect of the admitted use of one kind of property, and another rule in respect of the admitted use of another, in order that all may be compelled to contribute their proper share to the burdens of government.

The amount of penalty to be enforced for non-payment of taxes is a matter within legislative discretion.

UNDER an act of the general assembly of Indiana of March 6, 1891, c. 99, in respect of the assessment and collection of taxes upon all property within the jurisdiction of the State, it was provided that payment of the taxes in the year succeeding their assessment might be made in two instalments, and a penalty of ten per cent was denounced for the first six months of delinquency and of an additional six per cent for the second six months.

On March 6, 1893, an amendatory act was passed, c. 171, providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express, fast freight and joint stock associations, companies, copartnerships and corporations transacting business in the State, of which section 11 was as follows:

"In case any such association, copartnership or corporation as named in this supplemental and amendatory act, shall fail or refuse to pay any taxes assessed against it in any county or township in the State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of Indiana by the prosecuting attorneys of the different judicial circuits of the State on the relation of the auditors of the different counties of this State, and the judgment in said action shall include a penalty of fifty per cent of the amount of taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the line or route of any such association, copartnership, company or corporation shall extend, or in any county where such association, company, copartnership or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership or corporation shall have refused to pay the whole of the taxes assessed against the same by said state board of tax commissioners, or in case such association, company, copartnership or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, township or townships, such action may include the whole or any portion of the taxes so unpaid in any county or counties, township or townships, but the attorney general may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions in each separate county or township, or join counties and townships, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits, shall be by said auditor of State accounted for as a credit to the respective counties for or on account of which such collections were made by said auditor of State at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the State; and upon such settlement being made, the treasurers of the several counties shall, at their next settlements, enter credits upon the proper duplicates in their offices, and at the next settlement with such county report the

amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: *Provided, however*, That in any such action the amount of the assessment fixed by said state board of tax commissioners and apportioned to such county, or apportioned by the county auditor to any particular township, shall not be controverted."

In December, 1893, the Western Union Telegraph Company brought suit against the auditors and treasurers of the various counties in the State of Indiana through or in which its lines extended, to enjoin the collection of the taxes assessed for the year 1893, on the ground that the act of 1893 was unconstitutional. This cause was decided in favor of the validity of the law in the Circuit Court of Marion County, from which an appeal was taken to the Supreme Court of Indiana, where the judgment was affirmed. 141 Indiana, 281. A writ of error was sued out from this court to the Supreme Court of Indiana to review that decision, and the judgment of that court was affirmed. *West. Un. Tel. Co.* v. *Taggart*, 163 U. S. 1.

In August, 1894, the telegraph company filed a bill in the Circuit Court of the United States for the District of Indiana against the auditor of the State of Indiana to enjoin him from certifying to the auditors of the various counties the assessments on its property made by the state board of tax commissioners for the year 1894, on the ground of the unconstitutionality of the act of 1893. A demurrer was sustained to the bill, and it was thereupon dismissed. 68 Fed. Rep. 588. From this decree of the Circuit Court an appeal was taken to this court and the cause docketed February 17, 1896, which appeal was dismissed by appellant, December 7, 1896.

On May 7, 1894, the State of Indiana brought suit against the company in the Circuit Court of Marion County to recover the taxes for 1893, and subsequently, on June 11, 1895, filed a supplemental complaint therein, seeking judgment for the delinquent taxes for the year 1894. The State recovered judgment for the amount of the taxes and penalties thereon for the years named, including the penalty of fifty per cent, and the telegraph company appealed to the Supreme Court of the State, where the judgment was affirmed. 44 N. E. Rep.

793. The cause was then brought to this court on writ of error.

Mr. Samuel O. Pickens, *Mr. Willard Brown* and *Mr. Charles W. Wells* for plaintiff in error.

Mr. William A. Ketcham, Attorney General of the State of Indiana, *Mr. Alonzo Greene Smith* and *Mr. Merrill Moores* for defendant in error.

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

Whether the fifty per cent penalty clause of the act of 1893 contravenes the Constitution of the United States is the question presented on this writ. If it does not, the question whether that penalty was properly included in the judgment rendered against the telegraph company was for the determination of the state courts.

The necessity of classifying the subjects of taxation in order to reach uniform and just results, as far as possible, is not denied; nor that the infliction of penalties on delinquency is a usual and legitimate mode of compelling the prompt payment of taxes. But the contention is that this provision for a fifty per cent penalty is an arbitrary discrimination, not falling within the principle of classification; and, therefore, open to constitutional objection, as amounting to a denial of the equal protection of the laws and a deprivation of property without due process of law.

The Supreme Court of Indiana was of opinion that by reason of the differences in the nature of these companies and the uses to which their property was devoted in the prosecution of their business from other taxpayers and their property and business, the legislature was justified in placing them in a class by themselves and subjecting them to the particular method of effecting collection by means of penalties and suit for recovery of judgment for the delinquent taxes with penalties added.

Under the act of March 6, 1891, taxpayers and their property were variously classified in respect of the nature of their business and property; as for instance, associations for banking purposes not incorporated, were placed in one class, while the shares of capital stock of banks located within the State, whether organized under the laws of the State or the United States, were placed in another and assessed to the owners thereof, special provision being made for the bank to retain dividends belonging to the stockholders until the taxes should be paid (Acts, Ind. 1891, c. 99, §§ 59, 60 to 66); insurance companies, not organized under the laws of the State, were placed in another class, and it was provided that any insurance company failing or refusing for more than thirty days to render an account for its premium receipts and pay taxes thereon, should forfeit one hundred dollars per day for each day the report was withheld or payment delayed, to be recovered in an action, authority being also conferred on the auditor of State to revoke the authority of the defaulting company to do business (§ 67); express companies were placed in another class and provision made for the forfeiture of one hundred dollars per day for failing to render the particular account provided for and pay the required taxes thereon, to be recovered in an action, the companies being prohibited from carrying on business until the payment was made. (§ 68.) Similar provisions were made as to telegraph companies (§ 69), telephone companies (§ 70), and sleeping car companies (§ 71), and the same in substance as to bridge and ferry companies (§ 72). Street railroads, water-works, gas, manufacturing and mining companies, insurance companies and other associations incorporated under the laws of the State, etc., were subjected to still a different provision (§ 73). Railroad companies (§§ 76 to 88), and building, loan and savings institutions (§ 89), were also placed in different classes.

The act of March 6, 1893, repealed the sections of the prior act relating to express, telegraph, telephone and sleeping car companies, and, with other provisions, prescribed this fifty per cent penalty and provided for an action for the delinquent taxes and penalties, by way of securing collection. The ordi-

nary remedies by levy, distraint and sale were manifestly believed by the general assembly to be open, as to these companies and their properties, to objection as interfering with the exercise of their public functions, and directly impeding the transaction of interstate commerce; and the impracticability of pursuing the ordinary methods of collection, in view of that objection, furnished a sufficient ground for the adoption of another mode as better suited to the exigency because not involving the suspension of the discharge of public duty in that regard.

It has been repeatedly laid down, as stated by Mr. Justice Lamar, in *Pacific Express Company* v. *Seibert*, 142 U. S. 339, 351, "that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens"; and it is equally true as to the particular means taken to enforce the collection of taxes, one rule may be adopted in respect of the admitted use of one kind of property and another rule in respect of the admitted use of another, in order that all may be compelled to contribute their proper share to the burdens of government.

As to railroad companies, it had been decided in Indiana that, under existing statutes, neither the franchise and privileges of such companies, nor any lands, easements or things essential to their existence, or necessary to the enjoyment of their franchise, could be sold on execution to satisfy judgments at law against them, while their rolling stock, when not in actual use, was liable to seizure and sale; and that the legislature had deemed it the wiser course to leave the method of coercing payment in each case to the flexible jurisdiction of a court of chancery rather than to prescribe a method which might be suited to one case and not to another. *Louisville, New Albany and Chicago Railway Co.* v. *Boney*, 117 Indiana, 501.

In respect of the companies under consideration, the infliction of a severe penalty and the recovery of judgment in a suit for taxes and penalties, which judgment would bear interest (as it had been held delinquent taxes did not, *Evansville*

& Terre Haute Railroad v. *West*, 139 Indiana 254), and could be collected through the appointment of a receiver, by sequestration or otherwise, if in such manner as enabled the discharge of public duties to be maintained, was assumed, on grounds of public policy, to be the least objectionable and most efficient course to be pursued.

Judgments having been rendered at law, whatever course might be adopted, thereupon, for their collection would be necessarily such as would conserve the public interest and would not stay the operations the companies were organized to carry on.

The amount of the penalty was a matter for the legislature to determine in its discretion, and the Supreme Court refers to the imposition of penalties in other instances under the statutes of Indiana, varying according to particular subjects of taxation, apparently calculated to operate with quite as much harshness.

It may, properly, be further remarked that these companies could have avoided incurring this liability since, if desirous of testing the legality of the taxes assessed against them, they could have paid them under protest and brought suits to recover back the money so paid, if unlawfully exacted, or applied to the proper authorities for relief, adequate provision being made by the laws of Indiana for the prompt return thereof in case of the invalidity of the assessment, in whole or in part. Stat. Ind. 1894, §§ 7915, 7916.

We are unable to discover any ground for holding that the Federal Constitution was violated by this law, and agree in the view which the Supreme Court of the State expressed in the premises.

Judgment affirmed.

Mr. Justice Harlan and Mr. Justice White dissented.

PRICE *v.* UNITED STATES.

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

No. 625. Submitted January 19, 1897. — Decided February 15, 1897.

The indictment in this case is sufficient because it does, in fact, contain a charge that the book was obscene to the knowledge of the defendant who knowingly and wilfully, with such knowledge, deposited it in the mail, and thus violated Rev. Stat. § 3893. *Rosen* v. *United States*, 161 U. S. 29, followed.

Andrews v. *United States*, 162 U. S. 420, followed to the point that, 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, 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 accusation.

THE case is stated in the opinion.

Mr. Warren E. Price in person for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff was indicted under section 3893 of the Revised Statutes, for depositing in the mails of the United States obscene, lewd and lascivious matter. After trial, he was convicted and sentenced to eighteen months' imprisonment in the California state prison, and to pay a fine of $500. Upon writ of error sued out from this court the record is now before us for review.

The indictment contained five counts, the first, second and fourth of which charged the defendant with giving information as to where obscene matter might be obtained, and the third and fifth charged him with depositing such matter in the mails. A motion was made before trial to quash all the counts of the indictment, and it was granted as to the

first, second and fourth, and denied as to the third and fifth counts. The defendant then demurred to the indictment on the ground that it did not charge that the matter was non-mailable, nor did it charge that it was obscene or lewd or lascivious or of an indecent character. The demurrer was overruled and the parties went to trial. After his conviction of the offence stated in the third and fifth counts the defendant moved in arrest of judgment on the ground, among other things, that it was nowhere in either of these counts alleged that the book or pamphlets, or either of them, was in fact obscene, lewd or lascivious, or of an indecent character, and that they were non-mailable matter. The motion was overruled and the defendant sentenced as above stated.

There are but two grounds upon which the sufficiency of the indictment is attacked; the first being that there is no direct allegation in either count that the defendant knew that the book that he deposited in the mail was obscene or lewd or lascivious, the only charge being, as is claimed, that he knowingly deposited a book, the contents of which were, as a matter of fact, lewd and lascivious, the point being the alleged absence of any charge that he knowingly deposited a book which in fact was obscene, lascivious and lewd, and which he knew was of that character.

The further ground is taken that there is in truth no allegation that the matter was obscene or lewd or lascivious, but the indictment contains nothing more than a mere expression of the opinion of the pleader that it was so obscene as to be unfit for repetition in the indictment.

We think there is no force in either contention. The plain meaning of the indictment is that the defendant deposited in the mails a book which he knew to be obscene, and that in truth it was obscene, and so much so as to render it improper and offensive to place the same upon the public record of the court. The indictment is substantially like the one which we held to be sufficient in *Rosen's case*, 161 U. S. 29. The indictment in that case, as it is set forth in the report, states that the accused, on the 24th day of April, 1893, within the Southern District of New York, "did unlawfully, wilfully and know-

ingly deposit and cause to be deposited in the post office of the city of New York, for mailing and delivery by the post office establishment of the United States, a certain obscene, lewd and lascivious paper; which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, Broadway,' and on the same page were printed the words and figures following — that is to say: 'Volume 11, number 27; trade-mark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, $4.00 a year in advance'; and thereupon, on the same page, is a picture of a cab, horse, driver and the figure of a female, together (underneath the said picture) with the word 'Tenderloineuse,' and the said paper consists of twelve pages, minute descriptions of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd and indecent matters; and the said paper on the said twenty-fourth day of April, in the year one thousand eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows — that is to say: 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.' — against the peace of the United States and their dignity, and contrary to the statute of the United States in such case made and provided."

In that case we held that the general charge that defendant unlawfully, wilfully and knowingly deposited and caused to be deposited in the post office . . . a certain obscene, lewd and lascivious paper, as therein described, might not unreasonably be construed as meaning that the defendant was, and must have been, aware of the nature of its contents at the time he caused it to be put into the post office for transmission and delivery. Mr. Justice Harlan, in delivering the opinion of the court in that case, said: "Of course he did not understand the Government as claiming that the mere depositing in the post office of an obscene, lewd and lascivious paper was an offence under the statute, if the person so depositing it had neither knowledge nor notice, at the time, of its character or contents. He must have understood from the words of the indictment that the Government imputed to him

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

A distinction is attempted to be taken between the *Rosen case* and the one at bar for the reason, as is stated, that the indictment in the former case contained a direct charge that the defendant did deposit in the post office a certain obscene, lewd and lascivious paper, whereas in this case no such charge is made, but only that the defendant knowingly deposited, etc., a printed book and pamphlet "the character of which is so obscene, lewd and lascivious that said book would be offensive if set forth in full in this indictment." In other words, it is said that when an indictment contains a charge that a book "is so obscene, lewd and lascivious" that it would be offensive to set it forth in full in the indictment, it is not thereby charged that the book was in fact obscene, lewd or lascivious. It takes stronger eyes than we possess to discover any real and material difference in the meaning of the two expressions. The plain English of an allegation that a book is so obscene and indecent as to be offensive if set forth in full in an indictment and placed upon the records of the court, is that the book is obscene in fact and to the degree described. No one denies that there are degrees of obscenity, any more than that two and two make four, but when a book is stated to be so obscene that it would be offensive if set forth in full in an

indictment, such allegation imports a sufficient degree of obscenity to render the production non-mailable and obscene under the statute.

This indictment is sufficient, because it does, in fact, contain a charge that the book was obscene, to the knowledge of the defendant, who knowingly and wilfully, with such knowledge, deposited it in the mail and thus violated the statute. No one, on reading the third and fifth counts of the indictment, could come to any other conclusion in regard to their meaning, and when this is the case an indictment is good enough.

There is no danger of the defendant in such case being deprived of any of his just rights by holding the indictment to be good. If there were any defect at all in such an indictment it should, as was stated in the *Rosen case*, be regarded after verdict as one of form under section 1025 of the Revised Statutes, providing that the proceedings on an indictment found by a grand jury in any District, Circuit or other court of the United States, shall not be affected "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

One further ground for a reversal is made by counsel for plaintiff in error. It appears from the bill of exceptions that the Government inspector who instigated the prosecution in this case had been informed that the statute was being violated, and for the purpose of discovering the fact whether or not the plaintiff in error was engaged in such violation, the inspector wrote several communications of the nature of decoy letters, which are set forth in the record, asking the plaintiff in error to send him through the mail certain books of the character covered by the statute, which the plaintiff in error did, as is alleged by the prosecution and as has been found by the verdict of the jury. This has been held to constitute no valid ground of objection. *Rosen's case, supra*, 161 U. S. at page 42; *Andrews* v. *United States*, 162 U. S. 420.

There is no error in the record, and the judgment of the court below must be

Affirmed.

UNITED STATES *v.* GORHAM.

APPEAL FROM THE COURT OF CLAIMS.

No. 187. Argued January 28, 1897.— Decided February 15, 1897.

Under the Indian depredation act of March 3, 1891, c. 538, 26 Stat. 851, judgment may be rendered against the United States alone, when the tribe of Indians to which the depredators belong cannot be identified, and such inability is stated.

THE appellee herein filed his petition against the United States and the Comanche and Kiowa Indians in the Court of Claims on the 4th day of September, 1891, in which he claimed to recover damages for the destruction of his property on the 20th day of January, 1868, by the Comanche and Kiowa Indians, in amity with the United States, at Indian Creek, in Cooke County, Texas. The property destroyed consisted of horses, mares and colts, of the alleged value of $1390.

The government filed an answer to such petition, in which it denied each and every allegation therein contained. The case was duly tried before the court, which found as facts that the claimant was at the time of the loss of his property, and ever since has been, a citizen of the United States, and that in the year 1868 he was the owner of property described in his petition, and that it was of the total value of $1390; that it was destroyed or taken from him by Indians belonging to the Indian tribes, at the time in amity with the United States, and the depredation was without just cause or provocation on the part of claimant, and that it did not appear at the time of the depredation that any Indian troubles existed; that no part of the property included in the computation had been returned or paid for. Upon these findings the court decided as conclusions of law that the plaintiff was entitled to recover from the United States the value of the property, $1390; and that his petition as against the Comanche and Kiowas should be dismissed. Judgment was accordingly entered against the United States for the sum named and for

a dismissal against the Indians. A motion by the United States for a new trial was overruled, and thereafter an appeal was allowed to this court. 29 C. Cl. 97.

The appellant assigns for errors of fact:

(1.) That the court erred in finding that claimant's property was taken or destroyed by Indians belonging to Indian tribes at the time in amity with the United States.

(2.) In finding that the depredation was committed without just cause or provocation on the part of the claimant or his agent.

(3.) In finding that it does not appear that any Indian troubles existed at the time of the depredation.

Errors of law are assigned:

(1.) That the court erred in its conclusion of law that the claimant should recover from the United States the sum of $1390; and —

(2.) It erred in entering judgment against the United States.

Mr. Alexander Porter Morse for appellants. *Mr. Assistant Attorney General Howry* filed a brief for the same.

Mr. John Wharton Clarke for appellee.

Mr. Justice Peckham delivered the opinion of the court.

There is here but a single question for this court to review, and that relates to the right of the Court of Claims to render judgment against the United States alone under the Indian depredation act where the tribe of Indians to which the depredators belong cannot be identified, and such inability is stated and judgment rendered against the United States only.

The act in question is entitled, "An act to provide for the adjudication and payment of claims arising from Indian depredations," approved March 3, 1891, c. 538, 26 Stat. 851.

Under that act jurisdiction is conferred upon the Court of Claims to inquire into and finally adjudicate, in the manner provided in the act, first: All claims for the property of citizens of the United States taken or destroyed by Indians

belonging to any band or tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

The second section of the act waives all questions of limitation as to the time and manner of presenting such claims, provided that no claim accruing prior to July 1, 1865, is to be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of the act, before Congress or before the other officers named therein.

The third section provides that all claims shall be presented to the court by petition, setting forth the facts upon which such claims are based, "the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, *as near as may be*, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved."

The fourth section provides for service of the petition upon the Attorney General of the United States, and makes it his duty to appear and defend "the interests of the Government and of the Indians in the suit." It provides for the filing of a proper plea by the Attorney General, and that in case of his neglect to do so the claimant may proceed with the case, but he "shall not have judgment for his claim or for any part thereof unless he shall establish the same by proof satisfactory to the court."

The fifth section provides, among other things, "That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, *and against the tribes of Indians committing the wrong when such can be identified.*"

The sixth section provides that the amount of the judgment rendered against any tribe of Indians shall be charged against the tribe by which or by the members of which the court shall find that the depredation was committed, and shall be deducted

and paid in the following manner: "First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe other than appropriations for their current and necessary support, subsistence and education; and fourth, if no such annuity, fund or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe."

The eighth section provides "that immediately after the beginning of each session of Congress the Attorney General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act in favor of claimants and against the United States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bills."

The tenth section provides for an appeal by the claimant or the United States or the tribe of Indians, or other party thereto interested in any proceeding brought under the provisions of the act.

The scheme of the act is to provide payment to the citizen for property destroyed under the circumstances stated in the first section, and where the Indians can be identified to make them, through the funds coming to them from the government, pay back to it the amount it pays by reason of the property so destroyed. We think the liability of the government to pay, upon proof of the facts set forth in the first section, was not intended to be dependent upon the ability of the claimant to identify the particular tribe of or the individual Indians who committed the depredations. If the identification could be made they were to repay the

government, but the indemnification of the citizen was not to be dependent upon that fact.

When this case was before the Court of Claims it received the very careful attention of that court, and scarcely anything can be added to its well-considered opinion delivered by Judge Nott in directing judgment against the United States and dismissing the petition against the Comanche and Kiowa Indians.

In conferring jurisdiction in this class of cases upon the Court of Claims, it will be seen that Congress conferred it in regard to all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge. So long as the depredations were committed upon the property of citizens of the United States, and by Indians in amity with the government, without just cause, etc., jurisdiction and authority to inquire into and finally adjudicate upon such claims was granted to the court. This broad ground of jurisdiction would, unless circumscribed by the subsequent provision of the act, permit an adjudication against the United States alone. There is nothing in any other portion of the act which provides in terms for joining as co-defendants with the United States the tribes or bands of Indians by whom the alleged illegal acts were committed. The third section of the act merely provides for the contents of the petition, and by such section it is made the duty of the petitioner to state in his petition "the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be," etc. This is for the obvious purpose of giving some notice to the government of the alleged facts upon which the claim is based so that the proper defence, if any exist, may be made to the claim.

Section four, among other things, grants the right to any Indian or Indians interested in the proceedings to appear and defend by an attorney employed by such Indian or Indians, with the approval of the Commissioner of Indian Affairs,

if he or they so choose to do; but if no such appearance is made, it still remains the primary duty of the Attorney General, under the provisions of the same fourth section, to appear and defend the interest of the government and of the Indians in the suit, and no claimant can have judgment for his claim or any part thereof unless he shall establish the same by proof satisfactory to the court.

Taking into consideration that, by the fifth section, it is the duty of the court to determine in each case, "if possible, the tribe of Indians or other persons by whom the wrong was committed, and to render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified," it may be fairly claimed that, reading all the provisions together, the act makes it necessary, when known, to join with the United States the Indians or tribe of Indians by whom the illegal acts are alleged or are supposed to have been committed. Although the fourth section provides for the defence of the claim by the law officer of the government under any circumstances, yet as the interest of the Indians is embraced in the inquiry before the court because of their liability to a judgment against them if identified and to a payment of that judgment out of the annuities or otherwise as provided for in the sixth section, it is proper to allow them to appear and defend also by their own attorney. But the fifth section provides for judgment in favor of claimant and against the United States in any event, where the property of a citizen has been destroyed under the circumstances provided in the statute, but only against the tribe of Indians committing the wrong "when such can be identified," and of course it follows that if they cannot be identified no judgment can go against them. The United States would then be left as alone responsible for the property destroyed provided the proofs were of the character mentioned in the first section of the act; that is the claimant would be bound to prove that he was a citizen of the United States at the time of the taking or destruction of his property; that it had been taken by Indians belonging to some band or tribe or

nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and that it had not been returned or paid for.

Unless it can be asserted that it is impossible to make out a cause of action for such destruction of property by the class of Indians mentioned in the first section, without identifying such class as is mentioned in the fifth section, we can see no objection to a recovery against the United States alone in this case. We do not think that it is impossible to prove facts of the nature set forth in the first section, although they may have occurred under such circumstances as to prevent identification of the particular tribe or band of Indians committing the illegal act. The circumstances of the case might show beyond any reasonable doubt that the property had been destroyed by Indians; that it was at the time so situated with regard to various bands of Indians, all of whom were in amity with the United States, as to make it impossible to identify the particular band to which the Indians belonged who committed the depredation, but that from the facts it could not be successfully questioned that the Indians of one or the other of these bands had committed the depredation. Under such circumstances we think the claimant would bring his cause within the provisions of the act in question. He would have proved that his property had been destroyed by Indians belonging to a band or tribe in amity with the United States, but which of several bands of that description he would be unable to identify. Consequently the judgment would go against the United States, but not against any particular band because of the failure of the proof.

We think after a careful examination of the whole act that the Court of Claims was right in entering judgment against the United States alone. The claimant having died pending the suit, the question as to the appointment and appearance of an administrator may be dealt with in the Court of Claims.

The judgment of that court is, therefore,

Affirmed.

GRAVES v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

No. 31. Argued January 4, 5, 1897. — Decided February 15, 1897.

When the managers of a national bank make arrangements with depositors in the bank to give them credit at the bank for larger sums than appear upon the credit side of their accounts up to specified amounts and for a fixed time, and the proper officers of the bank make entries thereof in the books of the bank in good faith and in the belief that they have a right so to do, such an entry is not a false entry within the meaning of that term as used in Rev. Stat. § 5209, and the person so making it is not guilty of a violation of that statute in so doing.

THE case is stated in the opinion.

Mr. C. C. Cole for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error was convicted in the United States District Court for the Northern District of Iowa, under section 5209 of the Revised Statutes, of making false entries in certain reports in regard to the condition of the Commercial National Bank of Dubuque, of which he was president.

The indictment contained sixteen counts, all but six of which were taken from the jury, the remaining counts being the fourth, fifth, seventh, eighth, ninth and tenth.

The fourth and seventh counts relate to the making of alleged false entries in the returns made respectively on the 5th days of August and October, 1887. Those counts (each relating to one of the two returns) charged that the plaintiff in error falsely *understated* the amount of overdrafts paid by the bank and remaining unpaid to it on the date mentioned in the count.

The ninth and tenth counts relate to the same reports, and each count charges that the plaintiff in error falsely *overstated* the amount of loans and discounts which the bank had made and which stood on its books at the date mentioned, the claim in fact being that, as to the sum of about $20,000 contained in the item of "loans and discounts," the return was a false statement.

The point in dispute is in regard to which heading of the returns the items amounting to about $20,000 should have been placed under; whether they should have been treated as overdrafts or as loans and discounts.

The proof regarding these four counts shows that there are in substance two charges of making false entries under the two heads of "overdrafts" and "loans and discounts" in the returns dated respectively August and October, 1887.

The fifth and eighth counts relate to the making of entries alleged to have been false in the returns for the same two quarters, and relating to the liabilities of the directors, it being therein charged that those liabilities were stated in each report at a sum much less than the actual fact required it.

The plaintiff in error having been duly arraigned upon the indictment, pleaded not guilty, and was placed on trial at a term of the District Court for the Northern District of Iowa, Eastern Division, held in December, 1892, and was convicted upon the counts above mentioned.

In the course of the trial and for the purpose of proving the guilt of the accused under the fourth count, the Government gave evidence that from the books of the bank there appeared under the head of loans and discounts, on August 1, 1887, the sum of $490,133.78; that the plaintiff in error was the president of the bank and as such signed the quarterly report to the Comptroller of the Currency as to the condition of the bank at the time last named; that under the head of loans and discounts he placed in the report to the Comptroller the sum of $551,048.60, which, as is seen, is an increase of about sixty thousand dollars over the amount as shown by the bank's books on that date. One of the items going to make up this increase was the sum of $20,465.00, and this sum was

part of a sum of $23,413.38 appearing in the bank's books to have been drawn out by certain depositors in excess of the amounts appearing in such accounts to their credit. In this way it appeared on the books of the bank that there were overdrafts, on the above date, to the extent of $23,413.38. In the return to the Comptroller the amount of overdrafts was stated to have been, at the close of business on the 1st of August, 1887, $2948.38, when in truth, as is alleged, it was the sum above named, $23,413.38. The amount taken from the above item of overdrafts was placed by the plaintiff in error in the same report under the head of loans and discounts, thus increasing that sum by that amount. Other items were placed under that heading so as to make up the difference between the $490,000.00 and the $551,000.00 as above stated. The Government claims the plaintiff in error had no right to take those items amounting to over $20,000 from the heading "overdrafts" and place them under that of "loans and discounts," and that an intentional act of that kind was a violation of the statute, if meant to deceive. The plaintiff in error urged that he had the legal right to do as he did, and upon being called to the witness stand he testified substantially as follows:

"Certain overdrafts were classified and were put in the reports as loans and discounts, because the different persons making such overdrafts had spoken to the managers of the bank and obtained permission to make the same. Those overdrafts which had not been arranged for were reported as overdrafts. Those that were included in loans and discounts were accounts that had been arranged for and permission asked to overdraw. In other accounts treated as overdrafts were those where the person drew his check in advance without asking permission, and when this was done it was treated as an overdraft. Where they asked permission to overdraw and such permission was granted it was classified as a loan. The overdraft made upon permission of the bank was treated as a loan. The reports severally contained the overdrafts treated as a part of the loans and discounts, while the others were classed in the reports as overdrafts. (The witness names the persons

whose accounts were included in the loans and discounts, and each of whom had permission and had arranged for the overdraft; also the names and amounts of those whose accounts were overdrawn.)

"All these matters were brought before the board in detail. Explanations of the permission to overdraw were made to the board at their meetings. Each and all those accounts included in the loans and discounts had permission to overdraw and had arranged therefor. A classified list of overdrafts, showing the book loans and overdrafts proper, was laid before the directors at each of their meetings. A loan in the form of an overdraft account was classified as book loan and the others as overdrafts. They were presented to the directors in two lists; one headed as book loans and the other as overdrafts; and in this way they were presented to the board of directors at each of their meetings. Those persons having book loans were granted them for different reasons. The book loans were made to parties who had been to the bank and made arrangements to overdraw. The overdrafts were where checks were presented and paid without any arrangement or authority for the drawers to overdraw their accounts. Where an account had been overdrawn at first without permission, and parties thereafter made arrangement for its continuance for a few days, it was classed under the heading book loans."

Explanations of his action were given in regard to the other items in the report to the Comptroller, making up the sixty thousand dollar increase of loans and discounts, the sufficiency of which it is not necessary here to discuss. It appears from the reasons stated by the plaintiff in error for changing the amounts of "loans and discounts" and "overdrafts," that the items making up the $20,000 were regarded by him as a loan by the bank and not an overdraft; and although it appeared from an examination of the individual accounts of depositors in the bank that more money had been drawn by certain of them than stood to their credit on the books of the bank, yet he thought this did not necessarily show that the excess of the draft over the amount of the credit was an overdraft, but that where the overdrafts had been arranged for by the

depositors with the managers of the bank and consent been given by them that such overdrafts should be made and would be honored to the amount agreed upon, such a transaction amounted to a loan and not an overdraft. Under these circumstances the court charged the jury, among other things, as follows:

"The farther question remains as to this 'loans and discount' entry in the report to the Comptroller, did the defendant make a false entry in such report, when he entered as 'loans and discounts' the farther sum of $20,465, which he has testified before you is composed of part of the overdrafts that day shown by the books of the bank to exist in the accounts of various depositors whose names he has given you? It will be convenient to consider this question in connection with the farther charge in the indictment, with reference to said report of August 1, 1887, that defendant made a false entry in said report as to overdrafts.

"The proof shows that the amount of overdrafts entered in said report was the aggregate of $2948.38, and defendant has testified before you that the aggregate overdrafts upon that day, as shown by the books of the bank was the sum of $23,413.38, so that the books of the bank at the close of business on August 1, 1887, show an aggregate of overdrafts in excess of that entered in said report of $20,463. In other words, while the books of the bank, in the progress of their regular keeping from day to day, showed the accounts of its depositors to be then overdrawn in the aggregate of $23,413.38, the entry in the report to the Comptroller as to the condition of overdrafts that day was $20,465, less than shown by the books, and the entry in such report was the sum of $2948.38.

"You will have noticed that this difference ($20,465) is the exact amount which defendant testifies he entered from or took from the overdraft account of the books of the bank, and put into the entry in the report as to 'loans and discounts.' And the matter may be thus stated: If defendant rightly did this; that is, if in so doing he made a report to the Comptroller of the true condition of the bank, he did not then make a false entry in these particulars. But if the entry in report-

ing the overdraft that day as $2948.38 instead of $23,413.38, was not a truthful entry, then it would naturally follow that the entry in the 'loans and discounts' of said $20,465 of overdrafts was also not a truthful entry. For this sum of $20,465 of overdrafts could not have been truthfully entered in both overdrafts and loans and discounts. In which did a truthful entry of the condition of the bank require it to be entered?

"Now there is no difficulty in understanding what an overdraft is. There is no conflict in the testimony on this point. The books of the bank as testified to by defendant and by all the witnesses, and as themselves in evidence before you, show that an overdraft occurs whenever a depositor overdraws the amount of his deposit. I deposit in a bank a thousand dollars subject to be checked out. I commence to check it out. And whenever the amount of my checks paid by the bank exceeds the amount of the funds I have deposited, an overdraft occurs in my account, and such overdraft is the amount the bank has thus paid, over and beyond the amount I have deposited.

"Where then in the report to the Comptroller should these overdrafts appear? You will find upon looking at the report made to the Comptroller that it contains a heading called 'Overdrafts.' This heading is 'Overdrafts,' plainly and simply, and without more, 'overdrafts.' *This is the form the Comptroller has prescribed and which it was the duty of the defendant to follow and to enter correctly and truthfully whenever he made an entry in said report with regard to the condition of the bank as to overdrafts.*

"Counsel for defendant have argued to you that an overdraft is, in fact, a loan, and that, therefore, the defendant was justified in including 'overdrafts' in 'loans and discounts.' But the Comptroller demanded that the bank should report 'overdrafts' in one place in the report, as well as 'loans' in another place. Defendant assumed to report 'overdrafts.' Did he make a true entry thereof? No explanation on the report advises the Comptroller that the entry as to 'overdrafts' is an impartial or incomplete entry as to 'overdrafts' actually existing at the time the report assumed to give them.

"There is no separate heading of 'overdrafts arranged for' in the report."

The effect of this charge was to tell the jury in substance that the plaintiff in error was required by the law to place under the heading "overdrafts" the full sum which the bank books showed had been drawn out by the depositors of the bank over and above the amounts which they had severally deposited therein; that a failure to do this was a failure to comply with the law, and that a transfer of any portion of such excess from the heading "overdrafts" to the heading "loans and discounts" was the making of a false entry, and under the general directions of the charge, if intentionally and wilfully made, it was a violation of the statute and a crime on the part of the plaintiff in error. It took away from the jury the right to even consider, upon the question of intent, the explanation given by the plaintiff in error for his changing the twenty thousand dollar item from under the heading "overdrafts" to that of "loans and discounts."

If the jury believed the testimony given by the plaintiff in error in regard to the arrangements which had been made by certain depositors in the bank with its proper managers to give them credit at the bank for a larger sum than appeared on the credit side of their accounts, up to a certain amount and for a certain time, and if under such circumstances the plaintiff in error made the entries in good faith and in the belief of his right so to do, they were not false entries within the meaning of the statute, and he was not guilty of a violation thereof in making them. The charge of the learned judge substantially took away this defence and held the plaintiff in error guilty if he knowingly and wilfully placed the alleged overdrafts under the heading of loans and discounts, a fact about which there was no dispute, ignoring thereby the right of the plaintiff in error to have the jury pass upon the question whether they had been arranged for in good faith as demand loans. This charge had necessarily a prejudicial effect upon the defendant with regard to the other counts (fifth and eighth) of the indictment.

We think the court erred in the above charge, and the judgment must, therefore, be

Reversed, and the cause remanded with instructions to grant a new trial.

MR. JUSTICE HARLAN dissented.

DISTRICT OF COLUMBIA *v.* JOHNSON.

DISTRICT OF COLUMBIA *v.* SHECKELS.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 617, 618. Submitted January 4, 1897. — Decided February 15, 1897.

The act of February 13, 1895, c. 87, 28 Stat. 664, providing that in the adjudication of the claims against the District of Columbia therein referred to, the Court of Claims should allow the rates established and paid by the board of public works, simply conferred a gratuity upon the persons covered by its provisions, which became "due and payable" only from the time when the act which gave it was passed.

The claim of the District of Columbia to offset against any recovery here, the amount of the interest from June 1, 1874, on its counterclaim found due in its favor against the claimants, cannot be admitted.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dodge and *Mr. Special Assistant Attorney Howard* for appellants.

Mr. J. J. Johnson for Johnson, appellee.

Mr. W. L. Cole for Sheckels, appellee.

MR. JUSTICE PECKHAM delivered the opinion of the court.

These are appeals from the Court of Claims which gave judgments in favor of the appellees in actions commenced by them in December, 1880, pursuant to the provisions of the act

of June 16, 1880, c. 243, 21 Stat. 284, entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes." 31 C. Cl. 395.

The actions relate to work done under various contracts with the authorities of the District of Columbia between 1871 and 1876. These contracts were a few among a very large number of others, entered into with the authorities of the District of Columbia by many different persons, and relating to improvements then in contemplation and partly in course of completion in the city of Washington. Those in question here were originally made with one Peter McNamara, in or about the year 1872, for work in the nature of grading, sewering and filling various streets in that city. The contracts were in writing and stated the specific prices which were agreed upon for the various items of work to be performed under the contract.

At the time when these contracts were entered into, an act of Congress, approved February 21, 1871, c. 62, 16 Stat. 419, forbade the municipal authorities to contract except in writing, and forbade the allowance of extra compensation for work done under a written contract. Notwithstanding this legislative prohibition the board of public works then existing, without authority and in plain violation of the terms of the act, raised the prices agreed to be paid under the contracts with McNamara to what are called "board rates" (that is, rates allowed by the board of public works), the effect of which was to enormously increase the cost of the work done under them. In this way the work upon the improvements went on until in 1874, when Congress, by an act approved June 20, of that year, c. 337, 18 Stat. 116, abolished the District government and substituted another in its stead. The sixth section of the act constituted the First and Second Comptrollers of the Treasury of the United States a board of audit for the settlement of all unfunded or floating debts of the District of Columbia and of the board of public works as specified in such section, and the section further provided that the board of

audit should issue to each claimant a certificate signed by the board and countersigned by the comptroller of the District, stating the amount found to be due to each and on what account.

The seventh section of the act provided that the sinking fund commissioners of the District should cause bonds of the District of Columbia to be prepared, bearing date August 1, 1874, and payable 50 years thereafter, with interest at the rate of $3\frac{65}{100}$ per cent per annum, payable semi-annually, which bonds the sinking fund commissioners were authorized to exchange at par for like sums for any class of indebtedness named in the preceding sixth section, including certificates of the auditing board provided in the act. The section contained the following statement: "And the faith of the United States is hereby pledged that the United States will by proper proportional appropriations, as contemplated in this act, and by causing to be levied upon the property within said District such taxes as will do so, provide the revenues necessary to pay the interest on said bonds as the same may become due and payable, and create a sinking fund for the payment of the principal thereof at maturity."

By general resolution, approved March 14, 1876, 19 Stat. 211, Congress abolished the board of audit, and forbade the further issue of bonds.

By another act, approved June 11, 1878, c. 180, 20 Stat. 102, 104, 105, a permanent government was established for the District of Columbia, and in it the commissioners were required to annually make assessments for all expenses of the District, which, upon being submitted to the Secretary of the Treasury and approved by him, were to be laid before Congress; and it was then provided that "to the extent to which Congress shall approve of said assessments, Congress shall appropriate the amount of 50 per centum thereof, and the remaining 50 per centum of such approved assessments shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia." In this manner Congress assumed the payment of a portion of the bonds and expenses of the District.

Under the authority of these statutes, the bonds of the District of Columbia, carrying interest at the rate of $3\frac{65}{100}$ per cent were issued and used to a certain extent in the payment of the indebtedness of the District incurred as above mentioned. In 1880 there still remained outstanding many certificates which had been delivered by the board of audit under the sixth section of the act of 1874, and many accounts against the District were also outstanding and unprovided for.

On the 16th of June, 1880, Congress passed "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes." c. 243, 21 Stat. 284. That act conferred jurisdiction on the Court of Claims in regard to all such claims against the District of Columbia as then existed, arising out of contracts made by the late board of public works and extensions thereof, and to other claims mentioned in the section; and the act conferred upon the court the same power and provided that it should proceed in the same manner and should be governed by the same rules in respect to the mode of hearing, determination and adjudication of claims as in those against the United States.

The second section provided that the claims should be prosecuted by the contractor, his personal representative or his assignee, in the same manner and subject to the same rules, so far as applicable, as claims against the United States are prosecuted therein. Judgments were to be entered, and for the payment thereof the sixth section provided as follows:

"The Secretary of the Treasury is hereby authorized to demand of the sinking fund commissioner of the District of Columbia so many of the three sixty-five bonds authorized by act of Congress approved June twentieth, eighteen hundred and seventy-four, and acts amendatory thereof, as may be necessary for the payment of the judgments; and said sinking fund commissioner is hereby directed to issue and deliver to the Secretary of the Treasury the amount of three sixty-five bonds required to satisfy the judgments; which bonds shall be received by said claimant at par in payment of such judgments, and shall bear date August first, eighteen hundred and seventy-

four, and mature at the same time as other bonds of this issue: *Provided*, That before the delivery of such bonds as are issued in payment of judgments rendered as aforesaid on the claims aforesaid the coupons shall be detached therefrom from the date of said bonds to the day upon which such claims were due and payable; and the gross amount of such bonds heretofore and hereafter issued shall not exceed in the aggregate fifteen millions of dollars: *Provided*, The bonds issued by authority of this act shall be of no more binding force as to their payment on the Government of the United States than the three sixty-five bonds issued under authority of the act of June twentieth, eighteen hundred and seventy-four."

The mode of payment thus provided for was changed subsequently by a provision in the act approved March 3, 1881, c. 134, 21 Stat. 458, 466, as follows:

"The Treasurer of the United States, as *ex officio* sinking fund commissioner, is hereby authorized, whenever in his opinion it will be more advantageous for the District of Columbia to do so, to sell the bonds authorized to be issued under the provisions of the sixth section of the act of the Congress of the United States, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' approved June sixteenth, eighteen hundred and eighty, for the satisfaction of the judgments which may be rendered by said Court of Claims under the provisions of said act, and pay the said judgments from the proceeds of said sales, instead of delivering to said judgment claimants the said bonds as provided for in said act."

A large number of actions were brought against the District under these statutes, and among them the two actions in question. They were brought by the executrix of McNamara and by the assignee of a portion of his claim against the District for the purpose of recovering payment of the balance alleged to be due under the various contracts which McNamara had secured from the municipal authorities. They were consolidated into one action on motion of the Attorney General, and proceeded to trial before a referee. The referee found upon

the trial a certain amount due the claimants by reason of the work done under the contracts mentioned in the actions. He also found that there was due from the McNamara estate to the defendant, the District of Columbia, over and above the sum due from the District of Columbia to such estate, the amount of $6694.41, being the excess which had been paid to McNamara at "board rates" for work done under his contracts, and which sum was over and above the amount which was due him at the rates provided for in his contracts, and the referee further found that such amount was due to the defendant as a counterclaim June 1, 1874, with interest from that date. The report of the referee having been filed was excepted to by claimants, but the defendant took no exception to the report, and there the matter rested until after the passage of the act of February 13, 1895, c. 87, 28 Stat. 664.

Prior to the passage of that act many of those contractors in whose favor "board rates" had been allowed instead of the prices which were contained in the contracts executed by them had brought suits against the District of Columbia of a nature similar to the two suits now here, and had based their claims as to the balance due them with reference to the board rates allowed for work under the contracts instead of the prices named in such contracts. These claims had been held to be illegal, and the District of Columbia had successfully defended the actions and had succeeded in obtaining judgments allowing counterclaims in its favor for the difference between the prices as named in the contracts and those which had been paid by the board. The Court of Claims had decided many cases to that effect, among which are those of *Roche*, 18 C. Cl. 217, *Barnard*, 20 C. Cl. 257, *Barnes*, 22 C. Cl. 366, and *Eslin*, 22 C. Cl. 160, and 29 C. Cl. 370. This court had held the same proposition in *Barnard* v. *District of Columbia*, 127 U. S. 409. The ground upon which the recovery on the counterclaim had been allowed was the illegality of altering the prices named in the contracts and of paying any greater sums for the work contracted to be done than was provided for in the written contracts, and payments beyond those sums were held to have been illegal.

Prior to the passage of the act of 1895, therefore, it is undisputed there was no claim, legal or equitable, which the parties could successfully maintain against the District of Columbia for the recovery at board rates for work done under written contracts with the municipal authorities, but such work could only be legally paid for at the prices named in the various contracts for such work.

Under the statute of 1880, it had been customary for the Court of Claims in deciding questions arising in this class of cases to state the day upon which the claims awarded by it had become due and payable, so that under the sixth section of the act of 1880, if payment were to be made in the $3\frac{65}{100}$ bonds, the coupons thereon might be detached from the date of the bonds to the date upon which the claims were by the judgment of the court found to have been due and payable. If instead of paying judgments by the delivery of the bonds as provided for in the act of 1880, the Treasurer of the United States proceeded under the act of March 3, 1881, to sell the bonds, he might do so, and with the proceeds pay the judgments rendered by the Court of Claims.

Matters were in this condition when the act of February 13, 1895, was passed, which provided as follows, 28 Stat. 664:

"That in the adjudication of claims brought under the provisions of the act entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' approved the sixteenth of June, eighteen hundred and eighty (Twenty-first Statutes at Large, page two hundred and eighty-four), the Court of Claims shall allow the rates established and paid by the board of public works; and whenever said rates have not been allowed, the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause."

Under this act these claimants again presented their cases to the Court of Claims (no judgment having been entered upon the previous finding of the referee that the estate was indebted to the District), and thereupon the court granted

judgment to the administrator of McNamara and to the executrix of his assignee, respectively, by allowing the claimants compensation for work done under the contracts at the rates established and paid by the board of public works (instead of the contract prices), and the court held as a conclusion of law that those sums which were thus allowed by virtue of the act of 1895 were, according to its true intent and meaning, due and payable, one portion to the administrator of McNamara, February 1, 1872, and another portion February 1, 1876, and still another portion to the executrices of Theodore Sheckels, assignee, April 1, 1878. The effect of the finding is to allow interest on these sums secured under the provisions of the act of 1895, for about twenty years.

The claim of the appellant is that the amount allowed by the Court of Claims did not, as a matter of law, become due or payable until after the passage of the act of February 13, 1895, and the granting of a judgment by virtue of that act. The appellant further insists that, although the effect of the act was to extinguish its counterclaim so far as the principal sum was concerned, yet, as the referee found that principal sum was due the defendant, with interest from June 1, 1874, the claim for interest itself was not so extinguished, and that such interest should have been allowed as a counterclaim against the claim made by the estate of the contractor against the appellant.

In the opinion of the Court of Claims delivered in these cases it is conceded, and, indeed, there is no dispute in regard to it, that the finding of the referee was correct at the time he made it, as to the amount of the counterclaim legally existing in favor of the defendant and against the claimants, and the only ground upon which that finding can be attacked is based upon the act of February 13, 1895. The question, therefore, is as to the effect of that act. Did this enactment so far change existing facts and law as not only to permit a recovery of the board rates instead of the contract rates, but did it also make that sum "due and payable" 20 years before its passage? Under the holdings of the Court of Claims and of this court, it is perfectly apparent that the result of the passage of the act

of 1895 was simply to bestow a pure gratuity to the amount of the difference between the contract price and the board rates upon those persons included within its provisions. There is no element of a legal or an equitable claim within the proper meaning and signification of those words on the part of any of those who will profit by the act of 1895, against the municipal authorities of the District. That act bestowed a pure and simple gift.

Those who are to profit by it are those who had entered into a fair and legal written contract with the District authorities to do certain work at prices named in the contract and at a time when a law of Congress prohibited the granting of any extra compensation for contract work, and when it provided that all contracts should be in writing, signed by the parties making the same, and a copy thereof filed in the office of the secretary of the District. Viewed in the light of a gratuity, a gift, wholly without consideration, the statute itself must receive a strict construction; not such a construction as will prevent the fair meaning thereof from taking effect, but such as shall not be enlarged by inferences or implications not plainly to be drawn from the language of the act.

The United States has pledged its faith for the payment of claims arising out of these transactions when properly proved. Unless, therefore, the claim for interest against the government is clear and beyond question, it must be denied. Interest is not to be collected from the government in the absence of language specially providing for its payment. *United States* v. *Sherman*, 98 U. S. 565; *United States* v. *Verdier*, 164 U. S. 213. We are unable to see how it can be correctly stated that the claims in question became "due and payable" at the time of the completion of the work under these contracts more than twenty years ago, when it is conceded that but for the passage of the act of 1895 there was no legal or valid claim whatever, and that the right to any recovery depends upon the language used in that act. The statute of 1895 simply, as we have said, conferred a gratuity upon the persons covered by its provisions, and the reasonable construction of such an act is to say that the gratuity thus given becomes "due and payable" only

from the time when the act which gave it was passed. To make the amount of the gratuity thus given "due and payable" twenty years before the passage of the act giving it, so as thereby to allow interest from that time upon the amount of such gratuity, requires the clearest and most certain expression of legislative will to that effect. We do not find any such expression in the act here under consideration. Although it permits the Court of Claims to allow the rates used and paid by the board of public works, yet as that allowance is a mere gift, the further burden of twenty years' interest on it should not be added to the gift without the use of the very plainest language.

For these reasons we think the Court of Claims erred in holding that any portion of the moneys which might be due the claimants, and which arose by virtue of the act of 1895, became due and payable at any time before the passage of that act.

The claim of the appellant to offset against any recovery here, the amount of the interest from June 1, 1874, on its counterclaim found due in its favor against the claimants, in the report of the referee, we think cannot be admitted. The effect of the passage of the act of 1895 is in substance the same as if the counterclaim, which is the principal sum, had been paid, and when that is the case the interest becomes thereby extinguished. *Pacific Railroad* v. *United States*, 158 U. S. 118.

These views lead us to the conclusion that the judgments of the Court of Claims must be

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

DISTRICT OF COLUMBIA *v.* HALL.

APPEAL FROM THE COURT OF CLAIMS.

No. 619. Submitted January 4, 1897. — Decided February 15, 1897.

District of Columbia v. *Johnson*, 165 U. S. 330, approved and followed.

The case is stated in the opinion.

Mr. Assistant Attorney General Dodge and *Mr. Special Assistant Attorney Howard* for appellant.

Mr. Edwin Forrest for appellee.

Mr. Justice Peckham delivered the opinion of the court.

This is another of the same character of actions as those above disposed of. Hall was one of the contractors for doing work of the same nature, and filed his petition under the act of 1880 in December of that year. In that petition he alleged that he had done certain work and that he was paid for his work, under his contract, by certain certificates which were worth only fifty per cent of their face value, and which he consented to receive only at that rate, and he asked for judgment for the other fifty per cent of his contract price. He failed in the primary object of that suit, but he did recover on some other ground a small judgment of about one thousand dollars, which was entered June 1, 1885. Subsequently, and in pursuance of the act of 1895, he applied for a new trial for the purpose of claiming the "board rates" compensation for the work done by him at contract prices, under circumstances mentioned in the foregoing cases. The Court of Claims gave judgment in his favor for that difference between the two rates, and found that under the true intent and meaning of the acts of 1895 and 1880 the sum for which it gave judgment "became due and payable on the 1st of January, 1877," which was the date when the plaintiff had completed his work under the contract. 31 C. Cl. 376.

For the reasons mentioned in the foregoing cases, the judgment of the Court of Claims in this case must also be

Reversed, and the cause remanded for further proceedings not inconsistent with that opinion.

DISTRICT OF COLUMBIA *v.* DICKSON.

APPEAL FROM THE COURT OF CLAIMS.

No. 620. Submitted January 4, 1897. — Decided February 15, 1897.

District of Columbia v. *Johnson*, 165 U. S. 330, approved and again followed.

The case is stated in the opinion.

Mr. Assistant Attorney General Dodge and *Mr. Special Assistant Attorney Howard* for appellant.

Mr. V. B. Edwards for appellee.

Mr. Justice Peckham delivered the opinion of the court.

In this case, which is of the same general nature as the foregoing cases, the petitioner, who was the assignee of one of the contractors, filed his original petition in the Court of Claims December 15, 1880. The case, after being heard, was submitted to that court on the 26th of May, 1882, and was by it dismissed on the 29th of May, 1882. On the 6th of April, 1895, the judgment was vacated and a new trial granted by virtue of the act of February 13, 1895. 31 C. Cl. 399.

The difference between the contract price and the board rate price was claimed, and Dickson, as assignee, was allowed to recover $1386.30 for such difference, belonging to him by virtue of the assignment, and which sum the court held to have "been due and payable June 2, 1873, within the meaning and intent of the act of February 13, 1895, and the act of June 16, 1880."

For the same reasons as given in the foregoing cases, this judgment of the Court of Claims must also be

Reversed, and the cause remanded with the same directions as in the other cases.

HOPKINS *v.* GRIMSHAW.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 18. Argued December 16, 17, 1895. — Decided February 15, 1897.

Notwithstanding the provisions of the acts of July 2, 1864, cc. 210, 222 (reënacted in Rev. Stat. § 858, and Rev. Stat. D. C. §§ 876, 877), a widow is incompetent to testify, in a suit which she is neither a party to, nor interested in, to a private conversation between her husband and herself in his lifetime; and a conversation between them in their own home, in the presence of no one but a young daughter, who does not appear to have taken any part in it, is a private conversation, within the rule.

The rule against perpetuities is inapplicable to a trust resulting to the heirs of a grantor upon the failure of an express trust declared in his deed.

By a deed of land from a private person to three others as trustees for a particular society, not incorporated, but formed for the mutual aid of its members when sick and for their burial when dead, to have and to hold to the trustees, "and their successors in office forever, for the sole use and benefit of the society aforesaid, for a burial ground, and for no other purpose whatever," the trustees take the legal estate in fee; and, when the land has ceased to be used for a burial ground, and all the bodies there interred have been removed to other cemeteries, by order of the municipal authorities, and the society has been dissolved and become extinct, the grantor's heirs are entitled to the land by way of resulting trust; and, after one of those heirs and the heirs of the trustees have conveyed their interests in the land to another person, the other heirs of the grantor may maintain a bill in equity against him to enforce the resulting trust, and for partition of the land, and for complete relief between the parties.

This was a bill in equity, filed May 24, 1889, against William H. Grimshaw, and against Mary J. Brooks, an heir of Stephney Forrest, by the other heirs of Forrest, and by "Horace S. Cummings, trustee," to enforce a resulting trust in, and to obtain partition of, land in the city of Washington, conveyed by Forrest to David Redden and others, trustees

for the Union Beneficial Society of the City of Washington, for a burial ground. The case was heard upon pleadings and proofs, and was in substance as follows:

By deed dated August 9, 1845, and recorded October 21, 1845, William Nolan, Commissioner of Public Buildings, in consideration of the sum of $129.93, recited to be paid by the grantee, conveyed to "Stephney Forrest, his heirs and assigns forever," ten lots comprising the north half of square 1089 in the city of Washington.

By deed not dated, but acknowledged September 25, 1845, and recorded October 21, 1845, Stephney Forrest, for a like consideration, conveyed the same land to "David Redden, Daniel Simms and William Barton, trustees for the Union Beneficial Society of Washington City," to have and to hold to said Redden, Simms and Barton "and their successors in office forever, for the sole use and benefit of the Union Beneficial Society of the City of Washington as aforesaid, for a burial ground, and for no other purpose whatever."

Stephney Forrest died in 1855, having been twice married, and leaving six children by his first wife, and one daughter (since Mary J. Brooks) by his second wife, Rachel Forrest, who also survived him. He was a member of the society; and the answer alleged that he purchased the land in behalf of the society and with its money.

The only evidence offered in support of this allegation consisted of depositions of Rachel Forrest, his widow, and of Mary J. Brooks, their daughter, taken in November, 1889, the material parts of which were as follows: Mrs. Forrest testified that she was now eighty-five years old; that she knew her husband bought this land for the society, because, before he left home on the morning of the day of his purchase, he told her that he was going to buy the land for the society, and to get the money from the society to buy it, and came back and showed her a bundle which he said contained the money, and later in the day told her that he had bought the land for the society; and that she never talked with her daughter about this, or mentioned it to any one until the day she testified in this case. Mrs. Brooks testified that, when she was thir-

teen or fourteen years old, she heard her father, as he left home one morning, say that he was going to the secretary of the society to get the money to buy the land for the society. The plaintiffs' counsel, at the hearing, objected to this testimony of Forrest's widow and daughter as insufficient to establish a trust; and to the widow's testimony as incompetent to prove statements made by her husband to her.

The Union Beneficial Society of the City of Washington was an unincorporated association of colored persons, formed by articles of association in writing in 1841, by which provisions were made for visiting sick and infirm members, and for applying to their relief money appropriated for that purpose; and for paying, upon the death of any member, certain sums out of the funds of the society "towards defraying the funeral expenses," and "to the widow, orphan children or legal representatives, of such deceased member"; the funds of the society were to be derived from entrance fees, monthly dues and other pecuniary contributions of the members, and fines imposed upon them for violations of the articles; and "whilst six members of this institution unite for its continuance, it shall not be broken."

For many years after the deed of Forrest to the trustees, the land was used by the society for the burial of its members, and also for the burial of any other colored inhabitants of the city upon the payment of certain fees. Since 1852, at least, fees so obtained, instead of being applied to the use of the society, were divided from time to time among its members. The last admission of a new member was in 1870, and the members gradually dwindled in number until 1882, when there were only three members, one being Philip Wells, its president. For the five years before 1883, there were 1589 interments; and from January, 1883, to November 13, 1883, there were 560 bodies interred, many of them one upon another. On November 13, 1883, further interments were prohibited by the board of health; and none were made afterwards. It did not appear that since 1887 the society did anything, kept any records, or held any meetings.

All the trustees named as grantees in the deed from Steph-

ney Forrest being dead, the defendant Grimshaw, who was a son in law of Mrs. Brooks, obtained in 1887 and 1888 conveyances to himself, as follows: 1st. Deeds from Mrs. Forrest and Mrs. Brooks of their interests in the land. 2d. A deed from Philip Wells, the president of the society, purporting to convey all its and his interests in the land. 3d. Deeds of the land from the heirs of the trustees aforesaid.

In February, 1889, the board of health, upon the petition of Grimshaw, claiming to have authority from the surviving members of the society, ordered him to exhume all the bodies interred in this burial ground, and to remove them to other cemeteries; and he did so at his own expense, amounting, as he testified, to the sum of $2000.

The bill alleged that the plaintiffs and the defendants sued and were sued in their own right, except Cummings, who sued as trustee under the trust afterwards mentioned; and that on March 20 and 27, 1889, the land in question was conveyed to him by the other plaintiffs, by deeds which (as put in evidence at the hearing) purported to convey that land to Cummings in fee, "in and upon the trusts, nevertheless, hereinafter mentioned and declared, that is to say, in trust to sell and convey the same to such person or persons, in fee simple or otherwise, and upon such terms and conditions, as Franklin H. Mackey, of the District of Columbia, shall in writing direct, and the proceeds of said sale to distribute according to the terms of a paper of even date herewith, and signed in duplicate by the party of the first part, one copy of which is in the hands of the said Cummings, and the other in the hands of the said Mackey; and the purchaser or purchasers of said property shall not be required to see to the application of the purchase money." The paper so referred to, concerning the distribution of proceeds of sales, was not in the record transmitted to this court.

The bill further alleged that, "by virtue of said deeds, complainant Cummings now holds the entire legal title in trust for the other co-plaintiffs to said property, except the interest of the defendant William H. Grimshaw; and that a complete and perfect title to the same will be held by the complainants when this court has decreed the reverter which complainants

are entitled to have declared by reason of the terms of the said original deed from Stephney Forrest to said trustees."

The bill prayed that the land "be decreed to have reverted to the heirs of Stephney Forrest, by reason of the terms and provisions and purposes of the original conveyance of said Stephney Forrest, and the order of the municipal authorities, and the carrying out of said order"; that a commission be appointed to make partition of the land between Grimshaw as grantee of Mrs. Brooks, one of the heirs of Stephney Forrest, and the plaintiffs, his other heirs; that the deeds to Grimshaw from the heirs of the trustees be declared to be a cloud upon the plaintiffs' title, and of no effect to pass any title in the land, and be directed to be surrendered for cancellation; and for further relief.

Grimshaw, in his answer to the bill, denied that Cummings sued as trustee, and alleged that he sued in his own right and for his own benefit; and at the hearing, in support of this allegation, introduced a bill in equity, filed by Cummings alone April 16, 1889, similar to the present bill, except in alleging that by the deeds to him from Forrest's heirs the entire and full beneficial interest and estate vested in him. That bill was dismissed by Mr. Mackey, as solicitor for Cummings, on the same day on which he filed the present bill as solicitor for the plaintiffs therein.

The answer further averred that the deeds to Grimshaw from the heirs of the original trustees were procured by him at the instance and for the benefit of the Union Beneficial Society, and he held the land in trust for the society, and for no other use or purpose whatsoever; and denied that those deeds were clouds upon the plaintiffs' title; denied the plaintiffs' title; and denied that any title vested in Stephney Forrest's heirs, by reverter or otherwise; and averred that the deed from Forrest vested in the trustees named therein an absolute and indefeasible estate in fee simple; and that the society used the land solely for the purpose of a burial ground as long as it was lawful so to use it, and only ceased such use when compelled to do so by law. To this answer the plaintiffs filed a general replication.

Mrs. Brooks never filed an answer; and the plaintiffs, before the hearing, dismissed their bill as against her.

Upon the hearing, the Supreme Court of the District of Columbia dismissed the bill, "without prejudice to the rights of the complainants to claim, in any proper suit or proceeding, such right, if any, as the said Stephney Forrest may have been entitled to, in said real estate, as a member of said Union Beneficial Society." The plaintiffs appealed to this court.

Mr. Franklin H. Mackey and *Mr. H. O. Claughton* for appellants.

Mr. W. L. Cole and *Mr. T. J. Darlington* for appellee.

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

Stephney Forrest, in 1845, purchased a parcel of land in Washington, and conveyed it to three persons, "trustees for the Union Beneficial Society of Washington City," *habendum* to them "and their successors in office forever, for the sole use and benefit of the Union Beneficial Society of the City of Washington as aforesaid, for a burial ground, and for no other purpose whatever." Forrest died in 1855; and all three trustees afterwards died.

The Union Beneficial Society was an unincorporated association for the mutual aid of its members in case of sickness, and for their burial in case of death. This land was used by the society for a burial ground for nearly forty years, and then, by order of the board of health, ceased to be so used; and all the bodies which had been buried there were exhumed and removed to other cemeteries. Grimshaw afterwards procured conveyances of the land to himself from the heirs of the trustees named in Forrest's deed, as well as from Forrest's widow and from Mrs. Brooks, one of his heirs, and from Wells, the last president of the society and one of its three surviving members. And the society (which, by the terms of its articles of association, was to continue so long as it had six members)

does not appear to have since done any acts, held any meetings or kept any records, and was practically dissolved and extinct.

The present bill was filed by the other heirs of Forrest against Grimshaw and Mrs. Brooks, praying for a decree that the land had reverted to Forrest's heirs; and for a partition of the land between the plaintiffs and Grimshaw as grantee of Mrs. Brooks; and for cancellation of the deeds from the heirs of the trustees to Grimshaw, as being a cloud upon the plaintiffs' title; and for general relief.

The original joinder of Mrs. Brooks as a defendant is unimportant. By reason of having conveyed her right to Grimshaw, she had no interest in the suit, and filed no answer; and the plaintiffs, before the hearing, dismissed their bill as against her.

Nor can the joinder of "Horace Cummings, trustee," as a plaintiff in this bill, affect the rights of the principal parties to the suit. The deeds made to him by the other plaintiffs, two months before this suit was brought, and produced at the hearing, showed that the land was conveyed by them to Cummings in trust to sell and convey it to such persons and upon such terms and conditions as their solicitor should direct, and to distribute the proceeds of such sale according to the terms of a paper, copies of which were in the hands of the solicitor and of Cummings respectively. Although that paper is not in the record, the terms of those deeds clearly show Cummings to have been a mere trustee to bring suit and to sell the land for the benefit of the other plaintiffs, and not in his own behalf, notwithstanding the allegation, in the bill thereafter filed by him alone, and voluntarily dismissed upon the filing of the present bill, that by those deeds the whole beneficial interest and estate vested in him. Perhaps, as suggested by the counsel of the appellee, the former bill was dismissed for fear of the rule of law, recognized in *Schulenberg* v. *Harriman*, 21 Wall. 44, 63, that a right of entry for breach of a condition subsequent cannot be alienated.

The allegation in the answer, that Forrest purchased this land in behalf of the society, and with its money, is supported

by no competent and sufficient evidence. The only evidence upon this point was the testimony, taken forty years after the transaction, of Forrest's widow and daughter, respectively the grandmother and the mother of Grimshaw's wife.

The first question presented in relation to this testimony is whether the widow was a competent witness to prove admissions or declarations supposed to have been made by her husband in conversation with her.

At common law, upon grounds of public policy, husband and wife (with some exceptions not here material) were not permitted, even by consent, to give evidence for or against each other, or to testify, even after the ending of the marriage relation by death or divorce, to private communications which took place between them while it lasted. *Stein* v. *Bowman*, 13 Pet. 209, 222; *O'Connor* v. *Majoribanks*, 4 Man. & Gr. 435; *S. C.*, 5 Scott N. R. 394; 1 Greenleaf on Evidence, §§ 334–337.

The Congress of the United States, by a clause originally inserted in the Civil Appropriation Act of July 2, 1864, c. 210, § 3, 13 Stat. 351, and embodied in section 858 of the Revised Statutes of the United States, has enacted that there shall be no exclusion of any witness in a civil action because he is a party to or interested in the issue tried. But that clause has merely removed all disqualifications of witnesses for interest, and does not affect the exclusion of testimony of a husband or wife upon grounds of public policy. *Lucas* v. *Brooks*, 18 Wall. 436, 453; *Bassett* v. *United States*, 137 U. S. 496, 505.

Congress, on the same day, passed another act, entitled "An act relating to the law of evidence in the District of Columbia," by which it was enacted "that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding in any court of justice, in the District of Columbia, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, within said District, the parties thereto, and the persons in whose behalf any such action or other proceeding may be brought or defended, and any and all persons in-

terested in the same, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to said action or other proceeding: Provided, that nothing herein contained shall render any person who is charged with any offence, in any criminal proceeding, competent or compellable to give evidence for or against himself or herself; or shall render any person compellable to answer any question tending to criminate himself or herself; or shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, or in any proceeding instituted in consequence of adultery; nor shall any husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall any wife be compellable to disclose any communication made to her by her husband during the marriage." Act of July 2, 1864, c. 222; 13 Stat. 374.

This act (except in the restriction to the District of Columbia) was taken, almost word for word, from modern English statutes; the first half of it (except the words "and any and all persons interested in the same," who had been made competent witnesses by the statute of 6 & 7 Vict. c. 85) from section 2 of the statute of 14 & 15 Vict. c. 99; the first two clauses of the proviso from section 3 of that statute; and the last two clauses, being those concerning husband and wife, from the statute of 16 & 17 Vict. c. 83, § 3.

The same act has been reënacted in the Revised Statutes of the District of Columbia, with hardly any change, except in substituting for the words "except as hereinafter excepted," the words "except as provided in the following section"; and in making the proviso a separate section, omitting the words, "Provided that nothing herein contained," and beginning with the words, "Nothing in the preceding section." Rev. Stat. D. C. §§ 876, 877.

The latter part, which constituted the proviso in the act of 1864, c. 222, and which now forms section 877 of the Revised

Statutes of the District of Columbia, is upon its face, and according to its uniform construction in the courts of the District of Columbia, not new and affirmative legislation, but wholly negative, and by way of proviso or exception out of the enactment which goes before; and therefore has no application to any cases other than those in which the husband or wife, called as a witness, is a party, in name or in fact, to the suit, or interested in it; and does not make a husband or wife, not a party to or interested in the suit, competent to testify, before or after the death of the other, to private communications between the latter and the witness. *United States* v. *Guiteau*, 1 Mackey, 498, 547, 548; *Clark* v. *Krause*, 2 Mackey, 559, 572; *Holtzman* v. *Wagner*, 5 Mackey, 15, 16; *Beale* v. *Brown*, 6 Mackey, 574, 577. See also *Barbat* v. *Allen*, 7 Exch. 609; *Percival* v. *Caney*, 14 Jurist, 1056, 1062; *S. C.*, cited 7 Exch. 611; *Alcock* v. *Alcock*, 5 De G. & Sm. 671; *The Queen* v. *Payne*, L. R. 1 C. C. 349, 355; *The Queen* v. *Thompson*, L. R. 1 C. C. 377.

Stephney Forrest's widow was neither a party to nor interested in this suit, having conveyed all her interest in the subject thereof to the defendant Grimshaw before the suit was brought. She was therefore incompetent to testify to private conversations between her and her husband in his lifetime; and a conversation between them in their own home, in the presence of no one but their young daughter, who does not appear to have taken any part in it, must be deemed to be a private conversation, within the rule. *Jacobs* v. *Hesler*, 113 Mass. 157.

The daughter herself may have been a competent witness to such a conversation. But her testimony, which amounted to no more than that she heard her father, as he left home one morning, say that he was going to the secretary of the society to get money to buy land for the society, was clearly insufficient to prove that he bought the land with money of the society, or that the society had any greater or other title, legal or equitable, than appeared to be conveyed to it by the deed made by him to, and accepted by, the trustees in its behalf. Such slight testimony to a casual remark of the

supposed trustee, more than forty years ago, falls far short of the clear proof required by a court of equity, whenever a trust in real estate is sought to be implied, against the terms of a deed of conveyance, by parol evidence of payment of the price by a third person. *Prevost* v. *Gratz*, 6 Wheat. 481; *Slocum* v. *Marshall*, 2 Wash. C. C. 397; *Smith* v. *Burnham*, 3 Sumner, 435.

We are then brought to the principal question in the case, which is of the nature and effect of the deed from Forrest to trustees for the Union Beneficial Society for a burial ground.

The first inquiry which naturally arises is whether the deed was for a charitable use, in the legal sense. If it was, the conveyance would not be open to any legal objection by reason of the length of time during which the trust might last, or because of the society named not being a corporation. *Ould* v. *Washington Hospital*, 95 U. S. 303; *Russell* v. *Allen*, 107 U. S. 163, 171. And the trustees, although the deed did not in terms run to their heirs and assigns, would take the legal estate in fee. *Russell* v. *Allen*, above cited; *Potter* v. *Couch*, 141 U. S. 296, 309; *Easterbrooks* v. *Tillinghast*, 5 Gray, 17, 21.

A grant for the maintenance of a churchyard or burial ground in connection with a church or religious society, or of a public burial ground, or a burial ground of all persons of a certain race, class or neighborhood, might be considered as in the nature of a dedication for a pious and charitable use. *Beatty* v. *Kurtz*, 2 Pet. 566, 583, 584; *Cincinnati* v. *White*, 6 Pet. 431, 436; *Jones* v. *Habersham*, 3 Woods, 443, 470, and 107 U. S. 174, 183, 184; *Dexter* v. *Gardner*, 7 Allen, 243, 247; *In re Vaughan*, 33 Ch. D. 187.

By the act of Congress of May 5, 1870, c. 80, § 5, reënacted in the Revised Statutes of the District of Columbia, provision has been made for the voluntary incorporation of cemetery associations in the District of Columbia; and "any person or persons desiring to dedicate any lot of land, not exceeding five acres, as a burial ground or place for the interment for the dead, for the use of any society, association or neighborhood," may convey such land by deed to the District of Columbia, "speci-

fying in such deed the society, association or neighborhood for the use of which the dedication is desired to be made, and thereby vest the title to such land in perpetuity for the uses stated in the deed." 16 Stat. 106, 107; Rev. Stat. D. C. §§ 594–604.

But the conveyance now in question, made to private persons as trustees, twenty-five years before the passage of that act, was expressed to be "for the sole use and benefit of the Union Beneficial Society of the City of Washington as aforesaid, for a burial ground, and for no other purpose whatever." The articles of association of that society appear to have contemplated the burial of none but its own members; and the usage, which early sprang up, of permitting the interment in its burial ground of other inhabitants of the District of Columbia, upon the payment of certain fees, appears to have been adopted, not from any charitable motive, but as a source of private profit to the members of the association. It may be doubted whether, in the absence of express statute, the burial ground of such a society can be held to be a public charitable use. See *King* v. *Parker*, 9 Cush. 71; *Donnelly* v. *Boston Catholic Cemetery*, 146 Mass. 163; *Anon.*, 3 Atk. 277; *Pease* v. *Pattinson*, 32 Ch. D. 154; *Cunnack* v. *Edwards*, (1896) 2 Ch. 679; *In re Buck*, (1896) 2 Ch. 727.

If it be assumed, however, as most favorable to the defendant, that this deed created a charitable trust, it was not a grant indicating a general charitable purpose and pointing out the mode of carrying that purpose into effect, thus coming within the class of cases in which courts of chancery, when the particular mode had failed, have carried out the general purpose. *Mormon Church* v. *United States*, 136 U. S. 1, 51–60; *Jackson* v. *Phillips*, 14 Allen, 539. But the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground, adding (as if to put the matter beyond doubt) "and for no other purpose whatever." The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground and the society was dissolved. *Easterbrooks* v. *Tillinghast*, above cited; *Reed* v. *Stouffer*, 56 Maryland, 236, 254; *Second Universalist*

Society v. *Dugan*, 65 Maryland, 460; *In re Rymer*, (1895) 1 Ch. 19, 31, 32.

In *Easterbrooks* v. *Tillinghast*, above cited, an inhabitant of a town devised land to a trustee named, and his successors to be appointed as provided in the will, in trust to apply the income in support of the gospel and maintenance of a pastor or elder in a church already existing in the town, of a certain faith and practice, so long as the members of that church "or their successors shall maintain the visibility of a church in said faith and order, and uniting in fellowship and communion with those who hold and practise said principles, and no others." Three years after the testator's death, the members of the church, reduced to two in number, voted and resolved, at a meeting called by public notice, that they would no longer endeavor to maintain the appearance of a visible church, and declared the church dissolved and extinct. The Supreme Judicial Court of Massachusetts, speaking by Mr. Justice Metcalf, decided that the trustee took an estate in fee; but that, the church having been dissolved, and having ceased to be a visible church, he held the land for the devisor's heirs at law as a resulting trust. 5 Gray, 21.

In *Rawson* v. *Uxbridge*, 7 Allen, 125, cited by the defendant, the deed was to a town of land already, as the deed recited, "being improved for a burying place," *habendum* "to the said town of Uxbridge forever, to their only proper use, benefit and behoof, for a burying place forever." There were no such negative words, as in the deed now before us, "and for no other purpose whatever"; the action was at law; and the only question argued or considered was whether the deed created an estate upon condition subsequent. While deciding that it did not, Chief Justice Bigelow said: "If it be asked whether the law will give any force to the words in a deed, which declare that the grant is made for a specific purpose, or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee." 7 Allen, 130.

The somewhat similar cases of *Crane* v. *Hyde Park*, 135

Mass. 147, and *Mahoning County* v. *Young*, 16 U. S. App. 253, also cited by the defendant, likewise turned upon a question of forfeiture for breach of a condition subsequent in a deed to a municipal corporation.

In the case at bar, the trust created by the deed having been terminated, according to its express provisions, by the land ceasing to be used as a burial ground, and the dissolution and extinction of the society for whose benefit the grant was made, there arises, by a familiar principle of equity jurisprudence, a resulting trust to the grantor and his heirs, whether his conveyance was by way of gift, or for valuable consideration. 2 Fonblanque Eq. 116, 133, and notes; 2 Story Eq. Jur. §§ 1199, 1200; Hill on Trustees, 113, 133; *Easterbrooks* v. *Tillinghast*, and *Reed* v. *Stouffer*, above cited.

The question suggests itself whether the case at bar falls within the rule of law, known as the rule against perpetuities, by which an estate, legal or equitable, granted or devised by one person to another, which, by the terms of the instrument creating it, is not to vest until the happening of a contingency which may by possibility not occur within the period of a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards, is void for remoteness, and consequently a limitation over to a third person which may possibly not take effect within the period is void, and the estate remains in the first taker. That rule does not apply to a gift to a charity, with no intervening gift to or for the benefit of a private person or corporation; or to a contingent limitation over from one charity to another. But it does apply to a grant or devise to a charity after one to a private person; as well as to a grant or devise to a private person, although limited over after an immediate gift to a charity. *Russell* v. *Allen*, 107 U. S. 163, 171; *Jones* v. *Habersham*, 107 U. S. 174, 185; *McArthur* v. *Scott*, 113 U. S. 340, 381, 382; *Brattle Square Church* v. *Grant*, 3 Gray, 142; *Theological Education Society* v. *Attorney General*, 135 Mass. 285; *In re Tyler*, (1891) 3 Ch. 252; *In re Bowen*, (1893) 2 Ch. 491.

But when there is no limitation over in the grant or devise, and the grantor or devisor, or the heirs of either, claim the

estate, not under the grant or devise, but because, by reason of the failure thereof, the estate, legal or equitable, as the case may be, reverts or results to him or them, the rule against perpetuities is inapplicable.

Even when the first gift is strictly upon condition subsequent, requiring an entry on the part of the grantor or devisor, or his heirs, to revest the estate in him or them, the American courts have treated their title as unaffected by the rule against perpetuities. *Cowell* v. *Springs Co.*, 100 U. S. 55; *Gray* v. *Blanchard*, 8 Pick. 283; *Austin* v. *Cambridgeport Parish*, 21 Pick. 215; *Guild* v. *Richards*, 16 Gray, 309; *Tobey* v. *Moore*, 130 Mass. 448; Gray on Perpetuities, §§ 304–310.

But the deed in this case is clearly, in terms and effect, a conveyance in trust, with no words apt to create a condition. *Stanley* v. *Colt*, 5 Wall. 119; *Barker* v. *Barrows*, 138 Mass. 578; *Attorney General* v. *Wax Chandlers' Co.*, L. R. 6 H. L. 1. In such a case, it has been held, both in this country and in England, that, upon the failure of the trust declared in the deed, although depending upon a contingency which might not happen within the period prescribed by the rule against perpetuities, the resulting trust to the grantor and his heirs is not invalidated by the rule. *Easterbrooks* v. *Tillinghast*, above cited; *Stone* v. *Framingham*, 109 Mass. 303; *First Universalist Society* v. *Boland*, 155 Mass. 171; *In re Randell*, 38 Ch. D. 213, 218, 219; *In re Bowen*, (1893) 2 Ch. 491, 494. In *Randell's case*, Mr. Justice North said: "In my opinion, a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law." And in *Bowen's case*, Mr. Justice Sterling said: "As property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes."

In the case at bar, our conclusions as to the effect of Forrest's deed, assuming it to be in the nature of a valid dedication for a pious and charitable use, may be summed

up as follows: The trustees named in the deed took the legal estate in fee. The equitable estate in fee was from the beginning, and always remained, in the grantor and his heirs. The trust declared in the deed, for a burial ground for the Union Beneficial Society, came to an end, according to its own express restriction and limitation, by the land ceasing to be used as a burial ground, and the dissolution of the society. Thereupon, the trustees held the legal estate in fee, subject to a resulting trust to the grantor's heirs, unaffected by the rule against perpetuities; and the legal estate of the trustees descended to their heirs, and passed by the deeds of the latter to the defendant, charged with this resulting trust.

The alternative that the trust expressed in Forrest's deed was not a charitable use, but was void as tending to create a perpetuity, and that the trustees, immediately upon the execution and delivery of the deed to them, held the land subject to a resulting trust for the grantor and his heirs, would be wholly inconsistent with the position always taken by the defendant Grimshaw, and by the trustees and the society under whom he claims title, and could not, therefore, enure to his benefit by way of defence to this suit, on the ground of laches, or otherwise. All Forrest's heirs (except Mrs. Brooks, who had conveyed her title to the defendant Grimshaw) have joined as plaintiffs in this bill to enforce the resulting trust in their favor. Both they and Grimshaw had acted upon the theory that the deed of Forrest created a valid trust for the Union Beneficial Society. The plaintiffs made no claim to the land, so long as it was used by that society for a burial ground. And neither the trustees, nor Grimshaw claiming under them, contended that they took an absolute title, free from the trust expressed in Forrest's deed. The real controversy between the plaintiffs and Grimshaw was as to the construction of the deed, and as to the duration of the express trust therein declared for the Union Beneficial Society.

The objection that the plaintiffs' only remedy is at law is unavailing. The bill, besides specifically praying that the land be decreed to have reverted to Forrest's heirs, and that

a partition be ordered to be made between the defendant Grimshaw, as grantee of Mrs. Brooks, one of Forrest's heirs, and the plaintiffs, his other heirs, and that the deeds to Grimshaw from the heirs of the trustees be declared to be a cloud upon the plaintiffs' title, contains a prayer for general relief, under which the court may grant any relief justified by the facts stated in the bill and appearing in proof. *Jones* v. *Van Doren*, 130 U. S. 684, 692.

Upon the allegations of the bill, and the proofs at the hearing, the trustees named in Forrest's deed, and their heirs, and Grimshaw as grantee of the latter, took the legal title in fee, in any aspect of the case, subject to a resulting trust for the heirs of the grantor. A resulting trust is a creature of equity, and can be enforced in a court of chancery only. *Wilkins* v. *Holman*, 16 Pet. 25, 59. Moreover, the title of the plaintiffs appearing upon the allegations and proofs to be purely equitable, the bill may also be maintained for partition of the land. Act of August 15, 1876, c. 297, 19 Stat. 202; *Willard* v. *Willard*, 145 U. S. 116; *Lucas* v. *King*, 2 Stockton, (10 N. J. Eq.) 277.

The court, having acquired jurisdiction of the bill upon both these grounds, was authorized to retain it for the purpose of administering complete relief between the parties, including the question of any allowance to which Grimshaw might be entitled for the expense incurred in the removal of the bodies from the burial ground to other cemeteries, or upon any other account.

The decree below appears to have proceeded upon the misapprehension that the heirs of Forrest were not entitled to any relief, unless by reason of his membership in the Union Beneficial Society.

Decree reversed, and case remanded for further proceedings in conformity with this opinion.

ROBINSON v. CALDWELL.

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

No. 162. Submitted January 19, 1897. — Decided February 1, 1897.

The judiciary act of 1891 does not give the defeated party in a Circuit Court the right to have his case finally determined on the merits both in this court and in the Circuit Court of Appeals.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dickinson for appellant.

Mr. Charles A. Maxwell, *Mr. George S. Chase* and *Mr. James W. Reid* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought on the 20th day of October, 1893, by Caldwell against Robinson in the District Court of the Second Judicial District of the State of Idaho.

It appears from the complaint that the plaintiff claimed to be the owner of a certain tract of land in Idaho, containing six hundred and forty acres, and that the validity of his title depended partly, if not altogether, upon the construction of a treaty made between the government of the United States and the Nez Perce Indians on the 11th day of June, 1855. 12 Stat. 957. It also appears that there was drawn in question in the Circuit Court the constitutionality of the act of Congress of March 3, 1873, c. 324, 17 Stat. 627.

A temporary injunction was issued in the cause, enjoining the defendant and his servants, counsel and agents, and all others acting in his behalf, from interfering or intermeddling with the plaintiff in the control and peaceable possession of the lands and premises described in the complaint.

Upon a petition subsequently filed in the state court by the defendant, the cause was removed into the Circuit Court of

the United States for the District of Idaho, Northern Division. By stipulation of the parties the case was transferred to the Central Division of that court.

The case was heard in the Circuit Court of the United States upon a motion to dissolve the injunction, and also, pursuant to a stipulation of the parties, upon the merits. A final decree was rendered adjudging the plaintiff to be the true and lawful owner of an undivided one half interest in the land described in the complaint, and that his title be quieted against the claims, demands and pretensions of the defendant, whom the decree perpetually estopped from setting up any claim to said land or to any part thereof, as described in the decree. 59 Fed. Rep. 653. From this decree the defendant asked and was allowed an appeal to this court. The citation on this appeal was served July 21, 1894.

It is conceded that the appellant also prosecuted an appeal to the Circuit Court of Appeals, which determined the case February 4, 1895, in favor of the plaintiff — the opinion of that court being delivered by Judge Gilbert. 29 U. S. App. 468.

The opinion of Judge Beatty in the Circuit Court and of Judge Gilbert in the Circuit Court of Appeals both show that the respective courts considered all the questions in the case requiring a construction of the treaty of 1855, and involving the validity of the act of March 3, 1873.

The case was not brought to this court from the Circuit Court of Appeals upon *certiorari*, but is here upon appeal directly from the final decree in the Circuit Court of the United States.

Upon the present appeal a question is raised by the appellant as to the jurisdiction of the Circuit Court of the United States, the contention being that the plaintiff could not have brought an original suit in the Circuit Court of the United States, and, therefore, that the case was not removable from the state court. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Chappell* v. *Waterworth*, 155 U. S. 102. But no such question has been certified to this court, nor does it appear to have been raised either in the Circuit Court or in the Circuit Court of Appeals.

In *McLish* v. *Roff*, 141 U. S. 661, 668, the court said that after a final judgment in the Circuit Court, "the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court."

In *United States* v. *Jahn*, 155 U. S. 109, 114, it was said: "(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court; (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it; (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court; (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) The same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits."

In *Chappell* v. *United States*, 160 U. S. 499, 509, in which the constitutionality of an act of Congress was drawn in ques-

tion, the court said: "No question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction, this court, under the other clause of the statute, above cited, [§ 5,] has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of the jurisdiction or of merits."

As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the Circuit Court, this court could have taken cognizance of the case upon the appeal from the Circuit Court, and determined those questions; and having thus acquired jurisdiction of the cause, it could have determined any question of the jurisdiction of the Circuit Court appearing upon the record, whether certified or not. 26 Stat. 826, c. 517, § 5. But the defendant elected to prosecute also an appeal to the Circuit Court of Appeals, and that court considered and determined the whole case upon its merits.

It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals. As no question of jurisdiction was certified by the Circuit Court, and as the defendant chose not to await the action of this court upon the appeal to it from the Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the Circuit Court.

We are of opinion that the present appeal must be dismissed. After the final decree upon the merits in the Circuit Court of Appeals, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon *certiorari*.

Appeal dismissed.

OAKES *v.* MASE.

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

No. 182. Submitted January 28, 1897. — Decided February 15, 1897.

It is settled law in this court that the relation of fellow-servants exists between an engineer operating a locomotive on one train and the conductor on another train on the same road.

THE case is stated in the opinion.

Mr. C. W. Bunn for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The defendant in error, who was plaintiff in the trial court, sued to recover damages caused by an injury, resulting in the death of her intestate, whilst serving as an engineer on an engine of the defendant company in the State of Montana. After the cause was put at issue a jury was waived by a written stipulation, and it was submitted to the court for judgment on an agreed statement of facts. The facts stated established that the accident was caused by a switch negligently left open by the conductor of another train on the same road. The trial court, considering that the engineer on one train was not a fellow-servant of the conductor on another train of the same road, gave judgment for the sum of the damage, which was fixed in the statement of facts. On error to the trial court the Circuit Court of Appeals for the Eighth Circuit, although holding that the relation between the engineer on one train and the conductor on another was that of a fellow-servant, yet affirmed the judgment on the ground that, by the statute law of Montana, the common law rule as to the relation of master and servant was modified, hence the liability existed. The statute referred to

is found in the Compiled Statutes of the State of Montana of 1887, and reads as follows:

"SECTION 697. That in every case the liability of the corporation to a servant or employé, acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him, as if such servant or employé were a passenger."

Pending this writ of error prosecuted to the judgment of affirmance rendered by the Circuit Court of Appeals, the validity of the statute of Montana upon which that court based its decree was drawn in question before the Supreme Court of the State of Montana, where it was held that the statute was void under the constitution of the State because it applied only to domestic corporations, and therefore operated a discrimination against such corporations. *Crisswell* v. *Montana Central Railway Co.*, 44 Pac. Rep. 525. As this ruling of the court of last resort of the State of Montana, interpreting the constitution and laws of that State, is binding here, the sole ground upon which the Circuit Court of Appeals rested its judgment is destroyed and the only question remaining is, did the relation of fellow-servant exist between an engineer operating a locomotive on one train and the conductor on another train of the same road? That such relation did exist is no longer an open question in this court. *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349; *Northern Pacific Railroad* v. *Charless*, 162 U. S. 359; *Northern Pacific Railroad* v. *Peterson*, 162 U. S. 346; *Central Railroad Company* v. *Keegan*, 160 U. S. 259.

It follows, necessarily, that the judgment must be

Reversed, and ordered that judgment be entered in favor of defendants.

MR. JUSTICE HARLAN dissented.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *v.* OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 156. Argued January 15, 1897. — Decided February 15, 1897.

The provisions in §§ 4, 5 and 7 of the act of September 19, 1890, c. 907, conferring upon the Secretary of War authority concerning bridges over navigable water-ways, do not deprive the States of authority to bridge such streams, but simply create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.

THE case is stated in the opinion.

Mr. George C. Greene for plaintiff in error.

Mr. T. E. Burton for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The judgment of the Supreme Court of the State of Ohio to which this writ of error was prosecuted affirmed a judgment of the trial court rendered in proceedings by *quo warranto* ordering the defendant below, an Ohio corporation, to absolutely remove a bridge or to modify its structure by creating an adequate draw-span therein; the bridge being one by it erected and maintained over the Ashtabula River, a short distance above the point where that stream empties into Lake Erie. The legal conclusions of the lower court were rested upon certain specific findings of fact, viz., that the bridge without a draw had been erected and was maintained without the consent of the State by an abuse, by the corporation, of the franchise held by it from the State, and that it was a public nuisance impeding the navigation of the river, which was wholly within the State of Ohio. Both the pleadings and the errors here assigned deny the jurisdiction of the State of Ohio or its courts to control the subject-matter of the con-

troversy, on the theory that the determination of whether the defendant possessed the right to erect the bridge and to continue it, although constructed without authority, is a Federal and not a state question. This contention is predicated on §§ 4, 5 and 7 of the act of Congress of September 19, 1890, c. 907, 26 Stat. 426, 453.

The contention is that the statute in question manifests the purpose of Congress to deprive the several States of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the States as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined. *Willson* v. *Blackbird Creek Co.*, 2 Pet. 245; *Withers* v. *Buckley*, 20 How. 84; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1; *Shively* v. *Bowlby*, 152 U. S. 1, 33, and authorities there cited. Indeed, the argument at bar does not assail the rule settled by the foregoing cases, but asserts that as the power which it recognizes as existing in the States is predicated solely upon the failure of Congress to exert its paramount authority, therefore the rule no longer obtains, since the act of 1890, relied on, substantially amounts to an express assumption by Congress of entire control over all and every navigable stream, whether or not situated wholly within a State.

The correctness of this proposition is the sole question for consideration. The fourth section of the act relied on provides:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable water-ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the draw-span of such bridge by rafts, steamboats or other water craft, it shall be the duty of the said Secretary, first giving

the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

The fifth section makes it a misdemeanor to wilfully refuse to comply with the lawful orders of the Secretary of War in the premises, and for the prosecution of the offender by proceedings instituted by the proper district attorney. The portion of the seventh section, which relates to the question in hand, is as follows:

"And it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

On the face of this statute, it is obvious that it does not support the claim based upon it. Conceding, without decid-

ing that the words "water-ways of the United States," therein used, apply to all navigable waters, even though they be wholly situated within a State, and passing, also, without deciding, the contention, that Congress can lawfully delegate to the Secretary of War all its power to authorize structures of every kind over all navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end. When the distinction between an authorized structure so erected as to impede commerce, and an unauthorized work of the same character is borne in mind, the fallacy of the contention relied on becomes apparent. The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built. If the interpretation claimed were to be given to the act, its necessary effect would be that Congress, in creating an additional means to control bridges erected by authority of law, had, by implication, confirmed and made valid every bridge built without sanction of law.

The language of the seventh section makes clearer the error of the interpretation relied on. The provision that it shall not be lawful to thereafter erect any bridge "in any navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge . . . have been submitted to and approved by the Secretary of War," contemplated that the function of the Secretary should extend only to the form of future structures, since the act would not have provided for the future erection of bridges under state authority if its very purpose was to deny for the future all

power in the States on the subject. The qualification affixed to the proviso which accompanies this section throws light on the entire statute and points obviously to the purpose intended to be accomplished by its enactment. The qualifying language is that the section shall not apply to any bridge "heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water, not wholly within the limits of such State." The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters wholly within their territory. To hold that the act manifested an intention on the part of Congress to strip the several States of all authority over every navigable stream wholly within the State would require the obliteration of these qualifying words, and would therefore be the creation of a new statute by judicial construction. It follows, therefore, that, even conceding *arguendo* that the words "navigable waters" as used in the act were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.

Affirmed.

Mr. Justice Brewer concurred in the result.

BURLINGTON GAS LIGHT COMPANY *v.* BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 173. Argued January 26, 1897. — Decided February 15, 1897.

The use of the land, the subject of this controversy, being a public use, and within the authority granted by the original reservation, the extent of that use is a matter for determination by the public authorities of Burlington, and cannot be restrained by an adjoining lot owner, without reference to his right to compensation for the injury to his lots.

On July 2, 1836, Congress passed an act, c. 263, 5 Stat. 70, directing the survey and platting of certain tracts of land in Iowa into towns, among others the town (now city) of Burlington, the work to be done under the direction of the surveyor general of the public lands, with a proviso "that a quantity of land of proper width, on the river banks, . . . and running with the said river the whole length of said towns, shall be reserved from sale (as shall also the public squares), for public use, and remain forever for public use, as public highways, and for other public uses." This act was amended on March 3, 1837, c. 36, 5 Stat. 178, by transferring the duty of surveying, etc., from the surveyor general to a board of commissioners. Both the original act and its amendment provided for a public sale of the lots as surveyed and platted. In pursuance of these statutes the town of Burlington was platted, a strip of land two hundred feet in width, called "Front Street," being left between the eastern row of lots and the Mississippi River. February 14, 1853, Congress passed an act, c. 67, 10 Stat. 157, granting to the cities of Burlington and Dubuque "the land bordering on the Mississippi River, in front of said cities, reserved by the act of second July, eighteen hundred and thirty-six, for a public highway, and for other public uses, together with the accretions which may have formed thereto or in front thereof; to

Counsel for Plaintiff in Error.

be disposed of in such manner as the corporate authorities of said cities may direct."

The third section provided:

"That the grant made by this act shall operate as a relinquishment only of the right of the United States in and to said premises, and shall in no manner affect the rights of third persons therein, or to the use thereof, but shall be subject to the same."

The plaintiff is the owner of five lots facing on Front Street, holding them by a regular chain of title from the original purchasers at the government sale, and occupying them for its gas manufacturing plant. For many years the defendant, under authority from the city, and apparently without objection, had been using a portion of this open ground between the lots and the river. It had constructed a retaining wall thirty-six feet east of the line of plaintiff's lots, and had graded and used all east of that for tracks, switches and a freight house. Practically, therefore, the plaintiff was left a roadway in front of its lots of thirty-six feet in width. In 1892 the city council passed a resolution authorizing the railroad company to set this retaining wall back fifteen feet, "the space said wall was set back to be used solely for the purpose of a wagon road." The effect of this was to narrow the roadway in front of plaintiff's lots to about twenty feet, the wagon road east of the retaining wall being for approach to a new freight house the defendant was proposing to construct between that space and the river. In pursuance of this authority the railway company commenced to make the excavation and erect the wall. Upon this plaintiff filed its petition in equity in the Des Moines County District Court to enjoin the work. A decree in its favor in the District Court was reversed by the Supreme Court of the State, and one entered dismissing the suit, 91 Iowa, 470, to reverse which decree of dismissal plaintiff sued out this writ of error.

Mr. P. Henry Smythe for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The act of 1853 operated to transfer to the city of Burlington the fee to this strip along the river front, together with full control over it, subject only to the laws of the State and individual rights theretofore vested. Indeed, independent of the act it would seem that the United States has no control over the question of the uses to which the strip shall be put. *United States* v. *Illinois Central*, 154 U. S. 225.

The use to which this land was reserved was not that of a highway alone, but "other public uses." This does not mean other public uses similar in character. The rule *noscitur a sociis* does not apply; for under the act of 1836 the reservation is not simply of this strip but of public squares whose use is obviously not of the same character as that of the highway. Indeed, as well said by the Supreme Court of the State, "the fact that the land reserved was two hundred feet wide precludes the idea that it was intended for public travel alone." The further fact that the reservation was of a strip along the Mississippi River — a great navigable waterway — implies that the public uses to which this strip might be put included all public uses which would tend to facilitate commerce on such highway, including therein wharves, storehouses, etc.

Land devoted to the use of a railroad is devoted to public use, and under the settled law of Iowa a common highway may be used by a railroad without further compensation to adjoining landowners. *Barney* v. *Keokuk*, 94 U. S. 324, 341, and cases from the Supreme Court of Iowa cited in the opinion.

The public having control over a highway may determine the manner in which it shall be improved, and, as a general rule, such improvement cannot be enjoined by an abutting lot or landowner, whatever may be his right to compensation growing out of the injury which such manner of improvement may bring to his property. This being true of ordinary highways, *a fortiori* is it true in respect to this property which was not reserved for a highway alone, but for other public uses.

Syllabus.

It does not appear that the plaintiff was pecuniarily damaged. The Supreme Court of Iowa said in its opinion that "there is not one word in the evidence showing that the plaintiff would be damaged in any sum of money by the proposed change." Whether there be any damage or not, or whether it be true that the plaintiff, having suffered pecuniary injury, is entitled to compensation therefor, its right, if any, is limited to the matter of compensation, and does not in the absence of constitutional provisions — like those, for instance, found in the constitution of Illinois — entitle it to an injunction to restrain the proposed change.

The use of this strip for railroad purposes being a public use and within the authority granted by the original reservation, the extent of that use is a matter for determination by the public authorities and cannot be restrained by the plaintiff, an adjoining lot owner, whatever may be its rights to compensation for the injury to its lots. We see no error in the decision of the Supreme Court of the State, and it is

Affirmed.

Mr. Justice Peckham dissented.

DAVIS *v.* UNITED STATES.

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

No. 577. Submitted January 19, 1897. — Decided February 15, 1897.

Although there is no appearance for the plaintiff in error, yet, as this is a criminal case, involving the punishment of death, the court has carefully examined the record, to see that no injustice has been done the accused.

After a witness, qualified as an expert, has given his professional opinion in reference to that which he has seen or heard, or upon hypothetical questions, it is ordinarily opening the door to too wide an inquiry to interrogate him as to what other scientific men have said upon such matters, or in respect to the general teachings of science thereon, or to permit books of science to be offered in evidence.

An expert on behalf of the defence in cross examination was asked: "You

Statement of the Case.

think from your experience with him, from your conversation with him, that he killed the man because he threatened his life ?" An objection to the question being overruled he answered : "Well, in part; and because he thought his own life was in danger, and because he thought he had the right to destroy this menace to his own life." *Held*, that the objection was properly overruled.

The trial court charged : "The term 'insanity' as used in this defence means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control." *Held*, that this was not prejudicial to the defendant.

Under the circumstances the court did right to refuse the instruction asked for with reference to manslaughter.

On October 13, 1894, defendant was indicted in the Circuit Court of the United States for the Western District of Arkansas for the crime of murder. A trial being had he was found guilty and sentenced to be hanged. This judgment was reversed by this court on the ground of error in the instructions of the court in respect to the matter of insanity. *Davis* v. *United States*, 160 U. S. 469. A second trial was had, which resulted in a similar sentence, to review which this writ of error has been sued out.

The circumstances of the homicide were briefly these, and in respect to them there was no dispute: The deceased and defendant had a misunderstanding in regard to the making of a sugar cane crop which the defendant was making for the deceased on land rented from him. About a week thereafter, and on September 18, 1894, the defendant took a gun and slipped up to near where the deceased was at work picking cotton, shot and killed him while so at work, and while unarmed and doing nothing towards harming defendant. He then ran away from the place where the shot was fired to the nearest town and surrendered himself to the officers, telling them he had killed the deceased, and detailing the circumstances.

No appearance for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

The principal defence presented on this trial, as on the former, was insanity. Indeed, the circumstances of the homicide were such as to preclude any other. The deceased, peacefully at work, unarmed and making no demonstrations against the defendant, was shot and killed by the latter, and this in consequence of a dispute more than a week old. The act thus done, if done by a man fully responsible for his actions, was unquestionably murder in the first degree. Counsel for defendant have filed no brief and made no argument. With the trial in the Circuit Court, suing out a writ of error and filing assignments of error, their connection with the case ceased. If this were a civil case, undoubtedly, under Rule 16 of this court, the writ of error would be dismissed, or the record opened and an affirmance ordered without examination. And if it were a criminal case of small importance it is probable that the same disposition would be made, but as the offence charged, and of which the defendant was convicted, is murder, and the punishment death, we have felt it to be our duty to carefully examine the record, with all the assignments of error, in order to see that no injustice has been done the defendant. In this examination we have had the assistance of a brief prepared by the Assistant Attorney General, in which the views of the government are fully presented.

The first nine assignments of error refer to matters transpiring in the introduction of testimony. Some of the questions presented by those assignments have been already determined by this court in prior cases and need not, therefore, be noticed in this opinion. The others are as follows: Several lay witnesses were called who testified as to their acquaintance with the defendant and their opinion as to his sanity. He also called two medical witnesses, Dr. J. C. Amis and Dr. T. J. Wright, each of whom had seen him after his arrest and dur-

ing his confinement in jail, and had observed his conduct, actions and demeanor. While the record does not contain a recital of all the testimony of these witnesses enough is disclosed to show that the court permitted full inquiry of each as to what he had seen or heard of the actions and sayings of defendant; permitted each also to give fully his opinion as to the mental condition of defendant, and his belief as to the latter's knowledge of right and wrong and his ability to distinguish between them. Hypothetical questions were also put, involving all the circumstances of the homicide and the prior and subsequent conduct and appearance of defendant, and their answers received to such questions.

In the course of his testimony Dr. Amis stated that defendant "would sit down on his spittoon and gaze down on the floor as if looking at some object, when none was there, manifesting no interest in anything that was going on; that although violently ill he was indifferent and unconcerned during his illness, was never worried about his condition, never saw any change in his expression, but he would sit and gaze in a dreamy, melancholy way, with his mouth open and under jaw hanging down, having a vacant, meaningless stare, his face expressionless — just a blank." In reference to this matter he was subsequently asked this question: "What does medical science say as to that meaningless, vacant stare, and the lower jaw hanging down in a listless way? What does medical science teach as to that?" which was objected to and the objection sustained and exception taken. No ground of objection was stated and no reason given for sustaining the objection. It would seem probable that, inasmuch as the witness had shown himself qualified to testify as a medical expert, as he had stated all that he had seen and heard, and given his own expert opinion thereof, the court deemed it improper or unnecessary to enter into any examination as to what the witness thought medical science would say of defendant's conduct and appearance. It may have been because the matter had been sufficiently brought out in the prior testimony of the witness, but probably the reason we have suggested is the correct one, and in that view we are

of opinion that the ruling furnishes no ground for disturbing the judgment. After a witness has once qualified himself as an expert and given his own professional opinion in reference to that which he has seen or heard, or upon hypothetical questions, then it is ordinarily opening the door to too wide an inquiry to interrogate him as to what other scientific men have said upon such matters, or in respect to the general teachings of science thereon, or to permit books of science to be offered in evidence. *Collier* v. *Simpson*, 5 Carr. & Payne, 73. At any rate, the trial court must have some discretion as to the limit to be placed in any given case upon the extent to which the expert testimony may be carried, and when upon direct examination the opinion of the witness is fully disclosed, we think it cannot be said that the court erred in declining to permit on the same direct examination an inquiry into what is in some aspects both collateral and hearsay.

Again, when Dr. Wright was on the stand and had finished his direct examination, he was asked by the district attorney the following question: "You think from your experience with him, from your conversation with him, that he killed the man because he threatened his life; your idea is that he killed the man because he threatened his life?" which question was objected to, the objection overruled, and the witness permitted to answer. The answer which he gave was: "Well, in part; and because he thought his own life was in danger, and because he thought he had the right to destroy this menace to his own life." We think this was clearly within the proper limits of cross-examination, and, therefore, the objection was properly overruled.

The remaining fifty-one assignments run to the charge of the court and to the refusal to give a series of special instructions asked by defendant. It would be a waste of time to attempt to notice each assignment separately, although we have examined all. On the first trial the court had charged the jury that every man was presumed to be sane; that insanity was a special defence, and that to make out such defence it must be established to the reasonable satisfaction of the jury, and that the burden of proof thereof rests with de-

fendant. This court was of opinion that this was not the correct rule of law; that while it was true that every man is presumed to be sane, yet whenever by the testimony the question of insanity is raised then the fact of sanity, as any other essential fact in the case, must be established to the satisfaction of the jury beyond a reasonable doubt. On the second trial (the record of which is now before us for consideration) the court charged the law in accordance with the rule laid down by this court — quoting the very language of our opinion — and also defined what was meant by insanity in language which, under the circumstances of this case, was in no degree prejudicial to the rights of the defendant, as follows:

"The term 'insanity' as used in this defence means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control."

Although the court in addition to this specific language enlarged upon the question, its charge in reference to the matter of insanity covering several pages of the record and containing quotations from many adjudged cases, we find nothing which qualifies or restricts the definition as above quoted.

Seventeen special instructions were asked by defendant, all of which except the last were in respect to the presumption of innocence, reasonable doubt and insanity, matters which the court had fully treated of in the general charge; and of course repetition or restatement in the language of counsel was unnecessary.

The last instruction asked was in reference to manslaughter. But under the evidence there was no occasion for any statement of the law on this. There was no testimony to reduce the offence, if any there was, below the grade of murder. If the defendant was sane and responsible for his actions there

was nothing upon which any suggestion of any inferior degree of homicide could be made, and therefore the court was under no obligation (indeed it would simply have been confusing the minds of the jury) to give any instruction upon a matter which was not really open for their consideration. *Sparf* v. *United States*, 156 U. S. 51, 63; *Stevenson* v. *United States*, 162 U. S. 313, 315.

These are all the matters presented by the assignments of error, and all the questions of any importance disclosed by the record. We find no error in the rulings of the court, and its judgment is, therefore,

Affirmed.

GERMANIA IRON COMPANY *v.* UNITED STATES.

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

No. 52. Argued October 20, 1896. — Decided February 15, 1897.

When, while disputed matters of fact concerning a tract of public land, or the priority of right of claimants thereto, are pending unsettled in the land department, a patent wrongfully issues for the tract through inadvertence or mistake, by which the jurisdiction conferred by law upon the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere, and restore such lost jurisdiction by cancelling the patent.

On November 20, 1889, a patent was issued by the United States to Thomas Reed for the southwest quarter of the northeast quarter and lots 1 and 2 of section 30, township 63, north of range 11 west, containing one hundred and twelve acres, in the Duluth land district of the State of Minnesota. On October 13, 1891, the United States filed in the Circuit Court of the District of Minnesota a bill in equity to set aside such patent, making Thomas Reed the patentee and the appellants in this case parties defendant. These appellants claimed title by conveyances from Reed. Reed made default in the suit, but the appellants appeared and answered, and to their answer

a replication was filed. Whereupon, some testimony having been taken, the case was submitted to the court with certain stipulations of fact; and upon the pleadings and these stipulations a decree was entered sustaining the bill and cancelling the patent. On appeal to the Circuit Court of Appeals this decree was affirmed, 19 U. S. App. 10, and thereafter an appeal was taken to this court.

The facts as shown by the pleadings and stipulations are these: On July 21, 1885, Orilie Stram, formerly Moreau, attempted to make a location of the land in controversy with Sioux half-breed scrip. The validity of these locations was contested by other parties, and on February 18, 1889, the Secretary of the Interior, who had jurisdiction over the matter and the parties, cancelled such scrip locations, and ordered that the land be held for disposal under the public land laws of the United States. On February 23, 1889, Thomas Reed applied to make a soldier's additional homestead entry of the lands, which application was sustained by the local land officers, and a final certificate issued to him on that day. "At the same time that Reed made his entry Charles P. Wheeler applied to locate the southwest quarter of the northeast quarter of said section 30 with Valentine scrip," and "Warren Wing had applied to enter lot two of said section 30 under § 2306, Rev. Stat." "On the morning of the day when the Reed entry was allowed William M. Stokes was, among other applicants to make various kinds of entries before and at the time of the opening of the doors of the local land office at Duluth, present at said doors and attempting to enter . . . said southwest quarter of the northeast quarter of said section 30 as a soldier's additional homestead." The applications of Wheeler, Wing and Stokes were severally denied, and appeals were taken from such denials to the Commissioner of the General Land Office.

On February 18, 1889, the time of the decision by the Secretary of the Interior in respect to the attempted location by Orilie Stram, and ever since, there has been in existence in the Department of the Interior a rule that motions for review of decisions of the Secretary of the Interior should be filed in the

office of the Commissioner of the General Land Office, and that the Commissioner should thereupon suspend action under the decision sought to be reviewed. Motions for review of the decision of date February 18 were duly made and filed on March 13 and 15, 1889, respectively, by the parties affected adversely by said decision. Thereupon an order was made suspending all action under the decision sought to be reviewed, and such order was of force and such motions were pending unheard and undetermined at the time and after the issuing of the patent sought to be cancelled, and the patent was issued in direct violation or in ignorance of such order. At the time of the issue of such patent the appeals of Wheeler, Wing and Stokes were also pending unheard and undetermined, and have not been since heard or determined.

"While said appeals and motions were pending and undisposed of, a clerk of the General Land Office at Washington, whose duty it was to examine entries of the character described, in ignorance of the pendency of said conflicting claims, said motions and said appeals, approved the lands described in the said patent for patenting to Thomas Reed, one of the defendants hereto and a patent was, upon such approval, issued to him on the 20th day of November, 1889; that said patent was signed by the secretary to the President and countersigned by the recorder of the General Land Office, each of whom, at the time they signed and countersigned said patent as aforesaid, was in ignorance of the pendency of the aforesaid conflicting claims, and acted wholly upon the said approval of said clerk. The approval of the entry for patent and the signatures to the patent were made, notwithstanding the fact that a caveat pointing out the conflicts was on file with the rest of the entry papers relating to the lands involved and such approval and signatures were made in ignorance of the contents of said caveat."

The appellants made no claim as *bona fide* purchasers, and the case stood as though it were a proceeding against the patentee alone. So far as it bore on the question of good faith, it was admitted that the land was worth $75,000, as alleged in the bill.

Mr. William W. Billson for appellants.

Mr. Assistant Attorney General Dickinson for appellees.

Mr. Justice Brewer delivered the opinion of the court.

Appellants contend that this bill cannot be sustained because, first, no fraud is proved or even charged against the patentee; second, there is no showing that the other applicants for these lands had or have any rights superior to the patentee; third, that it is neither proved nor alleged that the patentee was not equitably as well as legally entitled to the lands; fourth, that the utmost that appears is the premature issue of a patent through mistake and inadvertence and in disregard of one of the rules of the department, and that such matters lay no foundation for the interposition of a court of equity unless accompanied by a trespass on some substantial right. They insist that a vendor cannot ask the aid of a court of equity to avoid his deed on the mere ground of irregularity on the part of his agents unless he also shows that the grantee in such deed was not equitably entitled to the conveyance; that courts never attempt to do a useless thing, and that it would be idle to enter a decree cancelling a patent, when for aught that appears it would be the duty of the government, after some formal proceedings and compliance with certain regulations, to reissue to the patentee a patent for the same lands. In other words, their contention is that this whole litigation is merely a dispute about form and order of proceeding, and not about substantial rights. Many authorities from this court and others are cited showing the conditions under which courts of equity will interfere to cancel patents and deeds on the ground of fraud, or by reason of other facts showing that the patentee or grantee is not of right entitled to the land. We have no disposition to weaken the force of these authorities, or to question their control in cases to which they are applicable. A patent from the United States is a solemn muniment of title not lightly to be challenged or set aside, and all that has been heretofore said in support of the sanctity of such an instrument we reaffirm.

But the theory of this bill is outside the scope of all such cases. It does not rest upon doubtful and uncertain testimony. The facts are conceded, and there is, therefore, certainty as to what they are. The only question presented is as to the right which flows from these undisputed and admitted facts. It is in effect a suit by the government to restore to a tribunal to which it has committed exclusive jurisdiction over certain matters that jurisdiction which through inadvertence and mistake it has been deprived of. "Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisprudence." *Hughes* v. *United States*, 4 Wall. 232, 236. Congress has entrusted to the land department the disposal of the public lands, and has invested the officers of that department with exclusive jurisdiction over many things in connection with such disposition. Their determination in respect to questions of fact in all matters of contest is exclusive and final. The issue of a patent is in effect the final determination of that department in favor of the patentee and against the contestants of all disputed questions of fact — a determination which it is not the function of courts to review except upon conditions of fraud, etc., which permit courts of equity to investigate and pass judgment upon all determinations of all tribunals. By inadvertence and mistake a patent in this case has been issued, and the effect of such issue is to transfer the legal title and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact.

The contention of the appellants is substantially that the courts must consider and determine those disputed questions of fact and exercise a jurisdiction not committed to them, before they restore to the land department the jurisdiction of which it has been wrongfully deprived. But why should the courts be called upon to consider and determine questions of fact, and after a determination adversely to the patentee relegate the matter for reëxamination and determination in the land department? Is not the duty of the court fully performed when it ascertains that through such inadvertence

and mistake the department which has jurisdiction over such matters has been deprived thereof? It restores to such department its lost jurisdiction and leaves to the tribunal designated by Congress the full power to discharge the duties conferred upon it. It is true that it does not affirmatively appear in this case that the patentee was not entitled equitably to the land, or that the contestants had any superior right thereto, but his rights and their rights depend upon questions of fact, such as priority of application, etc., the determination of which by act of Congress has been committed to the land department. It and not a court of equity is the tribunal entrusted by the law with jurisdiction over such matters, and the latter may not inquire what ought to have been the determination of the former, but whether it has been wrongfully deprived of the power to make such determination.

The question is not one simply between the government and the patentee — a vendor and vendee — such as was presented in *United States* v. *Railroad Company*, 26 Fed. Rep. 479. In that case there were no adverse or contesting rights; equitably the patentee was entitled to the land, and the only real objection was that the patent had been prematurely issued. A court might properly decline to set aside a patent when it affirmatively appeared that immediately after such action it would be the duty of the department to issue a new one. Here there are adverse claimants, there are contestants of the patentee's right, and the mere existence of a question of contested fact, the mere fact of a dispute between several parties, is sufficient ground for a court of equity returning the matter for examination to the tribunal which Congress has created for such purposes. This is not a mere matter of procedure between the government and the patentee, but a question of the forum for the adjudication of controversies between individual litigants.

The case of *Badeau* v. *United States*, 130 U. S. 439, is not in point, for there the only question was one between the United States and the claimant, and involved simply the amount of money due to the latter. The case of *Williams* v. *United States*, 138 U. S. 514, is more in point; for in that case

this court sustained a decree cancelling a patent although no fraud was shown, and its issue was simply owing to inadvertence and mistake. We are of the opinion that the ruling of the Circuit Court and the Court of Appeals was correct; that the matters of fact involved in these contests should be settled by the land department; that when through inadvertence and mistake a patent has been wrongfully issued, by which the jurisdiction of the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere and restore such lost jurisdiction, to do which it becomes necessary to cancel the patent.

To deny relief in this case would open the door to many possibilities of wrong. It appears that although an order had been made to suspend all action in respect to the application for this patent, somehow or other the clerk having charge of the proceedings in respect to it was ignorant of such order, and that although in the papers handed to him was the formal entry of an appearance for a contestee, he failed to examine such instrument, and assumed that it was a mere entry of an appearance in behalf of the applicant. Upon the showing made in this case he was innocent of wrong intent, but if such omission can be operative to deprive the land department of its appropriate jurisdiction, it affords too strong an inducement for an intentional omission, proof of which may well be beyond the power of the government. The decree of the Court of Appeals is

Affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

DEWEESE *v.* REINHARD.

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

No. 151. Argued January 13, 14, 1897. — Decided February 15, 1897.

The plaintiff's contention in this case was that, notwithstanding the action of the Department of the Interior in certifying the land in controversy to the State of Nebraska and the subsequent conveyances in the chain of title from that State to the appellees, such apparent legal title was absolutely void, because, by the acts of Congress the land was not subject to selection by the State, it being within the limits of the land grant to the Burlington & Missouri River Railroad Company, and reserved for homestead and preëmption, but not for private entry. All the facts upon which that contention rested were matters of statute and record, and any defence to the apparent legal title created by them was available in an action at law to recover possession. *Held*, that, without deciding whether the selection and certification of these lands were absolutely void or simply voidable at the election of the Government, or were valid and beyond any right of challenge of the Government, or any one else, a case was not presented for the interference of a court of equity.

THE controversy in this case respects the northeast quarter of section 14, township 5, range 3, situate in Saline County, Nebraska. The facts are these: The State of Nebraska upon its admission into the Union became entitled, by virtue of section 8 of the act of Congress, September 4, 1841, c. 16, 5 Stat. 453, 455, to 500,000 acres of public land to aid in promoting its internal improvements. March 26, 1868, the State selected 359,708 acres of land, including the tract in controversy as part of this grant. March 24, 1870, the selection was approved by the Commissioner of the General Land Office, who, in his certificate of approval, certified that the lists had been "carefully examined and compared with the township plats and tract books of this office and are found to be free from conflict; and I respectfully recommend that the same be approved subject to any valid interfering rights which may have existed at the date of selection." March 29, 1870, this action was approved by the Secretary of the Interior in these words: "Approved subject to all the rights above

mentioned." The lists duly certified were transmitted to the State and recorded in the proper office. April 20, 1871, the State of Nebraska patented 100,000 acres of these lands, including the tract in controversy, to the Midland Pacific Railway Company in execution of a contract made by the State, through an act of its legislature, February 15, 1869. Laws Nebraska, 1869, p. 153. The appellees hold under a chain of title from the Midland Pacific Railway Company, the deed to Jacob Reinhard, one of the appellees, and Frederick Fieser, being dated November 11, 1878, they at the time paying for the land twelve dollars per acre. On May 12, 1892, Frederick Fieser died, and his heirs and devisees are, in addition to Jacob Reinhard, the appellees in this case. The appellees and their grantors have paid the taxes of every kind levied upon the land since the patent from the State, amounting at the time of the decree in the Circuit Court to $1375.81.

The claim of appellant was initiated on May 31, 1883, more than fifteen years after the selection by the State, more than thirteen years after the approval by the Secretary of the Interior of such selection and the certification to the State, twelve years after the State had conveyed the land away to its grantee, and nearly five years after the deed to appellees. It was initiated by an occupation of the tract and an application to enter it as a homestead. This application was rejected by the local land officers, and their action in this matter was affirmed by the Commissioner of the General Land Office and the Secretary of the Interior. On July 6, 1888, the appellant, who had been in continuous possession ever since his first entry, tendered the local land office proof that he had complied with the terms and conditions of the homestead laws of the United States, and demanded a patent for the land. This was denied by the local land officers, and from such denial no appeal was taken. The theory upon which the appellant proceeded was that the land was within the limits of the grant made by the United States to the Burlington & Missouri River Railroad Company by act of Congress July 2, 1864, c. 216, 13 Stat. 356, 364, and that by the act

of March 6, 1868, c. 20, 15 Stat. 39, the even-numbered sections within such limits were raised to double minimum lands, and, while subject to homestead and preëmption entry, were not subject to private entry; that therefore the selection by and certification to the State were absolutely void and passed no title; that the title remained in the United States until he by full compliance with the requirements of the homestead laws acquired an equitable right to the land.

An action of ejectment having been commenced by Reinhard and Fieser on November 16, 1885, in the United States Circuit Court for the District of Nebraska, to recover possession, a bill in equity was filed by the appellant in the same court on October 8, 1888, to enjoin the further prosecution of that action and to quiet his title. Upon pleadings and proof the Circuit Court entered a decree dismissing the bill, which decree was affirmed by the Circuit Court of Appeals, 19 U. S. App. 698, from which decree an appeal was taken to this court.

Mr. G. M. Lambertson for appellant. *Mr. J. W. Deweese* was on his brief.

Mr. Charles E. Magoon and *Mr. Charles Offutt* for appellees.

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

On the threshold of this case we are confronted with the question whether, assuming that the appellant has any rights in the land, a case is presented for the interference of a court of equity. His contention is that notwithstanding the action of the Interior Department in certifying the land to the State, and the subsequent conveyances in the chain of title from the State to the appellees, such apparent legal title was absolutely void because by the acts of Congress the land was not subject to selection by the State, it being within the limits of the land grant to the Burlington & Missouri River Railroad Company, and reserved for homestead and preëmption, but not for private entry. All the facts upon which his contention rests are

matters of statute and record, and any defence to the apparent legal title created by them was available in the action to recover possession. For if it be true as contended that this land thus certified to the State was not under the acts of Congress land open to selection, the validity of such certification, as of a patent, can be challenged in an action at law. *Burfenning* v. *Chicago, St. Paul &c. Railway*, 163 U. S. 321, and cases cited in the opinion.

But the mandate of the statute, Rev. Stat. § 723, affirming in this respect the general doctrine in respect to the jurisdiction of courts of equity, is that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." This general proposition has been affirmed by this court in a multitude of cases, among others the following, in which the jurisdiction of courts of equity to restrain proceedings at law was denied on the ground that there existed a full and adequate defence, available in the legal action. *Hungerford* v. *Sigerson*, 20 How. 156; *Insurance Company* v. *Bailey*, 13 Wall. 616, 623, in which it was said: "Where a party, if his theory of the controversy is correct, has a good defence at law to 'a purely legal demand,' he should be left to that means of defence, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy." *Grand Chute* v. *Winegar*, 15 Wall. 373. It follows from these considerations that if this suit in equity is to be regarded as simply one to restrain the action at law, it cannot be sustained, because upon the appellant's own theory he has a full, adequate and complete defence at law.

But it is contended by appellant that his suit is something more than one to restrain the action at law; that it is a suit to quiet his title and to hold the appellees as trustees of the legal title for his benefit; that the restraint of the law action is simply incidental to and in furtherance of the main relief, which is the quieting of his title. Assuming for the purposes of this case that his contention in this respect is correct, we

agree with the Court of Appeals that the showing made in his bill is not one that appeals in the slightest degree to the conscience of a chancellor. The theory upon which the appellant proceeds is substantially that because he has not a legal title a court of equity must enforce and establish his right, or, in other words, that the lack of legal title creates an equitable duty. We are unable to assent to this contention. Something more than the absence of legal title is necessary to call into action the processes of a court of equity. The right, whatever it may be and from what source derived, must be not only one not protected by legal title, but in and of itself appealing to the conscience of a chancellor. A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

Upon his own showing the plaintiff's conduct demands condemnation rather than commendation. The title to vacant land within the States that originally formed the United States remained in those States severally, while the title to land subsequently acquired by the United States, whether through cession from the original States, by conquest or treaty, has been retained by the General Government — lands within the State of Texas furnishing the one notable exception. Though Congress on the admission of the new States has not transferred to them the vacant lands within their limits, it has made to them large grants for school and other purposes. In carrying out this policy, in 1841 Congress passed an act granting to certain named States and to each State subsequently admitted into the Union 500,000 acres of land to aid in internal improvements, the selection of such lands to be made in such manner as the legislatures of the respective States should provide. Such selections were subject to the approval of the land department of the United States, but when so made and approved the lands were to be certified to the State, and such certification was to have all the effect of a patent. Now, assuming that the contention of the plaintiff is correct, that

subsequent legislation of Congress had the effect of providing that such selection should be made from certain classes of lands, and that the tract in controversy did not belong to any of those classes, the fact remains that the land was selected by the State, and such selection approved by the land department, and that the land so selected and thereafter certified was land belonging to the United States. At the time of such selection and certification the only parties in interest were the United States and the State. Concede the fact that, through inadvertence, mistake or (of which there is no evidence) wrong on the part of the officials, this land was improperly selected and certified, yet the United States for thirteen years never questioned in any way the rightfulness of the selection and certification, or challenged the title which was apparently confirmed thereby to the State. It may be conceded that no error or wrong on the part of the officers of the land department concludes the United States, and that they might whenever they saw fit by proper proceedings set aside the title thus apparently conveyed. But they took no steps. They acquiesced in the transaction. The land was land which the United States had power to convey. Congress could by special act or otherwise have transferred this specific tract to the State. The records of the transaction were public and open. It was no secret conveyance by which title was wrongfully conveyed to the State, but a matter of record of which everybody, both governments included, were chargeable with notice. Not only was the title thus apparently transferred unchallenged, but also the State dealt with it as its own property, and conveyed it in satisfaction of one of its contracts. It passed from grantee to grantee, the last sale being at the price of $12 an acre. And further, the State during the years subsequent to its conveyance treated the land as subject to taxation, and they who purchased from it paid taxes thereon amounting to over one thousand dollars.

After all this, the plaintiff, assuming to do that which the United States had not done — that is, treat the selection and certification as void — and acting not for the United States but for himself, attempted to build up a right in himself to

the land. This was not done in ignorance of the claims of others, for when he first applied to enter the land as a homestead he was notified by the officers of the land department that it had already been selected and certified to the State, and his application to enter was on that account rejected. The county records also notified him of the several conveyances and the amount of money paid by the appellees. He was, therefore, simply an intruder. It is earnestly insisted by counsel that Congress by its legislation has set apart certain classes of land for the benefit of preëmptors and those desiring to enter homesteads; that the Government thereupon, became, as it were, a trustee, holding the title to those lands in trust for all who should elect to make themselves *cestuis que trust;* that the plaintiff, availing himself of this legislation, took the steps prescribed by the statute and made himself therefore a *cestui que trust*, with a beneficial right to this land, and the right to challenge not only all subsequent but also any prior action taken by his trustee in disregard of such beneficial right. We cannot agree to this contention. Whatever rights such so-called *cestui que trust* may have against his trustee, the government, or all parties claiming under the government subsequent to the time of the initiation of his proceedings, he is not in a position to challenge any action of his so-called trustee anterior to that time. The Government did not bind itself by its statutes to keep any lands for subsequent occupation and purchase, and if prior to such occupation it has even though mistakenly conveyed away a tract to a third party, such conveyance, although voidable at its instance, cannot be challenged by a mere intruder. And when such conveyance is of long standing, and the transaction has been acquiesced in for many years by the Government, and parties relying upon the title apparently conveyed have invested large sums of money, then an attempt by such an intruder to set aside all these transactions and to appropriate the property to himself is offensive to every sense of right and justice, and equity will lend no helping hand to such effort. The authorities cited in the opinion of the Court of Appeals sustain this conclusion. *Cooper* v. *Roberts*, 18 How.

173; *Spencer* v. *Lapsley*, 20 How. 264; *Cragin* v. *Powell*, 128 U. S. 691. This last case is quite pertinent. It appeared that in 1841 the United States had issued to one Bach patents to certain surveyed and described lands, the title to which by subsequent conveyances passed to Cragin. In 1877, Powell, a surveyor, was employed by Cragin to make a survey of his property, and discovering as he supposed an error by which lands apparently included within the survey and patent were, in fact, outside of its limits, persuaded one Samuel Wolf to obtain a patent which would cover the lands thus erroneously, as contended, included in the first survey, and afterwards purchased those lands from Wolf. Thereupon he commenced a suit "to fix the boundaries," the effect of which if the boundary was established according to his claim would be to set over to him lands which, as he alleged, were erroneously included in the first survey and patent, but which had been all these years occupied and cultivated by Bach, the patentee, and his grantees. A decree in his favor in the Circuit Court was reversed, and the case remanded with instructions to dismiss the bill, Mr. Justice Lamar saying in the opinion (p. 700):

"The appellee, Powell, is a surveyor, who, in the year 1877, while employed by appellant to make a survey of his plantation, thought he discovered an error in the public lands, whereby it would appear that his lands were not, in fact, situated on Bayou Four Points. From his own evidence it is shown that he induced Wolf to obtain the patent from the State of Louisiana for the land which he, the said appellee, purchased from him. When he purchased this land from Wolf he knew that the tracts to which he was laying claim had been possessed and cultivated by the appellant for a long period of years."

"An advantage thus obtained a court of equity will not readily enforce. As was said in *Taylor* v. *Brown*, 5 Cranch, 234, 256: 'The terms of the subsequent location prove that the locator considered himself as comprehending Taylor's previous entry within his location. . . . He either did not mean to acquire the land within Taylor's entry, or he is to be considered as a man watching for the accidental mistakes of

others, and preparing to take advantage of them. What is gained at law by a person of this description equity will not take from him; but it does not follow that equity will aid his views.'"

Without, therefore, determining whether the selection and certification of these lands was absolutely void or simply voidable at the election of the Government, or valid and beyond any right of challenge on the part of the Government or any one else, we are of the opinion that equity will not help the plaintiff in his suit, and the decree of the Court of Appeals is

Affirmed.

GLOVER *v.* PATTEN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 78. Argued January 5, 6, 1897. — Decided February 15, 1897.

An infant may affirm a contract or settlement made for her benefit, like the one here in controversy, and may sue upon it as if she were originally a party to it.

In a suit by children to establish their rights as creditors of the estate of their deceased mother other creditors are not necessary parties, as the executors or administrators represent them and guard their interests.

The bill in this case, filed by direction of the orphans' court to obtain the advice of a court of chancery upon the rights of the respective parties, discloses on its face a good cause of action in equity.

That cause of action is not barred by the Maryland statute of limitations, still in force in the District of Columbia.

Where a parent, being a debtor to his child, makes an advancement to the child, it is presumed to be a satisfaction *pro tanto* of the debt.

In a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged.

The objection that the complainants were incompetent to testify as to their mother's statements, and as to transactions in which she took part is entitled to some weight and is not free from doubt; but such testimony is not indispensable to the maintenance of the complainants' bill.

The general bequest to her daughters in the mother's will was not an extinguishment of her debt to them.

No interest should be allowed prior to the mother's death.

Statement of the Case.

THIS was a bill in equity filed in the Supreme Court of the District of Columbia by Mary E. Patten, Josephine A. Patten, Edith Patten and Helen Patten, against their sister, Augusta P. Glover, wife of John M. Glover, in aid of the jurisdiction of the Supreme Court as an orphans' court, to construe the will of their mother, Anastasia Patten, and to charge the estate with certain claims of the complainants prior to a general distribution of the assets.

The facts of the case are substantially as follows: Complainants and defendant Augusta P. Glover are the five daughters of Edmund Patten, late of the State of Nevada, deceased, and of Anastasia Patten, who, after her husband's death, took up her residence in Washington and died September 11, 1888, leaving a will executed in San Francisco December 23, 1879.

Edmund Patten, her husband, died November 16, 1872, intestate, his widow becoming his administratrix, and also the guardian of each of his children, all of whom were then, and for some years continued to be, minors under the age of twenty-one years. By the law of Nevada, Mrs. Patten became entitled, upon her husband's death, to one half his estate, the other half descending to his children. As administratrix and guardian, she took possession of the entire estate, and retained the same down to the time of her death. She made no accounting either as administratrix or guardian, nor did she keep any regular accounts or preserve her vouchers.

In September, 1885, apparently because of a desire on the part of the sureties on her bond, or some of them, to have her accounts settled, Mrs. Patten undertook to adjust her indebtedness to her children. She called in the services of Curtis J. Hillyer, a friend of her husband and herself, and the result was the preparation of the following document intended to take the place of a formal account and vouchers:

"Whereas our mother, Anastasia Patten, as guardian for us, received in the years 1873–'4–'5, certain amounts of money, being our portion by inheritance of the estate of our deceased father; and whereas no special separate investments of the

money so received have been made by our said guardian, but the same has been by her kept and safely invested in connection with moneys belonging to her in her own right derived from the said estate; and whereas our said guardian has up to the present date had entire charge of our maintenance and education, and has during the past thirteen years incurred a large amount of family expenses for our benefit, of which expenses no account has been kept by her; and whereas we and our said guardian are now desirous of settling the account between us in a just and equitable manner without attempting to secure technical accuracy in such settlement; and whereas our said mother and guardian has submitted to us for inspection all accounts and papers in her possession touching or relating to the receipts and disbursements entering into such accounting, and we have personally general knowledge concerning the family expenses during said period; and whereas from such examination and knowledge we believe that by a payment to each of us by our said guardian of the sum of $101,600 an equitable settlement will be made and full justice done to each of us:

"Now, therefore, each of us for herself agrees to accept the said sum of $101,600 in full and complete settlement of all accounts, claims and demands between us and each of us and our said mother and guardian, and in full satisfaction of all claims and demands of whatever character arising out of or connected with the administration of said estate or the said relation of guardian and ward, and each of us for herself authorizes and requests that upon presentation of this agreement and a receipt for the above amount the court having jurisdiction thereof will, without further investigation of accounts so far as they concern either of us, pass the final accounts of our mother as administratrix and guardian, and by proper decree discharge those liable as bondsmen for her action in either capacity."

"(Signed) Mary Ellen Patten.
Katherine Augusta Patten.
Josephine Antoinette Patten.
Edith Patten."

Statement of the Case.

This paper was signed by all the complainants except Helen and by the defendant Augusta. Helen being then a minor did not sign it, but subsequently adopted and accepted the adjustment and settlement evidenced by the paper.

This paper was never presented by Mrs. Patten to the proper court, and it was in her possession when she died. She did not at that time pay to her children, or any of them, the sum therein mentioned in settlement of her indebtedness to them, but subsequently and in February, 1887, when her daughter Augusta was on the point of marrying her husband, John M. Glover, she assigned and transferred to her United States government bonds of the par value of $80,000 and the actual value of $102,800, with the benefit of the interest accruing thereon since the preceding 1st day of January. Then Augusta married and left her mother's home.

Mrs. Patten did not at that time pay or give her other daughters anything on account of her indebtedness to them. In the following autumn, however, namely, on October 15, 1887, she made for them and in their names an investment of the sum of $45,000, being at the rate of $11,250 for each, which the complainants claimed to have been a payment on account of her indebtedness to them. It was undisputed that the interest on this investment, from the time it was made until Mrs. Patten's death and thereafter, was always deposited in bank to the credit of the appellees and for their account.

Within a year after this transaction, namely, on September 11, 1888, Mrs. Patten died, without having done anything further towards settling her accounts as administratrix or guardian or paying her indebtedness to the appellees. It was found that she had left a will bearing date December 23, 1879, some seven years after her husband's death, and nearly six years before the preparation and execution of the paper in September, 1885.

By the terms of this will, Mrs. Patten devised and bequeathed the whole of her estate, subject to $45,000 in legacies, to her five daughters, and named as her executrices such of them as might have attained the age of majority at the time of her death and who should not be otherwise incapacitated to

undertake the trust. By virtue of the latter provision all of the daughters were appointed and qualified in the Supreme Court of the District of Columbia, as executrices, but as the will was executed in the presence of two witnesses only, it was invalid to pass real estate situate in the District of Columbia, and as the greater part of Mrs. Patten's estate at the time of her death consisted of such real estate, it descended to her daughters, as though she had died intestate.

The daughters having all qualified as executrices, and having entered upon the discharge of their duties, the appellees, claiming to be creditors of the estate of which they were also executrices, presented to the Supreme Court of the District of Columbia a petition, wherein after reciting the indebtedness of Mrs. Patten to all of her daughters, including Mrs. Glover, by reason of her guardianship, alleged that in September, 1885, the amount of her indebtedness was adjusted, settled and determined by mutual agreement (except as to Helen), evidenced by the paper writing of that month hereinbefore set forth; that Helen, being fully advised in the premises, adopted and accepted the said agreement and settlement; that by virtue of the premises Mrs. Patten became and was indebted to each of the petitioners and to Mrs. Glover, as of that date, in the sum of $101,600; that on February 17, 1887, as of January 1, 1887, Mrs. Patten paid on account of her indebtedness to Mrs. Glover $102,800, by transferring to her bonds of the United States; that afterwards Mrs. Patten paid each of the petitioners on account the sum of $11,250, and that by virtue of the premises the estate of Mrs. Patten stood indebted accordingly; but, as the petitioners were advised that they might not retain for their claims, unless passed by the court, they accordingly in their petition prayed the court to pass upon and authorize the payment of the same.

To this petition Mrs. Glover, the remaining executrix, appeared and filed an answer, admitting the inheritance by her and the complainants of the estate aforesaid from their father, and set forth in substance that the said testatrix did become guardian of the complainants and said defendant, as alleged, and did receive their said estate aforesaid as such guardian,

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but that said testatrix never formally settled her accounts as such guardian, she not having been called upon so to do; that the document above set forth was drawn and signed in order to enable said testatrix formally to close her accounts as guardian aforesaid, but that the amounts agreed by the terms of said paper to be accepted by the complainants and said defendant were never paid, nor was any evidence of indebtedness given to them or any of them; and that, notwithstanding said paper, the accounts of said testatrix as guardian as aforesaid remained open at the time of her death, and the said estate of the complainants and the said defendant was dealt with by said testatrix after the execution of said paper in the same manner as before the same was so drawn and signed; that therefore, by reason of the circumstances, a trust existed on the part of the said testatrix towards the complainants and the said defendant in respect of their said estate, and that the relation of said testatrix to the complainants and the said defendant was recognized and treated by her to the day of her death as that of trustee and *cestuis que trustent* and not of debtor and creditors.

Defendant further set forth and contended that, by her last will and testament, the said testatrix devised, subject to certain bequests of comparatively trifling amount, all her estate, real and personal, as well the estate of the said defendant and the complainants held in trust for them as her own estate; that such devise operated the extinguishment, discharge and payment of any claim upon the part of the complainants in the premises; that their claims ceased to be provable as debts against the estate of said testatrix; that such alleged extinguishment, discharge and payment are not affected by the fact that the said defendant and the complainants took title to the real estate of said testatrix by descent instead of by devise, in consequence of the insufficient execution of the will; and that the several indebtednesses alleged by these complainants were never recognized or acted upon by said testatrix and no part payments were made by her on account thereof.

Upon consideration of the petition and answer, the court made an order that further action upon the petition be suspended "until said other matters whereof this court has not

jurisdiction shall be first tried and determined in the appropriate tribunal in such manner as counsel may advise."

Thereupon, on January 8, 1890, complainants filed their original bill in this cause, to which Augusta P. Glover interposed a demurrer and answer, and also filed a cross bill in which her husband joined. This was followed by a variety of answers, motions, demurrers and amendments unnecessary to be set forth in detail, as the material facts already sufficiently appear. Subsequently a considerable amount of oral and documentary evidence was taken and returned; and the cause having been transferred to the Court of Appeals of the District in pursuance of the act of Congress approved February 9, 1893, that court on November 8, 1893, entered a decree that the complainants were entitled to the relief prayed for, and that the cause be remanded to the Supreme Court with directions to enter a decree in conformity with the opinion of the court. 1 App. Cas. D. C. 466. From this decree Augusta and her husband appealed to this court.

Mr. Charles J. Bonaparte for appellants.

Mr. Henry E. Davis for appellees.

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

The object of this bill is to determine certain questions in aid of another branch of the same court, sitting as an orphans' court, and already in possession of a petition by the complainants to establish an indebtedness against the estate of their mother, action upon which petition was suspended by that branch of the court, awaiting the determination of these questions.

The theory of the complainants is that the amount of Mrs. Patten's indebtedness to her daughters was adjusted and settled by mutual agreement of the parties, evidenced by the instrument of September, 1885, at the sum of $102,600 each: that defendant, Augusta P. Glover, received her share upon her marriage, by a transfer of $80,000 of the United States bonds,

worth $102,800, and that the complainants received a credit in October, 1887, of $11,250 each.

The theory of the appellants is that the relation of the testatrix to her children was that of trustee, and not of debtor, and that the will, by reason of its provisions, operated the extinguishment, discharge and payment of the complainants' claims, and that said claims ceased to be provable as debts against the estate.

Several assignments of error are filed, which will be disposed of in their order.

1. That Helen was improperly joined in the bill as complainant, because she was not a party to the instrument of September, 1885. Being a minor, she did not sign the instrument, and would not have been bound by it if she had done so; but if there were any indebtedness to the children, it arose from the fact that the mother was guardian of all of them; that the law made no discrimination between them, and such indebtedness was due as much to Helen as to the others. While the instrument makes no mention of the children by name, it was evidently intended as much for her benefit as that of the other sisters, and upon her arriving at her majority, she had her election either to disaffirm it, or to adopt it as an adjustment of the amount due to herself. She chose the latter alternative, and in her petition to the orphans' court, of May 10, 1889, for the allowance of her claim, avers: "That the petitioner, Helen Patten, being fully advised in the premises, now adopts and accepts said agreement and the settlement aforesaid as though she had duly participated in the same at the time of the making thereof." An infant may affirm a contract or settlement thus made for her benefit, and may sue upon it as if she were originally a party to it. Irrespective, however, of any promise which the law might imply from the procurement by Mrs. Patten of the execution of this instrument by her daughters, if there were any indebtedness arising from her relation as guardian to her children, it existed in favor of Helen as much as the others, and as evidence of the amount of such indebtedness this document is as potent in her behalf as in that of her sisters.

2. The second assignment, that there is a non-joinder of necessary parties defendant, is based upon the theory that there are three legatees interested in the estate to the amount of $45,000; that there is no averment that these legatees have been paid, or can be paid in full, out of the personal estate if the claims of the complainants and those of other creditors are satisfied. There is nothing in this objection. The complainants do not sue as executrices, but expressly aver that they bring the suit "in their own right" as creditors of their mother's estate, and for the purpose of establishing their debt. To such a suit other creditors are not necessary parties. The case of *Dandridge* v. *Washington's Executors*, 2 Pet. 370, 377, is directly in point. This was a suit brought by the plaintiff against the executors of the will of Mrs. Martha Washington to obtain payment of legacies bequeathed to him in her last will. In reply to an objection that the residuary legatees under the will should have been made parties, Mr. Chief Justice Marshall observed: "They have undoubtedly an interest in reducing the sum to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks into the residuum, and that residuum is diminished as well by the claims of creditors and specific legatees as by this. In all such cases the executors represent the residuary legatees and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In such suits the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors." If this be the law with respect to residuary legatees, who are necessarily and directly interested in defeating every other claim against the estate, with much greater force is the rule applicable to specific legatees, who are in much less danger of being affected by the allowance of other claims. That such legatees need not be joined is as clearly settled as that other libellants need not be joined as respondents in a suit in admiralty to establish a claim against a vessel, although they may be admitted to defend. *Wiser* v. *Blachly*, 1 Johns. Ch. 437; *Pritchard* v.

Hicks, 1 Paige, 270; *West* v. *Randall*, 2 Mason, 181; Daniel's Ch. Prac. c. 5, § 2.

3. That there is no equity in the bill. Defendants' position in this connection is, that the case made is an indebtedness *created* by the instrument of September, 1885, to which Helen was not a party; that there was no agreement by Mrs. Patten to pay the sum named, or any sum whatever, and that the paper constituted a mere offer on the part of each of her children to receive a specified sum in satisfaction of her claim against her as guardian; that this paper, therefore, is no contract, and contains no promise on the part of the mother; that the only right which the complainants have to come into equity arose from the fact that, being executrices, they cannot sue themselves, and, therefore, cannot recover by action at law the debt due them by their testatrix; that, if the bill failed to show that they could have sued at law during their mother's lifetime, or could now sue her executrices, were they some one else than themselves, they have no better standing in equity than at law.

This, however, is a somewhat inaccurate statement of the complainants' case. The averment of the amended bill is (paragraph 6) that in her lifetime the said testatrix was indebted to the complainants and the defendant Augusta P. Glover, by reason of the fact that they had inherited from their father an estate which was received and retained by the testatrix as their guardian, and that in "September, 1885, the amount of indebtedness of said testatrix in the premises, on account of the estate aforesaid, was adjusted, settled and determined by mutual agreement of the said testatrix on the one part, and on the other the complainants and the said defendant, except the complainant Helen Patten," who was a minor. The amended bill further avers (paragraph 12) that "it then was and for a long time theretofore had been the duty in law of said testatrix, guardian as aforesaid, to deliver to them and each of them their said estate as aforesaid, the same consisting in contemplation of law exclusively of money; that thereby the said testatrix, as guardian aforesaid, was and had theretofore become in law the debtor of the complainants,

and the said defendant and each of them without regard to said paper so drawn and signed as aforesaid, and the said paper was only in law an adjustment, accounting and settlement between the said testatrix, guardian as aforesaid, on the one part, and the complainants and said defendant, on the other, having for its object and purpose the ascertainment of the amount of indebtedness of the said testatrix to the complainants and the said defendant and each of them."

As, under the laws of Nevada, the children were entitled to one half their father's estate, and as the mother received the entire estate and dealt with it as if she were the sole proprietor, although she was in fact guardian and trustee for her children as to their share, it requires no argument to show that she held a moiety in trust for them; was bound to account to them whenever an account was demanded, and was bound to pay to each of them one fifth of such moiety. Regularly this accounting should have been made to the court in Nevada, which granted the letters of administration, but as there was no one interested in the estate except herself and her children, she adopted the easier course of settling with them directly, and procured from them their assent to the instrument of September, 1885. While Helen was not a party to this instrument, by reason of non-age, as she stood in the same position to the estate as her sisters, and was equally a creditor of her mother, there is no reason why the instrument may not be used as an acknowledgment of her mother's indebtedness to her, as well as to the others. The fact that the sisters became executrices of their mother's will did not cancel such indebtedness, but rendered it impossible to bring an action at law, inasmuch as they would be plaintiffs in their own right and defendants as executrices. They did, however, petition the orphans' court for the allowance of their claims, making their sister, the only person interested adversely to them, a party to the proceeding. That court, instead of passing on the matter directly, thought it a proper subject for the advice of a court of chancery, and directed this bill to be filed. We are of opinion that upon its face it discloses a good cause of action.

4. That the cause of action is barred by the statute of limitations. It has always been held by the Supreme Court of Maryland that the act of 1715, which is still in force in this District, *Shepherd* v. *Thompson*, 122 U. S. 231, 234, does not apply to a claim by an executor against his estate, inasmuch as the executor cannot sue himself at law. *State* v. *Reigart*, 1 Gill, 1; *Brown* v. *Stewart*, 4 Md. Ch. 368; *Spencer* v. *Spencer*, 1 Md. Ch. 456; *Semmes* v. *Young's Admr.*, 10 Maryland, 242.

Irrespectively of this, however, it appears that in October, 1887, Mrs. Patten loaned $45,000 to one John E. Beall, and took a note payable to the order of the four complainants, which was subsequently paid to them. The testimony of the complainants as to this transaction is objected to upon the ground that by Rev. Stat. § 858, "in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or settlement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." Conceding the statute to be applicable to this case, it does not apply to the testimony of Beall himself, who swore to making a loan of this amount from Mrs. Patten, and giving a note payable to the order of the four complainants, Mrs. Patten stating "that the money was advanced to them out of the fund belonging to them out of their father's estate, and that she wished them to have the income of that amount of money"; that "she wished the interest notes made payable at intervals of three months, so that they might have the income, and she used the words 'pin money'; and further declared that she never had made them any allowance, and she wished them to have for themselves, every three months, the interest of this money to spend for themselves." She also said "that $45,000 was being distributed in this manner to the four girls as a part of what was coming to them from their father's estate, and she said that she had made advances to Mrs. Glover." The note was subsequently paid to the four daughters. The testimony of another witness is to the effect that Mrs. Patten told him "that it was some money she

wanted to give those four girls for pin money to give them a sense of independence, . . . and, further, that she had already provided for the other daughter — the married daughter — quite liberally, and she thought that she ought to give these girls something."

This testimony is not only uncontradicted, but accords with the probabilities of the case. It is scarcely reasonable to suppose that Mrs. Patten, who was indebted to her daughters in the sum of over $400,000 should have advanced them the large sum of $45,000 purely as a gift, and with no intention of being credited with it upon her debt, particularly in view of her statement to the witness Beall, that she made advances to Mrs. Glover. We think this must be regarded as payment upon the account of her indebtedness, and that it removed the bar of the statute of limitations.

In aid of this construction there is the presumption that where a parent, being a debtor to his child, makes an advancement to such child, it is presumed to be a satisfaction *pro tanto* of the debt. 1 Pomeroy's Eq. Juris. § 540; *Plunkett* v. *Lewis*, 3 Hare, 316.

5. That the communications made by Mrs. Patten to the witness Hillyer were privileged, from the fact she consulted him as her legal adviser. There is some doubt as to whether she did consult him in that capacity, or simply as a friend, who had for a good many years been the attorney of her husband. It is clear that, while she visited him frequently concerning the settlement of her account as administratrix and guardian, she paid him nothing, and he made no charge against her. But whatever view be taken of the facts, we are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin. That reason is thus stated by Lord Brougham in *Greenough* v. *Gaskell*, 1 Mylne & Keen, 98, 103: "But it is out of regard

to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case."

In *Russell* v. *Jackson*, 9 Hare, 387, 392, the contest was between the heirs-at-law and a devisee. The heirs claimed that the devise was upon a trust, unexpressed, because illegal. It was held that a solicitor, by whom the will was drawn, should be allowed to testify what was said by the testator contemporaneously upon the subject. Vice-Chancellor Turner, in delivering the opinion of the court, observed: "In the cases of testamentary dispositions, the very foundation on which the rule proceeds seems to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator, there does not appear to be any ground for applying it. . . . That the privilege does not in all cases terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client as against parties claiming adversely to him, I entertain as little doubt; but it does not, I think, therefore follow that it belongs to the executor as against the next of kin, and in such a case as the present. In the one case the question is, whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interests. In the other case the question is, to which of two parties claiming under the client the property in equity belongs, and it would seem to be a mere arbitrary rule to hold that it belongs to one of them rather than to the other."

An epitome of this case is given in the opinion of Mr. Justice Swayne in *Blackburn* v. *Crawfords*, 3 Wall. 175, 193, in which case, on a question of marriage and legitimacy, an attorney who drew the will for the alleged husband, in which the children of the connection set up as wedlock were described

as the natural children of the testator, might testify as to what was said by the testator about the character of the children and his relations to their mother, in interviews between himself and the testator preceding and connected with the preparation of the will.

As was said in that case, page 194, "the client may waive the protection of the rule. The waiver may be expressed or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its objects and in direct conflict with the reason upon which it is founded." See also *Hunt* v. *Blackburn*, 128 U. S. 464, 470.

The same rule has been applied in several cases in the state courts: *Layman's Will*, 40 Minnesota, 371; *Scott* v. *Harris*, 113 Illinois, 447; *Graham* v. *O'Fallon*, 4 Missouri, 338; Wharton on Evidence, § 591; *Goddard* v. *Gardner*, 28 Connecticut, 172; Weeks on Attorneys, § 165.

6. The objection that the complainants were incompetent to testify as to their mother's statements, and as to the transactions in which she took part, is entitled to some weight, and is not free from doubt. There is much reason, however, for saying that, as the object of this testimony was not to prove complainants' claim against the estate, but to show that their sister Augusta had had a similar claim, and had been paid, and the testimony related to conversations between Mrs. Patten and her daughter Augusta, the statute did not apply — in other words, that it was not a transaction with or a statement by the testator within the meaning of the statute. *Monongahela National Bank* v. *Jacobus*, 109 U. S. 275; Wharton on Evidence, § 468.

We do not, however, consider this testimony indispensable to the maintenance of complainants' bill. Discarding it for the present from our consideration of the case, there is no doubt that Mrs. Patten became the guardian and trustee for

her children to the extent of one half her husband's estate; that she rendered no account of her stewardship; that, at the suggestion of the witness Hillyer, she procured the document of September, 1885, to be drawn up and signed by her daughters; that by this instrument each of the daughters, except Helen, agreed to accept the sum of $101,600 in full and complete settlement of their accounts, claims and demands between each of them and their mother, arising out of or connected with the administration of their father's estate, and requested that, upon the presentation of this agreement and a receipt for that amount, the court having jurisdiction would, without further investigation, pass the final accounts of their mother as administratrix and guardian, and discharge her bondsmen. There is no doubt, too, that in the month of February, 1887, Mrs. Patten called at the bank of Riggs and Co. and inquired of a member of the firm what amount of bonds, with the premium added, would make up a sum somewhat over $100,000, stating that "her purpose was to transfer these bonds to one of her daughters about to be married"; that he furnished her the necessary figures, "somewhere in the neighborhood of $79,000, which made up about the amount she wished to use," and that he gave her a memorandum of them; that Mrs. Patten told him afterwards that she put these bonds under her daughter's plate, and that she went off and forgot them. The testimony of the complainants, which for this purpose is competent and uncontradicted, was that Mrs. Glover asked the witness Josephine on one occasion, when she had returned home, where she had been; that she replied that she had been to the Treasury, where her mother went to transfer her bonds to her name to the amount of $80,000, to which Mrs. Glover said, "that is not enough." Josephine replied: "It is too much; if I had not been there you would have gotten but $79,000"; that she saw the bonds in the possession of her sister, Mrs. Glover, who returned them to her mother with a request that she should keep them for her, and that they were subsequently sent to her at St. Louis by registered mail; that Mrs. Glover repeatedly said to her sisters that "when she was married she would ask for her money; that she had

a right to it, and she would ask for it," and that she repeatedly admitted afterwards having received her share of her father's estate. This admission is sworn to by each one of the complainants, and is entirely uncontradicted.

The court below was of opinion that, upon this state of facts, the complainants were entitled to the relief prayed, and in this opinion we concur. We can come to no other conclusion than that, upon the undisputed facts of the case, there was an indebtedness by Mrs. Patten to her daughters; that such indebtedness was liquidated by the agreement of September, 1885, and that the defendant Mrs. Glover received an amount in bonds which, at their market value, was somewhat greater than $100,000. As this payment was made to her upon the eve of her marriage, and as the amount was evidently computed as near as could be to the amount of the indebtedness, as stated in the agreement of September, 1885, the presumption is that it was intended as an advance and as a satisfaction of the debt. 1 Pomeroy's Eq. Juris. § 540; *Plunkett* v. *Lewis*, 3 Hare, 316.

7. The claim that the general bequest to her daughters, contained in Mrs. Patten's will, was an extinguishment of her debt to them, is equally unfounded. The appellants rely, in this connection, upon the general proposition that, where a debtor bequeathes to his creditor a legacy equal to or greater than the amount of his debt, it shall be presumed, in the absence of a contrary intent inferable from the will, that the legacy was intended to be in satisfaction of the debt. Had Mrs. Patten, subsequent to the execution of the agreement of September, 1885, made special bequests to her daughters, or either of them, of amounts equal to or greater than the amount of her indebtedness to them, the rule might, perhaps, be invoked as an answer to their claim; but the rule is in fact nothing more than a presumption, and may be rebutted by slight evidence that such was not the intention of the testator. *Spencer* v. *Spencer*, 4 Md. Ch. 456; *Gilliam* v. *Brown*, 43 Mississippi, 641; *Williams* v. *Crary*, 4 Wend. 443; *S. C.* 5 Cow. 368; *Eaton* v. *Benton*, 2 Hill, 576; *Reynolds* v. *Robinson*, 82 N. Y. 103; *Heisler* v. *Sharp*, 44 N. J. Eq. 167; *Horner's Ex-*

ecutors v. *McGaughy*, 62 Penn. St. 189; *Crouch* v. *Davis' Executors*, 23 Gratt. 62. These cases hold that the mere fact that the debt was unliquidated is enough to rebut the presumption.

It requires no argument to demonstrate that the rule has no application to a case where the bequest is a general one — all of the property of the testator "to be divided between them share and share alike" — and the will is made six years before the indebtedness is liquidated. That Mrs. Patten evidently did not consider her debt to her daughter Augusta extinguished by the will is evident from the fact that she paid the amount at the time of the marriage of her daughter, and there is no reason to suppose that she intended to treat her differently from her other daughters. Evidently the whole theory of a debt being extinguished by a bequest presupposes a bequest subsequent to the indebtedness, and while the indebtedness may have been said to have arisen in this case upon the receipt of the children's moiety of their father's estate, it was never treated by any of the parties in the light of an indebtedness, until the amount had been liquidated by the arrangement of September, 1885.

The effect of rejecting the claim of the complainants would be to prefer Mrs. Glover to her sisters to the extent of $102,800, when there is absolutely nothing in the will of the mother, in the arrangement of September, 1885, or in the facts or circumstances of the case, to indicate that this was ever contemplated by Mrs. Patten, or by the daughters themselves. The instincts of a mother would naturally lead her to put her daughters upon an exact equality, and the case is manifestly one for the application of the legal maxim that "equality is equity." That it ever entered her mind that one of her daughters should be preferred to the others in the very large sum of $102,800 is extremely improbable.

8. Whether the fact that Mrs. Glover had been paid her share of the indebtedness was strictly pertinent to the issue or not, it was alleged in the bill and in the amended bill, was first demurred to, and then denied in the additional answer. The fact had some tendency to prove that the indebt-

edness, which was incurred and liquidated in favor of all the sisters under the same circumstances, was a genuine one, was recognized both by the testatrix and Mrs. Glover as such, and that the bill was not an attempt on the part of the complainants to obtain a preference over their sister.

It would have been more satisfactory if the defendant had offered herself as a witness, and given her version of the transaction, or at least had put forward some testimony tending to show a different theory; but as she preferred to rest her case upon the testimony of the complainants, and as the facts proved are susceptible of but one construction, we can only assent to the conclusion of the court below.

The fact that Mrs. Patten did not pay, or agree to pay, her daughters interest upon the amount of her indebtedness as liquidated, is urged as a reason for holding that she continued to regard herself as trustee for her children in respect to their share of their father's estate, and never contemplated that an indebtedness to them had been recognized. This, however, seems inconsistent with the instrument of September, 1885, which was evidently prepared for a purpose and was wholly unnecessary, if her relation to her daughters were solely that of a trustee for their benefit. If it were for the purpose of fixing her liability, for which the sureties upon her bond were to be responsible, it would scarcely be consistent to hold that, so far as concerned her relations with her daughters, it was not intended to create a liability. It either created a liability or it did not. If it did, it was a liability to her children. If it did not, the instrument was useless.

It is true that no interest, as such, was paid or promised, but as an offset to that the daughters were never charged with their expense of maintenance, although most of them were of age. What the result would have been, if an account had been regularly opened and interest credited to each daughter and a charge made against each for her maintenance, we can only conjecture; but in the loose way in which business is usually done between members of the same family and household, it is not singular that no such account was kept. If Mrs. Glover had not received her share, it would make but

little practical difference whether the agreement of September, 1885, were treated as an operative instrument, or merely one for the purpose of satisfying the sureties on the administratrix's bond. As the effect of the latter construction would be to prefer Mrs. Glover to this amount over her sisters, the court will construe it as the parties themselves have construed it. It is apparent from what has been said that no interest should be allowed prior to the death of Mrs. Patten.

The decree of the court below is, therefore,

Affirmed.

ATLANTIC AND PACIFIC RAILROAD COMPANY *v.* MINGUS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 100. Argued December 15, 16, 1896. — Decided February 15, 1897.

Congress did not intend by the statutes under which the Atlantic and Pacific Railroad Company received its grants of public land, to vest the lands absolutely in the company, without a right to the Government to reacquire them on failure of the company to comply with the conditions of the grant; and no express provision for a forfeiture was necessary in order to fix the rights of the Government, and to authorize reëntry in case of breach of condition.

The act of April 20, 1871, c. 33, 17 Stat. 19, did not alter, amend or repeal the act of July 27, 1866, c. 278, 14 Stat. 292, in these respects, except so far as it permitted a foreclosure of any mortgage which might be put on the lands by the company to operate upon lands opposite and appurtenant to the then completed part of the road, and so far as it gave assurance that no forfeiture would be insisted upon for conditions then broken.

When the United States grant public lands upon condition subsequent, they have the same right to reënter upon breach of the condition which a private grantor would have under the same circumstances, which right is to be exercised by legislation.

Lands in the Indian Territory belonging to the Indians did not pass under the grant to the railroad company; and the United States were not required by the statutes to extinguish the Indian title for the benefit of the railroad company, nor could they be reasonably expected to do so.

As to Indian grants made subsequent to the grant to the railroad company,

Statement of the Case.

there was no restriction upon the right of the government to dispose of public lands in any way it saw fit prior to the filing of the map of definite location; and if it assumed to dispose of lands within the grant, after the rights of the railroad company had attached, such action would be void, but it would be no answer to the obligation of the company to complete its road within the stipulated time.

Congress did not exceed its powers in forfeiting this grant.

THIS was an action of ejectment brought by the railroad company in the District Court for San Miguel County, New Mexico, to recover of the defendant Mingus a parcel of land, to which the plaintiff claimed title under its land grant, made by act of Congress of July 27, 1866, c. 278, 14 Stat. 292. Upon the trial it gave evidence tending to show that the land in controversy was part of an odd-numbered section of public lands within the primary limits of the grant, and was vacant, and in all respects subject to the grant, both at the date thereof and at the date of the definite location of the road (March 12, 1872), and therefore passed to and became vested in the company at that date.

Defendant pleaded not guilty, and relied upon a patent for the same land issued December 10, 1891, to one Albert W. Bray, founded upon a preëmption filing made January 9, 1888. Whilst conceding the original vesting of title in the railroad company on March 12, 1872, and its undisturbed continuance until July 6, 1886, defendant claimed that under an act of Congress, approved upon that day, c. 637, 24 Stat. 123, declaring a forfeiture of the land grant, the title of the company was annulled and became revested in the United States, and, from that time, the land was properly subject to preëmption.

Plaintiff denied the validity of the alleged act of forfeiture; contended that it was ineffectual to annul its title, and hence that the patent of the defendant was issued without authority and was void upon its face.

The facts of the case were substantially as follows:

The company was originally incorporated by the act of July 27, 1866, c. 278, 14 Stat. 292, and by § 1 of the act was authorized to construct a continuous railroad and telegraph line from "the town of Springfield, in the State of Missouri,

thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Albuquerque on the river Del Norte, and thence by way of the Agua Frio or other suitable pass to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas at or near the town of Van Buren."

By § 2, authority was given to the company to take materials from the public lands adjacent to the line of the road for its construction, and the United States agreed to "extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

By § 3, there was granted to the company, for the purpose of aiding in the construction of the railroad and telegraph, etc., "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State."

By § 6, the President of the United States was to cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, "after the general route shall be fixed, and as fast as may be required by the construction of said railroad."

The eighth, ninth and seventeenth sections were as follows:

"SEC. 8. *And be it further enacted*, That each and every

grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

"SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistance, to its own use, for the purpose aforesaid: *Provided*, That any such grant or donation, power, aid or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States."

By the twentieth section the right was reserved to Congress, "at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company," to "add to, alter, amend or repeal this act."

The company proceeded with its organization, but up to April 20, 1871, had only been able to construct 75 miles of its road, including 34 miles in the Indian Territory, extending

westward from its eastern terminus at Springfield, Missouri. Along that construction in the State of Missouri, there was but little unappropriated public land available under the grant to aid in building the road. From the west line of Missouri to the west line of the Indian Territory, about 350 miles, the lands were unsurveyed, and were wholly embraced in Indian titles which the United States had not extinguished, and none of those lands were available to aid in construction. From thence, through New Mexico and Arizona to the Colorado River, the route of the road ran through numerous reservations occupied by hostile and warlike Indians, the boundaries of which reservations were subsequently enlarged by the United States, and new reservations created. Most of the lands which were not included in such unextinguished Indian occupancy were then unsurveyed, and were largely taken up by unadjusted Mexican land claims. It also appears that the surveying and engineering parties of the company were stopped by orders from the Secretary of the Interior from continuing westward through the Indian Territory, and the company was unable to proceed until March, 1871, and then only upon executing a bond in the sum of half a million of dollars, conditioned for the protection of the Indian tribes, through whose territory the line of route was required to pass by the act of Congress.

For these reasons the company was compelled to stop work, and appeal to Congress for express authority to mortgage its land grant in advance of the construction of the road, so as to secure capital for the prosecution of the work. Thereupon, on April 20, 1871, Congress passed an act, c. 33, 17 Stat. 19, authorizing the company to mortgage its property, with a proviso that "if the company shall hereafter suffer any breach of the conditions of the act above referred to (July 27, 1866), under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

Under the authority of this act the company executed mortgages to the aggregate amount of $31,500,000, of which $3,590,629 was secured by mortgages upon the central division of the road extending from the west line of Missouri to Albuquerque, and embracing the lands here in controversy.

By July 4, 1878, the date fixed by the act of 1866 for the completion of the road, the company had constructed only 125 miles out of the 2267 miles contemplated for the entire line; but, in order to have an outlet to the markets of St. Louis, and the transportation facilities of the Mississippi River, it had, in October, 1870, purchased the Southern Pacific railroad, then built from Pacific City, thirty-seven miles west of St. Louis, to Springfield. Owing, as is claimed, to the financial panic of 1873, and the failure of the United States to extinguish the Indian titles through the Indian Territory, or of the company to acquire them, no substantial progress was made with the road from 1871 until about the beginning of 1880, when the company made such arrangements as to enable it to resume the work of construction. In order to do this, however, it had to give up operations in the Indian Territory, and by making connection with the Atchison, Topeka and Santa Fé, whose construction had then reached the line of the Atlantic and Pacific at Albuquerque in New Mexico, it became practicable to build westward to the Pacific Ocean, and thus avoid many of the obstacles and hindrances which had been encountered in the Indian Territory. There were then constructed and equipped, at a cost of $16,000,000, about fifty miles more in the Indian Territory, and 560 miles westward from Albuquerque to "The Needles" on the Colorado River, all of which were examined and accepted by order of the President. It also acquired, by contract of purchase at an expense of $7,290,000, two hundred and forty-three miles of road from The Needles to Mojave, California, which had been constructed by the Southern Pacific Railroad Company, and by a trackage contract with the Southern Pacific the Atlantic and Pacific obtained the right to run its own cars to San Francisco, and to conduct to that point an independent and competitive freight and passenger business.

Argument for Plaintiff in Error.

On July 6, 1886, the company had about 1228 miles of constructed road, equipped and in operation, of which, however, it had itself constructed only 747 miles. That portion of the line from Sepulpa, in the Indian Territory, to Albuquerque, and from Mojave to the Pacific, were in 1886, and still remain, unconstructed.

Upon this state of facts, on July 6, 1886, Congress passed an act, c. 637, 24 Stat. 123, declaring all the lands, excepting the right of way, "adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated" by the act of organization, to be "forfeited and restored to the public domain." The validity of this act raised the only question at issue between the parties.

Upon the trial, the court directed a verdict for the defendant; plaintiff sued out a writ of error from the Supreme Court of the Territory, which affirmed by a divided court the judgment of the court below, 34 Pac. Rep. 592, whereupon plaintiff sued out a writ of error from this court.

Mr. E. J. Phelps and *Mr. A. B. Browne*, (with whom was *Mr. A. T. Britton* on the brief,) for plaintiff in error.

When the grant was, on March 12, 1872, identified by the filing and acceptance of the map of definite location the legal title to the land in controversy vested in the railroad company as of the date of the grant, and unless thereafter divested by voluntary relinquishment, or by due process of law, the railroad company and its assigns have the continuing right of possession against all subsequent claimants or patentees. *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 594, 595; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Wright* v. *Roseberry*, 121 U. S. 488.

These decisions state the law as reiterated by this court in numerous other opinions, too familiar to require citation. It may, therefore, be safely assumed as settled law that, inasmuch as the land in controversy was part of an odd-numbered section, not mineral, situate within the primary limits of the grant and

along the line of definite location filed and approved March 12, 1872, and not included within any of the exceptions from the grant, but in all respects subject thereto, the legal title of the railroad company attached and the right of possession continued perfect as against a subsequent patentee under the United States, unless such legal title has been divested by voluntary relinquishment or by due process of law.

There is no pretence of voluntary relinquishment, but the court below has decided that the legal title vested in the railroad company, subject to a reserved right in the United States to enforce a legislative forfeiture of the grant, upon failure to construct within a prescribed time; that there was a breach of such condition subsequent; and that the act of July 6, 1886, lawfully declared forfeiture and, by mere force of the statute, reinvested the legal title in the United States.

In support of our contention as to the incorrectness of this decision, and as to the unconstitutionality and invalidity of the act of July 6, 1886, the argument naturally invites a careful examination of the following propositions:

1. What were the conditions subsequent of the grant of July 27, 1866?

2. Was not said grant a legislative contract equally binding upon both parties thereto, and, if default upon part of the railroad company occurred or was compelled, through failure of the United States to perform its contract obligations, could the United States enforce such conditions subsequent?

3. Were not the rights reserved to the United States by the act of July 27, 1866, subordinated to the rights acquired by the subsequent act of April 20, 1871?

4. Can the legal title once vested under the act of July 27, 1866, be divested by a mere legislative declaration, containing no provision for any judicial inquiry into the facts upon which it is provided and extending to the grantee no opportunity of urging any equitable or other considerations by reason of which the breach of condition might be excused, or the condition itself discharged?

I. The court below has assumed that the same right of absolute forfeiture which, in other land grants by Congress

was expressly reserved to the United States, was equally reserved in this grant by necessary implication. The theory seems to be to read the terms of this statute, no matter how different in expression or intent, as in *pari materia* with other though wholly variant grants.

But suppose that there had been no conditions subsequent — no reservation of rights to the government — but simply a grant without conditions? In such case there could be no invoking of the analogy of other grants, based upon conditions subsequent, and with reservation of right to the grantor. Such case would clearly be controlled by the principle of the *Courtright case*, 21 Wall. 310, 315, where this court held that the title to 120 sections authorized to be sold before construction was absolute, because "No conditions therefore of any kind were imposed upon the State in the disposition of this quantity, Congress relying upon the good faith of the State to see that its proceeds were applied for the purposes contemplated by the act."

In such case, at the utmost the United States would only be entitled to the same equitable remedy that might obtain in case of a private grantor where consideration had wholly failed. It would have to be pursued in a court of chancery, and could not be effected by a mere legislative declaration.

We therefore maintain with confidence that the conditions subsequent of the act of 1866 are not to be read in the light or analogy of other and wholly variant statutes. They are to be tested by their own expressions, with resort, in case of ambiguity, to the purpose of Congress as shown by cotemporaneous history.

The only part of the Atlantic and Pacific grant which indicated an intent on the part of Congress to divest the grantee of any rights for failure of timely performance is found in the 19th section. That declared in unequivocal language that unless the company obtained the required amount of subscriptions within a stipulated time, "the act shall be null and void." The entire law will be searched in vain for any other indication of an intent by Congress.

II. The grant of July 27, 1866, coupled with the obligations

on part of the government attached thereto, was not only a law which incorporated the company, but it was also a legislative contract. To the performance of such contract obligations the Government was as much bound as the grantee. As this court said in the *Sinking Fund cases*, 99 U. S. 700, 719: "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen. No change can be made in the title created by the grant of the lands or in the contract for the subsidy bonds without the consent of the corporation. All this is indisputable."

The grant of lands was to enable the Atlantic and Pacific railroad to secure a construction fund. The absolute necessity for such governmental aid was the basis of the grant. In the theory of the law the road could not be built without it. Hence Congress said that we will give you this grant to aid you in raising moneys for construction purposes, and we require you to utilize its proceeds by completing construction within a given time, but, as the grant would be otherwise valueless to you, we will agree to do the things necessary to put it into available shape. Those absolutely necessary things, and without which the lands were scarcely worth a penny, were to extinguish the Indian titles and to survey the lands (sections 2 and 6, act July 27, 1866). The road had to be built from Springfield, Missouri, southwest to the Indian Territory, and thence west for three hundred and fifty miles through the Indian Territory. It was promptly built to and as far into the civilized parts of the Indian Territory as the condition of the unextinguished titles would permit. Then it had to cease operations and await the promised action of the United States in extinguishing those titles.

It is confidently submitted that the United States can lawfully exercise no reserved right of forfeiture or otherwise under the contract of July 27, 1866, so long as the United States effectually bars the way to agreed performance by the railroad company by failure to make the grant available

through the stipulated extinguishment of the Indian titles and by identifying the grant by surveys. The principle contended for has been heretofore announced by this court. In *Davis* v. *Gray*, 16 Wall. 203, 230, it was ruled that "the rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute. The analogy of that rule applied here would blot out these conditions. But this would be harsh and work injustice. Equity will therefore not apply the rule to that extent. It will regard the conditions as if no particular time for performance were specified."

III. The third question is equally pertinent whatever may be determined to be the reserved power of the United States under the act of July 27, 1866.

At the time of the enactment of the law of April 20, 1871, the railroad company was in default as to the condition contained in section 8 of the act of July 27, 1866. Construction had ceased for several years. Whatever was the reserved power of the United States upon condition broken, it had then attached and was fully enforceable. Upon and applicable to this condition of existing default and right of reëntry for condition broken, the act of 1871 was enacted. If it had been the intention of Congress that upon such existing default construction should cease and the enterprise terminate, it would surely have legislated in this act of 1871, in unambiguous terms, for the resumption of the grant, or upon the continuance of such right of resumption, if that was the reserved power in the act of 1866. Instead of this the action of Congress, upon the construction for which we contend, was in exact conformity with the powers reserved in sections 9 and 20, viz., to alter or add to the act so as to promote the construction and insure the completion of the road. For that purpose the act of 1871 offered a fresh inducement to the investment of private capital in this national work. To that end, it authorized the company to mortgage its lands to secure bonds to be issued, with the one solitary limitation in the form of a proviso, that, in case

of subsequent breach of condition, the right of the mortgagees should only extend to lands coterminous with road constructed at the time of the foreclosure of said mortgages.

The question turns upon the proviso. There is nothing ambiguous in its language. "At the time of the foreclosure of said mortgage" are words of common and every day use. Lawyer and layman understand them alike. The only way to avoid their ordinary effect is to construe them out of existence, either by treating those words as surplusage, or by substituting others in their stead. It is surely a reasonable contention, that if by the terms of the original act an absolute forfeiture of the grant was to be the consequence of a breach of condition, and if it had been the intention of Congress, while granting subsequent authority to mortgage the grant, to limit the right of mortgagees to lands appertaining to road constructed at date of the breach, or at date of forfeiture, Congress would have said so in apt terms. It would not have left room for doubt as to its intent.

Congress, by this act of 1871, intentionally legislated, 1st, to condone all past default, the language used being "that if the company shall hereafter suffer any breach of the conditions," etc.; 2d, to entirely change the conditions of the legislative contract so as to subordinate the reserved power of the Government to the rights of the mortgagees. The words "at the time of reëntry upon conditions broken" were purposely stricken from the meaning of the contract, and in lieu thereof was inserted the equally plain but essentially variant words, "at the time of the foreclosure of the mortgage." If the corporation failed to apply the land grant and the moneys raised thereon to seasonable construction, Congress assumed that the mortgagees would intervene for their own protection, and would see that their security was made good by construction. It further assumed that a foreclosure of their mortgages would be evidence that both the company and its mortgagees had abandoned the work; and in such event it provided that the United States could then see to the intended application of the residue of lands not coterminous with construction.

IV. The legal title once vested cannot, under the act of

July 27, 1866, be divested by mere legislative declaration, containing no provision for any judicial inquiry into the facts upon which it is founded and extending to the grantee no opportunity of urging any equitable or other consideration by reason of which the breach of condition might be excused, or the condition itself be discharged.

The act of 1886 is a naked declaration of forfeiture and a legislative restoration of the lands to the public domain. It contains no recital of breach of condition. It alleges no failure of performance upon the part of the grantee. It provides for no judicial inquiry into alleged facts of failure to perform, nor the legal effect thereof, nor offsets thereto. It authorizes no subsequent proceedings of any kind to effect a forfeiture or to extend a hearing to the parties in interest. It contains no suggestion of any purpose of devoting the lands to the completion of the road in some other way, or even through some other agency. There is no provision protecting the vested rights of the mortgagees, nor making the proposed restoration of the lands subject to their possible rights. The law simply declares forfeiture and requires an immediate restoration of the lands to the public domain. It seeks by legislative declaration to divest the outstanding fee-simple title, and by mere force of the statute to reinvest that title absolutely in the United States.

The power of the United States to take these lands from the railroad company and apply them in some other way or through some other agency to the construction of the "continuous" highway provided for by the act of 1866 may not be seriously challenged, but the forfeiture act of 1886 does not even pretend to do that. It simply restores the lands to the public domain, and thereby subjects them to sale and entry under the general public land laws. Where then, as in this case, the United States patents them off to an individual entryman, it is manifest they cannot be applied to the purpose to which they were thus originally dedicated, viz., the final completed construction of this "continuous" national and governmental highway under the contract of the United States to devote them to that purpose and no other.

We submit that a mere legislative declaration is not valid so as to effectuate that purpose; that it operates simply as an announcement of the legislative will to assert the reserved rights of the government; but that some proceeding, which shall have a semblance of "due process of law," must follow to determine the rights involved, so as to divest the title of the grantee and to reinvest it in the grantor.

Mr. Assistant Attorney General Dickinson for the United States. *Mr. Joseph H. Call* filed a brief for same.

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

While the value of the land involved in this case is small, the question at issue between the parties affects the validity of the entire land grant of the company adjacent to and coterminous with all that part of the main line of the road not completed on July 6, 1886. The case turns wholly upon the validity of the act of that date, forfeiting that portion of the land grant.

Plaintiff claims in this connection that the act was invalid, inasmuch as the United States had failed to perform their own obligations in two particulars: *First*, that they not only failed to extinguish the Indian title to lands along the prescribed route of the road, but had since further encumbered the grant by the creation of additional Indian reservations, carved out of the granted lands. *Second*, that they also largely failed to survey the lands as required by the sixth section, although repeatedly urged and requested to do so by the railroad company.

1. The reserved rights of the United States with respect to this land grant are contained in the eighth, ninth and twentieth sections of the original act, and are as follows: By § 8 the grant was made subject to the condition that the company should commence work within two years from the approval of the act, and should complete not less than fifty miles a year after the second year, and should complete the main line of

the whole road by July 4, 1878. By § 9, a "further condition" was imposed: that if the company made any breach of the conditions of the act, and allowed the same to continue for upwards of one year, the United States might do anything which might be needful and necessary to secure the speedy completion of the road. And by § 20 the general power was reserved to Congress to alter, amend or repeal the act, subject only to a due regard for the rights of the company.

The position of the plaintiff is that the rights of the United States were fixed and limited by § 9; that Congress did not intend that the grant should ever be forfeited, but that, upon a breach of any of the conditions, the United States could only take steps itself to insure the speedy completion of the road.

What steps the government could take in that direction, and what the effects of its action upon the land grant might be, it is difficult to decide. It would seem highly inequitable, however, that if the government were compelled to go on and complete the road at its own expense the company should yet be able to retain the land grant, the condition of which was the completion of the road at its expense. The act makes no provision whatever for the disposition of the land grant in this contingency. What remedy the government would have had in case it had elected itself to go on and complete the road is left entirely to conjecture. Some further action on the part of Congress would seem to have been necessary.

Aside from this difficulty, however, we are clearly of opinion that Congress intended to impose this simply as a "further condition," consequent upon a breach by the railroad company of its stipulations, and to reserve to the United States the option of forfeiting the grant entirely, or of taking measures to insure the speedy completion of the road. This further condition was obviously intended for the benefit of the government, and with no purpose of merging other conditions, or of superseding other remedies to which it might be entitled. While, by the act of July 27, 1866, like other similar acts passed about the same time, it was doubtless intended that the grant should operate *in præsenti*, it certainly never could have been contemplated that, in case the

company took no steps toward the completion of the road, the government could not forfeit the grant, and could resort to no other remedy than building the road itself. It certainly would be highly inequitable as well as impolitic that the company should retain the land grant and do nothing toward the construction of the road, or that the lands granted should be permanently withdrawn from the public domain. A more reasonable interpretation would be to say that Congress contemplated a possibility that the company might proceed in good faith with the construction of the road, and might so nearly approach its completion that it would be for the best interests of the government to go on itself and complete it rather than to insist upon an entire forfeiture of the grant. Even if § 9 were intended as a limitation upon the power of Congress, which might otherwise be inferred from § 8, the power reserved by § 20 to alter, amend or repeal the act, except so far as its exercise might interfere with the just rights of the company, being the latest expression of the legislative will, may properly be construed to dominate the others.

But little light is to be gained in the consideration of this question by referring to the conditions for forfeiture or reinvestment of title under other railway land grant acts. There is no such uniformity in the terms of their conditions subsequent as to lead us to give any different construction to the three sections in question than such as their language plainly requires. It cannot be supposed that Congress intended to vest a title in the railway company to this enormous grant of lands without contemplating that the Government might in some way reacquire it in case of a failure of the company to comply with the conditions of the grant. No express provision for a forfeiture was required to fix the rights of the Government. If an estate be granted upon a condition subsequent, no express words of forfeiture or reinvestiture of title are necessary to authorize the grantor to reënter in case of a breach of such conditions. *Stanley* v. *Colt*, 5 Wall. 119; *Mead* v. *Ballard*, 7 Wall. 290; *Ruch* v. *Rock Island*, 97 U. S. 693; *Hayden* v. *Stoughton*, 5 Pick. 528; *Jackson* v. *Allen*, 3 Cowen, 220; *Gray* v. *Blanchard*, 8 Pick. 283. And the fact that

Congress imposed as a further condition the right to complete the road itself, did not deprive it of the power of resorting to other remedies to which the breach of such conditions entitled it.

2. As to the proper construction of the act of April 20, 1871. This act, in general terms, authorized the railroad company to make and issue its bonds in such sums as it pleased, and to mortgage its road, etc., to secure them, with a proviso that if the company should *thereafter* suffer any breach of the conditions of its act of organization, the rights of those claiming under the mortgage of the land grant should extend only to so much thereof as should be "coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage." Conceding that, with respect to the rights of the mortgagees, at least, this act was a condonation of the breach of any condition which had previously occurred, it left the rights of the Government unimpaired with respect to any breach which should thereafter occur, and expressly limited the rights of the mortgagees to such land as should appertain to and be coterminous with the completed portion of the road at the time of the foreclosure. It is insisted by the plaintiff that the final words of this act indicate an intention on the part of Congress to extend the time for the construction of the road until such time as the mortgagees might see fit to foreclose. But we do not so read it. There is nothing in the act evincing an intention on the part of Congress to waive any of the conditions of the act of 1866, except so far as such conditions had already been broken. Congress doubtless anticipated that the mortgage might be foreclosed, and desiring to provide against the possible contingency that the mortgagees might claim the right to sell the entire land grant upon the foreclosure, declared that it should operate only upon that part of the grant appertaining to the completed portion. If there were any ambiguity in this act we should feel bound, upon familiar principles, to give the Government the benefit of the doubt. *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66, 88; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733, 740; *Coosaw Mining Co.* v. *South Carolina*, 144

U. S. 550, 562. But in our view there is no case made calling for the application of this rule, as the intention of Congress to simply limit the remedy of the mortgagees seems entirely clear. The original act being silent upon the subject of mortgaging the grant, there is reason to suppose that Congress passed the act for the purpose of resolving any doubts that capitalists may have entertained with respect to such power. The mortgagees, standing in the place of the mortgagor, had no greater rights than it had, and must be held to have known that they were taking an estate which was defeasible upon condition broken. It cannot be supposed that Congress intended to postpone indefinitely, or until the mortgagees chose to foreclose, any remedy it might have against the mortgagor for a breach of its covenants. The plain meaning of the proviso is to permit any foreclosure of the mortgage to operate only upon such lands as are opposite and appurtenant to that part of the road which should be constructed at the time of the foreclosure, but not to extend for a day the time within which the road should be completed. The act also had a purpose in its assurance to mortgagees that no forfeiture would be insisted upon for conditions already broken, and that they might safely advance their money, if no breach should thereafter occur. Except to this extent there was no intention by this act to alter, amend or repeal the act of 1866.

3. Coming now to the act of 1886, forfeiting the grant, it is claimed in the first place that Congress has no right by simple act to forfeit a title already vested, without providing for a judicial inquiry as to whether there has been a breach of a condition on the part of the grantee, and the legal effect of such breach; and, also, whether there has not been a breach on the part of the United States which would estop them from claiming a forfeiture. There is no doubt that, where an estate is granted subject to a condition subsequent, the mere fact that there has been a breach of such condition will not revest the title in the grantor without some act or declaration upon his part. *Ruch* v. *Rock Island*, 97 U. S. 693, 696. In this case it was said by Mr. Justice Swayne that "it was not denied by the plaintiff that the title had passed, and that the

estate had vested by the dedication. If the condition subsequent were broken, that did not, *ipso facto*, produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This act can only be done by the grantor during his lifetime, and after his death by those in privity of blood with him." In the case of a private grant this is ordinarily done by reëntry on the part of the grantor, although, as was said in this case, "bringing suit for the premises by the proper party is sufficient to authorize a recovery without actual entry or a previous demand of possession." *Cowell* v. *Springs Co.*, 100 U. S. 55; *Austin* v. *Cambridgeport Parish*, 21 Pick. 215; *Jackson* v. *Crysler*, 1 Johns. Cas. 125; *Hosford* v. *Ballard*, 39 N. Y. 147; *Cruger* v. *McLaury*, 41 N. Y. 219; *Cornelius* v. *Ivins*, 2 Dutch. 376.

But where the grant is a public one, this court has held in a series of cases that the remedy of the Government is by an inquest of office or office found, a judicial proceeding but little used in this country, or by a legislative act directing the possession and appropriation of the land.

Blackstone defines an inquest of office as "an inquiry made by the king's officer, his sheriff, coroner or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or less, or more. . . . These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he, in general, can neither take nor part from anything." 3 Black. Com. 258, 259.

The necessity of an inquest of office was considered by this court at an early day in two cases. In *Smith* v. *Maryland*, 6 Cranch, 286, it was held that, by the confiscation act of Maryland, passed in 1780, before the adoption of the Constitution, interests in land were completely divested by operation of law, without office found. The validity of the act was apparently not considered.

The case of *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603, involved the title to a large tract of land in Virginia, granted to Lord Fairfax. The lands were devised by will to Denny Fairfax, a British subject, who never became a citizen of the United States, but always resided in England, and was an alien enemy. In 1789, the governor of the Commonwealth of Virginia granted the lands by patent to Hunter, a citizen of Virginia, who entered into possession prior to the institution of the action. It was the opinion of the court that the title acquired by an alien by purchase is not divested until office found, although it was contended that the common law as to inquests of office had been dispensed with by statute, so as to make the grant to Hunter complete and perfect. As to this point Mr. Justice Story observed, p. 622: "We will not say that it was not competent for the legislature (supposing no treaty in the way), by a special act, to have vested the land in the Commonwealth without an inquest of office for the cause of alienage. But such an effect ought not, upon principles of public policy, to be presumed upon light grounds; that an inquest of office should be made in cases of alienage, is a useful and important restraint upon public proceedings. . . . It prevents individuals from being harassed by numerous suits introduced by litigious grantees. It enables the owner to contest the question of alienage directly by a traverse of the office. It affords an opportunity for the public to know the nature, the value and the extent of its acquisitions, *pro defectu hæredis;* and above all it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature. The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." It was further held that during the war the lands in controversy were never, by any public law, vested in the Commonwealth. It was also held that the treaty of 1794 with Great Britain completely protected and confirmed the title of Denny Fairfax. Mr. Justice Johnson, dissenting, was of opinion that the interest acquired by Denny Fairfax under the devise was a mere *scintilla juris*, and that that

scintilla was extinguished by the grant of the State vesting the tract in Hunter; that it was competent for the State to assert its rights over an alien's property by other means than by an inquest of office; that in Great Britain, in the case of treason, an inquest of office had been expressly dispensed with by the statute of 33 H. VIII, c. 30, and that he saw no reason why it was not competent for the legislature of Virginia to do the same.

Subsequent cases in this court have asserted this power to exist beyond any controversy. As was said in *United States* v. *Repentigny*, 5 Wall. 211, 268: "The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly, under the authority of the Government, without these preliminary proceedings." Practically the same language is used in *Schulenberg* v. *Harriman*, 21 Wall. 44, 63. In *Farnsworth* v. *Minnesota & Pacific Railroad Co.*, 92 U. S. 49, 66, we said: "A forfeiture by the State of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant or to their possession when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination — that is, by judicial proceedings — is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the State, after default of the grantee — such as an act resuming control of them and appropriating them to particular uses, or granting them to

others to carry out the original object — will be equally effectual and operative."

These cases were all quoted with approval, and the doctrine reasserted in *McMicken* v. *United States*, 97 U. S. 204, 217; *Van Wyck* v. *Knevals*, 106 U. S. 360, 368.

These cases are not put upon the ground that the United States reserved the right to declare a forfeiture, or even provided expressly for a reversion of title in case of a breach, but upon the general ground that the Government was vested with the same right as a private grantor, upon breach of a condition subsequent, though such right was, from the necessities of the case, to be exercised in a somewhat different manner, viz., by legislative act instead of reëntry.

But while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in defence any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the Government nor with the constitutional rights of the grantee, to hold that the Government by an arbitrary act might devest the latter of his title when there had been no breach of the conditions subsequent, or when the Government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the reëntry or act of forfeiture.

The charge, in this connection, is that the Government not only failed in its legal obligation to extinguish the Indian titles and to survey the lands, but, upon the contrary, has still further burdened these titles with the very cloud it stipulated to remove by additional reservations in favor of the Indians. The main contest in the case has been upon this point. In locating the road between Springfield, in Missouri, and Albuquerque, in New Mexico, the most direct route lay, for 350 miles, through the Indian Territory. To determine whether the Government has been derelict in this particular, it is nec-

essary to compare the several sections of the act to ascertain exactly what the grant covered, and to what extent the legal rights of the grantee were impaired by the non-action of the Government. By the third section of the act a grant was made of twenty sections per mile on each side of the line through the *Territories*, and ten sections per mile through the States, subject to the conditions that " whenever, on the line thereof, the United States shall have full title not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or part of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of, other lands shall be selected by said company in lieu thereof." If the grant stood upon this language alone, there could be no doubt that, as the lands in the Indian Territory had been set apart for the sole use and occupation of various Indian tribes, they were reserved lands within the meaning of that section. *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733. It was held in this case that a grant of lands, in similar terms to the one under consideration, did not apply to lands which had been reserved to the Osage tribe of Indians within the State of Kansas, whether the Indian right were extinguished before or after the definite location of the route. See also *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535.

Indeed, it is open to serious doubt whether that large tract of land, known distinctively as the Indian Territory, is a Territory of the United States within the meaning of the act. While, for certain purposes, such for instance as the enforcement of the criminal and internal revenue laws, it has been recognized as such, and within the jurisdiction of the United States, *United States* v. *Rogers*, 4 How. 567; *The Cherokee Tobacco*, 11 Wall. 616, a reference to some of the treaties, under which it is held by the Indians, indicates that it stands in an entirely different relation to the United States from other

Territories, and that for most purposes it is to be considered as an independent country. Thus in the treaty of December 29, 1835, 7 Stat. 478, with the Cherokees, whereby the United States granted and conveyed by patent to the Cherokees a portion of this territory, the United States, in article 5, covenanted and agreed that the land ceded to the Cherokees should "in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory"; and by further treaty of August 16, 1846, 9 Stat. 871, provided (Art. 1) "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit, and a patent shall be issued for the same." So, too, by treaty with the Choctaws of September 27, 1830, 7 Stat. 333, granting a portion of the Indian Territory to them, the United States (Art. 4) secured to the "Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendants, and that no part of the land granted shall ever be embraced in any Territory or State; but the United States shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own national councils, not inconsistent," etc. And in a treaty of March 24, 1832, 7 Stat. 366, with the Creeks (Art. 14), the Creek country west of the Mississippi was solemnly guaranteed to these Indians, "nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them."

Under the guaranties of these and other similar treaties the Indians have proceeded to establish and carry on independent governments of their own, enacting and executing their own laws, punishing their own criminals, appointing their own officers, raising and expending their own revenues. Their position, as early as 1855, is indicated by the following extract

from the opinion of this court in *Mackey* v. *Cox*, 18 How. 100, 103:

"A question has been suggested whether the Cherokee people should be considered or treated as a foreign state or territory. The fact that they are under the Constitution of the Union, and subject to acts of Congress regulating trade, is a sufficient answer to the suggestion. They are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the Federal Government as a Territory did in its second grade of government under the ordinance of 1787. Such Territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other Territories in the Union. It is not a foreign, but a domestic territory — a Territory which originated under our Constitution and laws."

Similar language is used with reference to these Indians in *Holden* v. *Joy*, 17 Wall. 211, 242. Under these circumstances it could scarcely be expected that the United States should be called upon to extinguish, for the benefit of a railroad company, which had chosen to locate its route through this Territory, a title guaranteed to the Indians by solemn treaties and which had been possessed by them for upwards of forty years with the powers of an almost independent government.

The terms of the second section of the land grant act indicate that nothing of this kind was contemplated. The United States did not agree to extinguish the Indian title absolutely but only "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession." Whether an extinguishment of an Indian title at all was consistent with public policy and the welfare of the Indians could only be determined by Congress, or the execu-

tive officers of the Government; whether it could be obtained by voluntary cession could only be determined by the acts of the Indians themselves.

In *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, wherein a grant to the Northern Pacific Railroad, with a similar provision for the extinguishment of Indian titles, was under consideration, it was held that, under the principal treaties applicable to that case, the grant operated to convey the fee to the company, subject to the right of occupancy by the Indians, but that the right of the Indians could not be interfered with or determined, except by the United States; that no private individual could invade it, and the manner, time and conditions of its extinguishment were matters solely for the consideration of the Government, and were not open to contestation in the judicial tribunals. It appeared in that case that the United States had full title to the lands, subject to a mere right of occupancy on the part of the Indians.

With respect to the power of the United States to extinguish the Indian titles, it was observed in *Beecher* v. *Wetherby*, 95 U. S. 517, 525: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians."

The railroad company was in no position to insist that the Government should extinguish these titles, at least without affirmatively proving that the Indians were willing to make the cession, and that it was consistent with public policy and their own general welfare to permit them to do so. It made the Government its arbiter in this particular. Indeed, it is doubtful if the engagement of the Government amounted to anything more than an expression of its willingness to assist the company in acquiring Indian titles, if the company could persuade the Indians to relinquish such titles, and the Government

considered it consonant with their welfare to do so. The stipulation should be read in connection with the seventeenth section of the act which authorized the company to accept grants from "any Indian tribe or nation through whose reservation the road herein provided for may pass," provided that any such grant or donation, power, aid or assistance from any Indian tribe or nation should be subject to the approval of the President of the United States. This proviso is obviously inconsistent with any general undertaking on the part of the Government to extinguish all Indian titles. That it required the United States absolutely and at all hazards to extinguish such titles, and to take from the Indians a strip of land forty miles in width through the entire Territory, and open it to settlement, is not only inconsistent with their treaties and with their agreement with the company, but one which involved a grave disturbance, if not practically the upsetting of a long established Indian government. In fact, Congress promised nothing in this particular from which the company could claim a legal breach of their agreement, without at least showing that the Indians were willing to cede that portion of their territory, and that public policy and their own welfare required this to be done.

Plaintiff admits that there was a reserved discretion in the Government as to the circumstances under which the Indian titles should be extinguished, but insists that, so long as that discretion was exercised and performance withheld, the Government was in no position to assert a right of forfeiture — in other words, that so long as fulfilment by the company remained impossible, by reason of the failure of the Government to keep its promises, no matter for what reason, the power to insist upon performance by the railroad was postponed. We consider this construction of the compact unsound. The railroad company took its chances with the Government in this particular. The latter might not deem it sound policy or for the welfare of the Indians to extinguish their title, or it might not procure their assent. Under neither contingency would the company have the right to complain nor to set up this non-performance as a defence to its own failure to build

the road. Knowing the title under which the Indians held this territory, the company should, when it contemplated the construction of the road, have obtained some positive assurances from the Indians that they would permit the road to be built. It seems that by treaties made in 1866 with the Seminoles, the Choctaws and Chickasaws, the Creeks, the Delawares and the Cherokees, 14 Stat. 755–799, provision was made for a right of way for certain railways from north to south, and from east to west, through the Indian Territory ; but the very fact that these treaties made no provision for a grant of lands to the railways through this Territory as appurtenant to their line of road was notice to the companies that no such grant was contemplated. Indeed, these very treaties made additional provisions for the exercise of legislative power by the several Indian nations, and contained additional guaranties for their legislative independence and self-government — guaranties quite inconsistent with a grant to the railway of alternate sections of land forty miles in width, and the opening of the other alternate sections to purchase as public lands. All of these treaties were entered into prior to the land grant act of July 27, 1866, and both parties must have had them in view at that time.

4. The defence that other reservations were made to these Indians after this act was passed stands upon a somewhat different basis. So far as these Indian reservations were in the Indian Territory they are immaterial, since we have already held that lands in that Territory did not pass, and it could make no difference whether they were reserved for one tribe or another. Of the reservations in New Mexico and Arizona most of them were made after July 4, 1878, the time fixed for the completion of the road, and at a time when the Government had a right to declare the grant forfeited. All these reservations, too, were made opposite portions of the road which were actually built, and cannot be made available as an excuse for not completing the other portions. None of them seem to affect in any way the lands coterminous with the unconstructed portion. There was no restriction upon the right of the Government to dispose of public lands in any way

it saw fit prior to the filing of the map of definite location; and if it assumed to dispose of lands within the grant, after the rights of the railroad company had attached, such action might be void, but it would be no answer to the obligation of the company to complete its road within the stipulated time. Some of these reservations, too, were made in pursuance of treaties made with the Indians prior to the land grant act, and were apparently made in pursuance of a plan to confine the Indians within designated boundaries of territories previously occupied by them. These reservations did not seem to have seriously interfered with the company in the prosecution of its work, or, with the exception of those in the Indian Territory, to have been seriously insisted upon as an answer to the proposed forfeiture of its land grant.

5. It is finally contended that the Government failed to fulfil its obligation to survey the lands, and that this was a condition precedent to its right to declare a forfeiture. This obligation is contained in the sixth section in the following language: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad." Evidently the failure to do this did not prevent the company from realizing the full value of the land granted by mortgaging the road, and it is open to doubt whether it could, under any circumstances, be insisted upon as a defence to the forfeiture. It is true that the railroad company offered to furnish the money for such surveys, and that the United States refused to accept it; but such offer was not made until 1881, three years after the time stipulated for the completion of the road, and at a time when the Government had a right to treat the land grant as forfeited, although the act of forfeiture was not passed for five years thereafter.

Upon the whole it does not seem to us that Congress exceeded its powers in forfeiting this grant. The plaintiff company seems to have undertaken its great enterprise in building a transcontinental railroad without adequate appreciation of

the difficulties to be surmounted, which finally caused a total suspension of its work; and, when in 1880, after the panic of 1873 had spent its force, it resumed operations, the time had already expired for the completion of the road, and it was only by the inaction or indulgence of Congress that it was permitted to proceed. So far as the road was built and accepted by the Government after that time, it was probably entitled to receive its appropriate land grant, but this was rather a matter of favor than of strict right. During this long period, from 1871 to 1880, it should, under its charter, have constructed at least fifty miles per year, and should have completed the whole road by July 1, 1878. But it did nothing. After this long inaction of nine years and its practical abandonment of the work, the company was not in a position to demand of the Government a strict and literal performance of its obligations when it had so completely failed to meet its own. While the reservation of some of these lands for the benefit of the Indian tribes might not have been consistent with its obligations to extinguish Indian titles, if the company had been prosecuting its work according to its contract, we do not think that it is entitled to complain that the Government did not deal with it precisely as if it lived up to its undertaking.

The judgment of the court below must, therefore, be

Affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

In re CHETWOOD, Petitioner.

ORIGINAL.

No. 7, Original. Argued January 11, 1897. — Decided February 15, 1897.

A writ of error from this court removes a cause from a Circuit Court to this court, and it is then for this court to determine whether it may entertain jurisdiction of the cause removed, and to dispose of controversies in respect of the form of the writ, the parties, and the citation and service, without interference from any other court.

A receiver of a national bank, appointed by the Comptroller of the Currency in pursuance of law, acts under the control of the officer appointing him, and does not, by application to the proper court touching a sale of personal property of the bank, become an officer of that court, or place the assets of the bank within its control.

When a state court has acquired jurisdiction of an action or suit to recover moneys alleged to be due a national bank, in the hands of a receiver, the receiver's subsequent discharge and the substitution of an agent in his place by the act of the stockholders does not oust it.

Where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.

Where property is in the possession of a court of competent jurisdiction, that possession cannot be disturbed by process out of another court of concurrent jurisdiction.

Under the circumstances set forth in the statement of the case, and in the opinion of the court, it is clear that the Circuit Court of the United States for the Northern District of California could not restrain the prosecution of his suit in the state courts by the petitioner, and, if Federal questions arose, it could not prevent this court, or a justice thereof, or the presiding judge of the state court, from granting writs of error, by restraining the parties from applying therefor; nor could it properly direct their dismissal, having been granted.

This court may issue writs of certiorari in all proper cases, and will do so when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in furtherance of justice.

This is a petition for the vacating of or prohibition upon certain orders of the Circuit Court of the United States for the Northern District of California in the suit of *Stateler* v. *The California National Bank of San Francisco et al.*, enjoining (as was held) the bank and John Chetwood, Jr., from

prosecuting a writ of error from this court in the name of the bank as plaintiff in error; directing Chetwood to dismiss a second writ of error from this court; and punishing Chetwood and E. G. Knapp, of counsel, as for a contempt of the Circuit Court in suing out said writs of error. Leave was granted to file the petition, and a rule to show cause was entered thereon, to which return was made.

The facts necessary to be considered appear to be as follows:

In October, 1886, the California National Bank of San Francisco was organized under the national banking laws with a paid up capital stock of $200,000, and petitioner became and remains a stockholder therein. In December, 1888, the bank became insolvent, and the Comptroller of the Currency on January 14, 1889, appointed one S. P. Young receiver thereof.

July 19, 1890, petitioner began his suit in equity in the Superior Court of the city and county of San Francisco against the bank, Richard P. Thomas, Robert R. Thompson, Richard A. Wilson, and S. P. Young as receiver, "and therein and thereby, on behalf of said bank and himself as a representative stockholder therein, specially set up and claimed the right to hold said defendants Thomas, Thompson and Wilson, as officers and trustees and directors of said bank, accountable to it in equity, under and in pursuance of the statutes and laws of the United States, for sundry breaches of their trust as such officers, directors and trustees," etc.

Thomas was the president, and with Thompson and Wilson formed the executive committee of the board of directors of the bank. The complaint set forth the by-laws with respect to the separate duties and liabilities of the president and said executive committee, and charged gross negligence against each of them in discharge thereof, whereby the bank through the fraudulent acts of its cashier in making excessive and unsecured loans and advances was rendered insolvent; and plaintiff prayed a "joint and several money judgment against them, the said Richard P. Thomas, Robert R. Thompson and Richard A. Wilson, for the sum of $400,000, with legal inter-

Statement of the Case.

est thereon from the time of such loss, and costs herein, be rendered and entered by this court in this case in favor of said corporation, the California National Bank of San Francisco, and that said corporation, and this plaintiff do have such further order, decree, judgment and relief as may be meet and agreeable to equity."

The complaint further averred, and it was so found on the hearing of the case, that Chetwood had, prior to the commencement of such suit, requested the officers of the bank, the receiver thereof and the Comptroller of the Currency, severally, to bring and prosecute the same against the alleged delinquent officers, which requests were refused.

It appears from an affidavit attached to the return that "the receiver, when so made a defendant, and as such served with process, answered, and followed his refusal to bring the suit by opposition and hostility thereto."

On April 27, 1894, the trial court ordered judgment in favor of the plaintiff for the benefit of the bank against Thomas, Thompson and Wilson, and referred the case to a referee to examine and report in respect of the amount for which judgment should be entered. The referee reported to the court a total loss of $166,919 suffered by the bank by reason of the acts and omissions of the defendants, but not the amount for which each was severally responsible. Thereafterwards Thompson and Wilson paid into court $27,500, whereupon the court made an order dismissing them from the suit, and on November 20, 1894, rendered judgment for the plaintiff for the use and benefit of the bank against Thomas for $139,419, with interest at seven per cent per annum from December 15, 1888, being for the sum of $166,919, reported by the referee, less the $27,500 paid by Thompson and Wilson. Thomas appealed from this judgment to the Supreme Court of California, and that court held that the dismissal of Thompson and Wilson was a retraxit and operated in law as a full satisfaction of the cause of action, and upon that ground reversed the judgment against Thomas and entered a personal judgment against Chetwood for costs, etc. *Chetwood* v. *California National Bank*, 113 California, 414; 45 Pac. Rep.

704. To review that judgment a writ of error was sued out from this court, bearing date September 24, 1896. This writ of error was allowed by Mr. Justice Field, who approved a bond and signed a citation running in the name of the California National Bank of San Francisco as plaintiff in error to Richard P. Thomas as defendant in error, service of which on Thomas, Stateler, S. P. Young and R. A. Wilson was accepted. Chetwood also accepted service, but asked that he be entered as a plaintiff in error, and that for that purpose the writ of error be amended. The case was docketed by the clerk of this court as No. 673, under the title of *California National Bank of San Francisco* v. *Richard P. Thomas.*

The receiver of the bank never authorized or aided in the prosecution of the suit, nor claimed nor attempted to take control or possession thereof, nor of the judgment entered therein, nor of any part of the $27,500 paid into the state court by Thompson and Wilson.

The Comptroller of the Currency in July, 1894, had paid all the creditors of the bank whose claims had been proven or allowed, except shareholders who might have been creditors of the bank, together with all the expenses of the receivership, and the redemption of the bank's notes having been provided for by deposit of lawful money therefor with the United States Treasurer, a meeting of the stockholders of the bank was called pursuant to the act of August 3, 1892, c. 360, 27 Stat. 345, at which Thomas, holding nine hundred and sixty shares of the stock and controlling sixty shares more, threw, as is alleged, one thousand and twenty votes, being a majority, in favor of discontinuing the receiver, and of the selection of T. K. Stateler as agent of the bank to succeed the receiver, Young, in the settlement of its affairs. Stateler was thereupon declared elected, Chetwood protesting, and on February 26, 1895, the Comptroller and the receiver executed an assignment of all assets of said bank then in their hands or subject to their order or control to said Stateler.

On March 19, 1895, and pending the appeal of Thomas in the Supreme Court of the State, Stateler voluntarily appeared in the Superior Court of San Francisco and moved for an

order directing that so much of the $27,500 as then remained in that court be paid over to him, which motion was resisted by petitioner and denied by the Superior Court. From this order Stateler appealed to the Supreme Court of the State, which reversed it and directed that the money be paid over to him. 113 California, 649. Petitioner thereupon sued out a writ of error from this court, which was allowed by the Chief Justice of California, citation duly issued and served, bond approved and, as the money was in custody of the Superior Court and drawing interest, the writ was made a supersedeas. The record was filed in this court and the cause docketed as No. 674. This writ bears date October 17, and appears to have been allowed October 22.

January 4, 1896, while both the appeals of Thomas and Stateler were pending in the Supreme Court of the State and undetermined, Stateler filed an original bill in the Circuit Court of the United States for the District of California against the bank and Chetwood, alleging that as such agent he was an officer of the United States, and that he had sole power to act for the bank and its shareholders, to the exclusion of the stockholders, directors and officers thereof. This bill contained, among other allegations, the following:

"Your orator further avers that heretofore, to wit, on the 21st day of February, 1889, and prior to the commencement of any of the suits hereinbefore mentioned, S. P. Young, the receiver of the defendant banking association, did file in this honorable court a petition entitled '*In re* application of receiver of the California National Bank for the sale of personal property,' and which said petition, among other things, recited that said California National Banking Association had been duly adjudged insolvent by the Comptroller of the Currency of the United States; that the petitioner therein had been by said Comptroller duly appointed the receiver of such association, and that said petitioner had duly qualified as such receiver and entered upon the performance of the duties of his office, and that as such receiver there had come into his possession certain personal property of said banking association, and thereupon in and by said petition the said receiver of

said banking association thereupon submitted himself and the affairs of said banking association to the jurisdiction of this honorable court, as provided by the national banking laws of the United States and the amendments thereof, and thereupon asked for and obtained from this honorable court an order authorizing him to sell the property described in said petition, and to apply the proceeds thereof as provided by law, and that the filing of said petition was a necessary step in the winding up of the affairs of said defendant banking association; that thereafter and from time to time the said receiver did obtain from this honorable court orders directing him to sell various pieces of property belonging to said banking association and to compromise various debts due to said banking association and did, as such receiver, institute in this honorable court suits to collect moneys due said banking association, all of which said proceedings and suits were necessary steps in the winding up of the affairs of said defendant banking association, and, as such receiver, did in every way and as provided by the Revised Statutes of the United States and the amendments thereto hold himself amenable to the orders of this honorable court; and your orator avers that the jurisdiction of this honorable court over the affairs of said defendant banking association did attach on the 21st day of February, 1889, as aforesaid, and that the affairs of said defendant banking association have never been wound up, but that your orator is now engaged in winding up the affairs of said defendant banking association, and that it will be necessary for him to bring various suits to collect the outstanding assets of said association, and, among others, a suit against the defendant John Chetwood, Jr., to recover the moneys so as aforesaid due and owing from him to the defendant banking association, and that it is necessary for him to bring this suit and to obtain the relief herein prayed for, so that he can proceed to wind up the affairs of said defendant banking association without further interference from the defendants John Chetwood, Jr., or the alleged board of directors of said insolvent association."

The prayer was for a decree adjudging that complainant "is

the duly elected, qualified and acting agent of the defendant bank, to wit, the California National Bank of San Francisco, and as such exclusively entitled to have and receive in his custody and under his control all the moneys and property of said bank, and to collect the outstanding indebtedness due to said bank, whether the same be evidenced by open accounts, bills, notes or judgments of record, to the end that the affairs of the bank may be wound up, its property converted into money, and its money distributed among its shareholders, as provided by the national banking laws of the United States; that all the acts of the defendant banking association through its alleged board of directors, as herein set forth, since the appointment of a receiver to take charge of its affairs, as herein set forth, be adjudged null and void, and that its board of directors has no authority to take any action touching the affairs of the association; that the said bank, its board of directors, officers and employés, and the said John Chetwood, Jr., his agent and servants, and each and every of their said attorneys, solicitors and counsellors, be forever restrained and enjoined from denying the rights of your orator to the said office of agent of said banking association, and from denying his right as such to the exclusive control of the assets of said bank, as above set forth, and from commencing any further litigation against him as such agent, and from prosecuting or defending any action heretofore brought by them or either of them against your orator as such agent touching his right to said office and touching his exclusive right as such agent to collect the assets of said bank, except the suit, now pending in this court, brought by them as aforesaid against your orator on the 12th day of November, 1895, and which suit your orator hereby especially exempts from the operation of any injunction that may hereafter be granted herein, and that the said bank, its board of directors, officers and employés, and the said defendant Chetwood, his agents and servants, and each and every of their said attorneys, solicitors and counsellors, be forever restrained and enjoined from commencing any further suits to collect any outstanding debts due the said bank, whether the same

be evidenced by an open account, bill, note or judgment, and particularly from attempting in any manner to collect the judgment heretofore recovered for said bank against the said Richard P. Thomas and hereinbefore referred to, and from further prosecuting the suit brought by them in the Superior Court of Alameda County to place a receiver in charge of the Standard Soap Company, as hereinbefore set forth"; for an order to show cause why an injunction should not issue, and a temporary restraining order; and for general relief.

The Circuit Court, on February 24, 1896, entered the following order:

"It is now ordered, adjudged and decreed that until the further order of this court or of the judge thereof the defendants, The California National Bank of San Francisco, its directors, officers and employés, and said John Chetwood, Jr., his agents, servants, attorneys, solicitors or any other representative, are hereby restrained and enjoined from commencing any further litigation against the complainant, as agent of said bank, and from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by open accounts, bills, notes or judgments, or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the said bank, and from settling and allowing or attempting to settle or allow any attorneys' charges or any other fees, expenses or costs growing out of or which it may be claimed grew out of any past litigation in this matter, and from in any way disposing of or encumbering any of the assets, money or property of said bank; but the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the Supreme Court of the State of California or in this court."

In September, 1896, petitioner gave notice and attempted to move in his action in the Superior Court of San Francisco for an allowance for fees and costs, whereupon Stateler moved in the Circuit Court to punish petitioner and his counsel for so doing; and some days later moved for a further order punishing petitioner and his counsel, as well as one Vanderslice,

claiming to be president of the bank, and Thompson, his counsel, for being concerned in suing out each of the writs of error in cases now numbered 673 and 674 on the docket of this court. Rules to show cause were entered. As to the matter of the motion in the state court for an allowance, it appeared that petitioner had withdrawn his application, and the Circuit Court adjudged the punishment of costs only, as it held the violation of its order had been merely technical.

As to the other rule to show cause, the court on the 19th of November, 1896, entered an order which, after discharging Vanderslice and Thompson, thus continued:

"3d. That at the time of applying for a writ of error to the Supreme Court of the United States, in the name of the defendant bank, to review the action of the Supreme Court of the State of California in reversing the judgment recovered by John Chetwood, Jr., in the Superior Court of the City and County of San Francisco, State of California, against Richard P. Thomas in the action of John Chetwood, Jr., plaintiff, *v.* The California National Bank of San Francisco *et al.*, defendants, the said E. G. Knapp was ignorant of the fact that an injunction had issued out of this court in this case on the 24th day of February, 1896, enjoining the defendants herein and their attorneys from using the name of the bank in any of the litigation referred to in the amended bill in this action, and that by reason thereof the said E. G. Knapp is not guilty of any contempt of this court in applying for said writ of error, and that said order to show cause, as regards the action of the said E. G. Knapp in applying for said writ of error, is hereby discharged as to the said E. G. Knapp.

"4th. That at the time of applying for a writ of error to the Supreme Court of the United States, in the name of the defendant bank and John Chetwood, Jr., the defendants here, to review the action of the Supreme Court of the State of California upon the appeal taken by the complainant here from an order of the Superior Court of the City and County of San Francisco, State of California, in the action of John Chetwood, Jr., plaintiff, *v.* The California National Bank of San Francisco *et al.*, defendants, made by said Superior Court on the 8th day

of July, 1895, refusing to turn over to the complainant here, as the agent of the bank, a certain fund of money on deposit in said Superior Court to the credit of said action, and which said fund then belonged and now belongs to said bank and which said fund the complainant here, as the agent of said bank, was then entitled and is now entitled to receive and have in his custody, to the end that it may be distributed among the shareholders of said bank under the advice and direction of this court, as provided by law, and which said writ of error was applied for and obtained for the purpose of raising in that action the question of the validity of the election and qualification of the complainant as the agent of said defendant bank and for the purpose of preventing said fund from coming into the hands of the complainant as agent of said bank, so that it might be used by the said defendant, John Chetwood, Jr., for attorneys' fees and costs incurred by him in the litigation referred to in the amended bill herein and in prosecuting the writ of error referred to in paragraph 3d hereof, the said E. G. Knapp well knew that an injunction had duly issued out of this court in this action on the 24th day of February, 1896, enjoining the defendants herein and their attorneys from any further litigation in and about said fund outside the Supreme Court of the State of California and from using the name of the bank in any further litigation in and about said fund or the matters referred to in the amended bill herein, and well knew that it had been adjudged by this court in this action that this court had the sole and exclusive jurisdiction over the matter of winding up said defendant national bank and had the sole and exclusive jurisdiction over the question as to whether or not said complainant was the duly elected and qualified agent of said bank, and that in applying for said last named writ of error the said E. G. Knapp has been guilty of a contempt of this court.

"5th. That the applications for both of the writs of error, hereinbefore referred to, were made by the said E. G. Knapp, claiming to be counsel for said bank; that the said E. G. Knapp did not then represent and never has at any of the times

herein referred to represented said bank as its attorney, and did not then and never has had authority to make either of said applications in its name; and that both of said applications were made by the said E. G. Knapp at the instance and request and with the full knowledge and approval of the defendant John Chetwood, Jr., and that in making both of said applications the said defendant John Chetwood, Jr., has been guilty of a contempt of this court.

"6th. It is further ordered and adjudged, that the defendant John Chetwood, Jr., and said E. G. Knapp pay the costs of this proceeding; and that in prosecuting the writ of error referred to in paragraph 3d hereof, and which said writ of error was obtained in the name of the defendant bank, they altogether refrain from further using the name of said bank; and they are hereby forbidden to use the name of said bank in any way, manner or form in the further prosecution of said writ of error.

"7th. It is further ordered and adjudged, that the defendants herein and E. G. Knapp, the attorney for said defendants, dismiss in the Supreme Court of the United States the writ of error referred to in paragraph 4th hereof, obtained from the Chief Justice of the State of California, to review the action of the Supreme Court of the State of California, on the appeal of Thomas K. Stateler, complainant herein, from the order made on the 8th day of July, 1895, by the Superior Court of the City and County of San Francisco, State of California, in the action entitled John Chetwood, Jr., plaintiff, *v.* The California National Bank of San Francisco *et al.*, defendants, and which said writ of error was made returnable before the Supreme Court of the United States on the 15th day of December, 1896, and which said proceeding in said Supreme Court of the United States is entitled 'The California National Bank of San Francisco and John Chetwood, Jr., representative stockholder thereof, Plaintiffs in Error, *v.* T. K. Stateler (Agent), S. P. Young (Receiver), Robert A. Wilson, Richard R. Thompson, and Richard P. Thomas, Defendants in Error'; that said writ of error be dismissed free of all cost to said complainant, and that the defendants herein have and produce

evidence of the dismissal thereof before this court within twenty (20) days from the date hereof."

It appeared that Chetwood had commenced suit in the Circuit Court directly attacking the validity of Stateler's election; and also that it was claimed that the bank had regularly maintained a board of directors, and that officers had been elected, pending the receivership and the subsequent agency.

The petition alleged that petitioner and Knapp were authorized to appear on behalf of the bank, and that they had been employed by the president and the vice-president of the bank and certain other shareholders to appear on behalf of the bank and prosecute the writs of error, and had given security that they would so prosecute said writs and make their pleas good, and attached to the petition was the affidavit of Vanderslice in the Superior Court of San Francisco, subscribed and sworn to October 24, to the effect that he was the president of the California National Bank of San Francisco, and that "said corporation has, through him and the authority given him by the board of directors, retained and employed E. G. Knapp, an attorney and counsellor at law, as attorney to represent it in this court and in the Supreme Court of this State and of the United States, if necessary."

The record contains very many matters not above set forth, but the foregoing are deemed sufficient so far as the questions determined by the court are concerned.

Section 5234 of the Revised Statutes provides that on refusal of any national bank to pay its circulating notes and its consequent default, "the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may,

if necessary to pay the debts of such association, enforce the individual liability of stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

By the act of June 30, 1876, c. 156, 19 Stat. 63, the authority of the Comptroller to appoint a receiver was given, under the circumstances enumerated, and, among them, whenever the Comptroller became satisfied on examination of its affairs that the bank was insolvent.

The substitution of an agent for the receiver is provided for by the act of June 30, 1876, as amended by the act of August 3, 1892, c. 360, 27 Stat. 345. When the Comptroller has paid the debts of the particular bank, not including shareholders who are creditors of such association, and all expenses, and the redemption of the bank's circulating notes shall have been provided for as prescribed, the Comptroller calls a meeting of the shareholders, at which they determine by a majority vote whether the receiver shall be continued to wind up the affairs of the bank, or an agent shall be appointed for that purpose. "In case the said meeting shall by a vote of a majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided, and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and

control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer or other instrument, the person elected such agent shall hold, control and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise or compound the debts due to such association, with the consent and approval of the Circuit or District Court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such District or Circuit Court a full account of all his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond."

Mr. A. B. Browne for petitioner. *Mr. Robert Rae* and *Mr. A. T. Britton* were on his brief.

Mr. Robert Brent Mitchell opposing.

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

The writs of error removed the original suit in both its branches to this court, and whether or not jurisdiction may be entertained of both or either of them, it is for this court to determine when the question properly arises.

And so if there be controversy in respect of the form of the writs, parties, citation and service, or otherwise, these are matters for the disposition of this court without interference from any other.

We find it impossible to accept any ground suggested for the assumption by the Circuit Court of jurisdiction to compel Chetwood to desist from using the name of the bank on the writ of error in the case against Thomas, and to dismiss absolutely the writ of error in the case involving Stateler's effort to obtain control of the funds.

It is true, as stated in *In re Tyler, Petitioner*, 149 U. S. 164, 181, that "no rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor." But we do not regard these proceedings as falling within that rule.

As neither the bank's officers or directors, nor the receiver, nor the Comptroller, would, on demand, bring suit, Chetwood's suit on behalf of himself and other stockholders of the California National Bank of San Francisco to recover judgment in the bank's favor for the alleged wrongful acts of the managing agents of the corporation, must be assumed, on this record, to have been properly instituted, and it is not contended that this was ever challenged by the receiver or by Stateler claiming as his successor. The receiver was made a party defendant thereto, but took no steps to remove the cause to the Federal court, and, as is averred, assumed an attitude of hostility to the prosecution of the suit, and did nothing to aid in securing judgment against the officers of the bank, whose alleged breach of trust and liability therefor was the sole foundation for the action. Nor is it questioned that the suit was rightly brought in the state court. *Whittemore* v. *Amoskeag National Bank*, 134 U. S. 527.

The receiver was appointed by the Comptroller of the Currency, January 14, 1889, and Chetwood commenced his suit

July 19, 1890. The receiver was not the officer of any court but the agent and officer of the United States, as ruled by Mr. Justice Gray, on circuit, in *Price* v. *Abbott*, 17 Fed. Rep. 506, and by Mr. Justice Jackson, then Circuit Judge, in *Armstrong* v. *Trautman*, 36 Fed. Rep. 275. And see *Porter* v. *Sabin*, 149 U. S. 473, 479; *Platt* v. *Beach*, 2 Ben. 303; *Frelinghuysen* v. *Baldwin*, 12 Fed. Rep. 395; *Armstrong* v. *Ettlesohn*, 36 Fed. Rep. 209.

It has been so often decided that the authority vested in the Comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to objection because vesting that officer with judicial power in violation of the Constitution, that we have recently declined to reëxamine that question. *Bushnell* v. *Leland*, 164 U. S. 684.

The receiver acts under the control of the Comptroller of the Currency and the moneys collected by him are paid over to the Comptroller, who disburses them to the creditors of the insolvent bank. Under section 5234 of the Revised Statutes, when the receiver deems it desirable to sell or compound bad or doubtful debts, or to sell the real and personal property of the bank, it devolves upon him to procure "the order of a court of record of competent jurisdiction," but the funds arising therefrom are disbursed by the Comptroller, as in the instance of other collections.

The Circuit Court did not have the assets or property of this bank in its possession on July 19, 1890, nor was the leave of that court necessary in order that the receiver might be made a party defendant to the action instituted by Chetwood on that day.

In the bill filed by Stateler in the Circuit Court, January 4, 1896, to enjoin Chetwood and the bank, the averment is made that on February 21, 1889, the receiver filed an application in the Circuit Court entitled "*In re* application of receiver of the California National Bank for the sale of personal property," and the bill asserts as a conclusion of law that thereby "the said receiver submitted himself and the affairs of said banking association to the jurisdiction of this honorable court."

The application thus referred to is not made part of the return to the rule, but from the averments of the bill in regard to it, and from the terms of the national banking law itself, we think it plain that no such result followed its presentation. Our attention has been called to no case in which it has been held that the filing of such petitions by national bank receivers in the Federal courts operates to make the receiver an officer of the court or to place the assets of the bank within the control of the court in the sense in which control is acquired where a receiver is appointed by the court.

As we have said, Chetwood's right to bring the suit in the state court against the officers of the bank must be held as not open to dispute on this record, and the bank was properly made a party.

Whether the bank's name was necessarily or rightly used in the prosecution of the writs of error, we are not now called on to decide.

The suit was properly brought in the state court, proceeded to judgment, and was carried to the Supreme Court of California on appeal. These courts undeniably had jurisdiction over the suit and the parties. About four years after the suit was commenced, Stateler was elected agent to succeed the receiver, and the usual assignment by the Comptroller and receiver, to him as such, was executed. The legality of Stateler's election, though controverted, must be conceded for the purposes of this application. But did the substitution of an agent for the receiver oust the jurisdiction of the state court? Certainly not. He was no more an officer of the Circuit Court in the first instance than the receiver was. The agent proceeds in the settlement with like authority to that conferred upon the receiver, although at the conclusion of his duty he is required to render to the Circuit or District Court of the United States, for the district where the business of the bank is carried on "a full account of all his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond"; and thus he and his bondsmen are protected by the final order of the Federal

court upon the performance of the conditions imposed. But there is nothing in the language of the statute from which it can be inferred that it was the intention that the jurisdiction of state courts of competent and concurrent jurisdiction, first obtained, should be interfered with by restraining orders issued by Federal courts on the application of such an agent. The agent may indeed intervene in a case in the state court and receive the fruits of the litigation to be administered subject to the final approval of the Federal court, and, accordingly, Stateler as agent submitted himself to the jurisdiction of the state courts and applied for an order turning over to him the fund so far as realized. Nevertheless the agent must abide the result and cannot control it through the interposition of another independent and concurrent jurisdiction.

The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court of concurrent jurisdiction. *Moran* v. *Sturges*, 154 U. S. 256, and cases cited. And by section 720 of the Revised Statutes the granting of injunctions to stay proceedings in any court of a State is prohibited in express terms. It is unnecessary here to point out such exceptions or limitations as may exist.

Obviously the Circuit Court could not restrain the prosecution of this suit in the state courts, and we are equally clear that if Federal questions arose, the Circuit Court could not prevent this court, or a justice thereof, or the presiding judge of the state court, from granting writs of error, by restraining the parties from applying therefor; nor could it properly direct their dismissal, having been granted. Cases transferred to this court must be dealt with by this court. Of course it is quite possible that the litigation had gone far enough after the state Supreme Court had passed upon it, but parties cannot be deprived of the right to prolong it, if the right exists, in this manner and under such circumstances.

Considered apart from the construction placed upon it by the Circuit Court, we should say that the injunction order of February 24, 1896, was not intended to restrain either Chetwood or the bank, or both, from prosecuting the writs of error from this court. The concluding words of the order are "but the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the Supreme Court of the State of California or in this court." According to the practice in this court a writ of error has been treated rather as a continuation of the original litigation than the commencement of a new action, *Nations* v. *Johnson*, 24 How. 195, 205; *Cohens* v. *Virginia*, 6 Wheat. 410; but in any view we should not have thought that writs of error were included within the scope of the order, or that the Circuit Court designed to interfere in such a way with the prosecution of the principal controversy as to arbitrarily stop the case on the judgment of the Supreme Court of the State if it proved adverse to the bank and its interested stockholders, and leave them, if such order were lawful, wholly without further remedy, if such they had; or to preclude one of the parties from attempting to obtain a review of the judgment in the matter of the rights of Stateler, however that might be determined in the Supreme Court of the State, whose decisions on both appeals were rendered after the entry of the restraining order.

The Circuit Court, however, has otherwise construed the order, and has adjudged petitioner and his counsel guilty of contempt in its violation as thus construed. And it has directed petitioner to dismiss one of the writs of error and to desist from using the name of the bank in the other, in advance of what we may determine as to either of these matters when coming on to be disposed of.

As in our opinion the Circuit Court exceeded its jurisdiction in thus proceeding, we are constrained to make the rule absolute.

By section 14 of the Judiciary Act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts

of the United States were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law"; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. * 398; Bac. Ab., Certiorari.

Judgments in proceedings in contempt are not reviewable here on appeal or error, *Hayes* v. *Fischer*, 102 U. S. 121; *In re Debs*, 158 U. S. 564, 573; 159 U. S. 251; but they may be reached by certiorari in the absence of any other adequate remedy.

The writ of certiorari will be allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error, and directing them, or either of them, to refrain from prosecuting the one writ in the name of the bank and to dismiss the other, may be revised and annulled. We presume, after what we have said, it will not be necessary for the writ to issue.

Rule absolute; Certiorari allowed.

UNITED STATES v. WINONA AND ST. PETER RAILROAD COMPANY.

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

No. 321. Argued November 30, December 1, 1896. — Decided February 15, 1897.

In view of the fact that many years have passed since the certification of the lands in controversy, and since the railroad company, in reliance upon the title which it believed it had acquired, disposed of them, and that other parties have become interested in them, and have dealt with them as private property, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts.

The act of March 3, 1887, 24 Stat. 556, providing for the adjustment of land grants made by Congress to aid in the construction of railroads, and the act of March 2, 1896, 29 Stat. 42, operated to confirm the title to purchasers from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation; provided that they purchased in good faith, and paid value for the lands; and provided, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims.

This was a bill in equity filed by the United States in the Circuit Court for the District of Minnesota under authority of the act of Congress of March 3, 1887, c. 376, 24 Stat. 556, providing for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, etc. The charge was that the lands specified in the bill had been wrongfully certified to the State of Minnesota for the benefit of the defendant company, and the prayer was for a cancellation of such certification and a restoration of the lands to the public domain. After answers by the railroad company and some of the other defendants an agreed statement of facts was prepared, upon which, with the pleadings, the case was submitted to the Circuit Court for decision. Upon hearing a decree was entered dismissing the

bill, which thereafter was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 32 U. S. App. 272.

By the agreed statement the following facts appear, and upon them the rights of the parties depend: On March 3, 1857, Congress passed an act, c. 99, 11 Stat. 195, granting to Minnesota to aid in the building of certain lines of railroad the alternate odd-numbered sections for six sections in width on each side of the line of each road. The amount of this grant was increased by the act of March 3, 1865, c. 105, 13 Stat. 526, to ten sections per mile. By appropriate state legislation the defendant railroad company became one of the beneficiaries of this grant. It duly constructed its road, and the construction was accepted and approved. The lands in controversy were within the limits and terms of the grant, and were certified to the State nearly all in the years 1872, 1873, 1874 and 1875, though two tracts were not so certified until the year 1879. At the time of the filing by the railroad company of its map of definite location there were on the records and files of the Land Office homestead entries or pre-emption filings upon these lands, regular in form and *prima facie* valid, some of them having been made intermediate the time that the line of the railroad was surveyed, staked out and marked on the face of the earth and the date of the filing of the map of definite location, and some having been made prior to the first-named time. Proceedings were had in the General Land Office, after proper notice by publication, by which all these entries and filings were duly cancelled prior to the certification of the lands to the State of Minnesota. The cancellations were generally on the ground of abandonment, and from the time thereof up to the filing of the agreed statement of facts, July 26, 1893, none of the persons who had made such homestead entries or preëmption filings had ever made any claim to the lands, so far as shown by the records of the land department. The railroad company sold and conveyed the lands to parties who paid value and bought believing that the company's title was unimpeachable. Further, after the patent from the State the lands were subjected to taxation, and the land company, the grantee from

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the railroad company of most of these lands, alone paid over $8000 of taxes while it held the title. It was not pretended that the amount of lands certified for the benefit of the defendant railroad company (including therein the lands in controversy) exceeded the grant. In other words, it was not claimed that the railroad company ever got more lands than it was entitled to, but only that these particular tracts were wrongly certified to it.

It was also admitted "that on, before and for a long time after the certification of the lands in question to the State on account of the railroad grants it was uniformly held and ruled by the Secretary of the Interior and the other officers of the land department of the United States: (*a*) That the line of a railroad became and was definitely fixed so as to attach the grant to the odd-numbered sections within the granted limits as soon as surveyed, staked out and marked on the face of the earth; and (*b*) That a homestead entry in all respects regular and legal excepted the land covered thereby from the operation of a railroad grant attaching during the existence of such entry; that the validity of a homestead entry was open to question by the company, and if it was shown that such entry was fraudulent or irregular in its inception, or that it had been abandoned before the right of the road attached, it was held not to except the land from the grant, but the burden of so showing was upon the company, and, in the absence of such proof, the entry being valid upon its face, was held to except the land from the grant, even though subsequently abandoned; and (*c*) That a preëmption claim, which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned, and not consummated, even though in all respects legal and *bona fide*, was held not to operate to defeat the grant, but, upon the failure of such claim, the land covered thereby was held to inure to the grant as of the date when such grant became effective; and (*d*) That the rights under the grant attached to the lands in the granted and indemnity limits as of the same date, and that selection was not deemed necessary to attach the grant to any specific tract within the indemnity

limits; and (*e*) That the lands within the indemnity limits were withdrawn at the same time as those within the primary or granted limits; and (*f*) That within the common limits of like character of two contemporaneous grants each was held to be entitled to an undivided moiety of the lands within such common limits; and (*g*) That in pursuance of and in accordance with the aforesaid rules, the grants to and for each and all of the land-grant railroad companies in the State of Minnesota were, before, at and for a long time after the certification of the lands in question, administered."

The act of March 3, 1887, is found printed below.[1]

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[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

SEC. 2. That if it shall appear, upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through or under grant from the United States to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or preëmption entry of any *bona fide* settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously cancelled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated, within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any:

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After the passage of that act, and on March 3, 1891, Congress passed an act (26 Stat. 1093) containing this provision: "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." And

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and if there be no such purchasers, then to *bona fide* settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment, as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said

on March 2, 1896, Congress passed a still further act, c. 39, 29 Stat. 42, which is also found in the foot-note.[1]

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lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section, which at the date of such sales were in the *bona fide* occupation of adverse claimants under the preëmption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preëmption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the state and county taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the Government price, and patents for such lands shall thereupon issue: *Provided*, That said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation or individual would be rightfully entitled.

[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

Mr. Solicitor General for appellants.

The certification, by the Secretary of the Interior, to the

SEC. 2. That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. That if at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

State of Minnesota of the lands described in the bill of complaint, for the benefit of the Winona and St. Peter Railroad Company, after homestead and preëmption rights had attached to such lands and while the lands were still covered by these entries, was an act not merely voidable, but absolutely void, because control over and power of disposition of said lands by the Interior Department had ceased. *United States* v. *Stone*, 2 Wall. 525; *Maxwell Land Grant case*, 121 U. S. 325; *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357; *Whitney* v. *Taylor*, 158 U. S. 85; *Weeks* v. *Bridgman*, 159 U. S. 541; *Burfenning* v. *Chicago & St. Paul Railway*, 163 U. S. 321, 323, where the court said: "But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preëmption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the expressed will of Congress or convey away public lands in disregard or defiance thereof."

The present suit (No. 321) is between the United States and the Winona company, which holds the lands and refuses to relinquish them. Its claims must stand or fall upon the acts in its aid, and it is sufficient for this case to determine that the lands in dispute were not included in the grants in aid of the Winona road. What becomes of them after they are recovered by the United States is a matter of no concern whatever to the Winona company. *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 604.

The lands were by mistake certified in aid of the Sioux City road. The legal effect of that certification was, as this court has determined, to convey them for the use and benefit of the Winona company.

The Secretary of the Interior, under whose direction this suit was instituted, in proceeding to adjust the grants in aid of the Winona road, found these lands in the possession of the Winona company, claimed by it under its grants, and that company cannot shield itself from the operation of the adjust-

ment act and of its own granting acts, by insisting that these lands fell, or were certified to the Sioux City road.

We submit that a proper construction of the granting acts in aid of the two roads does not sustain the position taken by the Winona company.

The courts have uniformly construed these grants strictly against the grantee companies. They are never extended beyond the scope of their express provisions, and wherever the question as to reservations and exceptions has arisen, or there appear conflicting claims between two or more companies, great care has been exercised to exclude from grants lands which have been reserved, appropriated or devoted to another purpose by every reasonable construction in favor of such reservation, on the theory that it has been the evident intention and purpose of Congress, in all such grants, to limit them in their operation to such lands only as the United States had the clear and unquestioned right to convey at the time without disturbing existing relations or producing vexatious conflicts. *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, 543; *United States* v. *Missouri, Kansas & Texas Railway*, 141 U. S. 358, 368, 374; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *United States* v. *Northern Pacific Railroad*, 152 U. S. 284, 296.

If, then, at the time of the certification by the Secretary of these lands to the State of Minnesota, the line of definite location of the railroad had not been fixed by filing the maps in the office of the Secretary of the Interior, no title whatever vested in the railroad, even under a grant by the governor of Minnesota of such land. And if at the time of the filing of such map homestead and preëmption rights had already attached, then these were excepted from such grant.

The power is lodged with the Secretary of the Interior to ascertain and determine facts upon the existence of which may depend the conveyance by him of title to public lands of the United States. His determination of such facts is final and conclusive. But it is going entirely too far to insist, as is done here by counsel for appellee, that the determination as to whether one is or is not a *bona fide* purchaser from or

under the United States is a fact which the Secretary of the Interior may conclusively establish and determine.

Whether one is such a purchaser or not may — and in this case in large measure does — depend upon the existence of power in the Secretary to convey such lands. For one cannot be a *bona fide* purchaser unless he from whom he purchase have power to sell.

The Secretary cannot be the judge of the existence and extent of the powers which he assumes to exercise. In no aspect of this case can it be claimed that the State of Minnesota, or the railroad company, or the land company, or the purchasers from either, were purchasers without notice. As we have already shown, the act itself gave notice of the reservation in favor of homestead and preëmption claimants. The records of the land offices, both local and general, afforded notice of the existence of the homestead and preëmption entries; and also of the official communication from Hendricks, Commissioner of the General Land Office, to the Governor of Minnesota, of July 21, 1857, that the title of the Territory would not rest under the land grant until the maps of definite location were filed in the office of the Secretary of the Interior.

All these not only put subsequent purchasers upon inquiry, but actually afforded full and complete notice of the outstanding equitable rights of the homestead and preëmption entrymen.

We submit that the question of *bona fide* purchasers cannot properly arise in this case, brought under the act of March 3, 1887. The only object of proceedings under that act being to have declared void the certification of lands under railroad grants, if upon the facts proven the court should be satisfied that the lands were certified without authority of law.

Mr. Thomas Wilson for appellees.

Mr. J. A. Tawney and *Mr. H. M. Lamberton* filed a brief for the Winona and St. Peter Land Company, appellee.

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

There are other matters disclosed in the record, such as the claim at one time asserted by the St. Paul and Sioux City Railroad Company to these lands or a part of them; the litigation between the two companies, and the final decision by this court; also certain transactions between the railroad company and a land company and the litigation resulting therefrom, together with a series of conveyances by the railroad and the land company of the lands. But in view of the conclusions to which we have come upon the facts stated, we deem it unnecessary to cumber the record with any detailed mention of those matters.

These facts appear: *First.* The railroad company has constructed its road and has earned the land grant. *Second.* It has received no more land than Congress by the act referred to proposed to grant to aid in the construction of the road. *Third.* At the time that the lands were certified to the State for its benefit they were not subject to any homestead or preëmption entry. They were free from all claims other than those of the railroad company itself, and were, except as subject to such claims, in the fullest sense public lands and within the jurisdiction of the land department. *Fourth.* Up to March 2, 1885 (when *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629, was decided by this court), the uniform ruling of the land department had been that the title to railroad lands became settled at the time the line of the railroad was surveyed, staked out and marked on the face of the earth, and not at the time of the filing of the map of definite location in the land department; that a homestead entry, though apparently regular and valid, was open to question by the railroad company, and if shown to have been fraudulent or irregular in inception, or that it had been abandoned before the right of the company attached, was held not to except the land from the grant; and also that a preëmption claim existing at the time of the attaching of a railroad grant, if subsequently abandoned and not consummated — even though in all respects legal and *bona fide* — did not defeat the grant, but upon the failure of such claim the land covered thereby inured to the grant as of the date when it became effective. *Fifth.*

Under such rules of construction the land in controversy was all properly certified to the State for the benefit of the railroad company. *Sixth.* The lands were sold and conveyed by the railroad company to parties who paid full value and bought in good faith, believing the title which the railroad company assumed to convey to be perfect.

It is in the light of these facts that the scope and effect of the legislation of Congress is to be considered and determined. There is certainly much of equity in the contention of the appellees. The railroad company has constructed the road, in aid of whose construction Congress made this grant. Even though retaining all these tracts, it has failed to receive as large an amount of land as Congress proposed to give. With full performance on its side, it has not received all that Congress proffered. Of course, in entering upon its work it took all the chances of failure of title of any particular tract, and therefore has no legal ground of complaint, and yet it may with reason say that, though it must be content with such lands as the Government at the time of the filing of the map of definite location could rightfully convey, it ought not to be deprived of any which the Government did convey, and could convey without wrong to any one, and which were embraced in the description of the lands which Congress proposed to give. No individual is wronged by permitting this certification to stand; no preëmptor or person seeking to enter any tract as a homestead has been deprived of his rights or privileges by virtue of this certification. The land was free from all individual claims. It was within the absolute control of Congress. It belonged to the Government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the Government now asks to have that set aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was erroneous, yet it was one made by the officers of the department

charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company in reliance upon the title it believed it had acquired has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained — carried even to this court — and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely after such a lapse of time, and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts.

The first section of the act of 1887 directs the Secretary of the Interior to adjust all railroad land grants in accordance with the decisions of this court; and the second, that upon such adjustment the Attorney General shall commence the proper proceedings to cancel all patents, certification or other evidences of title erroneously issued. If these two sections were all the legislation of Congress bearing upon the subject it might be difficult to sustain the conclusions of the lower courts, or to deny to the Government the relief sought by this bill, for, by the construction placed upon such railroad grants in *Kansas Pacific Railway Company* v. *Dunmeyer*, *supra*, and other cases, these lands did not pass under the railroad grant because at the time of the filing of the map of definite location they were on the records of the department claimed under homestead and preëmption entries. The lapse of time would be no bar, for statutes of limitation cannot be invoked against the Government.

But these sections are not all the legislation. Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse

individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities or improper action of its officers therein.

Thus, in the act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. The act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them.

But limitation was not the only protection given. The act of 1896, which extended the period of limitation, followed such extention with this provision: "But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." It is true this act was passed after the commencement of this

suit — indeed, after the decision by the Court of Appeals — but it is none the less an act to be considered. There can be no question of the power of Congress to terminate, by appropriate legislation, any suit brought to assert simply the rights of the Government. This suit was instituted by the Attorney General in obedience to the direct command of Congress, as expressed in the act of 1887, and Congress could at any time prior to the final decree in this court direct the withdrawal of such suit; and it accomplishes practically the same result when, by legislation within the unquestioned scope of its powers, it confirms in the defendants the title to the property which it was the purpose of the suit to recover. So, if this act of 1896, taken by itself alone, or in conjunction with preceding legislation, operates to confirm the title apparently conveyed by the certification to the State for the benefit of the railroad company, that necessarily terminates this suit adversely to the Government, and compels an affirmance of the decisions of the lower courts without the necessity of any inquiry into the reasons advanced by those courts for their conclusions. We are of the opinion that Congress intended by the sentence we have quoted from the act of 1896 to confirm the title which in this case passed by certification to the State. It not only declares that no patents to any lands held by a *bona fide* purchaser shall be vacated or annulled, but it confirms the right and title of such purchasers. Given a *bona fide* purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the Government to disturb it.

It is earnestly contended by the Government that the present holders of the title are not "*bona fide* purchasers"; that that term has a fixed and well-defined meaning, as announced in the frequent decisions of this and other courts; that, as said in 2 Pom. Eq. Jur. § 745, "the essential elements which constitute a *bona fide* purchaser are, therefore, three — a valuable consideration, the absence of notice, and presence of good faith"; *United States* v. *California &c. Land Company*, 148 U. S. 31, 42; that while two of these essential elements may be found, to wit, a valuable consideration and the presence of good faith, the third, the absence of notice, is lacking; that all men are

conclusively presumed to know the law, and that as the true rule of construction in reference to these grants was laid down by this court, the purchasers were bound to know such true rule; that the records of the land office disclosed the existence of these homestead entries and preëmption filings, and, therefore, they who purchased from the railroad company knew, or at least were chargeable with knowledge, of the fact that those lands could not rightfully have been certified to the railroad company but were excepted from the terms of grant, and in fact remained the property of the Government. It is further insisted that, as Congress in this statute used this well understood expression, it intended only the protection of such parties as came within the scope of this settled meaning. It is said that the only cases to be covered by this provision were those in which the State or the railroad company by presentation to the land office, before the filing of the map of definite location, of a forged relinquishment by the preëmptor, or one having made a homestead entry, or by some other fraudulent representations, secured a certification or patent to the tracts, and thereafter sold and conveyed to one who purchased in ignorance of the fraud.

We are unable to agree with this contention of counsel, for several reasons: In the first place, the situation as it was known to exist makes against any such narrow construction. While instances of such fraudulent conduct on the part of the State to which the lands were certified, or the company to which the lands were patented, might exist, yet in the nature of things they would be few and hardly worth the special notice of Congress, while on the other hand the fact that there had been a difference between the land department and the courts, one construction obtaining in the former prior to the decisions by the latter, and the further fact that by this difference of construction many tracts had been erroneously certified or patented, must have been well known to Congress, and naturally therefore a subject for its legislation. Further, there was no need of any legislation to protect a "*bona fide* purchaser." This had been settled by repeated decisions of this court. *United States* v. *Burlington & Missouri River Rail-*

road Company, 98 U. S. 334, 342; *Colorado Coal Company* v. *United States*, 123 U. S. 307, 313 — reaffirmed in *United States* v. *California &c. Land Company*, 148 U. S. 31, 41. For in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the Government, if the land conveyed was within the jurisdiction of the land department, the title of a *bona fide* purchaser from the patentee could not be disturbed by the Government, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the Government is all that was intended by Congress. We do not mean to assert that because legislation to cover such a contingency was unnecessary, therefore the language used by Congress necessarily implies something other and different, because of course it may have been that Congress intended nothing but a simple declaration of the law as it was known to exist. At the same time the fact, that under one construction it was needless, raises a presumption that something more was intended, and that Congress had in view the protection of other parties than were already protected by general law.

But we need not rest on these inferences and presumptions. Other provisions of the acts of 1887 and 1896 make clear the intent of Congress. Section 3 of the act of 1887 provides that if the homestead or preëmption entry of any *bona fide* settler has been erroneously cancelled on account of any railroad grant it may be reinstated, provided he has not located another claim or made an entry in lieu of the one so cancelled, and also did not voluntarily abandon such entry. By this section Congress provided for a reinstating of the title of one deprived thereof by an erroneous ruling of the land department, but, at the same time, limited the right of reinstating to cases in which the original entryman had not voluntarily abandoned his entry, or had not since that time made a new entry. In other words, it was limiting the restoration of the title of the original entryman to cases in which he had a continuing and present equitable right to recognition. As to all other cases, Congress reserved the determination of the equities between the Government, the railroad company and pur-

chasers from the latter, and in subsequent sections it made provision for the adjustment of such equities.

Section 4 of the same act, expressly referring to all other lands erroneously certified or patented to any railroad company, provides that citizens who had purchased such lands in good faith should be entitled to the lands so purchased and to patents therefor issuing directly from the United States, and that the only remedy of the Government should be an action against the railroad company for the Government price of similar lands. It will be observed that this protection is not granted to simply *bona fide* purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a *bona fide* purchaser, to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the Government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the Government a simple claim for money against the railroad company. It will be observed that the technical term "*bona fide* purchaser" is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent.

Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant and coterminous with the constructed portions of its road, and it is there provided that where the lands so sold by the company "are for any reason excepted from the operation of the grant to said company," the purchaser may obtain title directly from the Government by paying to it the ordinary

Government price of such lands. It is true the term used here is "*bona fide* purchaser," but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and "for any reason excepted from the operation of the grant," indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a "*bona fide* purchaser," has nevertheless purchased in good faith from the railroad company.

We have been referred in the arguments of this and other cases to the debates in Congress, and to the reports of the committees of the two houses to whom the bills were referred as confirmatory of the conclusions we have reached, but it is unnecessary to consider any of the evidence derived from these sources, if, indeed, it is open to consideration, for the language of the two acts is clear, and fully discloses the intent of Congress. Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims.

If it be suggested that under the scope of these acts, though the suit must fail so far as it is one to set aside and cancel the certification, it may yet be maintained against the defendant railroad company for the value of the lands so erroneously certified, and that the decree should be modified to this extent,

it is sufficient to say that, first, the Government has not asked any such decree; second, that it may be doubtful whether for the mere purpose of recovering money an action at law must not be the remedy pursued; but lastly, and chiefly, that it does not appear from this record either that the railroad company received an excess of lands or has even received (these lands included) the full quantity of lands promised in the grant; and further, that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification. It will hardly be contended that, if, simply through a mistake of the land department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified and which have since been disposed of by the Government to other parties, so that there is now no way of filling the grant, the Government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers of the Government cannot be both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the Government to recover from the company the value of lands erroneously certified. Our conclusion, therefore, is that upon the record as it is presented, the decree of the Court of Appeals was right, and it is

Affirmed.

UNITED STATES *v.* UNION PACIFIC RAILWAY COMPANY. Appeal from the Circuit Court of Appeals for the Eighth Circuit, No. 319, argued December 1, 2, 1896. UNITED STATES *v.* ST. PAUL AND SIOUX CITY RAILROAD COMPANY, No. 322, argued with No. 321, November 30 and December 1, 1896.

MR. JUSTICE BREWER. The facts in these cases are different from the facts in the case just decided. But the principles announced in the foregoing opinion are conclusive of the rights of the parties herein, and so, without any statement in detail of the facts, and for the reasons given in that opinion, the decrees in these cases will be

Affirmed.

Statement of the Case.

Mr. Solicitor General for appellants in both cases.

Mr. John F. Dillon (with whom were *Mr. Harry Hubbard, Mr. John M. Dillon* and *Mr. T. F. Garver* on his brief), for appellees in No. 319.

Mr. Thomas Wilson for appellees in No. 322.

WINONA AND ST. PETER RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 602. Submitted December 1, 1896. — Decided February 15, 1897.

Anterior to any claim of right under its grant by the Winona and St. Peter Railroad Company, by virtue either of filing its map of definite location or of surveying and staking its line upon the ground, a preëmption filing was placed upon the land. This filing was never cancelled. The claimant entered into possession and continued so either personally or through a tenant until after the construction of the railroad, and until after the railroad company had conveyed the land to a land company, and until an action of ejectment was brought by the land company. The court below was of opinion, in which this court concurs, that the land company could not be considered a purchaser in good faith from the railroad company; that it took its conveyance with notice, from possession, of all the rights and the claims of the party so in possession; that it therefore did not bring itself within the protecting clauses of the act of March 3, 1887, c. 376, 24 Stat. 556; and that there was nothing to stay the right of the Government to have the certification, so erroneously issued, cancelled.

This case distinguished from *United States* v. *Winona & St. Peter Railroad Company, ante,* 463.

This was a bill filed by the United States in the Circuit Court of the United States for the District of Minnesota against the Winona and St. Peter Railroad Company, the Winona and St. Peter Land Company, and Thomas Marshall, Jr. The suit was one to set aside the certification of a patent made to the State of Minnesota for the benefit of the defendant railroad company of the northeast quarter of section 35,

township 106 north, range 18 west, which certification was of date December 1, 1862. After answers, proof and an agreed statement as to certain facts, a decree was entered by the Circuit Court, August 29, 1894, dismissing the bill. On appeal to the Court of Appeals for the Eighth Circuit this decree was, on May 6, 1895, reversed, 32 U. S. App. 306, and the case remanded with instructions to enter a decree granting the relief prayed for.

It appears from the agreed statement that on July 3, 1857, Thomas Marshall, Jr., one of the defendants, made a preëmption filing at the proper local land office of the land in controversy, which filing was *prima facie* regular and valid, and was never cancelled on the records of the land office; the construction of the railroad of the defendant railroad company was conceded; and it was agreed that on the 1st of March, 1877, defendant Marshall, being still in possession and claiming to be the owner thereof, the defendant land company, which had a conveyance from the railroad company, commenced an action of ejectment against him in the District Court of Dodge County, Minnesota, that court having jurisdiction of the subject-matter; that Marshall appeared in such action, and such proceedings were had that on the 9th day of December, 1878, the court rendered judgment in favor of the plaintiff for the possession of the land; that no appeal was taken from such judgment, and that the same now remains in full force and effect; and that in pursuance thereof said Marshall surrendered possession to the defendant land company, and since that time the defendant land company has remained in possession and paid the taxes; that Marshall, on November 15, 1887, filed with the Commissioner of the General Land Office, and now has pending before the land department, an application for reinstatement of his rights to said land, which application has not been acted upon, as it is held by the said department that it has no jurisdiction to pass thereon. Other facts are agreed to, such as are stated in the opinion in the case No. 321 of the United States against the same railroad company and others just decided. *Ante*, 463.

Mr. J. A. Tawney for appellants. *Mr. Tawney* and *Mr. H. M. Lamberton* filed a brief on behalf of the Winona and St. Peter Land Company, appellant.

Mr. Solicitor General for appellees.

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

The differences between this case and that referred to in the foregoing statement are these: Anterior to any claim of right by the railroad company, by virtue either of filing its map of definite location or of surveying and staking upon the ground its line, a preëmption filing was placed upon the land which was never cancelled. There remained, therefore, on the records until after the certification to the State a claim of a right to preëmpt. The party making this claim continued in possession by himself or tenant until not only the construction of the railroad, but until after the conveyance by the railroad company to the land company, and so remained in possession until a suit of ejectment was brought by the land company in 1877.

On the strength of these facts the Court of Appeals was of opinion that the land company could not be considered one purchasing in good faith from the railroad company; that it took its conveyance with notice, from possession, of all the rights and claims of the party so in possession, and therefore that it did not bring itself within the protecting clauses of the act of March 3, 1887, c. 376, 24 Stat. 556, and there was nothing to stay the right of the government to have this certification so erroneously issued cancelled. With that conclusion we concur. That the land was erroneously certified is, under the prior decisions of this court, not open to question; and the acts of 1887 and 1896 have, as indicated in the opinion in the prior case, the purpose of protecting only that party whose purchase from the railroad company must be considered one in good faith. It is essential to the protection of these statutes that the party purchasing from

the railroad company has no notice by any fact subsequent to and independent of the certification or patent of any defect in title. Such a purchaser cannot claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right. The protection goes only to matters anterior to the certification and patent. The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived.

Here the claimant Marshall was in possession; had been in possession for twenty years; the land was not wild and vacant land. His possession was under a recorded claim of title, and under such a claim as forbade the issue of a patent. In other words, the land was erroneously certified. There was, and continued to be, an individual claimant for the land. There was no cancellation on the records of the land department of his claim. He continued in possession, and was in possession not only when the certification was made but when the land company purchased. Its purchase, therefore, was not one made in good faith, and there is nothing disclosed to stay the mandate of the statute for the adjustment of the land grant, and a suit to set aside the certificate erroneously issued. The decree of the Court of Appeals is

Affirmed.

DUNLOP *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 472. Argued December 21, 1896. — Decided February 15, 1897.

There was no error in overruling the motion of the defendant, made prior to the trial, to require the District Attorney to file the printed matter alleged in the indictment to be obscene, lewd, lascivious and indecent.

There was no error in the admission of the advertisements of proprietorship of the Dispatch as it is difficult to see how the identity of the paper,

Syllabus.

which the indictment averred that the defendant deposited in the post office for mailing, could have been more conclusively proved than by the production of a newspaper called the Dispatch, and purporting to be the official paper of the city of Chicago.

There was no error in permitting government officers in the Post Office Department to testify as to the course of business in the respective offices with which they were connected, with a view of proving the customs of the post office, the course of business therein, and the duties of the employés connected with it.

Where a question is made whether a certain paper or other document has reached the hand of the person for whom it is intended, proof of a usage to deliver such papers at the house, or of the duty of a certain messenger to deliver such papers, creates a presumption that the paper in question was actually so delivered.

There was no error in permitting the government to prove that during the three years preceding the trial, and also during the period covered by the dates of the papers, admitted in evidence, namely, July 6 to October 19, 1895, a newspaper, purporting to be the Chicago Dispatch, was regularly on each day, except Sunday, received in great quantities at the Chicago post office for mailing and delivery.

Whether the matter is too obscene to be set forth in the record is a matter primarily to be considered by the District Attorney in preparing the indictment; and, in any event, it is within the discretion of the court to say whether it is fit to be spread upon the records or not; and error will not lie to the action of the court in this particular.

There is no merit in the assignment of error taken to the action of the court, in refusing to direct a verdict of not guilty at the close of the testimony.

In his argument to the jury the District Attorney said: "I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, lewdness, lasciviousness, licentiousness and wrong of these publications." To this language counsel for the defendant excepted. The court held that it was improper, and the District Attorney immediately withdrew it. *Held*, that the action of the court was commendable in this particular, and that this ruling, and the immediate withdrawal of the remark by the District Attorney, condoned his error in making it, if his remark could be deemed a prejudicial error.

There was no error in the remarks of the District Attorney as to massage treatment.

There was no error in instructing the jury that: "It is your duty to come to a conclusion upon all those facts, and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life." "There is no technical rule; there is no limitation in courts of justice, that prevents you from

applying to them (the facts and circumstances in evidence) just the same rules of good, common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."

There was no error in the following instructions as to obscene publications: "Now, what is (are) obscene, lascivious, lewd or indecent publications is largely a question of your own conscience and your own opinion; but it must come — before it can be said of such literature or publication — it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. . . . It is your duty to ascertain in the first place if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

In view of the previous instructions of the court, there was no error in refusing to instruct the jury that the presumption of innocence was stronger than the presumption that the government employés who delivered the newspapers to Mr. Montgomery in the Chicago post office building obtained such papers from the mails; or that the presumption that the person who deposited them in the box in the St. Louis post office building from which box the witness McAfee took the papers obtained them from the mails.

This was a writ of error to review the conviction of the plaintiff in error for unlawfully depositing and causing to be deposited, upon the days set out in the various counts, in the post office at Chicago, for mailing and delivery, a newspaper called the Chicago Dispatch, containing obscene, lewd, lascivious and indecent matter. There were thirty-two counts in the indictment. The District Attorney, under order of the court, elected to proceed upon the first, sixth, twelfth, sixteenth, twenty-sixth and thirty-second counts. The other counts were quashed, and no evidence was offered to sustain the first count.

The sixth count was as follows:

"And the grand jurors aforesaid under their oath aforesaid do further present that the said Joseph R. Dunlop, on the sixth day of July, in the year aforesaid, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the

post office of the said United States there, for mailing and delivery, a large number of copies, to wit, one hundred copies of a certain paper, print and publication entitled The Chicago Dispatch, one of which said copies was then and there directed to Mr. Montgomery, at Chicago aforesaid; another to R. M. Williams, box 801, at St. Louis, Missouri, and the rest to divers persons, respectively, to the said grand jurors unknown, and each of which last-mentioned copies was then and there a copy of the five-o'clock edition of the day in this count aforesaid and number 840 of the said paper, print and publication, and contained (amongst other things) on the eleventh page thereof and under the headings of Personal and Baths, certain obscene, lewd, lascivious and indecent matters in print, of too great length and of too indecent character to be here set forth in full, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided."

The other counts differed from this only in the dates of the newspapers alleged to have been mailed, and the days upon which they were deposited in the post office.

The testimony introduced by the government tended to show that there was published in the city of Chicago, during the year 1895, and the three years immediately prior thereto, a daily and weekly newspaper entitled The Chicago Dispatch; that the plaintiff in error, Joseph R. Dunlop, was the publisher of said newspaper during those years; that copies of the Chicago Dispatch in large numbers were deposited in the Chicago post office for mailing and delivery during said years, daily except Sunday; that the copies of the Chicago Dispatch described in the indictment as directed to Mr. Montgomery at Chicago, and the copies of the Chicago Dispatch described in the indictment as directed to R. M. Williams, box 801, at St. Louis, Missouri, were deposited for mailing and delivery at the post office in Chicago on the dates of said several copies; that all the copies of said Chicago Dispatch, so directed to said R. M. Williams and Mr. Montgomery, contained therein, under the headings of Personal and Baths, certain advertisements that were obscene,

lewd, lascivious and indecent; and that the plaintiff in error, by reason of being the publisher of said Chicago Dispatch, was liable for the alleged depositing in said post office of said newspapers, so directed to said R. M. Williams and Mr. Montgomery.

Defendant was found guilty, and after motions for a new trial and in arrest of judgment had been overruled, was sentenced to imprisonment to hard labor in the penitentiary for two years, and to pay a fine of $2000 and costs.

Thereupon he sued out this writ, assigning sixty-one errors as grounds for reversal. These errors related to the refusal of the court, prior to the trial, to order the District Attorney to file the printed matter, alleged to be obscene, or copies of the same; to the admission of improper testimony, including all the newspapers introduced; to the refusal of the court at the close of the testimony of the government to direct a verdict of not guilty; to prejudicial remarks made by the District Attorney in his argument to the jury; to the giving of improper instructions, and to the refusal to give proper instructions requested on behalf of the plaintiff in error.

Mr. William S. Forrest and *Mr. A. H. Garland* for plaintiff in error.

Mr. Attorney General and *Mr. Assistant Attorney General Dickinson* for defendants in error.

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

In passing upon this case we shall notice only such errors as were pressed upon our attention in the argument or briefs of counsel.

1. The first assignment is to the alleged error of the court in overruling the motion of the defendant, made prior to the trial, to require the District Attorney to file the printed matter alleged in the indictment to be obscene, lewd, lascivious and indecent, for the purpose of enabling the defendant to demur to the indictment. Defendant's petition for this

order stated as the reason for it that, if the advertisements complained of were not filed, his counsel "must investigate and critically examine" over three thousand advertisements and notices, and that he would "necessarily be confused and embarrassed," and unable "to make suitable preparations to sustain his defence." It is nowhere stated that he desired it for the purpose of demurring to the indictment, and if it had been furnished it would not have been the subject of demurrer, since it is no part of the record. *Commonwealth* v. *Davis*, 11 Pick. 432. If the indictment be not demurrable upon its face, it would not become so by the addition of a bill of particulars.

Beyond this, however, the application is one addressed to the discretion of the court, and its action thereon is not subject to review. *Rosen* v. *United States*, 161 U. S. 29, 35; *Commonwealth* v. *Giles*, 1 Gray, 466; *Commonwealth* v. *Wood*, 4 Gray, 11; *State* v. *Bacon*, 41 Vermont, 526. While such applications are ordinarily, and should be, granted, wherever the accused is liable to be surprised by evidence for which he is unprepared, it is difficult to see how the defendant in this case was prejudiced by its refusal. The alleged obscene matter was contained in a published newspaper to which his own name was attached as proprietor, and of which he had in fact been the proprietor for several years, the days and editions of which were set forth in the several counts. He was duly informed upon the trial of what particular advertisements the government complained, and requested the court to charge the jury they were not obscene, within the meaning of the law. He thus gained every advantage that he could possibly have had by the production of the advertisements prior to the trial.

2. The second and five other assignments of error are taken to the admission of the following advertisements of proprietorship, appearing in the several editions set forth in the indictment, upon the ground that there was no proof that the newspapers, from which they were taken, were copies of the Chicago Dispatch, and that they did not tend to show who was the publisher:

The Dispatch.

By JOSEPH R. DUNLOP.

AN INDEPENDENT AFTERNOON DAILY PAPER

THREE EDITIONS DAILY — 12, 3 AND 5 O'CLOCK.

Official Paper of the City of Chicago

AND

Official Paper of Cook County.

It is difficult to see how the identity of the paper, called the Chicago Dispatch, which the indictment averred that the defendant deposited in the post office for mailing, could have been more conclusively proved than by the production of a newspaper called the Dispatch, and purporting to be the official paper of the city of Chicago. In that particular the paper proved itself.

While the addition of the words "by Joseph R. Dunlop," might not have been, standing alone, sufficient evidence of his being the proprietor of the paper, and the cause of its being mailed, yet, in view of the fact that the name of the publisher usually follows the name of the paper in that connection, it certainly had a tendency in that direction, and was, therefore, admissible, particularly when it was shown by other testimony that defendant had stated that he was the proprietor and publisher of this paper; that a paper of this name had been for a long time printed and circulated by him; that it had for a long time and in large numbers passed through the post office; that he had negotiated for the renting of a building for the purpose of publishing a paper called the Dispatch; that he had conversations with witnesses in regard to the publication of a paper of that name; that, as proprietor, he had caused papers, similar to these, to be sent through the post office, and that the accounts for postage had been rendered to him.

3. The eighth assignment was taken to an alleged error in permitting the witness McAfee to testify that it was the duty of a certain messenger of the post office inspector, whose

office was in the post office building at St. Louis, Missouri, to take the mail from the post office, and distribute it in the private boxes of persons who had desk room in the inspector's office.

The thirteenth assignment was taken to a similar alleged error in permitting the witness Montgomery to testify that it was among the duties of a government employé, not a mail carrier, to take from a table called the round table, in the mailing department of the Chicago post office, a copy of the Dispatch, and deliver it to him in the office occupied by him as superintendent of mails in the government building at Chicago, and that it was in this way that the newspapers identified by Montgomery were received by him.

Each count in the indictment, upon which the trial was had, charged a mailing of the Dispatch to Montgomery at Chicago, as well as one to Williams, box 801, at St. Louis.

Montgomery's testimony tended to show that he had been superintendent of the mails at the Chicago post office for six years past; had charge of the receipt and dispatch of all mails in and out of that office, and knew that there was a publication passing through the office known as the Chicago Dispatch; that he received the papers, put in evidence, in the Chicago post office from what is known as the round table, the place at which the mail comes into the office from a platform, where it is received direct from the publication office; that it was delivered to him by a messenger through the regular channels of the mail in the same manner that all other papers of this kind were delivered, and subsequently turned over to Mr. McAfee. He was then asked the question, "What are the duties of that messenger?" — that is, the one who brought to his office from the round table in the post office building the papers he had identified. To this question objection was made.

The witness McAfee testified that he was a post office inspector, commissioned but not paid by the Government, and was also a commission agent of the Western Society for the Prevention of Vice; that on June 12, 1895, he addressed a letter to the Dispatch of Chicago, enclosing therein the sum

of $1.25, requesting the Dispatch to be sent to R. M. Williams, box 801, St. Louis, Missouri, for three months from date, signing the letter "R. M. Williams"; that he received the papers, identified by him, from his box in the inspector's office in St. Louis; that he did not take them from his box in the post office; that his mail was put in the box by a messenger from the inspector's office, whose office was in the post office building; that the only way that he knew that the paper came in the mail was that he found it in his private box in the inspector's office; that he had received his mail in that way for ten years; that it was not a post office box in the same sense as 801, but was simply a box where his mail was deposited. He was then asked "Who was this messenger who delivered these papers?" to which objection was made, and he answered that he was a messenger for gathering the mail for inspectors, and distributing it in boxes provided in the post office.

The testimony of both of these witnesses was objected to upon the ground that they testified nothing as to the delivery of these papers of their own personal knowledge. It is claimed that the error consisted in assuming that the papers, purporting to be the Dispatch, which McAfee testified that he found in his private box in the inspector's office, were deposited in that box by the clerk or messenger, and then in permitting McAfee to testify that it was the duty of the clerk or messenger to take the mail from the post office, and distribute the same in certain private boxes in the inspector's office. A similar objection was made to the testimony of Montgomery.

It is unnecessary to dwell upon these assignments at any length. While the witnesses were not personally cognizant of the fact that these very papers were placed in their private boxes, it was perfectly competent for them to prove the customs of the post office, the course of business therein and the duties of the employés connected with it. If it were the duty of this messenger to take these papers from the office and deliver them in the private boxes of these witnesses, and the papers identified were there found, it would be proper for the jury to infer that they had been delivered in the usual way, after having been mailed at the post office in the city of pub-

lication. Both of these witnesses were government officers, and testified as to the course of business in the respective offices with which they were connected. There was no error in permitting them to do so.

This question was elaborately considered by Mr. Justice Bradley in the *Knickerbocker Life Ins. Co.* v. *Pendleton*, 115 U. S. 339, in which evidence of the custom and usage of a bank, offered in support of the evidence of the cashier of his conviction and belief that a draft had been presented for payment, came within the rule which allowed the course of business to be shown for the purpose of raising a presumption of fact in aid of collateral testimony. Indeed, the authorities are abundant to the proposition that, where a question is made whether a certain paper, or other document, has reached the hand of the person for whom it is intended, proof of a usage to deliver such papers at the house, or of the duty of a certain messenger to deliver such papers, creates a presumption that the paper in question was actually so delivered. Business could hardly be carried on without indulging in the presumption that employés, who have certain duties to perform and are known generally to perform such duties, will actually perform them in connection with a particular case. Thus, if it be shown that a letter, properly stamped, has been mailed, there is a presumption that it reached the person addressed; or, if letters properly directed to a gentleman be left with his servant, it is reasonable to presume that they reached his hands. *Macgregor* v. *Keily*, 3 Exch. 794; *Skilbeck* v. *Garbett*, 7 Q. B. 846; *Hetherington* v. *Kemp*, 4 Campbell, 193; *Dana* v. *Kemble*, 19 Pick. 112; *Goetz* v. *Bank of Kansas City*, 119 U. S. 551; 1 Greenl. on Ev. § 40.

4. Thirteen assignments of error were taken to the ruling of the court in permitting the government to prove that, during the three years preceding the trial, and also during the period covered by the dates of the papers, admitted in evidence, namely, July 6 to October 19, 1895, a newspaper, purporting to be the Chicago Dispatch, was regularly on each day, except Sunday, received in great quantities at the Chicago post office for mailing and delivery.

The object of the government in offering this testimony was to show that, upon the days stated in the several counts, large numbers of copies of this paper were actually received at the Chicago post office for mailing, and that though said copies were not identified as the papers described in the indictment, the packages may be presumed to have contained them. As every copy of the same edition of a paper is almost necessarily an exact duplicate of every other copy of the same edition, proof that a certain edition was mailed in large quantities every day at a certain post office was certainly competent evidence that papers received by the two persons mentioned in the indictment, purporting to be of that edition, were in fact among the number that were mailed upon that date. Unless the paper were marked before delivery to the post office at Chicago, it would be impossible to say whether that identical paper was mailed; but if large numbers of that edition were mailed every day, it would be practically safe for the jury to assume that the papers identified were among the number. This testimony, taken in connection with that of the two witnesses McAfee and Montgomery, showed with reasonable, if not absolute, certainty that the papers which they received and identified were among those which had been actually mailed. It is true that this testimony did not affirmatively show that the papers thus received belonged to the five o'clock edition of the Dispatch; but, while this may have detracted from the force of the testimony, it did not render it incompetent. As the evidence showed that large quantities of this paper were mailed every day, and that McAfee and Montgomery received, as part of their mail matter, copies of the five o'clock edition of that paper, it was for the jury to say whether these copies were not a part of the papers that were so mailed.

5. The twenty-fifth and six following assignments were taken to the admission of the copies of the Dispatch set forth in the indictment. These exhibits were substantially copies of each other. Such of the advertisements as were relied upon were marked, by order of the court, in blue pencil during the argument to the jury. They were objected to upon

the ground that the evidence failed to show that they were deposited in the post office by the defendant, or that they were copies of the Chicago Dispatch; both of which objections have been already disposed of. Also that it did not appear that they contained matter that was too long, or too obscene, to be set out in the indictment, or to be spread upon the records of the court. Whether the matter was too obscene to be set forth in the record was a matter primarily to be considered by the District Attorney in preparing the indictment; and, in any event, it was within the discretion of the court to say whether it was fit to be spread upon the records or not. We do not think that error will lie to the action of the court in this particular.

6. The thirty-second assignment of error was taken to the action of the court in refusing to direct a verdict of not guilty at the close of the testimony. This assignment is based partly upon the ground that there was no sufficient evidence of the mailing of the papers in question, which has already been disposed of, and partly because the evidence failed to show that the defendant knew that any of the advertisements complained of were contained in the copies of the Chicago Dispatch put in evidence; or that these papers contained anything which was obscene or indecent. We think, however, that the evidence was amply sufficient to lay before the jury. It was shown that Mr. McAfee had repeatedly talked with the defendant about his paper, of which he admitted himself to be the responsible head; that defendant was told there had been complaints made about its character, and that in the opinion of the District Attorney the advertisements, under the heads of Personal and Baths, were improper and illegal; that Mr. Dunlop replied that he scarcely ever saw the advertisements until after they had been published; that he had instructed his agent to scrutinize them with more care. He said that all of the newspapers had carried such advertisements in times past, until they became wealthy, and then complained about others that did the same. He did not deny a general knowledge of the contents of his paper, and it was scarcely possible that he could have been the responsible

head of the establishment for a number of years, as the testimony tended to show, without personal knowledge of the character of the advertisements.

7. The thirty-fifth and thirty-sixth assignments of errors were taken to certain remarks made by the District Attorney in his argument to the jury, one of which is as follows: "I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, lewdness, lasciviousness, licentiousness and wrong of these publications." To this language counsel for the defendant excepted. The court held that it was improper, and the District Attorney immediately withdrew it. The action of the court was commendable in this particular, and we think this ruling, and the immediate withdrawal of the remark by the District Attorney, condoned his error in making it, if his remark could be deemed a prejudicial error. There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.

Complaint is also made of the remark of the District Attorney to the following effect: "Now, gentlemen, it is not necessary for me to tell you what the massage treatment is; how a man is stripped naked, from the sole of his feet to the crown of his head, and is rubbed with the hands." If the counsel gave a wholly erroneous definition of the word "massage," or misled the jury by giving them a false impression of the operation, the remark might be prejudicial, and possible ground for error. But as the word is defined as "a rubbing

or kneading of the body," an operation which could hardly be carried on unless the person were divested of his clothing, we see no error in the remark of the District Attorney in this case. As the massage treatment is comparatively a recent device, it is quite possible that it may not have been understood by all the members of the jury, but if the District Attorney fairly explained to them what it is ordinarily understood to be, and gave an explanation which was not radically wrong, there was no impropriety in his doing so.

A large number of exceptions were taken to various portions of the charge to the jury, and to the refusal of the court to give certain instructions requested by the defendant. Some of these have already been passed upon in connection with the testimony; some are too obviously frivolous to justify discussion, but two or three of them demand an independent consideration.

8. The forty-second and forty-third assignments were taken to the following instructions:

"It is your duty to come to a conclusion upon all those facts, and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life." "There is no technical rule; there is no limitation in courts of justice, that prevents you from applying to them (the facts and circumstances in evidence) just the same rules of good, common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment."

There was no error in these instructions. One of the main objects of a jury trial is to secure to parties the judgment of twelve men of average intelligence, who will bring to bear upon the consideration of the case the sound common sense which is supposed to characterize their ordinary daily transactions. If cases were to be decided alone by the application of technical rules of law and evidence, it could better be done by men who are learned in the law and who have made it the study of their lives; and while it is entirely true that the jury

are bound to receive the law from the court, and to be guided by its instructions, it by no means follows that they are to abdicate their common sense, or to adopt any different processes of reasoning from those which guide them in the most important matters which concern themselves. Their sound common sense brought to bear upon the consideration of testimony, and in obedience to the rules laid down by the court, is the most valuable feature of the jury system and has done more to preserve its popularity than any apprehension that a bench of judges will wilfully misuse their power. To construe these instructions as authorizing the jury to depart from the rules of evidence and to decide the case upon abstract notions of their own, or from facts gathered outside of the testimony, is hypercritical. They were simply told to come to a conclusion upon the facts that had been proven, and to apply to those facts the same rules of good sense that they would apply to any other subject that came under their consideration and demanded their judgment. In these remarks the court gave a just and accurate definition of their functions. It certainly would have been error to have told them to apply to the facts proven any other rules than those which their good common sense dictated, or to set up any other standard of judgment than that which influenced them in the ordinary business of life.

9. Error is also assigned to the following instruction of the court, upon the subject of obscene publications:

"Now, what is (are) obscene, lascivious, lewd or indecent publications is largely a question of your own conscience and your own opinion; but it must come — before it can be said of such literature or publication — it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. . . . It is your duty to ascertain in the first place if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

The construction placed by counsel upon this is, that it practically directed the jury that obscene literature was such as tended to deprave the morals of the public *in any way whatever*, whereas the true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sensual desires and lascivious thoughts. It is not, however, the charge given by the court that was too broad, but the construction put upon it by counsel. The alleged obscene and indecent matter consisted of advertisements by women, soliciting or offering inducements for the visits of men, usually "refined gentlemen," to their rooms, sometimes under the disguise of "Baths" and "Massage," and oftener for the mere purpose of acquaintance. It was in this connection that the court charged the jury that, if the publications were such as were calculated to deprave the morals, they were within the statute. There could have been no possible misapprehension on their part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure, sexual relations. The words were used by the court in their ordinary signification, and were made more definite by the context, and by the character of the publications which had been put in evidence. The court left to the jury to say whether it was within the statute, and whether persons of ordinary intelligence would have any difficulty in divining the intention of the advertiser. We have no doubt that the finding of the jury was correct upon this point.

10. Error is also assigned to the action of the court in refusing to instruct the jury that the presumption of innocence was stronger than the presumption that the government employés who delivered the newspapers to Mr. Montgomery in the Chicago post office building obtained such papers from the mails; or than the presumption that the person who deposited them in the box in the St. Louis post office building from which box the witness McAfee took the papers obtained them from the mails. The court had already charged the jury "that until the government proves beyond a reasonable doubt that he knowingly caused to be deposited such a publication in the

mails, the presumption of innocence stands between any penalty that the court might inflict, or any verdict that you might pronounce, and the defendant. That presumption of innocence is only overcome when these facts I have named as the gist of the offence are, in your judgment, established beyond a reasonable doubt." The court further instructed the jury that "the presumption of innocence means that it is a presumption of the law that the defendant did not deposit, or cause to be deposited, in the post office for mailing, any of the newspapers admitted in evidence, and this presumption should continue and prevail in the minds of the jury in such a way as to cause them to find the defendant not guilty, unless, from all the evidence in the case, beyond a reasonable doubt, the jury are convinced that the newspapers, or some of the newspapers, admitted in evidence, were deposited or caused to be deposited in the post office for mailing by the defendant." The court made a similar charge with reference to the knowledge of the defendant that the publications contained indecent matters.

The position of the defendant in this connection is that the presumption of the defendant's innocence in a criminal case is stronger than any presumption, except the presumption of the defendant's sanity, and the presumption of knowledge of the law, and that he was entitled to a direct charge that the presumption of the defendant's innocence was stronger than the presumption that the messengers, who deposited these papers in their proper boxes, took them from the mails. If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts. Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company, were arrested near the spot with a

bloody dagger in his possession, it would raise, in the absence of explanatory evidence, a presumption of fact that he had killed him. So, if it were shown that the shoes of an accused person were of peculiar size or shape, and footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption, more or less strong according to the circumstances, that those marks had been made by the feet of the accused person. It is true that it is stated in some of the authorities that where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But this is said with reference to a class of presumptions which prevail independently of proof to rebut the presumption of innocence, or what may be termed abstract presumptions. Thus, in prosecutions for seduction, or for enticing an unmarried female to a house of ill-fame, it is necessary to aver and prove affirmatively the chastity of the female, notwithstanding the general presumption in favor of her chastity, since this general presumption is overridden by the presumption of the innocence of the defendant. *People* v. *Roderigas*, 49 California, 9; *Commonwealth* v. *Whittaker*, 131 Mass. 224; *West* v. *State*, 1 Wisconsin, 209; *Zabriskie* v. *State*, 43 N. J. Law, 640; 1 Greenl. Ev. § 35. This rule, however, is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the defendant, and has no application where such proof constitutes a link in the chain of evidence against him.

In such cases as the one under consideration, it is not so much a question of comparative presumptions, one against the other, as one of the weight of evidence to prove a certain fact, namely, that these papers were taken from the mails. It was a question for the jury to say whether the facts proven in this connection satisfied them beyond a reasonable doubt, and notwithstanding the presumption of innocence, that these papers were taken from the mails; and the abstract instruction requested would only have tended to confuse them, since, if literally followed, it would have compelled a verdict of acquittal.

Upon a careful consideration of the record in this case, we are of opinion that there was no error of which the defendant was justly entitled to complain, and the judgment of the court below is, therefore,

Affirmed.

UNITED STATES *v.* McMILLAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 164. Argued January 21, 1897. — Decided February 15, 1897.

The clerk of a district court of a Territory is bound to account to the United States for fees received by him from private parties in civil actions, and from the Territory, on account of territorial business.

The clerk of a district court of a Territory is not bound to account to the United States for sums received for his services in naturalization proceedings.

THIS was an action brought December 31, 1892, in the Third Judicial District Court of the Territory of Utah, by the United States against Henry G. McMillan, clerk of that court, and the sureties on his official bond, to recover the amount of certain fees received by him and not accounted for.

The complaint contained two counts, the first of which alleged that "between January 8 and December 31, 1889, inclusive, the said Henry G. McMillan, while clerk as aforesaid, and as such, earned, collected and received from different sources, as the fees and emoluments of his said office, $7458.70, of which sum $988.90 was earned and received in United States business; $3776.00 for declarations of intention and naturalizations; and $2693.80 from private persons in civil litigation, and from the Territory of Utah, on account of territorial business"; that he was entitled to retain, of the moneys aforesaid, the sum of $1984.93 as his personal compensation, and the further sum of $1744.05 as the reasonable and necessary expenses of his office, as allowed by the Attor-

ney General of the United States; that it was his duty, as clerk aforesaid, on January 31, 1890, to account for and to pay over to the United States all moneys, so earned and received by him as aforesaid, in excess of these two sums; and that he neglected and failed so to do.

The second count was precisely like the first, except that it related to fees received between January 1 and December 31, 1890, inclusive, and specified different sums.

The defendants demurred to the complaint, as not stating facts sufficient to constitute a cause of action. The court sustained the demurrer, and the attorney for the United States saying that he could not amend the complaint, judgment was rendered for the defendants. The United States appealed to the Supreme Court of the Territory, which affirmed the judgment. 10 Utah, 184. The United States sued out this writ of error.

Mr. Assistant Attorney General Dodge for appellants. *Mr. Assistant Attorney Binney* was on his brief.

Mr. Arthur Brown for appellees. *Mr. J. L. Rawlins* was on his brief.

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

The questions presented by the case are whether "the fees and emoluments of his office," for which it is the duty of the clerk of a district court of the Territory of Utah to account to the United States, include: 1st. Fees received by him from private parties in civil actions, and from the Territory, on account of territorial business; 2d. Sums received by him for declarations of intention, and for naturalizations, of aliens?

The true answer to each of these questions appears to us, if not to be found in, at least to be necessarily inferred from, one of two judgments of this court, both delivered by Mr. Justice Blatchford, who, from his long experience in the

District and Circuit Courts, was peculiarly familiar with questions of this kind. *United States* v. *Averill*, 130 U. S. 335; *United States* v. *Hill*, 120 U. S. 169. The weight of those decisions, as applied to the case at bar, may be the better appreciated by recapitulating the legislation supposed to affect the case.

The Congress of the United States, by the act of February 26, 1853, c. 80, entitled "An act to regulate the fees and costs to be allowed to clerks, marshals and attorneys of the Circuit and District Courts of the United States, and for other purposes," enacted, in section 1, that, in lieu of the compensation then allowed by law, the fees and costs therein specified, and no other compensation, should be taxed and allowed to "attorneys, solicitors and proctors in the United States courts, to United States district attorneys, clerks of the District and Circuit Courts, marshals, witnesses, jurors, commissioners and printers, in the several States"; and, in section 3, that such district attorneys, clerks and marshals should make half-yearly returns in writing to the Secretary of the Interior, "embracing all the fees and emoluments of their respective offices, of every name and character"; that "no clerk of a District Court, or clerk of a Circuit Court, shall be allowed by the said Secretary to retain, of the fees and emoluments of his said office, or, in case both of said clerkships shall be held by the same person, of the said offices, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars per year for any such district clerk or circuit clerk, or at and after that rate for such time as he shall hold the office"; and that every such officer should, with each return made by him, pay into the Treasury of the United States "any surplus of the fees and emoluments of his office, which his half-yearly return, so made as aforesaid, shall show to exist over and above the compensations and allowances hereinbefore authorized to be retained and paid by him." 10 Stat. 161, 166.

That statute did not mention the clerks of the territorial

courts. But by section 12 of the Civil Appropriation Act of March 3, 1855, c. 175, the provisions of the act of 1853 were extended to Utah and other territories "as fully, in all particulars, as they would be, had the word 'Territories' been inserted in" the clause last quoted above from section 1 of that act, "after the word 'States,' and the same had read 'in the several States and in the Territories of the United States'; this clause to take effect from and after the date of said act, and the accounting officers will settle the accounts within its purview accordingly." 10 Stat. 671.

By the express words, and the necessary effect, of this section of the act of 1855, "the provisions," that is to say, all the provisions, of the act of 1853, and, among others, those concerning "clerks of the District and Circuit Courts," "in the several States," were extended to Utah and other Territories, "as fully, and in all particulars," as if the clause "in the several States" had read "in the several States and in the Territories of the United States." Clerks of district or circuit courts in the Territories were thus subjected, not only to the fee bill established by the act of 1853, but also to the directions of that act, that "clerks of the District and Circuit Courts" should be allowed no other compensation than the fees and costs therein specified; that they should make half-yearly returns, "embracing all the fees and emoluments of their respective offices, of every name and character"; that "no clerk of a District Court, or clerk of a Circuit Court," should be allowed to retain, of the fees and emoluments of his office, or, if holding both clerkships, of the two offices, for his personal compensation, a sum exceeding $3500 a year; and that every such clerk should pay any surplus into the Treasury of the United States.

Notwithstanding this Congressional legislation, the legislature of the Territory of Utah, by a statute of January 21, 1859, adopted a fee bill for the clerks and other officers of the Supreme Court and district courts of the Territory, differing from the fee bill established by the acts of Congress of 1853 and 1855. Laws of Utah of 1851–1870, p. 71. And by a territorial statute of February 20, 1874, c. 23, a new fee bill was

adopted, also differing from that established by the acts of Congress. Laws of Utah of 1874, p. 37.

By chapter 16 of Title 13, entitled "The Judiciary," of the Revised Statutes of the United States, approved June 22, 1874, Congress again, in section 823, established a fee bill, founded on that of 1853, and enacted that the fees and costs therein prescribed, "and no other compensation," should "be taxed and allowed to" "clerks of the Circuit and District Courts," and to other officers and persons in those courts, "in the several States and Territories, except in cases otherwise expressly provided by law"; in section 828, prescribed the "clerks' fees" for different items of services; in sections 833, 839 and 844, substantially reënacted the provisions of section 3 of the act of 1853, relating to the returns, the limit of the amount to be retained, (transferring, however, the supervision from the Secretary of the Interior to the Attorney General, in accordance with the act of June 22, 1870, c. 150, § 15; 16 Stat. 164;) and the payment of the surplus into the Treasury of the United States, by clerks of District and Circuit Courts; and, in section 1883, provided that the fees and costs to be allowed "to the clerks of the Supreme and district courts," and other officers, "in the Territories of the United States, shall be the same for similar services by such persons, as prescribed in chapter 16, Title 'The Judiciary,' and no other compensation shall be taxed or allowed." And by the act of Congress of June 23, 1874, c. 469, § 7, "the act of the Congress of the United States, entitled 'An act to regulate the fees and costs to be allowed clerks, marshals and attorneys of the Circuit and District Courts of the United States, and for other purposes,' approved February 26, 1853, is extended over and shall apply to the fees of like officers in said Territory of Utah"; "and all laws of said Territory, inconsistent with the provisions of this act, are hereby disapproved." 18 Stat. 256.

The words "except in cases expressly otherwise provided by law," in section 823 of the Revised Statutes, doubtless referred to the cases (also excepted out of section 839) mentioned in sections 840 and 842, by the first of which "the clerks of the several Circuit and District Courts in California, Oregon

and Nevada," were entitled to charge double fees, and to retain and be allowed a double maximum compensation; and by the other of which, in prize causes, the clerks might be allowed to retain an additional compensation not exceeding one half of the usual maximum.

With those exceptions, Congress thus, in 1874, by acts passed on two successive days, the Revised Statutes on June 22, and the other act on June 23, substantially reënacted, as including the Territories, all the provisions of the acts of 1853 and 1855; and, in the act of June 23, 1874, as if to emphasize its intention to cover the whole subject, both of the fees to be taxed, and of the maximum amount thereof to be retained, by every clerk of a district court in the Territory of Utah, expressly disapproved "all laws of said Territory, inconsistent with the provisions of this act."

Yet the fee bill which had been adopted by the territorial statute of February 20, 1874, was afterwards retained by the legislature of Utah in codifying the statutes of the Territory. Compiled laws of Utah of 1876, §§ 2378 *& seq.*; of 1888, §§ 5441 *& seq.*

By a provision inserted in the Civil Appropriation Act of March 3, 1883, c. 143, the clerk of the Supreme Court of the District of Columbia was subjected to sections 833 and 844 of the Revised Statutes. 22 Stat. 631.

In *United States* v. *Averill*, 130 U. S. 335, this court, at October term, 1888, reversing the judgment of the Supreme Court of the Territory of Utah, reported in 4 Utah, 416, adjudged that Congress, by the acts above referred to, in extending to clerks of the district courts of the Territory the statutes applicable to clerks of District and Circuit Courts of the United States in a State of the Union, included not only those provisions which regulated the separate items and sums of fees to be taxed and collected by the clerk, but also those provisions which restricted the aggregate amount allowed or permitted to be retained by him, and those which required him to pay the surplus into the Treasury of the United States.

Mr. Justice Blatchford, speaking for this court, after reviewing the legislation of Congress upon the subject, concluded as

follows: "The fees mentioned in section 1883, as 'to be allowed' to clerks of the district courts in the Territories, cover the fees to be retained by them for compensation for services. Sections 823 and 839 are in chapter 16 of the Title mentioned. They prescribe the fees to be allowed to, and retained by, clerks of District Courts; 'and no other compensation' can, under section 1883, be allowed to be retained by clerks of the district courts in Utah for personal compensation, than is, by the provisions of chapter 16 of the Title mentioned, prescribed to be allowed to be retained by the clerks of the District Courts named in section 839, for personal compensation." 130 U. S. 340, 341.

In that case, indeed, no question was presented as to the classes of fees to be accounted for, and to be included in ascertaining the amounts to be retained, by the clerks of the district courts of the Territory. And the position of the appellee, that in all cases to which the United States were not a party, he was entitled to fees taxed according to the territorial fee bill, and was not bound to account for them to the United States, is supported by an opinion given by the Attorney General to the First Comptroller of the Treasury on December 2, 1891, (a copy of which was annexed to the appellee's brief,) as well as by the opinions of the Supreme Court of the Territory in *Marte* v. *Ogden City Railway*, 9 Utah, 459, and in the present case. 10 Utah, 184.

But that position appears to us to be inconsistent with the manifest intent of Congress, apparent upon the face of the acts above referred to, and with the reasoning upon which this court based its decision in *United States* v. *Averill*, above cited.

Doubtless, the courts of a Territory are not, strictly speaking, courts of the United States, and do not come within the purview of acts of Congress which speak of "courts of the United States" only. *Clinton* v. *Englebrecht*, 13 Wall. 434, 447; *Reynolds* v. *United States*, 98 U. S. 145, 154; *McAllister* v. *United States*, 141 U. S. 174; *Thiede* v. *Utah*, 159 U. S. 510, 514, 515, and other cases there cited. But it is equally indubitable that Congress, having the entire dominion and sovereignty, national and municipal, Federal and state, over

the Territories of the United States, so long as they remain in the territorial condition, may itself directly legislate for any Territory, or may extend the laws of the United States over it, in any particular that Congress may think fit. As said by Chief Justice Waite, speaking for this court, "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." *National Bank* v. *Yankton County*, 101 U. S. 129, 133. See also *Mormon Church* v. *United States*, 136 U. S. 1, 44; *Shively* v. *Bowlby*, 152 U. S. 1, 48, and other cases there cited.

By the organic act of the Territory of Utah, as of other Territories of the United States, the legislative power of the Territory extended only "to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States"; all statutes of the Territory, if disapproved by Congress, were "to be null and of no effect"; and the Constitution and all laws of the United States, not locally inapplicable, were extended over and declared to be in force in the Territory. Act of September 9, 1850, c. 51, §§ 6, 17; 9 Stat. 454, 458; Rev. Stat. §§ 1850, 1851, 1891.

In each Territory, the Supreme Court and the district courts were established, the general nature of their jurisdiction defined, and the mode of appointment of their clerks prescribed, by Congress, as appears in Title 23 of the Revised Statutes of the United States. By section 1865 of those statutes, the district courts were to be held by one of the Justices of the Supreme Court of the Territory, appointed by the President under the Constitution and laws of the United States. The district courts of the Territory were vested, by section 1868, with general "chancery as well as common law jurisdiction"; and by section 1910, with "the same jurisdiction, in all cases arising under the Constitution and laws of the United

States, as is vested in the Circuit and District Courts of the United States"; with a right of appeal to the Supreme Court of the Territory. And by section 1871 it was provided that there should be but one clerk of each district court in the Territory, appointed and designated by the presiding judge, as well as that "only such district clerk" should be entitled to a compensation from the United States.

Congress, then, in the exercise of its sovereign and supreme power of legislation over the Territories of the United States, had extended, in the clearest and fullest manner, to the clerks of the district courts of the Territories, all the provisions of the statutes of the United States, establishing a fee bill, and restricting both the sums of the fees and emoluments to be received, and the maximum amount thereof to be retained, by the clerks of the courts of the United States held within a State; and it had expressly disapproved all laws of the Territory of Utah, inconsistent with the legislation of Congress.

Among the provisions of the act of 1853, and of chapter 16 of Title 13 of the Revised Statutes, expressly extended by Congress to the Territories, is the provision that the maximum personal compensation of a clerk of a District Court, or of a Circuit Court, of the United States shall be no greater if he holds both clerkships, than if he holds only one. This clearly indicates the intention of Congress that the maximum compensation of the clerk of a territorial district court should not be increased even if his fees and emoluments were derived from two distinct sources of authority.

But the fees and emoluments of the appellee were not derived from two offices or from two sources of authority, but from a single office and a single appointment. Each district court of the Territory, vested by Congress with the jurisdiction, which the Circuit and District Courts of the United States have, over cases arising under the Constitution and laws of the United States, and also with general jurisdiction, at law and in equity, was, in the execution of either branch of its authority, whether exercising Federal or general jurisdiction, one and the same court, deriving its existence and its judicial powers from Congress; and its clerk, whether dealing

with Federal or with territorial business, was one and the same clerk, holding a single appointment under an act of Congress and from a judge commissioned by the President of the United States.

Whenever Congress has considered the amount of the compensation authorized to be received and retained by the clerk of a court, either of the United States, or of a Territory, to be insufficient, it has authorized him to charge double fees, and to be allowed a double maximum compensation, as in the courts of the United States held in the States of California, Oregon and Nevada, by section 840 of the Revised Statutes, above cited; or to tax double fees, without increasing his maximum compensation, as in the courts of the Territories of New Mexico and Arizona, by the act of August 7, 1882, c. 436. 22 Stat. 344; *McGrew* v. *United States*, 23 C. Cl. 273.

The United States have no greater interest, in cases to which they are not a party, in a court of the United States, than in a territorial court. The acts of Congress, regulating the fees to be received, the accounts to be rendered, and the compensation to be retained, by the clerks, are no more limited to cases or fees in which the United States are interested, in the district courts of the Territories, than in the Circuit and District Courts of the United States.

For these reasons, we are of opinion that the fees, received by the appellee from private parties in civil actions, and from the Territory, on account of territorial business, must be included in his returns, and be considered in computing the aggregate compensation to be allowed to and retained by him; and that, to this extent, the judgment of the Supreme Court of the Territory is erroneous, and must be reversed.

The question of the appellee's right to retain, or his duty to account for, sums received by him in naturalization proceedings, depends upon distinct and peculiar considerations.

The only place, it is believed, in the statutes of the United States, in which fees received by the clerk in such proceedings have ever been mentioned, is in one of the earlier Naturalization Acts. The act of April 14, 1802, c. 28, enacted, in section 1, that an alien's declaration of intention to become

a citizen might be made before a court of record of one of the States, or of a Territory of the United States, or before a Circuit or District Court of the United States; and, in section 2, that a report in behalf of an applicant for naturalization, stating his name, birthplace, age, nation and allegiance, the country whence he migrated, and the place of his intended settlement, should be received and recorded by the clerk of the court; and that the clerk should receive fifty cents for recording such report, and fifty cents for a certificate thereof under his hand and seal of office. 2 Stat. 153. The provision as to clerk's fees has been omitted in the later Naturalization Acts. Conkling's U. S. Pract. (4th ed.) 722. Rev. Stat. Tit. 30; Act of February 1, 1876, c. 5; 19 Stat. 2. And no act of Congress, regulating the fees and accounts of clerks of courts, has fixed the sums which they might charge, or specifically required them to account to the United States, for services performed for aliens presenting to the court, through the clerk, preliminary declarations of intention to become citizens, or final applications for naturalization.

At the time of the passage of the Naturalization Act of 1802, above referred to, the only statutes affecting the compensation of clerks of the Circuit and District Courts of the United States fixed their compensation at five dollars a day for attending court; ten cents a mile for travel; such fees as were allowed in the Supreme Court of the State; and a reasonable compensation, to be allowed by the court, for any kind of service for which the laws of the State made no allowance. Acts of March 3, 1791, c. 22, § 2; May 8, 1792, c. 36, § 3; 1 Stat. 217, 277. The earliest legislation restricting the aggregate amount which clerks might retain, or requiring any returns from them, was in the Appropriation Act of March 3, 1841, c. 35; and the provisions of section 3 of the act of 1853, already cited, had their origin in the Appropriation Act of May 18, 1842, c. 29, No. 167, which, however, vested in the Secretary of the Treasury the supervisory power over their accounts, afterwards transferred to the Secretary of the Interior by the act of March 3, 1849, c. 108, § 4, and to the Attorney General by the act of June 22, 1870, c. 150, § 15. 5 Stat. 427, 483; 9

Stat. 395; 16 Stat. 164. By the act of August 16, 1856, c. 124, § 1, reënacted in section 846 of the Revised Statutes, their accounts were to be examined and certified by the District Judge, before being presented to the accounting officers of the Treasury for settlement; and to be then subject to revision upon their merits by those officers. 11 Stat. 49.

The case of *United States* v. *Hill*, 120 U. S. 169, arose in this way: It was an action brought December 4, 1884, in the Circuit Court of the United States for the District of Massachusetts, by the United States upon the official bond of the clerk, appointed in 1879, of the District Court for that district, to recover a large amount of fees of one dollar and two dollars each, respectively, charged and received by him for a declaration of intention to become a citizen, and for a final naturalization and certificate thereof. The judgment of the Circuit Court, reported in 25 Fed. Rep. 375, in favor of the defendants, was affirmed by this court, speaking by Mr. Justice Blatchford, at October term, 1886, upon the following grounds: Section 823 of the Revised Statutes, reënacting section 1 of the act of 1853, applies *prima facie* to taxable costs and fees in ordinary suits between party and party prosecuted in a court. There is no specification of naturalization matters in the fees of clerks. From as early as 1839, it had been the practice of the clerks of the courts of the United States for that district to charge the fees of one dollar and two dollars in naturalization proceedings, in gross sums, without any division for specific services according to any items of the fee bill. The clerk of the District Court had never included these fees in his returns of fees and emoluments. From 1842 and including 1884 his accounts were examined and approved by the District Judge; they then went from 1842 to 1849 to the Secretary of the Treasury, from 1849 to 1870 to the Secretary of the Interior, and since 1870 to the Attorney General; and they were, during this long period, examined and adjusted by the accounting officers of the Treasury, with the naturalization fees not included. This long practice amounted to a contemporaneous and continuous construction of the statute by the concurring interpretation of judicial and executive officers

charged with the duty of carrying out its provisions. 120 U. S. 181, 182.

After that decision, the clerks of the courts of the United States in Massachusetts, and in some other States, at least, continued to omit, in the returns of their official fees and emoluments, sums received for their services in naturalization proceedings; and attempts made, from time to time, to require them to include such fees in their returns, have proved unsuccessful. *United States* v. *Hill*, 123 U. S. 681; Attorney General's Report for 1890, xx; 52d Congress, 1st sess. H. R. Bills 9612, 9613, and Reports No. 1966, pp. 22, 23, and Nos. 1969, 1970; 53d Congress, 1st sess. H. R. Bill 3963, and Report No. 111.

In the Fifty-second Congress, on July 21, 1892, the Committee on the Judiciary of the House of Representatives reported a bill, approved by the Attorney General and by the First Comptroller of the Treasury, entitled "A bill to amend section 833 of the Revised Statutes of the United States, relating to semi-annual returns of fees by district attorneys, marshals and clerks," and purporting to amend that section by inserting, after the words "all fees and emoluments of his office, of every name and character," the words "including all naturalization fees," and by requiring each clerk's return to contain "a true statement of all naturalization fees." On January 17, 1893, the bill was amended in the House by adding at its close these words: "That in each of the three judicial districts of the State of Alabama there shall be a district attorney and a marshal"; and, as amended, was passed by the House and sent to the Senate. On February 13, 1893, the Committee on the Judiciary of the Senate reported that the bill be amended by striking out all after the enacting clause, except the words which had been added by amendment in the House; and the bill in this shape, with its title amended accordingly, and thus leaving out everything relating to returns of fees, was passed by both Houses, vetoed by the President and passed over the veto. 52d Congress, 1st sess. H. R. Bill 9612, Report No. 1969; 24 Congr. Rec. 649, 1508, 1582, 1656, 1661, 2287, 2381, 2433, 2523, 2524; Act of March 3, 1893, c. 220; 27 Stat. 745.

The Judiciary Committee of the House of Representatives, on the same day on which they reported that bill, also reported a bill, having the like approval, entitled "A bill to amend section 828 of the Revised Statutes of the United States, relating to clerks' fees," and purporting to amend that section by adding, at the end thereof, these words: "For filing declaration of intention to become a citizen by an alien, one dollar; for final papers and all services connected therewith, two dollars." This bill, after being passed by the House, was referred to the Committee on the Judiciary of the Senate, and no further proceedings thereon appear to have been had. 52d Congress, 1st sess. H. R. Bill 9613, Report No. 1970; 24 Congr. Rec. 650, 684.

In the next Congress, a bill embodying the provisions of those two bills was reported by the Committee on the Judiciary of the House of Representatives, passed by the House, referred to the Committee on the Judiciary of the Senate, and not afterwards heard of. 53d Congress, 1st sess. H. R. Bill 3963, Report No. 111; 25 Congr. Rec. 2608, 2657, 2663, 2710.

Congress not having legislated upon the subject since the decision of this court in *United States* v. *Hill*, 120 U. S. 169, and no special usage or sound reason being shown for not applying a uniform rule in all the courts established by authority of Congress in the States and in the Territories, the Supreme Court of the Territory of Utah rightly held, in accordance with that decision, that the appellee was not obliged to return to the United States, as a part of the emoluments of his office, sums received for his services in naturalization proceedings.

But the erroneous ruling of that court upon the other branch of the case requires its

Judgment to be reversed, and the case remanded (pursuant to the act of July 16, 1894, *c.* 138, § 17; 28 *Stat.* 111;) *to the Circuit Court of the United States for the District of Utah for further proceedings in conformity with this opinion.*

SMITH *v.* VULCAN IRON WORKS.

NORTON *v.* WHEATON.

PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 200, 639. Argued January 19, 1897. — Decided February 15, 1897.

Under the act of March 3, 1891, c. 517, § 7, an appeal to the Circuit Court of Appeals from an interlocutory order or decree of the Circuit Court, granting an injunction and ordering an account, in a patent case, may be from the whole order or decree; and upon such an appeal the Circuit Court of Appeals may consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill.

In each of these cases, the Circuit Court of the United States for the Northern District of California, upon a bill in equity for the infringement of a patent for an invention, an answer denying the validity and the infringement of the patent, a general replication and a hearing, entered an interlocutory decree, adjudging that the patent was valid and had been infringed, granting an injunction, and referring the case to a master to take an account of profits and damages. From that decree, in each case, the defendant appealed to the Circuit Court of Appeals for the Ninth Circuit.

In the first case, the defendant, at the time of taking the appeal, filed in the Circuit Court an assignment of errors, alleging error in holding that the patent was valid, and that it had been infringed. The plaintiff moved the Circuit Court of Appeals to dismiss the appeal, so far as it involved any question except whether an injunction should be awarded. But that court denied the motion; and, upon a hearing, examined the questions of validity and infringement, decided them in favor of the defendant, and entered a decree reversing the decree of the Circuit Court. 15 U. S. App. 217, 577. On petition of the plaintiff, this court, on January 28, 1895, granted a writ of *certiorari* to the Circuit Court of Appeals.

In the second case, the Circuit Court of Appeals affirmed the decree of the Circuit Court; 29 U. S. App. 409; but, upon

a rehearing, decided that there had been no infringement, reversed its own decree and that of the Circuit Court, and remanded the case with instructions to dismiss the bill; and afterwards denied a petition for a rehearing, and a motion to certify questions of law to this court. 44 U. S. App. 118, 425. The Circuit Court, upon receiving the mandate of the Circuit Court of Appeals, and without hearing the plaintiffs, entered a final decree dismissing the bill. An appeal from this decree was taken by the plaintiff to the Circuit Court of Appeals, and upon the defendant's motion, and without any hearing on the merits, was dismissed by that court. The plaintiff, on November 9, 1896, presented to this court a petition for a writ of *certiorari;* and the court thereupon granted a rule to show cause why the writ should not issue to bring up the decree of the Circuit Court of Appeals, "so that it may be determined whether, upon an appeal from an interlocutory decree granting a temporary injunction in a patent case, the Circuit Court of Appeals can render or direct a final decree on the merits."

That question was now, by leave of the court, orally argued in both cases; the parties in the first case stipulating in writing that, if the decision of this court upon that question should be in favor of the jurisdiction of the Circuit Court of Appeals, the case should be dismissed by the appellees.

Mr. Calderon Carlisle (with whom was *Mr. William G. Johnson* on the brief) for the Vulcan Iron Works.

Mr. John H. Miller (with whom was *Mr. M. Estee* on the brief) for the petitioners in both cases.

Mr. Milton A. Wheaton in person for himself.

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

The act of March 3, 1891, c. 517, establishing Circuit Courts of Appeals, after providing in section 5, for appeals from the Circuit Courts and District Courts directly to this court in

certain classes of cases; and, in section 6, for appeals from final decisions of those courts to the Circuit Court of Appeals in all other cases, including cases arising under the patent laws; further provides, in section 7, that "where, upon a hearing in equity in a District Court, or in an existing Circuit Court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, during the pendency of such appeal." 26 Stat. 828.

The questions presented by each of these cases are whether, in a suit in equity for the infringement of a patent, an appeal to the Circuit Court of Appeals from an interlocutory order or decree of the Circuit Court, granting an injunction, and referring the case to a master to take an account of damages and profits, may be from the whole order or decree, or must be restricted to that part of it which grants the injunction; and whether the Circuit Court of Appeals, upon such an appeal, may consider and decide the merits of the case, and, if it decides them in the defendant's favor, may order the bill to be dismissed.

Upon these questions there has been some diversity of opinion among the Circuit Courts of Appeals of the different circuits. But those courts have now generally concurred in taking the broader view of the appeal itself, and of the power of the appellate court.

In the earliest of such appeals, the cases were examined on the merits, and, upon a reversal of the order or decree appealed from, the authority to direct the bill to be dismissed was assumed, without question, in the Circuit Courts of Appeals for the Fifth Circuit: *Dudley E. Jones Co.* v. *Munger Co.*

(December, 1891), 2 U. S. App. 55; for the First Circuit: *Richmond* v. *Atwood* (February, 1892), 5 U. S. App. 1; and for the Second Circuit: *American Pail Co.* v. *National Box Co.* (July, 1892), 1 U. S. App. 283. The cases in the Fifth and First Circuits were afterwards reconsidered upon petitions for rehearing. In the Fifth Circuit, the decree was modified so as only to direct the injunction to be dissolved. *Dudley E. Jones Co.* v. *Munger Co.* (May, 1892), 2 U. S. App. 188. But in the First Circuit, the power of the Circuit Court of Appeals, upon such an appeal, to consider the merits of the case, and to order the bill to be dismissed, was maintained, after thorough discussion of the subject on principle and authority, in an opinion delivered by Judge Aldrich. *Richmond* v. *Atwood* (September, 1892), 5 U. S. App. 151.

This view has since prevailed, not only in the First Circuit: *Marden* v. *Campbell Press Co.* (May, 1895), 33 U. S. App. 123; *Wright & Colton Co.* v. *Clinton Co.* (May, 1895), 33 U. S. App. 188, 206, 236; but also in the Second Circuit: *Florida Construction Co.* v. *Young* (December, 1892), 11 U. S. App. 683, 685; *Bidwell Cycle Co.* v. *Featherstone* (August, 1893), 14 U. S. App. 632, 655; *Curtis* v. *Overman Wheel Co.* (December, 1893), 20 U. S. App. 146; *Westinghouse Brake Co.* v. *New York Brake Co.* (October, 1894), 26 U. S. App. 248, 358; *Kilmer Manuf. Co.* v. *Griswold* (April, 1895), 35 U. S. App. 246; in the Third Circuit: *Union Switch Co.* v. *Johnson Signal Co.* (May, 1894), 17 U. S. App. 609, 611, 620; *Erie Rubber Co.* v. *American Dunlop Tire Co.* (July, 1895), 28 U. S. App. 470, 513, 522; in the Seventh Circuit: *Temple Pump Co.* v. *Goss Pump Co.* (October, 1893), 18 U. S. App. 229; *Northwestern Stove Co.* v. *Beckwith* (October, 1893), 18 U. S. App. 245; *Electric Manuf. Co.* v. *Edison Electric Co.* (May, 1894), 18 U. S. App. 637, 643; *Card* v. *Colby* (November, 1894), 24 U. S. App. 460, 480, 486; *Standard Elevator Co.* v. *Crane Elevator Co.* (October, 1896), 46 U. S. App. —; in the Eighth Circuit: *Lockwood* v. *Wickes* (June, 1896), 40 U. S. App. 136, overruling *S. C.* (December, 1895), 36 U. S. App. 321; and in the Ninth Circuit: *Consolidated Cable Co.* v. *Pacific Cable Co.* (July, 1893), 15 U. S. App. 216;

Butte City Railway v. *Pacific Cable Railway* (February, 1894), 15 U. S. App. 341; *Vulcan Iron Works* v. *Smith* (May, 1894), 15 U. S. App. 577; *Wheaton* v. *Norton* (January, 1895), 29 U. S. App. 409, and (October, 1895), 44 U. S. App. 118, 170.

In the Fourth Circuit, the question does not appear to have arisen in a patent case. But where, upon a bill in equity to restrain a supervisor of registration from interfering with the right to vote at the election of delegates to a convention to revise the constitution of the State of South Carolina, the Circuit Court of the United States for the District of South Carolina had, by successive orders, granted and continued a temporary injunction, the Circuit Court of Appeals, upon appeal from these orders, entered a decree, not only reversing the orders, but directing the bill to be dismissed; the Chief Justice saying, "Although the appeal is from interlocutory orders, yet, as we entertain no doubt that such a bill cannot be maintained, we are constrained, in reversing these orders, to remand the cause with a direction to dismiss the bill." *Green* v. *Mills* (1895), 25 U. S. App. 383, 398. An appeal from that decree was dismissed by this court, without touching this question. 159 U. S. 651.

In the Sixth Circuit, on the other hand, in a case in which the Circuit Court had entered an interlocutory decree sustaining the validity of the patent, adjudging that there was an infringement, ordering an account of damages and profits, and granting an injunction, and had allowed an appeal from so much only of that decree as granted the injunction, and denied an appeal from the rest of the decree, the Circuit Court of Appeals, in an opinion delivered by Mr. Justice Jackson (then Circuit Judge) with the concurrence of Judge Taft and Judge Hammond, held that the appeal had been properly restricted by the Circuit Court, and that the Circuit Court of Appeals had no authority, upon this appeal, to hear and fully determine the merits of the case, but that those remained, notwithstanding the appeal, within the jurisdiction and control of the Circuit Court. That decision was made before the second decision in *Richmond* v. *Atwood*, 5 U. S. App. 151, above cited,

had been reported, and without reference to the practice of courts of chancery elsewhere. And it was said in the opinion: "It would doubtless have been well if, in the creation of this court, the seventh section of the act had permitted or authorized an appeal from interlocutory decrees sustaining the validity of patents and adjudging their infringement, so as to obviate in many cases the taking of expensive accounts, and the delays incident thereto." *Columbus Watch Co.* v. *Robbins* (October, 1892), 6 U. S. App. 275, 281. A certificate thereupon made by the Circuit Court of Appeals, for the purpose of obtaining the instructions of this court, was dismissed by this court, with Mr. Justice Jackson's concurrence, because no question of law was distinctly certified, and because the Circuit Court of Appeals had decided the case before granting the certificate. 148 U. S. 266.

That decision was long treated as settling the practice in that circuit on appeals from such interlocutory decrees, and as permitting the questions of validity and infringement to be considered only so far as they affected the granting or refusal of an injunction. *Blount* v. *Société Anonyme* (November, 1892), 6 U. S. App. 335; *Columbus Watch Co.* v. *Robbins* (October, 1894), 22 U. S. App. 601, 634; *Duplex Press Co.* v. *Campbell Press Co.* (July, 1895), 37 U. S. App. 250; *Thompson* v. *Nelson* (November, 1895), 37 U. S. App. 478; *Goshen Co.* v. *Bissell Co.* (December, 1895, and February, 1896), 37 U. S. App. 555, 689.

But, at last, the Circuit Court of Appeals of the Sixth Circuit, in an able and elaborate opinion delivered by Judge Lurton, with the concurrence of Judge Taft and Judge Hammond, being a majority of the court which had made the decision in *Columbus Watch Co.* v. *Robbins*, 6 U. S. App. 275, above cited, expressly overruled that decision, and brought the practice in that circuit into harmony with the practice prevailing in other circuits. *Bissell Co.* v. *Goshen Co.* (March, 1896), 43 U. S. App. 47; *Dueber Co.* v. *Robbins* (May, 1896), 43 U. S. App. 391.

By the practice in equity, as administered in the Court of Chancery and the House of Lords in England, and in the

Courts of Chancery and Courts of Errors in the States of New York and New Jersey, appeals lay from interlocutory, as well as from final, orders or decrees; and upon an appeal from an interlocutory order or decree the appellate court had the power of examining the merits of the case, and, upon deciding them in favor of the defendant, of dismissing the bill, and thus saving to both parties the needless expense of a further prosecution of the suit. Palmer H. L. Pract. 1; 2 Dan. Ch. Pract. (1st ed.) 1491, 1492; *Forgay* v. *Conrad*, 6 How. 201, 205; *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436, 498, 499, 507–509; *Bush* v. *Livingston*, 2 Caines Cas. 66, 86; *Newark & New York Railroad* v. *Newark*, 8 C. E. Green (23 N. J. Eq.), 515.

But under the judicial system of the United States, from the beginning until the passage of the act of 1891 establishing Circuit Courts of Appeals, appeals from the Circuit Courts of the United States in equity or in admiralty, like writs of error at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause. Acts of September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803, c. 40, 2 Stat. 244; Rev. Stat. §§ 691, 692, 699, 701; *Forgay* v. *Conrad*, above cited; *Barnard* v. *Gibson*, 7 How. 650; *Humiston* v. *Stainthorp*, 2 Wall. 106; *Keystone Iron Co.* v. *Martin*, 132 U. S. 91; *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 545; *American Construction Co.* v. *Jacksonville &c. Railway*, 148 U. S. 372, 378, 379.

The provision of section 7 of the act of 1891, that where "upon a hearing in equity" in a Circuit Court "an injunction shall be granted or continued by an interlocutory order or decree," in a cause in which an appeal from a final decree might be taken to the Circuit Court of Appeals, "an appeal may be taken from such interlocutory order or decree granting or continuing such injunction" to that court, authorizes,

according to its grammatical construction and natural meaning, an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction.

The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.

The power of the appellate court over the cause, of which it has acquired jurisdiction by the appeal from the interlocutory decree, is not affected by the authority of the court appealed from, recognized in the last clause of the section, and often exercised by other courts of chancery, to take further proceedings in the cause, unless in its discretion it orders them to be stayed, pending the appeal. *Hovey* v. *McDonald*, 109 U. S. 150, 160, 161; *In re Haberman Co.*, 147 U. S. 525; *Messonnier* v. *Kauman*, 3 Johns. Ch. 66.

In each of the cases now before the court, therefore, the Circuit Court of Appeals, upon appeal from the interlocutory decree of the Circuit Court, granting an injunction and ordering an account, had authority to consider and decide the case upon its merits, and thereupon to render or direct a final decree dismissing the bill.

In the second case, it was argued, in support of the petition for a writ of *certiorari*, that the Circuit Court, upon receiving the mandate of the Circuit Court of Appeals directing a dismissal of the bill, erred in entering a final decree accordingly, without further hearing; and that the Circuit Court of Appeals erred in dismissing an appeal from that decree. But the rule to show cause did not proceed upon that ground. And the merits of the case, having been once determined by

the appellate court in reversing the interlocutory decree, were not open to reconsideration at a later stage of the same case, either in that court or in the court below. *Sanford Fork & Tool Co., petitioner*, 160 U. S. 247, and cases there cited; *Great Western Tel. Co.* v. *Burnham*, 162 U. S. 339. Had the case been heard anew in each court after the first mandate, the only difference in the result would have been an affirmance, instead of a dismissal, upon the second appeal. That difference, not affecting the essential rights of the parties, is no ground upon which this court should exercise its discretionary power of issuing a writ of certiorari.

It follows that, in the first case, in accordance with the stipulation of the parties, the writ of certiorari heretofore granted is dismissed; and, in the second case, the writ of certiorari is denied.

Judgments accordingly.

In re KOLLOCK, Petitioner.

ORIGINAL.

No. 9. Original. Argued January 25, 1897. — Decided March 1, 1897.

The act of August 2, 1886, c. 840, imposing a tax upon, and regulating the manufacture, sale, etc. of oleomargarine, required packages thereof to be marked and branded; prohibited the sale of packages that were not, and prescribed the punishment of sales in violation of its provisions. It authorized the Commissioner of Internal Revenue to make regulations describing the marks, stamps and brands to be used. *Held*, that such leaving the matter of designating the marks, brands and stamps to the Commissioner, with the approval of the Secretary, involved no unconstitutional delegation of power.

Kollock was indicted in the Supreme Court of the District of Columbia for the violation of the sixth section of the act of Congress approved August 2, 1886, 24 Stat. 209, c. 840, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine"; and also for carrying on in the District the business of a retail dealer in oleomargarine without having paid the special tax thereon. He was arraigned,

tried and convicted on each indictment and was sentenced to fine and imprisonment on the first, and to fine on the second, with costs on both, and to stand committed further in default of payment.

December 14, 1896, he was committed to the custody of the United States marshal of the District of Columbia, and on the same day filed his petition in this court alleging that he was deprived of his liberty unlawfully, in that the law under which he was convicted is in violation of the Constitution and laws of the United States, for the reason that "it is not within the power of the Congress of the United States under the Constitution of the United States to delegate to the Commissioner of Internal Revenue or the Secretary of the Treasury of the United States, or any other person, authority or power to determine what acts shall be criminal, and the said act of Congress aforesaid does not sufficiently define, or define at all, what acts done or omitted to be done within the supposed purview of the said act shall constitute an offence or offences against the United States"; and praying for a writ of *habeas corpus*.

Leave was given to file the petition and a rule to show cause was entered thereon, petitioner being admitted to bail, to which the marshal made return that he held petitioner pursuant to the judgment and sentence of the Supreme Court of the District of Columbia, until he was released from custody on giving bail in compliance with the order of this court.

It appeared that Kollock had appealed to the Court of Appeals of the District of Columbia, which affirmed the judgments below, 25 Wash. Law Rep. 41, in accordance with the decision of that court in *Prather* v. *United States*, 24 Wash. Law Rep. 395.

The act of Congress in question consists of twenty-one sections: Sections 1 and 2 define butter and oleomargarine; section 3 imposes special taxes on manufacturers, wholesale dealers and retail dealers in oleomargarine; section 4 prescribes penalties for carrying on business as manufacturer, wholesale dealer and retail dealer without payment of

taxes; and section 5, the duty of the manufacturer as to notice, etc., keeping books, etc., and conduct of business.

Section 6 is as follows:

"That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offence not more than one thousand dollars, and be imprisoned not more than two years."

Section 7 provides that every manufacturer shall affix a label on each package manufactured under penalty; section 8, for a tax on the manufacture to be represented by coupon stamps, the requirements of law as to stamps relating to tobacco and snuff being made applicable; section 9, for the assessment of taxes on oleomargarine sold without using stamps; section 10, for an additional tax on imported oleomargarine; section 11, a penalty for purchasing or receiving for sale any oleomargarine not branded or stamped according to law; section 12, a penalty for purchasing or receiving for sale any oleomargarine from any manufacturer who has not paid the special tax; section 13, for the destruction of stamps on

stamped packages when empty; and section 14, for a chemist and microscopist in the office of the Commissioner, etc.; and the Commissioner is authorized to decide what substances, etc., submitted to inspection in contested cases shall be taxed under the act.

Section 15 is as follows:

"That all packages of oleomargarine subject to tax under this act, that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States.

"Any person who shall wilfully remove or deface the stamps, marks or brands on packages containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months."

Section 16 provides for the exportation of oleomargarine; and section 17 imposes a penalty for fraud by the manufacturer in relation to the tax.

Section 18 is as follows:

"That if any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof shall knowingly or wilfully omit, neglect or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States."

Section 19 provides for the recovery of fines, etc.

Sections 20 and 21 read:

"SEC. 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

"SEC. 21. That this act shall go into effect on the ninetieth day after its passage; and all wooden packages containing ten or more pounds of oleomargarine found on the premises of any dealer on or after the ninetieth day succeeding the date of the passage of this act shall be deemed to be taxable under section eight of this act, and shall be taxed, and shall have affixed thereto the stamps, marks and brands required by this act or by regulations made pursuant to this act; and for the purposes of securing the affixing of the stamps, marks and brands required by this act, the oleomargarine shall be regarded as having been manufactured and sold, or removed from the manufactory for consumption or use, on or after the day this act takes effect; and such stock on hand at the time of the taking effect of this act may be stamped, marked and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same and to affix thereto the proper tax-paid stamps."

The first indictment against Kollock set forth that pursuant to the authority conferred on the Commissioner of International Revenue by the sixth section of the act of August 2, 1886, "the said Commissioner, with the approval of the Secretary of the Treasury, did, on the twelfth day of March, in the year of our Lord one thousand eight hundred and ninety-one, prescribe certain regulations, in substance and to the effect, among other things, that the wooden or paper packages in which retail dealers in oleomargarine were required by said act of Congress to pack the oleomargarine sold by them, such retail dealers, should have printed or branded upon them in the case of each sale the name and address of the retail dealer making the same; likewise the words 'pound' and 'oleomargarine' in letters not less than one quarter of an inch square, and likewise a figure or figures of the same size indicating (in connection with said words 'pound' and 'oleomargarine') the

quantity of oleomargarine so sold, written, printed or branded on such wooden or paper packages and placed before the said word 'pound,' and that the said words 'oleomargarine' and 'pound' so required to be printed or branded on such packages as aforesaid in the case of each sale as aforesaid and the said figure or figures so indicative of quantity as aforesaid in the case of each sale as aforesaid and so required to be written, printed or branded on such packages as aforesaid should be so placed thereon as to be plainly visible to the purchaser at the time of the delivery to him, such purchaser, by such retail dealers of the oleomargarine sold to such purchaser, by them, such retail dealers."

And thus continued:

"That on the fourteenth day of January, in the year of our Lord one thousand eight hundred and ninety-six, and at the District aforesaid, one Israel C. Kollock, late of the District aforesaid, being then and there engaged in business as a retail dealer in oleomargarine at a store of him, the said Israel C. Kollock, situated on Fourth street southeast, in the city of Washington, in the said District, did then and there and at said store knowingly sell and deliver to a certain Florence Davis one half of one pound of oleomargarine as and for butter, which said one half of one pound of oleomargarine was not then and there and at the time of such sale and delivery thereof packed in a new wooden or paper package having then and there printed or branded thereon the name and address of him, the said Israel C. Kollock, in letters one quarter of an inch square and the words 'pound' and 'oleomargarine' in letters of like size and a figure or figures of like size written, printed or branded thereon indicative (in connection with said words 'pound' and 'oleomargarine') of the quantity of oleomargarine so sold and delivered to her, the said Florence Davis, as aforesaid, and which said one half of one pound of oleomargarine at the time it was so knowingly sold and delivered to her, the said Florence Davis, as aforesaid, by him, the said Israel C. Kollock, as aforesaid, was then and there and at the time of the sale and delivery thereof as aforesaid packed in a paper package upon which there had not

been printed, branded or written any or either of the marks and characters aforesaid so required by the said regulations to be placed thereon as aforesaid, as he, the said Israel C. Kollock, then and there well knew, against the form of the statute, etc."

Mr. Jeremiah M. Wilson and *Mr. Henry E. Davis* for petitioner.

Mr. Solicitor General opposing.

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

By the terms of the act, manufacturers of oleomargarine are required to pack it in wooden packages "marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe"; and all sales by manufacturers and wholesale dealers must be in "original stamped packages."

Retail dealers are required to "pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe."

And fine and imprisonment are denounced on "every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law."

Kollock was convicted as a retail dealer in oleomargarine of knowingly selling and delivering one half pound of that commodity, which was not packed in a wooden or paper package bearing thereon any or either of the marks or characters provided for by the regulations and set forth in the indict-

ment. It is conceded that the stamps, marks and brands were prescribed by the regulations, and it is not denied that Kollock had the knowledge, or the means of knowledge, of such stamps, marks and brands. But it is argued that the statute is invalid because it "does not define what act done or omitted to be done shall constitute a criminal offence," and delegates the power "to determine what acts shall be criminal" by leaving the stamps, marks and brands to be defined by the Commissioner.

We agree that the courts of the United States, in determining what constitutes an offence against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not; and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps and brands to be used. The criminal offence is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offence. We think the act not open to the objection urged, and that it is disposed of by previous decisions. *United States* v. *Bailey*, 9 Pet. 238; *United States* v. *Eaton*, 144 U. S. 677; *Caha* v. *United States*, 152 U. S. 211.

In the last case Caha had been convicted of perjury, under section 5392 of the Revised Statutes, in a contest in a local land office in respect of the validity of a homestead entry, the oath having been administered by one of the land officers before whom the contest had been carried on. It was contended that the indictment alleged no offence, because the statute made no provision for such a contest before those officers, and, therefore, it could not be said that the oath was taken in a "case in which a law of the United States authorized an oath to be administered."

But it was held by this court, in view of the general grant

of authority to the land department to prescribe appropriate regulations for the disposition of the public lands; the rules and regulations prescribed by that department for contests in all cases of such disposition, including homestead entries; and the frequent recognition by acts of Congress of contests in respect to that class of entries, that the local land officers in hearing and deciding upon a contest as to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.

As bearing on the case in hand, we cannot do better than to quote at length from Mr. Justice Brewer, delivering the opinion, (p. 218) as follows:

"This is not a case in which the violation of a mere regulation of a department is adjudged a crime. *United States* v. *Bailey*, 9 Pet. 238, is in point. There was an act of Congress making false testimony in support of a claim against the United States perjury, and the defendant in that case was indicted for making a false affidavit before a justice of the peace of the Commonwealth of Kentucky in support of a claim against the United States. It was contended that the justice of the peace, an officer of the State, had no authority under the acts of Congress to administer oaths, and that, therefore, perjury could not be laid in respect to a false affidavit before such officer. It appeared, however, that the Secretary of the Treasury had established, as a regulation for the government of his department and its officers in their action upon claims, that affidavits taken before any justice of the peace of any of the States should be received and considered in support of such claims. And upon this the conviction of perjury was sustained, Mr. Justice McLean alone dissenting. It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States. Much stronger is the case at bar, for the tribunal was composed of officers of the government of the United States; it was created

by the land department in pursuance of express authority from the acts of Congress. This perjury was not merely a wrong against that tribunal or a violation of its rules or requirements; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the statute.

"Nor is there anything in the case of *United States* v. *Eaton*, 144 U. S. 677, 688, conflicting with the views herein expressed. In that case the wrong was in the violation of a duty imposed only by a regulation of the Treasury Department. There was an act entitled 'An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine,' which contained several sections forbidding particular acts, and imposing penalties for violation thereof. And in addition there was a general provision in section 18 that 'if a party shall knowingly, or wilfully, omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, . . . he shall pay a penalty,' etc. There was authority given to the Commissioner of Internal Revenue to make all needful regulations for carrying into effect the act. In pursuance of that authority the Commissioner required the keeping of a book in a certain form, and the making of a monthly return — matters which were in no way referred to in the various sections of the statute prescribing the duties resting upon the manufacturer or dealer in oleomargarine, although subsequently to this statute, and subsequently to the offence complained of, and on October 1, 1890, Congress passed an act, by section 41 of which wholesale dealers in oleomargarine were required to keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue should require. It was held by this court that the regulation prescribed by the Commissioner of Internal Revenue, under that general grant of authority, was not sufficient to subject one violating it to punishment under section 18. It was said by Mr. Justice Blatchford, speaking for the court: 'It is necessary that a sufficient statutory authority should exist for

declaring any act or omission a criminal offence; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offence for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.

"'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence.'

"This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of section 5392. We have no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section."

The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And, considered as a revenue act, the designation of the stamps, marks and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer. *United States* v. *Symonds*, 120 U. S. 46; *Ex parte*

Reed, 100 U. S. 13; *Smith* v. *Whitney*, 116 U. S. 167; *Wayman* v. *Southard*, 10 Wheat. 1.

We concur with the Court of Appeals that this provision does not differ in principle from those of the Internal Revenue laws, which direct the Commissioner of Internal Revenue to prepare suitable stamps to be used on packages of cigars, tobacco and spirits; to change such stamps when deemed expedient; and to devise and regulate the means for affixing them. Rev. Stat. §§ 3312, 3395, 3445, 3446, etc.

By section 3446, the Secretary and the Commissioner were empowered to alter or renew or change the form, style and device "of any stamp, mark or label used under any provision of the laws relating to distilled spirits, tobacco, snuff and cigars, when in their judgment necessary for the collection of revenue taxes and the prevention or detection of frauds thereon; and may make and publish such regulations for the use of such mark, stamp or label as they find requisite"; and by the act of March 1, 1879, 20 Stat. 327, 351, c. 125, § 18, the section was amended so as to provide that the Commissioner, with the approval of the Secretary, might "establish and, from time to time, alter or change the form, style, character, material and device of any stamp, mark or label used under any provision of the laws relating to internal revenue." The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. Protection to purchasers in respect of getting the real and not a spurious article cannot be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding must be regarded as means to effectuate the objects of the act in respect of revenue.

And we are of opinion that leaving the matter of designating the marks, brands and stamps to the Commissioner, with the approval of the Secretary, involved no unconstitutional delegation of power.

Writ denied.

Syllabus.

In re McCAULLY, Petitioner, 8 original. *In re* LUSBY, Petitioner, 10 original. Argued January 25, 1897. Decided March 1, 1897.

THE CHIEF JUSTICE: These are petitions for *habeas corpus* to discharge petitioners from confinement on convictions under the oleomargarine law on the ground of the unconstitutionality of that enactment. So far as that question is concerned, it is conceded that the records are substantially the same as the record in *Kollock's case* just decided, and the applications must be disposed of in the same way.

Writs denied.

Mr. Jeremiah M. Wilson and *Mr. Henry E. Davis* for petitioners.

Mr. Solicitor General opposing.

McCORMICK *v.* MARKET BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 554. Submitted December 7, 1896. — Decided March 1, 1897.

In an action against a national bank upon a contract, each party relied on section 5136 of the Revised Statutes, by which a national bank, upon filing its articles of association and organization certificate with the Comptroller of the Currency, becomes a corporation, with power "to make contracts" and other corporate powers, but is prohibited to "transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." The defendant relied on the prohibition. The plaintiff relied on the exception to the prohibition, and also contended that, under the general power to make contracts, the contract sued on was valid as between the parties, even if contrary to the prohibition. *Held*, that a judgment for the defendant in the highest court of the State might be reviewed by this court on writ of error.

By section 5136 of the Revised Statutes, a contract of lease, at a large rent, of an office to be occupied "as a banking office, and for no other purpose," for the term of five years, determinable at the end of any year by either party, executed by a national bank as lessee, after having duly filed its articles of association and organization certificate with the Comptroller of the Currency, but not having been authorized by him to com-

mence the business of banking, is void, cannot be made good by estoppel, and will not support an action against the bank to recover anything beyond the value of what it has actually received and enjoyed.

THIS was an action brought July 17, 1895, by McCormick against the Market National Bank of Chicago, Illinois, in the superior court of Cook county in the State of Illinois, and was submitted by the parties, waiving a trial by jury, to that court, upon an agreed statement of facts, in substance as follows:

On January 31, 1893, articles of association were signed, and an organization certificate was signed and acknowledged, by nine citizens of Illinois, before a notary public, and both were transmitted to the Comptroller of the Currency, as required by Title 62 of the Revised Statutes of the United States (the material parts of which are copied in the margin [1]), for the purpose of making them a national banking association at Chicago by the aforesaid name; and were on

[1] SEC. 5133. Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

SEC. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association.

Second. The place where its operations of discount and deposit are to be carried on.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders, and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title.

SEC. 5135. The organization certificate shall be acknowledged before a judge of some court of record, or notary public, and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

SEC. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such,

February 3, 1893, recorded, and afterwards carefully preserved, in the Comptroller's office.

On January 31, 1893, at a meeting of the directors of the bank, chosen by the stockholders, and named in the articles of association, a president and a cashier were duly elected; and the directors caused a seal to be made for the bank. On February 9, 1893, the president, pursuant to a resolution of the directors, signed and sealed with the corporate seal a lease in writing from the plaintiff to the bank of certain offices in Chicago, "to be used and occupied by said Market National Bank as a banking office, and for no other purpose," for the term of five years from May 1, 1893, at a yearly rent of $13,000, payable in equal monthly instalments. By an agreement made part of the lease, the plaintiff was to make certain alterations

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and in the name designated in the organization certificate, it shall have power:

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless sooner dissolved or its franchise becomes forfeited.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law.

Seventh. To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on their business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debts; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes, according to the provisions of this Title.

But no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

SEC. 5168. Whenever a certificate is transmitted to the Comptroller of the Currency as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with

and repairs at his own expense; either party might cancel the lease on May 1 of any year by giving ninety days' notice in writing; and no rent was to be charged until the bank took possession. On April 12, 1893, the parties made a supplemental agreement, by which the plaintiff was to make further alterations, the bank paying half the cost thereof. All the alterations and repairs were made by the plaintiff as agreed; the cost, paid by him, of the alterations made under the agreement of April 12, 1893, being $2475.

Upon the completion of the alterations, on June 22, 1893, the president and cashier, in the name of the bank, took possession of the demised premises, and put in the fixtures and furniture, blank books and stationery, necessary to carry on a banking business, and they were not removed until April 30, 1895.

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all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

SEC. 5169. If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business.

SEC. 5170. The association shall cause the certificate issued under the preceding section to be published, in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof.

SEC. 5190. The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.

Of the whole capital stock of $1,000,000, provided for in the articles of association, no more than the sum of $331,594 was ever paid in. And the bank was never authorized by the Comptroller of the Currency to commence, and never did commence, the business of banking.

The officers of the bank, from time to time, corresponded with the plaintiff, using letter heads with the name, location and place of business of the bank and the names of its officers printed thereon, and signing in their official capacity.

The plaintiff, at the times of the negotiations for the lease, and of its execution, and of the taking possession of the demised premises by the officers of the bank, understood and believed that it was legally organized as a national bank, and as such was ready to do banking business, and had the power to enter into the lease and agreements aforesaid; and had no knowledge or information to the contrary until August 15, 1893, when the officers of the bank informed him that the bank had never been authorized by the Comptroller of the Currency to commence the business of banking, and had no power to enter into the lease, and had abandoned all further proceedings for carrying on the banking business, and offered to surrender the lease, but he refused to accept the surrender. On September 20, 1893, the president of the bank caused the key of the office to be left on the desk of the plaintiff's agent, he refusing to accept it.

On July 15, 1893, the nine persons, who had signed the aforesaid articles of association and organization certificate, signed and transmitted to the Comptroller of the Currency a certificate revoking them; and he placed it on file in his office. On the same day, five of those persons and seven others signed and acknowledged, and forwarded to the Comptroller, other articles of association and organization certificate, for the purpose of making them a national bank by the same name, with a capital of $500,000; and they were forthwith recorded in the Comptroller's office. On July 25, 1893, the persons signing the latter articles of association and organization certificate abandoned all further proceedings with regard to the organization of the bank as therein

provided, and with regard to its commencing the business of banking.

On October 4, 1893, the parties agreed in writing that, without prejudice to the rights of either, the plaintiff should take possession of the premises, and endeavor to lease them and to collect the rent thereof. The plaintiff made every effort to obtain a tenant accordingly, but was unable to do so.

On January 3, 1895, the plaintiff gave written notice to the president of the bank of his intention to terminate the lease on May 1, 1895, in accordance with its terms.

The cashier paid the rent, according to the lease, until July 22, 1893. But the bank refused to pay any rent subsequently accruing; and never paid its half of the cost of the alterations made under the agreement of April 12, 1893.

If, upon the facts stated, without regard to the form of the pleadings, the court should be of opinion that the plaintiff was entitled to recover, judgment was to be rendered for him for such sum as he was entitled to, with costs; otherwise, judgment for the defendant, with costs.

The plaintiff asked the court to find, as matter of law, the following propositions:

"1st. That the execution of the lease in question by the defendant was incidental and necessarily preliminary to its organization, and to its entering upon a banking business.

"2d. That the execution of the lease in question was a proper exercise of the powers possessed by such defendant to make contracts under paragraph 3 of section 5136 of the Revised Statutes of the United States.

"3d. That the limitation or last clause of paragraph 7 of said section does not apply to the powers conferred by paragraphs 1 to 6 in said section; that the Market National Bank of Chicago had the power to enter into said lease, and to legally bind itself thereby.

"4th. That there was no want of power on the part of said defendant to execute said lease, but merely a defective organization, and said bank cannot plead such defective organization to defeat a recovery.

"5th. That said contract of lease has been fully executed.

Counsel for Parties.

"6th. That the said plaintiff was not bound to ascertain whether or not the said defendant was properly and legally organized; and that, if the plaintiff relied upon the representations and statements of the proper officers of said defendant that the bank was properly and legally organized and empowered to make and enter into said lease, he is entitled to recover the stipulated rental named therein, and the defendant is estopped to deny its liability.

"7th. That the said defendant, by its acts, conduct and declarations, as shown by the agreed statement of facts in this case, is estopped from alleging that it was not fully organized as a banking corporation under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

"8th. That the plaintiff, under the facts of this case as agreed upon, is entitled to recover judgment, at the rate agreed upon in said lease, from July 22, 1893, up to May 1, 1895, and also to recover one half of the expenses of repairing and changing the said premises, according to the stipulation, with interest upon each instalment as it became due, at the rate of five per cent per annum."

The court refused to find the foregoing propositions of law, or any of them; and the plaintiff duly excepted to the refusal.

The court found for the plaintiff, and gave judgment in his favor for the rent from July 22 to August 15, 1893, and for half the cost of the alterations made by the plaintiff under the agreement of April 12, 1893, with interest, amounting in all to the sum of $2548.85.

The judgment was affirmed, on successive appeals of the plaintiff, by the Appellate Court and by the Supreme Court of Illinois. 61 Illinois App. 33; 162 Illinois, 100. The plaintiff thereupon sued out this writ of error. The assignments of error upon each appeal, as well as upon the writ of error, were based upon the propositions of law above stated.

Mr. A. M. Pence for plaintiff in error.

Mr. Hiram T. Gilbert for defendant in error.

Opinion of the Court.

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

By the National Bank Act, a national banking association, "upon duly making and filing articles of association, and an organization certificate," with the Comptroller of the Currency, "shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, shall have power," "to adopt and use a corporate seal," "to have succession for the period of twenty years from its organization," "to make contracts," "to sue and be sued, as fully as natural persons," to elect and dismiss officers, to make by laws, and to exercise "all such incidental powers as shall be necessary to carry on the business of banking." "But no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." Rev. Stat. § 5136.

The question upon which this case turned was whether a national banking association which, after having duly made and filed its articles of association and organization certificate with the Comptroller of the Currency, but not having received from him a certificate authorizing it to do banking business, enters with the owner of real estate into a contract of lease, for a term of five years, determinable at the end of any year by either party, of an office to be occupied by the association as a banking office, is bound by the lease, according to its provisions.

This action was brought by the lessor in such a lease against the defendant as lessee. The first question that presents itself upon the record is whether this court has jurisdiction of this writ of error.

The defendant contended, and the highest court of the State of Illinois adjudged, that the contract of lease sued on was not incidental and necessarily preliminary to the organization of the corporation, and therefore, by virtue of the last clause of section 5136 of the National Bank Act, above cited,

having been executed by the defendant before being authorized by the Comptroller of the Currency to commence the business of banking, did not bind the defendant.

If the decision had been the other way, it would, as admitted at the bar, have been a decision against an immunity set up and claimed by the defendant under a statute of the United States, and therefore reviewable by this court on writ of error. *Swope* v. *Leffingwell*, 105 U. S. 3; *Logan County Bank* v. *Townsend*, 139 U. S. 67; *Metropolitan Bank* v. *Claggett*, 141 U. S. 520; *Chemical Bank* v. *Hartford Deposit Co.*, 161 U. S. 1.

It does not, however, follow that the plaintiff is not entitled to a review by this court of the judgment, so far as it was against him.

The plaintiff, in the courts of the State, and by his assignment of errors filed with the writ of error sued out from this court, specially set up and claimed a right to recover, so far as concerned the construction of that section of the statute, upon two grounds.

His first ground was that the execution of the lease by the defendant was "incidental and necessarily preliminary to its organization," and therefore within the exception of the last clause of the section in question. As to that ground, the case stands thus: The defendant relied on the prohibition to transact any business until it had been authorized by the Comptroller of the Currency to commence the business of banking. The plaintiff relied on the exception out of that prohibition. The decision against the plaintiff, therefore, was a decision against a right claimed by him under a statute of the United States.

The case, in this particular, is analogous to those arising under the provision of the Bankrupt Act, that a bankrupt who had in all things conformed to his duty under the act should receive a discharge from all his debts, with certain exceptions, among which were debts created by his fraud or embezzlement, or by his defalcation as a public officer, or while acting in a fiduciary character. Rev. Stat. §§ 5114, 5117. In *Strader* v. *Baldwin*, 9 How. 261, indeed, under the like pro-

vision of a former bankrupt act, where a bankrupt, being sued upon a debt, pleaded his discharge, and the plaintiff replied that the debt was contracted while acting in a fiduciary capacity, and the decision of the state court was in favor of the defendant, this court held that it had no jurisdiction, because the decision below was in favor of the right set up by the defendant. But the court there failed to notice that the decision, while in favor of the right or immunity, set up by the defendant, of a discharge under the Bankrupt Act, was also against the right or immunity, set up by the plaintiff, under the clause excepting fiduciary debts from the effect of that discharge. And the case has accordingly been overruled in similar cases arising under the recent bankrupt act, in which this court has taken jurisdiction, not only when the writ of error was sued out by the defendant; *Neal* v. *Clark*, 95 U. S. 704; but also when it was sued out by the plaintiff, because, as was said by Chief Justice Waite in delivering judgment in the latest case upon this point, the plaintiff "specially set up and claimed an immunity, under § 5117 of the Revised Statutes, from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him." *Hennequin* v. *Clews*, 111 U. S. 676; *Palmer* v. *Hussey*, 119 U. S. 96, 98.

The plaintiff's second ground likewise affords ample support for the appellate jurisdiction of this court. It was specially set up and claimed by the plaintiff, that, taking the whole section together, the defendant, from the date of filing with the Comptroller of the Currency its articles of association and its organization certificate, became a corporation empowered to make contracts appropriate to the business of banking; and that any such contracts were valid as between the parties to them, even if they violated the restriction in the last clause of the section, and therefore might afford a reason for which the United States could enforce a forfeiture of the charter. This position of the plaintiff was, in effect, that, so far as he was concerned, the bank had power under the statute of the United States to make the contract sued on; and the decision of the highest court of the State, that the statute,

rightly construed, did not give such power to the bank, was a decision against the right so specially set up and claimed by the plaintiff under a statute of the United States, and is therefore reviewable by this court. Rev. Stat. § 709.

But we are of opinion that there was no error in that decision.

While by the earlier provisions of section 5136 of the Revised Statutes, the association, upon filing its articles of association and its organization certificate with the Comptroller of the Currency, becomes "as from the date of the execution of the organization certificate," and "for the period of twenty years from its organization," a body corporate, with the usual powers of a banking corporation, yet, by the last clause of that section, Congress has enacted that "no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking."

By subsequent sections of the National Bank Act, the Comptroller is required to make a careful examination into the condition of the association; and, taking into consideration a full statement upon the oaths of the president and cashier, and of a majority of the directors, and any other facts which may come to his knowledge, by means of a special commission of inquiry, or otherwise, to ascertain and determine that at least fifty per cent of the capital stock has been duly paid in, and that the association has in all other respects complied with the provisions of the National Bank Act, required to be complied with before commencing the business of banking; and thereupon, and not before, to make and to give to the association a certificate, under his hand and official seal, that the association has complied with all those provisions, and is authorized to commence the business of banking. Rev. Stat. §§ 5168, 5169. The Comptroller, as this court has said, is "clothed with jurisdiction to decide as to the completeness of the organization." *Casey* v. *Galli*, 94 U. S. 673, 679; *Bushnell* v. *Kneeland*, 164 U. S. 684.

Until the association has been authorized by the Comptroller

to commence the business of banking, section 5136 peremptorily forbids the corporation to "transact any business" whatever, whether appertaining or not to the business of banking, "except such as is incidental and necessarily preliminary to its organization." The only business which it is permitted to transact is "such as is incidental and necessarily preliminary," not to carrying on, or even to commencing, the business of banking, but "to its organization," that is to say, such as is requisite to complete its organization as a corporation, which might doubtless include electing directors and officers, receiving subscriptions and payments for shares, procuring a corporate seal, and a book for recording its proceedings, temporarily hiring a room, and contracting any small debts incidental to the completion of its organization.

To take a lease is certainly to "transact business," within the meaning of the statute; and a lease for a term of years, at a large rent, of offices to be occupied by the bank "as a banking office, and for no other purpose," however necessary it might be for the transacting, or even for the commencing, of banking business by a corporation whose organization had been completed, and which had been lawfully authorized to commence the business of banking, is in no sense incidental or necessarily preliminary to the organization of the corporation.

The provision of section 5190, that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate," refers to its "usual business," after obtaining the certificate from the Comptroller; and to "the place," that is, the city or town, in which, after it has been authorized by the Comptroller's certificate to commence its business of banking, its "office or banking house" is located.

The lease sued on, therefore, was clearly prohibited by the very terms of the statute from which the association assumed to derive its power to execute the lease.

The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this court

has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. *Pearce* v. *Madison & Indianapolis Railroad*, 21 How. 441; *Pittsburgh &c. Railway* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 48.

When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter, and of the general laws restricting or defining the powers of the corporation. *Pearce* v. *Madison & Indianapolis Railroad*, above cited; *Zabriskie* v. *Cleveland &c. Railroad*, 23 How. 381, 398; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 290, 630. In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation. *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1, 25; *Central Transportation Co.* v. *Pullman's Car Co.*, above cited.

It is settled by a long series of decisions of this court, that a lease of a railroad by one railroad corporation to another, which is beyond the corporate powers of either, is unlawful and void, and cannot be made good by ratification or estoppel, so as to sustain an action upon the lease; that this is so, not only when the lease is *ultra vires* of the lessor corporation, and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration upon which it received its charter from the State; but even if the lease is *ultra vires* of the lessee corporation only, and therefore not open to that particular

objection. *Thomas* v. *Railroad Co.*, *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, *Oregon Railway* v. *Oregonian Railway*, and *Central Transportation Co.* v. *Pullman's Car Co.*, above cited; *St. Louis &c. Railroad* v. *Terre Haute & Indianapolis Railroad*, 145 U. S. 393, 404.

The case at bar is no less clear than those just referred to. Congress, indeed, in establishing the system of national banks, instead of undertaking to grant special charters of incorporation upon its own judgment of the expediency of doing so in each case, has allowed corporations to be organized by voluntary acts of the associates, under the general conditions defined in the statute. But the capacity of these voluntary associations to make contracts and to transact business has not been left to depend upon their own will, however formally expressed, without any public authority having ever passed upon their responsibility and fitness. On the contrary, Congress has entrusted to the Comptroller of the Currency the power and the duty of making a careful examination into the condition of the association, including the amount of its capital stock actually paid in, and its compliance with the requirements of the statute in other respects, and, if the result of his examination is satisfactory, of granting to the association an official certificate that it is authorized to commence the business of banking; and has forbidden the corporation to transact any business whatever, except so far as required to perfect its organization, until it has received the certificate of the Comptroller.

The result of the Comptroller's examination, and his certificate of that result, and of the authority thereupon granted the corporation to commence the business of banking, of course appear on the records of his office, as do the articles of association and the organization certificate previously transmitted to him. Every one dealing with the corporation is bound to take notice of the facts thus appearing on a public record, upon which, by the very terms of the National Bank Act, depend the right of the association to exist as a corporation, and its capacity to transact business.

The Comptroller's examination and certificate are required,

not only for the security of those dealing with the bank, but also for the protection of the stockholders, for, without them, stockholders who had paid in the amount of their subscriptions might find themselves held liable for debts contracted by the corporation, without its having obtained the payments due from other stockholders, and otherwise complied with the requirements of the act.

One important object of Congress, in requiring the fitness of each corporation for carrying on business, with safety to its stockholders and to all persons dealing with it, to be ascertained and certified by a public officer before the corporation should have power to transact any business whatever, except to complete its organization as a corporation, doubtless was to create and maintain public confidence in the new system of national banks established by Congress to take the place of the local banks to which the people had been accustomed.

The cases on which the plaintiff principally relied are distinguishable in essential elements from the case at bar. *Whitney* v. *Wyman*, 101 U. S. 392; *Harrod* v. *Hamer*, 32 Wisconsin, 162; and *Hammond* v. *Straus*, 53 Maryland, 1, depended on provisions of local statutes, differing from those of the National Bank Act; and in *Whitney* v. *Wyman*, the corporation, after being authorized to commence business, had ratified the previous contract. *Chubb* v. *Upton*, 95 U. S. 665, was to the familiar point that one who has contracted with a *de facto* corporation cannot set up irregularity in its organization in defence of a suit upon the contract. *Smith* v. *Sheeley*, 12 Wall. 358, merely held that when land had been conveyed for full value to a *de facto* corporation, the grantor and those claiming under him could not afterwards deny its capacity to take the title. *National Bank* v. *Matthews*, 98 U. S. 621, and *National Bank* v. *Whitney*, 103 U. S. 99, depended upon section 5137 of the Revised Statutes, specifying the purposes for which a national bank might purchase, hold and convey real estate, which, as construed by the court, did not make void mortgages taken for other purposes by a banking association authorized to transact business. See also *Fritts* v. *Palmer*, 132 U. S. 282, 293, and cases cited; *Thompson* v. *St. Nicholas Bank*, 146 U. S. 240, 251.

Syllabus.

The present case is not one of irregularity of organization, or of abuse of a legal power, but of an attempt to exercise a power expressly prohibited by statute.

The lease sued on having been executed by the defendant, contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever, except in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed. *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 54–61; *Logan County Bank* v. *Townsend*, 139 U. S. 67.

The plaintiff, who by the judgment below has recovered rent at the rate stipulated in the lease for all the time of the defendant's occupation, as well as all that the defendant had agreed to pay towards the repairs, has certainly no ground of complaint; and the defendant, not having sued out a writ of error, is in no position to object to the amount recovered.

Judgment affirmed.

SWAIM *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 33. Argued January 7, 1897. — Decided March 1, 1897.

It is within the power of the President, as commander-in-chief, to convene a general court-martial, even when the commander of the accused officer to be tried is not the accuser.

A charge was made by letter against an officer in the army; the letter was referred to a court of inquiry to investigate; on the receipt of its report charges and specifications against him were prepared by order of the Secretary of War; and the President thereupon appointed a court-martial to pass upon the charges. *Held*, that such routine orders did not make the President his accuser or prosecutor.

In detailing officers to compose a court-martial the presumption is that the President acts in pursuance of law; and its sentence cannot be collater-

ally attacked by going into an inquiry, whether the trial by officers inferior in rank to the accused was or was not avoidable.

When a court-martial has jurisdiction of the person accused and of the offence charged, and acts within the scope of its lawful powers, its proceedings and sentence cannot be set aside by the civil courts.

The action of the President in twice returning the proceedings of the court-martial, urging a more severe sentence, was authorized by law; and a sentence made after such action, and in consequence of it, was valid.

When an officer in the army is suspended from duty, he is not entitled to emoluments or allowances.

On February 23, 1891, David G. Swaim filed in the Court of Claims a petition against the United States, alleging that he was on the 30th day of June, 1884, and still was, judge advocate-general of the army of the United States, with the rank, pay and allowance of a brigadier-general therein. He complained that, by reason of the unlawful creation and action of a certain court-martial, he had been, on February 24, 1885, suspended from rank and duty for twelve years, and that one half of his pay had been forfeited for that period. For reasons set forth in the petition, the claimant asked that the proceedings, findings and sentence of the said court-martial should be declared to be void, and that judgment should be rendered, awarding him the amount of his pay and allowances retained in pursuance of the said sentence.

The Court of Claims made, upon the evidence, certain findings of fact, and, on the 27th day of February, 1893, entered a final judgment dismissing the claimant's petition. 28 C. Cl. 173. From that judgment an appeal was taken to this court.

Mr. Benjamin Butterworth (on whose brief was *Mr. Julian C. Dowell*) and *Mr. J. H. Gillpatrick* for appellant.

Mr. Attorney General for appellees.

Mr. Justice Shiras, after making the foregoing statement, delivered the opinion of the court.

The theory of the claimant's petition was that the sentence

of the court-martial was void, and hence constituted no defence to his action for his retained pay.

It was said by this court in *Dynes* v. *Hoover*, 20 How. 65, 82, that "with the sentences of courts-martial which have been convened regularly, and have proceeded regularly, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation have been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."

Keyes v. *United States*, 109 U. S. 336, was, like the present, a suit in the Court of Claims to recover back pay alleged to have been wrongfully retained by reason of an illegal judgment of a court-martial, and the rule was laid down thus: "That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence must be held valid when it is questioned in this collateral way," but "where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."

In *Smith* v. *Whitney*, 116 U. S. 167, these cases were cited with approval, and numerous other decisions, both English and American, were cited to the same effect. We shall have occasion to revert to this case at a subsequent portion of this opinion when examining some of the objections urged to the action of the court-martial.

With these general principles in view we shall now briefly consider the several contentions urged on behalf of the appellant.

The first of these challenges the authority of the President

of the United States to appoint the general court-martial in question. The argument is based on the phraseology of the seventy-second article of war, contained in section 1342 of the Revised Statutes, as follows:

"Any general officer, commanding the army of the United States, or separate army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case."

It is claimed to be the legal implication of this section that the power of the President to appoint a court-martial is restricted to the single case where the commander of an officer charged with an offence is himself the accuser or prosecutor, and that, as in the present case, General Sheridan, the immediate commander of the appellant, was not the accuser or prosecutor, the right of the President to make the order convening the court-martial did not arise. In other words, the contention is that in the seventy-second article of war, just quoted, is found the only power of the President, as commander-in-chief of the armies of the United States, to appoint a general court-martial.

This view of the President's powers, in this particular, was asserted in *Runkle's case*, 19 C. Cl. 396, 409, but was not approved by the Court of Claims, which held that when authority to appoint courts-martial was expressly granted to military officers, the power was necessarily vested in the commander-in-chief, the President of the United States. Chief Justice Drake, after quoting from writers on military law in support of the statement that the authority of the President to appoint general courts-martial, had, in fact, been exercised from time to time from an early period, said:

"As commander-in-chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers

to assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by the articles of war. If this power could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department commander — as, for example, a large proportion of the officers of the general staff, and the whole body of the retired officers."

On appeal, the judgment of the Court of Claims was reversed by this court on the sole ground that the record did not disclose that the sentence of the court-martial had been approved by the President, as prescribed in express terms by the seventy-second article of war. As this court, in its opinion, did not think fit to notice or discuss the question of the power of the President to appoint the court-martial, the case must be deemed an authority for the proposition that the court-martial had been properly convened by the order of the President as commander-in-chief.

It may be interesting to notice, as part of the history of this question, that the Senate of the United States, by a resolution adopted February 7, 1885, directed its Committee on the Judiciary to report, among other things, whether, under existing law, an officer may be tried before a court-martial appointed by the President in cases where the commander of the accused officer to be tried is not the accuser, and that the committee, after an examination of the question, expressed its conclusions in the following language:

"Under the present Constitution, when, for the first time in 1806, Congress enacted a code on the subject, it changed the imperative language of the articles of war existing under the confederation, and simply provided that any general officer commanding an army, etc., may appoint general courts-martial, thus evidently intending to confer an authority, and not to exclude the inherent power residing in the President of the United States under the Constitution. The substance of this provision has been in force ever since, and from the formation of the Constitution until the present time the com-

mittee is advised that the President of the United States has, at all times, when in his opinion it was expedient, constituted general courts-martial.

"In this state of the history of legislation and practice, and in consideration of the nature of the office of commander-in-chief of the armies of the United States, the committee is of opinion that the acts of Congress which have authorized the constitution of general courts-martial by an officer commanding an army, department, etc., are, instead of being restrictive of the power of the commander-in-chief, separate acts of legislation, and merely provide for the constitution of general courts-martial by officers subordinate to the commander-in-chief, and who, without such legislation, would not possess that power, and that they do not in any manner control or restrain the commander-in-chief of the army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised."

Without dwelling longer on this question, we approve the conclusion reached by the Court of Claims, that it is within the power of the President of the United States, as commander-in-chief, to validly convene a general court-martial even where the commander of the accused officer to be tried is not the accuser.

The contention that the President of the United States was, in the present case, the accuser or prosecutor of the appellant, within the meaning of the seventy-second article of war, is, we think, wholly unfounded. The accusation was made by one A. E. Bateman, in a letter addressed to the Secretary of War, dated April 16, 1884. Thereupon, on April 22, 1884, the President appointed a court of inquiry to examine into the accusations made in the letter of Bateman to the Secretary of War. Upon the report of the court of inquiry, by order of the Secretary of War, the subject was referred to Major R. N. Scott, with directions to prepare charges and specifications against General Swaim; and on June 30, 1884, the President appointed the general court-martial which pro-

ceeded to hear and pass upon the charges and specifications. It is not seen how these routine orders which led to the trial of the appellant can be construed as making the President his accuser or prosecutor.

It is next contended that, even if the court-martial in the present case were validly convened by the order of the President, yet that it was constituted in violation of the seventy-ninth article of war, which provides that "officers shall be tried only of general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank."

It appears that a majority of the court-martial as organized for the trial was composed of colonels, officers inferior in rank to the appellant, whose rank was that of brigadier-general; and it is argued that the record does not affirmatively disclose that the appointment of officers inferior in rank to the accused was unavoidable by reason of some necessity of the service.

In *Martin* v. *Mott*, 12 Wheat. 19, 34, 35, it was contended that, where the articles of war provided that "general courts-martial may consist of any number of commissioned officers from five to thirteen inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service"; and where the court-martial in question consisted of six officers only, the court was not legally formed, because the government's pleading in the case did not affirmatively show that thirteen officers could not have been appointed "without manifest injury to the service."

Replying to this, the court, through Mr. Justice Story, said:

"Supposing these claims applicable to the court-martial in question, it is very clear that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being a matter submitted to his sound discretion, must be conclusive."

In *Mullan* v. *United States*, 140 U. S. 240, 245, the case was one where Mullan sued in the Court of Claims to recover pay as commander in the navy accruing after he had been dismissed by the sentence of a court-martial, which sentence was

alleged to be void, because the court was illegally formed, in that five of its seven members were junior in rank to the accused, the thirty-ninth article for the government of the United States navy providing that in no case, where it can be avoided without injury to the service, shall more than one half, exclusive of the president, be junior to the officer to be tried. But this court, through Mr. Justice Harlan, said: "Whether the interests of the service admitted of a postponement of the trial until a court could be organized of which at least one half of its members, exclusive of the president, would be his seniors in rank, or whether the interests of the service required a prompt trial upon the charges preferred, by such officers as could then be assigned to that duty by the commander-in-chief of the squadron, were matters committed by the statute to the determination of that officer. And the courts must assume — nothing to the contrary appearing upon the face of the order convening the court — that the discretion conferred upon him was properly exercised, and, therefore, that the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided 'without injury to the service,'" citing *Martin* v. *Mott*, 12 Wheat. 19.

In the present case, several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance, or the injury to the public interests by detaching officers from their stations. The presumption must be that the President, in detailing the officers named to compose the court-martial, acted in pursuance of law. The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.

Error is assigned to the Court of Claims in overruling an exception to the action of the court-martial in permitting, after objection made, an officer to sit on the trial whom the appellant, in the performance of his official duty, on several occasions severely criticised in official reports, and whose enmity and dislike had been thereby incurred. This error

is sufficiently disposed of by quoting the provisions of the eighty-eighth article of war: "Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time." The decision of the court-martial in determining the validity of the challenge could not be reviewed by the Court of Claims in a collateral action.

Objections were made to the action of the court-martial in permitting a person to act as judge advocate who was not appointed by the convening officer of the court-martial, nor sworn to the faithful performance of his duty, in receiving oral and secondary evidence of an account when books of original entry were available; in receiving evidence to implicate the accused in signing false certificates relating to money which formed no part of the subject-matter of the charges on trial; in refusing to permit evidence as to the bad character of a principal witness for the prosecution; in refusing to hear the testimony of a material witness for the defence.

It was the opinion of the Court of Claims that the errors so assigned could not be reviewed collaterally, and that they did not affect the legality of the sentence; and in so holding we think that court followed the authorities. Such questions were merely those of procedure, and the court-martial having jurisdiction of the person accused and of the offence charged, and having acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts. *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Reed*, 100 U. S. 13; *Smith* v. *Whitney*, 116 U. S. 167; *Johnson* v. *Sayre*, 158 U. S. 109.

It is strongly urged that no offence under the sixty-second article of war was shown by the facts, and that the Court of Claims should have so found and have held the sentence void. If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the articles of war.

But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith* v. *Whitney*, 116 U. S. 178, "of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. . . . Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business."

In *United States* v. *Fletcher*, 148 U. S. 84, will be found observations to the same effect.

It is earnestly contended that upon the fourteenth finding of the Court of Claims it was the duty of that court to set aside the sentence. That finding was as follows:

"The court-martial having reached a finding and having thereupon sentenced claimant upon the charges promulgated, in the said general court-martial orders, No. 19, and the reviewing officer having referred to the court for trial another set of charges alleging fraud and conduct unbecoming an officer and a gentleman, under the sixtieth and sixty-first articles of war, as promulgated in general court-martial orders, No. 20, of 1885, and the court-martial having heard all the evidence for the prosecution therein (except an absent witness, but with a statement as to what such witness would testify to), thus making a *prima facie* case against claimant, and he not having presented a defence, the reviewing authority returned the case promulgated in said court-martial orders, No. 19, to the court for reconsideration and a more severe sentence, with an opinion of the Attorney General hereinbefore set forth, which proceedings were with closed doors, and of which claimant had no notice at the time."

In order to apprehend the legal effect of this finding we should read a portion of the history of the case as stated in the opinion of the Court of Claims:

"The question of fraud being out of the case, and the court-martial having properly acquitted the claimant on the charge of conduct unbecoming an officer and a gentleman, imposed this sentence: 'To be suspended from rank, duty and pay for the period of three years.' The record then went to the President and was by him referred to the Attorney General. On the 11th of February, 1885, the President returned the record to the court-martial 'for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be commensurate with the offences as found by the court in the first and third specifications under the first charge.' The President also communicated to the court the opinion of the Attorney General, 'whose views,' he added, 'upon the matter submitted for reconsideration have my concurrence.'

"The court-martial adhered to its determination that the facts found did not constitute the offence charged, but imposed a second sentence upon the accused, the language of which is as follows: 'The court, upon mature reconsideration, has not found the accused guilty of such degree of wrongful or deceitful conduct as to justify a finding of guilty of conduct unbecoming an officer and a gentleman, and has therefore respectfully adhered to its findings upon the first charge.' But the court imposed the following sentence: 'To be suspended from rank and duty for one year, with forfeiture of all pay for the same period, and at the end of that period to be reduced to the grade of judge advocate with the rank of major in the judge advocate-general's department.' This sentence the President likewise disapproved, because, as he thought, that part of the sentence that provided that the accused should be reduced in rank could not be carried into effect by the executive alone, but would require a nomination by the President and confirmation by the Senate, and then only in case of an existing vacancy.

"The court a third time deliberated, and then imposed the

sentence which was approved by the President and carried into effect, and which the claimant now attacks. It is 'to be suspended from rank and duty for twelve years and forfeit one half his monthly pay every month for the same period.'"

It is claimed that the action of the President in thus twice returning the proceedings to the court-martial, urging a more severe sentence, was without authority of law, and that the said last sentence having resulted from such illegal conduct was absolutely void. This contention is based upon the proposition that the provision in the British Mutiny Act, which was in force in this country at the time and prior to the American Revolution, and which regulates proceedings in courts-martial, is applicable. This provision was as follows: "The authority having power to confirm the findings and sentence of a court-martial, may send back such findings and sentence, or either of them, for revision once, but not more than once, and it shall not be lawful for the court on any revision to receive any additional evidence, and when the proceedings only are sent back for revision the court shall have power, without any direction, to revise the sentence also. In no case shall the authority recommend the increase of a sentence, nor shall the court-martial, on revisal of the sentence, either in obedience to the recommendation of the authority or for any other reason, have the power to increase the sentence awarded."

Even if it be conceded that this provision of the British Mutiny Act was at any time operative in this country, the subject is now covered by the Army Regulations, 1881, section 923, relied upon by the Attorney General in his letter to the President and cited by the Court of Claims, which is as follows:

"When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford it

an opportunity to reconsider the record for the purpose of correcting or modifying any conclusions thereupon, and to make any amendments of the record necessary to perfect it."

This regulation would seem to warrant the course of conduct followed in the present case. In *Ex parte Reed*, 100 U. S. 13, a somewhat similar contention was made. There a court-martial had imposed a sentence which was transmitted with the record to Admiral Nichols, the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court revised the sentence and substituted another and more severe sentence, which was approved. The accused filed a petition for a writ of *habeas corpus* in this court; and it was claimed that the court had exhausted its powers in making the first sentence, and, also, that it was not competent for the court-martial to give effect to the views of the revising officer by imposing a second sentence of more severity. The Navy Regulations were cited to the effect that the authority who ordered the court was competent to direct it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed, but that it was not within the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial.

This court held that such regulations have the force of law, but that as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority; that the matters complained of were within the jurisdiction of the court-martial; that the second sentence was not void; and, accordingly, the application for a writ of *habeas corpus* was denied. We agree with the Court of Claims that the ruling in *Ex parte Reed*, in principle, decides the present question.

We think that the Court of Claims did not err in hold-

ing that where an officer is suspended from duty he is not entitled to emoluments or allowances. *United States* v. *Phisterer*, 94 U. S. 219.

We have felt constrained to, at least briefly, consider the several propositions urged upon us with so much zeal and ability on behalf of the appellant, though we might well have contented ourselves with a reference to the able and elaborate opinion of the Court of Claims delivered by Justice Nott. 28 C. Cl. 173.

As we have reached the conclusion that the court-martial in question was duly convened and organized, and that the questions decided were within its lawful scope of action, it would be out of place for us to express any opinion on the propriety of the action of that court in its proceedings and sentence. If, indeed, as has been strenuously urged, the appellant was harshly dealt with, and a sentence of undue severity was finally imposed, the remedy must be found elsewhere than in the courts of law.

The decree of the Court of Claims is

Affirmed.

DE VAUGHN *v.* HUTCHINSON.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 114. Argued October 30, 1896. — Decided March 1, 1897.

This court looks to the law of the State in which land is situated for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances; and in the District of Columbia those rules are the rules which governed in Maryland at the time when the District was separated from it.

Under a will devising real estate in the District of Columbia to M. A. M. during her natural life, and after her death to be equally divided among the heirs of her body begotten, share and share alike, and to their heirs and assigns forever, M. A. M. takes a life estate only, and her children take an estate in fee.

Samuel De Vaughn, a resident of the District of Columbia, died on the 5th day of July, 1867, leaving a last will and

testament dated April 20, 1861. This will was admitted to probate September 1, 1867, and was, as to those of its provisions which are involved in the present litigation, as follows:

"I give and bequeath unto my sister, Susan Brayfield, all my personal property of whatever description.

"Item. I give and devise unto my sister Susan Brayfield the whole square four hundred and eighty-three and improvements, also lots twenty, twenty-one and part of lot twenty-two in square three hundred and seventy-eight, situated in the city of Washington, during her natural life, and at her death to her daughters Mary Rebecca Brayfield, Catharine Sophia Harrison and Martha Ann Mitchell, to be divided in the following manner, that is to say: Martha Ann shall have one half of lot twenty, as subdivided, being seventy-three feet deep, having on the same two houses. To Catharine Sophia, the other half (being the east half) of said lot twenty, having also on the same two houses, and Mary Rebecca shall have the corner store situated on lot twenty-one. Catharine Sophia shall have the two houses next south of said corner store on said lot twenty-one, and Martha Ann shall have the next two houses south of the two to Catharine Sophia, and adjoining the same on said lot twenty-one, and Mary Rebecca shall have the whole of that part of lot twenty-two, as subdivided from lot twenty and improvements, during their natural lives, and after their death to their heirs begotten of their bodies, and to their heirs and assigns forever.

"I also desire that square four hundred and eighty-three shall be subdivided at the death of my sister Susan Brayfield, and distributed as follows: Mary Rebecca Brayfield shall have the whole front on K street, ninety feet deep to a ten-foot alley, which comprises lots one and two, with all improvements on the same. Martha Ann Mitchell shall have ninety feet on Sixth street, running that breadth through the square to Fifth street, and Catharine Sophia Harrison shall have the remainder north portion of said square four hundred and eighty-three, during their natural lives, and at their death to be equally divided among the heirs of their bodies begotten, share and share alike, and to their heirs and assigns forever.

"Item. I give and devise to Mary Rebecca Brayfield the east part of lot nineteen, in square three hundred and seventy-eight, and all improvements on said lot, front and rear, during her natural life, and after her death to her heirs and assigns forever.

"Item. I give and devise to Catharine Sophia Harrison the east part of lot seventeen, in square three hundred and seventy-eight, including all improvements, and also that part as subdivided in the rear in said square, during her natural life, and after her death to the heirs of her body begotten, and to their heirs and assigns forever.

"Item. I give and devise to Martha Ann Mitchell, daughter of Susan Brayfield, the west part of lot eighteen in square three hundred and seventy-eight, and all improvements, including that part as subdivided in the rear on said square, and to her heirs and assigns forever.

"I give and bequeath to my mother during her natural life, out of the rents of lots No. twenty, twenty-one and part of twenty-two, in square three hundred and seventy-eight, and also the whole of square four hundred and eighty-three, devised to my sister Susan Brayfield, the sum of twenty-five dollars per month; or, if properly provided for by my said sister, then only five dollars per month for her own use as she may think proper.

"Item. I give and devise to my brother John De Vaughn, in square four hundred and eight, lot D and parts of lots five in square four hundred and five, and lot two in square four hundred and eighty-seven, and all improvements, also lot eleven in square five hundred and seventeen, lots four and five *in square four and five* in square seven hundred and eighty-five, and to his heirs and assigns forever. All of which property is situated in the city of Washington, District of Columbia.

"Item. I give and devise to my brother William De Vaughn, of the city of Alexandria, State of Virginia, lot three in square one thousand and ninety-five, lot one in square six hundred and seventy-seven, lot four in square forty-four, lot two in square one hundred and twenty-nine. Also lots B, C, D, F and G in square forty-three, all lying and being in the city

of Washington and District of Columbia, also the house and lot on Henry street in the city of Alexandria, State of Virginia, and to his heirs and assigns forever."

Martha Ann Mitchell, one of the devisees named in the will, died in the year 1866, before the death of the testator, Samuel De Vaughn, leaving as her only children and heirs at law Benjamin D. Mitchell, Richard R. Mitchell and Sarah W. Hutchinson. Mrs. Susan Brayfield, the tenant for life, died in December, 1891.

In May, 1892, James H. De Vaughn, Emily De Vaughn and Rebecca J. Kirk, as heirs at law of Samuel De Vaughn, brought, in the Supreme Court of the District of Columbia, a bill in equity against William H. De Vaughn and others, also heirs at law of Samuel De Vaughn. The purpose of the bill was to have a declaration that by reason of the decease of Martha Ann Mitchell during the lifetime of the testator the devise to her lapsed and became void, and that thereupon, upon the death of the testator and of Susan Brayfield, the real estate described in said devises became vested in the heirs at law of the said testator as if the said testator had died intestate as to said real estate; and, upon such declaration, that the said real estate should be sold and the proceeds of such sale should be distributed among the parties lawfully entitled thereto as heirs at law of the said Samuel De Vaughn.

To this bill appeared Benjamin D. V. Mitchell and others, the children of the said Martha Ann Mitchell, who were living at the death of the said testator, and who filed a demurrer to said bill. Upon argument in the Supreme Court of the District of Columbia, the demurrer was sustained, and, the complainants electing to stand on their said bill, a final decree was entered, dismissing the bill and awarding an account of rents and profits.

From this decree an appeal was taken to the general term, but the cause was thereafter transferred to and heard in the Court of Appeals of the District of Columbia, and on April 2, 1894, the decree of the Supreme Court was affirmed. From the decree of the Court of Appeals an appeal was duly prayed and allowed to this court.

Mr. H. O. Claughton for appellants. *Mr. Chapin Brown* was on his brief.

Mr. Jeremiah M. Wilson for appellees. *Mr. A. A. Hoehling, Jr.*, was on his brief.

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

It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McGoon* v. *Scales*, 9 Wall. 23; *Brine* v. *Insurance Co.*, 96 U. S. 627.

Accordingly, in the present case, we are relieved from a consideration of the innumerable cases in which the courts in England and in the several States of this Union have dealt with the origin and application of the rule in *Shelley's case.* We have only to do with that famous rule as expounded and applied by the courts of Maryland while the land in question formed part of the territory of that State, and to further inquire whether, since the cession of the lands forming the District of Columbia, there has been any change in the law by legislation of Congress.

We learn from the reported cases that the rule, as established in the jurisprudence of England before the American Revolution, was introduced into Maryland as part of the common law, and has been constantly recognized and enforced by the courts of that State. *Horne* v. *Lyeth*, 4 Har. & Johns. 431; *Ware* v. *Richardson*, 3 Maryland, 505; *Shreve* v. *Shreve*, 43 Maryland, 382; *Dickson* v. *Satterfield*, 53 Maryland, 317; *Halstead* v. *Hall*, 60 Maryland, 209.

But we also learn from those cases and other Maryland cases that might be cited, that though the rule is recognized as one of property, yet if there are explanatory and qualifying expressions, from which it appears that the im-

port of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail.

Thus in the case of *Shreve* v. *Shreve*, 43 Maryland, 382, where there was a devise to named children of the testator, for and during their natural lives, and on the death of said children, or either of them, to his or her issue lawfully begotten, and their heirs or assigns forever, it was held that the word *issue* used in the clause cited was a word of purchase; and in the opinion it was said: "Again, there are words of limitation superadded to the gift to the issue; it is to them and *their heirs* forever. Now in the well-known case of *Luddington* v. *Kime*, 1 Ld. Raym. 203, the devise was in very nearly the same terms, viz., to A for life without impeachment of waste, and in case he should leave any *issue* male, then to such *issue* male and *his heirs* forever, with a limitation over in default of such issue, and the court held the testator intended the word *issue* should be *designatio personæ*, and not a word of limitation, '*because he added a further limitation to the issue*, viz., *and to the heirs of such issue forever*.' The principle deduced from this case is thus stated in Cruise's Digest, vol. 6, (3d Am. ed.) page 259: 'Where an estate is devised to a person for life, with remainder to his issue, with words of limitation added, the word "issue" will in that case be construed to be a word of purchase.'"

The court, in *Shreve* v. *Shreve*, 43 Maryland, 382, 397, took notice of the fact that the case of *Luddington* v. *Kime* has been doubted, particularly by Powell in his learned work on Devises, but the Maryland court adds:

"But these views (of Powell) do not appear to have been adopted at least by the most recent English decisions, for in *Golder* v. *Cropp*, 5 Jurist, N. S. 562, where a testator devised property to his daughter for life, and after her death to the issue of her body lawfully begotten, to hold to them and their heirs forever as tenants in common, and in default of such issue then over, it was held, the daughter took but a life estate. That case was decided by Sir J. Romilly, M. R.; and his opinion is thus briefly and emphatically expressed: 'I have always considered that where an estate is given to

the ancestor, and there is a direction that it is afterwards to go to the issue of his body, and the mode in which the issue are to take is specified, with words added giving them the absolute interest, there the ancestor takes an estate for life and not an estate tail, although there is a devise over in the event of the ancestor not having any issue. No one can doubt that the word *issue* is here used as equivalent to *children*. I am of opinion the daughter takes an estate for life, and that her issue take as purchasers an estate in fee simple as tenants in common.'

"So in the still more recent case of *Bradly* v. *Cortwright*, L. R. 2 C. P. 511, it was held that where an estate is given for life and the remainder to the issue is accompanied by words of distribution and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life; and that, whether the estate is given in fee to the issue by the usual technical words, heirs of the body, or by implication.

"It may be stated by Mr. Powell, that subsequent decisions in England have in effect overruled *Luddington* v. *Kime*, and that at the present time the will before us would receive a different construction in the English courts, but we have been referred to no decision in this country, nor are we aware of any, in which that case has been overruled or its authority questioned. It is, with others, cited by Chancellor Kent, as authority for the position that where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate, the case will be withdrawn from the operation of the rule. 4 Kent's Com. 221. It meets an approving reference in the very able opinion of Yeates, J., in *Findlay* v. *Riddle*, 3 Binney, 156, where there was a devise to it for life, and if he died leaving lawful issue, to his heirs as tenants in common and their respective heirs and assigns, and the court held that A took only an estate for life with a contingent remainder to his heirs.

"But what is more important to the decision of this case is the fact that the doctrine of *Luddington* v. *Kime*, and other

similar cases, has been repeatedly recognized and approved by the courts of this State. Thus in *Horne* v. *Lyeth*, 4 H. & J. 435, a case which Chancellor Kent cites as containing a learned and accurate exposition of the rule under all its modifications and exceptions, we find an exception to its operation thus stated: 'So where the persons to take cannot take as heirs by the description by reason of a distributive direction incompatible with a course of descent, as where gavelkind lands were devised to A and the heirs of her body lawfully to be begotten, as well males and females, and to their *heirs and assigns forever*, to be equally divided between them, share and share alike as tenants in common and not as joint tenants; in this case it was held that the words heirs of the body did not operate as words of limitation because they were corrected or explained by the words which followed, and were irreconcilable with the notion of descent, and *also because there were words of fee engrafted in the words of limitation*, which showed that the estates given to the children and not the estate of A were to be the groundwork of succession of heirs, or in other words that the children of it were to be the *termini* for the succession to take its course from.'

"Again, in *Lyles* v. *Diggs*, 6 H. & J. 373, we find approval of *Backhouse* v. *Wells* (another case that Mr. Powell insists has been overruled in England), in reference to which the court say: 'The devise was to one for life, and after his decease to the issue male of his body, and to the heirs male of the bodies of such issue, and the first taker was held to have only an estate for life, the word *issue* not being *ex vi termini* a word of limitation, and the words of limitation grafted upon it, as in this case, showing that it was used as a word of purchase and as descriptive of the person who was to take the estate tail.'

"In *Chelton* v. *Henderson*, 9 Gill, 432, the testator devised land to his son for life, and if he should have lawful issue of his body, then such issue, after the son's death, to have the land in fee tail, and if the son died without such issue, then over, and it was held that the son took but a life estate. In the opinion prepared by Judge Magruder in that case, which

is reported in a note to *Simpers* v. *Simpers*, 15 Maryland, 191, he says: 'In the case now to be decided there are words superadded to the word issue quite sufficient to give them the inheritance, and the law is, that where an estate is devised to a person for life, with remainder to his issue, with words of limitation superadded, the word issue will, in that case, be construed to be a word of purchase, which is the doctrine of *Luddington* v. *Kime*, cited from Cruise's Digest.' . . .

"After this repeated and recent recognition by our predecessors of this rule of construction derived from *Luddington* v. *Kime*, and other like cases in the earlier English reports, we are constrained to hold that it applies to and governs that part of that clause of this will, which we have thus far considered, even though we may be of opinion a different construction would be given to it by the courts of England. Having thus determined the word issue is here used as a word of purchase, it is clear it must bear the same construction when used in the immediately following sentence, 'and if any of said children shall die without issue lawfully begotten, I give, devise and bequeath his or her portion to the surviving child or children and their issue and to the heirs of said issue forever.' In other words, the portion given to each child for life, goes in case he dies without leaving children in the same way as the original share, that is, to the surviving children for life, and upon their death to their issue in fee."

We have extracted such large portions of the opinion in this case of *Shreve* v. *Shreve* because it plainly shows that the will before us in the present case would have been construed by the Supreme Court of the State of Maryland as creating a life estate only in Martha Ann Mitchell and an estate in fee in the heirs of her body begotten. It is true that the words in *Shreve* v. *Shreve* were *issue* lawfully begotten, but the case of *Horne* v. *Lyeth* (4 H. & J. 435) is approved, where the words "the heirs of her body lawfully to be begotten," were similarly construed.

In *Clark* v. *Smith*, 49 Maryland, 106, 117, the court, by Alvey, J., stated the rule as follows:

"It is a well-settled rule of construction, that technical

words of limitation used in a devise, such as 'heirs' generally, or 'heirs of the body,' shall be allowed their legal effect, unless, from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise. Or, to use the language of Lord Eldon, in *Wright* v. *Jesson*, 2 Bligh, 1, the words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expression showing the particular intent of the testator, but they must be clearly intelligible and unequivocal."

Though these decisions were made since the lands in question in this case became part of the District of Columbia, yet their reasoning is based upon the history of the law in Maryland ever since that State became independent, and we are therefore warranted in the conclusion that the law as laid down in the cited cases was the law when the State of Maryland ceded to the United States the territory now embraced in the city of Washington and District of Columbia.

It is not claimed that there has been any legislation by the Congress of the United States which has modified or changed the law in this particular as it was when the lands in question were subject to the law of Maryland.

Nor do we find that there has been any attempt by the courts of the District to lay down a different rule. What is the law of those courts we learn from the opinion of the Court of Appeals filed in this case, reported in *De Vaughn* v. *De Vaughn*, 3 D. C. App. 50, where the doctrine was thus stated:

"It is certainly a well-settled principle in the law of real property, indeed as well settled as the rule in *Shelley's case* itself, that where an estate is expressly devised to a person for life, with remainder to the *heirs of his body*, and there are words of explanation annexed to such word *heirs*, from whence it may be collected that the testator meant to qualify the meaning of the word *heirs*, and not to use it in a technical sense, but as descriptive of the person or persons to whom he intended to give his estate, after the death of the first devisee, the word *heirs* will, in such case, operate as word of purchase."

As this opinion was delivered by a judge who was but recently the chief justice of the Court of Appeals of Maryland, it may not be out of place to quote what he says respecting the law of that State:

"In the courts of Maryland, where the law of real property is supposed to be the same as that which prevails in this District, except as it may have been changed by positive legislation since the cession by that State, the same principle of construction has been fully recognized and applied in numerous cases. This will clearly appear upon examination of the cases of *Horne* v. *Lyeth*, 4 H. & J. 435; *Chelton* v. *Henderson*, 9 Gill, 432; *Shreve* v. *Shreve*, 43 Maryland, 382; *Fallon* v. *Harman*, 44 Maryland, 263; and *Clark* v. *Smith*, 49 Maryland, 117."

The case of *Daniel* v. *Whartenby*, 17 Wall. 639, was cited by the court below, and is discussed in the briefs of the respective counsel. The syllabus of the case is as follows:

"A testator gave his estate, both real and personal, to his son R. T., 'during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns forever.' In case R. T. should die without lawful issue, then, in that case, he devised the estate to his own widow and two sisters 'during the natural life of each of them, and to the survivor of them,' and after the death of all of them to J. W., his heirs and assigns forever; with some provisions in case of the death of J. W. during the life of the widow and sisters. *Held*, that the rule in *Shelley's case* did not apply, and that the estate in R. T., the first taken, was not a fee-tail, but was an estate for life, with remainder in fee to the issue of his body, contingent upon the birth of such issue, and in default of such issue remainder for life to his widow and two sisters, with remainder over in fee, after their death, to J. W."

This case came up on a writ of error to the Circuit Court of the United States for the District of Delaware, and it is noticeable that the reasoning of this court did not proceed upon the law as expounded by the courts of that State, but rather upon a general view of the English and American cases. Still, as the judgment of the Circuit Court was

affirmed, we may well suppose that the conclusion reached in this court was in conformity with the law as applied in the State of Delaware.

The rule extracted from the cases was thus stated by Mr. Justice Swayne:

"In considering it [the rule in *Shelley's case*] with reference to the present case a few cardinal principles, as well settled as the rule itself, must be kept in view. In construing wills, where the question of its application arises, the intention of the testator must be fully carried out, so far as it can be done consistently with the rules of law, but no further. The meaning of this is that if the testator has used technical language, which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule and cannot affect the result. But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

And, after examining the language used, the conclusion was thus expressed:

"We entertain no doubt that the testator intended to give a life estate only to Richard, and a fee simple to his issue, and that they should be the springhead of a new and independent stream of descents. We find nothing in the law of the case which prevents our giving effect to that intent."

We agree with the court below that the reasoning of the case of *Daniel* v. *Whartenby*, 17 Wall. 639, if applicable to the present case, would sustain the construction put upon the will of Samuel De Vaughn by the Supreme Court of the District.

But even if that case be regarded as declaratory only of the law of Delaware, its principles were followed and applied in the subsequent case of *Green* v. *Green*, 23 Wall. 486, involving the construction of a conveyance of lands situated in the District of Columbia, and where the cases of *Daniel* v. *Whar-*

tenby, 17 Maryland, 639, and *Ware* v. *Richardson*, 3 Maryland, 505, were both approved.

We, therefore, think it clear that, under the law as declared in the courts of Maryland and of the District of Columbia, Martha Ann Mitchell took a life estate only, and that her children took an estate in fee.

In the view that we have taken of the case we are not called upon to reinforce the reasoning of the cases cited, but we shall add a single observation, in application of Chancellor Kent's statement of an exception to the rule. 4 Kent's Com. (6th ed.) 221. The word "heirs," in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as "heirs." But the devise here was to Martha Ann for life, and at her decease to her heirs begotten of her body and to *their* heirs and assigns — a restricted class of heirs — and this limitation shows that it was the intention of the testator that Martha Ann's children should become the root of a new succession, and take as purchasers and not as heirs.

The decree of the court below is

Affirmed.

ALLGEYER *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 446. Submitted January 6, 1897. — Decided March 1, 1897.

The provision in act No. 66 of the Louisiana laws of 1894 that any person, firm or corporation . . . who in any manner whatever does an act in that State to effect, for himself or for another, insurance on property then in that State, in any marine insurance company which has not complied in all respects with the laws of the State, shall be subject to a fine, etc., when applied to a contract of insurance made in the State of New York, with an insurance company of that State, where the premiums were paid, and where the losses were to be paid, is a violation of the Constitution of the United States.

Hooper v. *California*, 155 U. S. 648, distinguished from this case; and it is further held that, by the decision in this case it is not intended to

Statement of the Case.

throw any doubt upon, or in the least to shake the authority of that case.

When or how far the police power of the State may be legitimately exercised with regard to such subjects must be left for determination in each case as it arises.

THE legislature of Louisiana, in the year 1894, passed an act known as act No. 66 of the acts of that year. It is entitled "An act to prevent persons, corporations or firms from dealing with marine insurance companies that have not complied with law."

The act reads as follows: "*Be it enacted by the General Assembly of the State of Louisiana*, That any person, firm or corporation who shall fill up, sign or issue in this State any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this State to effect, for himself or for another, insurance on property, then in this State, in any marine insurance company which has not complied in all respects with the laws of this State, shall be subject to a fine of one thousand dollars, for each offence, which shall be sued for in any competent court by the attorney general for the use and benefit of the charity hospitals in New Orleans and Shreveport."

By reason of the provisions of this act, the State of Louisiana on the 21st of December, 1894, filed its petition in one of the courts of first instance for the parish of Orleans, and alleged, in substance, that the defendants, E. Allgeyer & Co., had violated the statute by mailing in New Orleans a letter of advice or certificate of marine insurance on the 27th of October, 1894, to the Atlantic Mutual Insurance Company of New York, advising that company of the shipment of 100 bales of cotton to foreign ports in accordance with the terms of an open marine policy, etc. The State sought to recover for three violations of the act the sum of three thousand dollars.

The defendants filed an answer, in which, among other things, they averred that the above-named act was unconstitutional in that it deprived them of their property without due process of law, and denied them the equal protection of

the laws in violation of the constitution of the State of Louisiana and also of the Constitution of the United States. They also set up that the business concerning which defendants were sought to be made liable, and the contracts made in reference to such business, were beyond the jurisdiction of the State of Louisiana, and that the defendants were not amenable to any penalties imposed by its laws; that the contracts of insurance made by defendants were made with an insurance company in the State of New York, where the premiums were paid, and where the losses thereunder, if any, were also to be paid; that the contracts were New York contracts, and that under the Constitution of the United States the defendants had the right to do and perform any act or acts within the State of Louisiana which might be necessary and proper for the execution of those contracts, and that in so far as the act No. 66 of the general assembly of the State of Louisiana of the year 1894 might be construed to prevent or interfere with the execution of such contracts, the same was unconstitutional and in violation of the constitution of both the State of Louisiana and the United States.

The case was tried upon an agreed statement of facts, as follows: The Atlantic Mutual Insurance Company is a corporation, created by the laws of the State of New York and domiciled and carrying on business in that State, and the defendants made a contract with that company for an open policy of marine insurance for $200,000, on account of themselves, and to cover cotton in bales purchased and shipped by them on which drafts might be drawn for the purchaser, upon "Whom It Might Concern." By the terms of the policy, among other things it was stated: "Shipments applicable to this policy, to be reported to this company by mail or telegraph the day purchased, warranted not to cover cotton in charge of carriers on shore or during inland transportation. No risk is to be insured by this policy until a letter signed by ———, and addressed to the president of this company, detailing the name of the vessel, particulars of the shipment, with description of the property and amount to be insured, is deposited in the post office at———, which must be done

while the property is in good safety, and in all cases prior to the departure of the risk from ———; a duplicate of such letter to be sent by the following mail. A new and separate policy to be issued for each risk, the premium on which is to be paid in cash upon the delivery of such policy in New York to E. Allgeyer & Company."

The Atlantic Mutual Insurance Company is engaged in the business of marine insurance, and has appointed no agent in the State of Louisiana, and has not complied with the conditions required by the laws of that State for the doing of business within the same by insurance companies incorporated and domiciled out of the State.

On the 23d of October, 1894, the defendants mailed to that company a communication, stating insurance was wanted by defendants for account of same (the open policy); loss, if any, payable at Paris, in French currency, etc., for $3400 on 100 bales of cotton, which, at the time of the communication, were within the State of Louisiana. The premiums to be paid under the contract of insurance and the loss or losses under the same were payable in the city of New York, the premiums being remitted by the defendants from New Orleans by exchange.

Defendants are exporters of cotton from the port of New Orleans to ports in Great Britain and on the continent of Europe; they sell cotton in New Orleans to purchasers at said ports. For the price of every sale of cotton made by them they, in accordance with the general custom of business, draw a bill of exchange against the purchaser, attaching to the same the bill of lading for the cotton and an order on the Atlantic Mutual Insurance Company for a new and separate policy of insurance, spoken of in the open policy, and the form of the said order is as follows:

"Attached to draft No. —— on ——— from E. Allgeyer & Co., New Orleans, 189, to Atlantic Mutual Ins. Co., New York.

"Marks and numbers, ———.

"Please deliver to —— ——— or order special policy for

$—— on ——— bales cotton per ——— from New Orleans to ———.

"Respectfully,

(Signed) "E. Allgeyer & Co.,

"Per ——— ———."

This bill of exchange, with the bill of lading attached, is sometimes negotiated with banks in the city of New York; sometimes it is not negotiated at all, but forwarded direct for collection from the purchaser of the cotton. The bill of exchange, with bill of lading and order for insurance attached, in either case is sent from New Orleans first to New York, where, after its negotiation or before being forwarded from thence for collection, the order for insurance is presented to the Atlantic Mutual Insurance Company. Upon this showing the insurance company in New York issues and delivers to the holder of the exchange and bill of lading when the former has been negotiated, or to the agent of defendant when the exchange has not been negotiated, a new and a separate policy of insurance for the cotton, in accordance with the contract made with the defendants and evidenced by the policy above mentioned and described. This new and separate policy, when received, is attached to the bill of exchange. The exchange cannot be negotiated in New York unless it is accompanied by both the bill of lading and order for insurance, and unless the new and separate policy issued by the company is attached to it the purchaser of the cotton is under no obligation to pay the bill drawn on him for the price of the cotton. The new and separate policy delivered to the holder of the exchange and bill of lading in New York, or to defendants' agent there, as the case may be, is for the benefit of the holder of the latter, or of defendants, according as the exchange has been negotiated or not. The holder of the exchange becomes the owner of the cotton covered by the bill of lading attached and is the owner of the policy of insurance covering the same, in the event of a loss within the terms of the policy.

The business thus described is conducted as above by the general custom and agreement of all parties concerned.

The court of first instance before which the trial was had ordered that plaintiff's demand be rejected and that judgment in favor of the defendants be given. An appeal was taken from that judgment to the Supreme Court of the State, which, after argument before it and due consideration, reversed the judgment of the court below and gave judgment in favor of the plaintiff for $1000, as for one violation of the statute, being the only one which was proved. *State* v. *Allgeyer*, 48 La. Ann. 104. The plaintiffs in error ask a review in this court of the judgment entered against them by directions of the Supreme Court of Louisiana.

Mr. Branch K. Miller for plaintiffs in error.

Mr. M. J. Cunningham, Attorney General of the State of Louisiana, and *Mr. E. Howard McCaleb*, for defendant in error.

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

There is no doubt of the power of the State to prohibit foreign insurance companies from doing business within its limits. The State can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute. The cases upon this subject are cited in the opinion of the court in *Hooper* v. *California*, 155 U. S. 648.

A conditional prohibition in regard to foreign insurance companies doing business within the State of Louisiana is to be found in article 236 of the constitution of that State, which reads as follows: "No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the State, upon whom process may be served."

It is not claimed in this suit that the Atlantic Mutual Insurance Company has violated this provision of the constitution by doing business within the State.

In the *State of Louisiana* v. *Williams*, 46 La. Ann. 922, the Supreme Court of that State held that an open policy of marine insurance, similar in all respects to the one herein described, and made by a foreign insurance company, not doing business within the State and having no agent therein, must be considered as made at the domicil of the company issuing the open policy, and that where in such case the insurance company had no agent in Louisiana it could not be considered as doing an insurance business within the State.

The learned counsel for the State also admits in his brief the fact that the contract (*i.e.* the open policy) was entered into at New York City.

In the course of the opinion delivered in this case by the Supreme Court of Louisiana that court said:

"The open policy in this case is conceded to be a New York contract; hence the special insurance effected on the cotton complained of here was a New York contract.

"The question presented is the simple proposition whether under the act a party while in the State can insure property in Louisiana in a foreign insurance company, which has not complied with the laws of the State, under an open policy — the special contract of insurance — and the open policy being contracts made and entered into beyond the limits of the State.

* * * * *

"We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. We are concerned only with the fact of its having been entered into by a citizen of Louisiana while within her limits affecting property within her territorial limits. It is the act of the party, and not the contract, which we are to consider. The defendants who made the contract did so while they were in the State, and it had reference to property located within the State. Such a contract is in violation of the laws of the State, and the defendants who made it were within the jurisdiction of the State, and must be necessarily subject to its penalties, unless there is some inhibition in the Federal or state constitution, or that it violates one of those inalienable rights relat-

ing to persons and property that are inherent, although not expressed, in the organic law. It does not forbid the carrying on by the insurance company of its legalized business within the State. It is a means of preventing its doing so without subscribing to certain conditions which are recognized as legitimate and proper. It does not destroy the constitutional right of the citizens of New York to do business within the State of Louisiana or of the citizens of Louisiana from insuring property. It says to the citizens of New York engaged in insurance business that they must, like its own citizens, pay a license and have an authorized agent in the State as prerequisite to their doing said business within its State, and says to its own citizens: You shall not make a contract while in the State with any foreign insurance company which has not complied with the laws. You shall not in this manner contravene the public policy of the State in aiding and assisting in the violation of the laws of the State. The sovereignty of the State would be a mockery if it had not the power to compel its citizens to respect its laws.

* * * * *

"The defendants while in the State undoubtedly insured their property located in the State in a foreign insurance company under an open policy. The instant the letter or communication was mailed or telegraphed the property was insured. The act of insurance was done within the State and the offence denounced by the statute was complete.

* * * * *

"There is in the statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired; but in exercising this liberty they would interfere with the policy of the State that forbids insurance companies which have not complied with the laws of the State from doing business within its limits. Individual liberty of action must give way to the greater right of the collective people in the assertion of well-defined policy, designed and intended for the general welfare."

The general contract contained in the open policy, as well

as the special insurance upon each shipment of goods of which notice is given to the insurance company, being contracts made in New York and valid there, the State of Louisiana claims notwithstanding such facts that the defendants have violated the act of 1894, by doing an act in that State to effect for themselves insurance on their property then in that State in a marine insurance company which had not complied in all respects with the laws of that State, and that such violation consisted in the act of mailing a letter or sending a telegram to the insurance company in New York describing the cotton upon which the defendants desired the insurance under the open marine policy to attach. It is claimed on the part of the State that its legislature had the power to provide that such an act should be illegal and to subject the offender to the penalties provided in the statute. It is said by the Supreme Court that the validity of such a statute has been decided in principle in this court in the case of *Hooper* v. *California*, 155 U. S. 648.

We think the distinction between that case and the one at bar is plain and material. The State of California made it a misdemeanor for a person in that State to procure insurance for a resident of the State from an insurance company not incorporated under its laws, and which had not filed a bond required by those laws relative to insurance. Hooper was a resident of San Francisco and was the agent of the firm of Johnson & Higgins, who were insurance brokers residing and having their principal place of business in the city of New York, but having also a place of business in the city and county of San Francisco, of which the defendant had charge as their employé and agent. In response to a request from a Mr. Mott, a resident of the State of California, the defendant Hooper procured through his principals, Johnson & Higgins, an insurance upon the steamer Alliance, belonging to said Mott, in the China Mutual Insurance Company, which was a company not then and there incorporated under the laws of California, and not having itself or by its agent filed the bond required by those laws relating to insurance. The policy was delivered by the defendant Hooper to Mott, the insured, at

San Francisco, who thereupon paid Hooper, as agent of Johnson & Higgins, the premium for the insurance. The case states that "all the verbal acts of Mott, the insured, and also of the defendant and all his acts as agent in procuring said insurance, were done in the city and county of San Francisco." The court held that the whole transaction amounted to procuring insurance within the State of California by Hooper, residing there and for a resident in the State, from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance; that Hooper, the defendant, acted as the agent of his principals in New York City, who were average adjusters and brokers there, and who had a place of business in San Francisco, and that Hooper, as such broker, having applied for the insurance to his principals in New York City, received the policy from them for delivery in San Francisco, and the premium was there paid.

Upon the question as to the place where the contract was made, Mr. Justice White, speaking for the court said: "It is claimed, however, that, irrespective of this [commerce] clause, the conviction here was illegal, first, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the State; and, secondly, because the evidence shows that the contract was in fact entered into without the territory of California. The language of the statute is not fairly open to this construction. It punishes 'every person who in this State procures or agrees to procure for a resident of this State any insurance,' etc. The words 'who in this State' cannot be read out of the law in order to nullify it under the Constitution."

In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made.

The distinction between a contract made within and that made without the State is again referred to by Mr. Justice White in the same case as follows: "It is said that the

right of a citizen to contract for insurance for himself is guaranteed by the Fourteenth Amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The Fourteenth Amendment, however, does not guarantee the citizen *the right to make within his State, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear non sequitur, and ignores the vital distinction between acts done within and acts done beyond a State's jurisdiction.*"

We do not intend to throw any doubt upon or in the least to shake the authority of the *Hooper case*, but the facts of that case and the principle therein decided are totally different from the case before us. In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

It is natural that the state court should have remarked that there is in this "statute an apparent interference with the liberty of defendants in restricting their rights to place

insurance on property of their own whenever and in what company they desired." Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the State says is its policy with regard to foreign insurance companies which had not complied with the laws of the State for doing business within its limits. In this case the company did no business within the State, and the contracts were not therein made.

The Supreme Court of Louisiana says that the act of writing within that State, the letter of notification, was an act therein done to effect an insurance on property then in the State, in a marine insurance company which had not complied with its laws, and such act was, therefore, prohibited by the statute. As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley, in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S. 746, 762, in the course of his concurring opinion in that case, that "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life,

liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Again, on page 764, the learned justice said: "I hold that the liberty of pursuit — the right to follow any of the ordinary callings of life — is one of the privileges of a citizen of the United States." And again, on page 765: "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen." It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty" as contained in the Fourteenth Amendment.

Again, in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684, Mr. Justice Harlan, in stating the opinion of the court, said: "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law." It was there held, however, that the legislation under consideration in that case did not violate any of the constitutional rights of the plaintiff in error.

The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word "liberty" as used in the amendment, but we do not intend to hold that in no such case can the State exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.

Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract out-

side of the State for insurance on his property — a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the *Hooper case* (*supra*), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.

In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the

State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. *Milliken* v. *Pratt*, 125 Mass. 374; *Tilden* v. *Blair*, 21 Wall. 241. The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State.

The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the State of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the State of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to

carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State.

In such a case as the facts here present the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with reference to a company which is not doing business within its limits.

For these reasons we think the statute in question, No. 66 of the Laws of Louisiana of 1894, was a violation of the Federal Constitution, and afforded no justification for the judgment awarded by that court against the plaintiffs in error. That judgment must, therefore, be

Reversed, and the case remanded to the Supreme Court of Louisiana for further proceedings not inconsistent with this opinion.

WALKER *v.* NEW MEXICO AND SOUTHERN PACIFIC RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 171. Argued January 26, 1897. — Decided March 1, 1897.

The act of April 4, 1874, c. 80, legislating for all the Territories, secures to their inhabitants all the rights of trial by jury, as they existed at the common law.

It is within the power of a legislature of a Territory to provide that, on a trial of a common law action, the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.

The doctrine of the civil law and that of the common law, touching the respective rights and duties of proprietors of upper and lower land as to the flow of surface-water are conflicting; and it is the duty of this court,

in cases involving such rights and duties, to follow the decisions of the local state courts, although it may involve apparently contradictory decisions.

A territorial legislature has all the legislative power of a state legislature, except as limited by the Constitution, and by act of Congress; and, the legislature of New Mexico, having adopted the common law as the rule of practice and decision, this court is bound by it.

On November 3, 1886, A. C. Walker commenced this action in the District Court of the Second Judicial District of the Territory of New Mexico in and for the county of Socorro, against the railroad company defendant, to recover damages resulting from an overflow of his lands, caused, as charged, by a wrongful obstruction of a natural watercourse. Subsequently, an amended declaration was filed, and after the death of A. C. Walker the action was revived in the name of his administratrix, the present plaintiff in error. After some preliminary proceedings, a trial was had in December, 1892, on which trial the jury returned a general verdict, finding the defendant guilty, and assessing the plaintiff's damages at $9212.50. At the same time the jury returned, in response to certain questions submitted by the court, special findings of fact. The trial court, overruling all other motions, entered a judgment in favor of the defendant, on the ground that the special findings of fact were inconsistent with and controlled the general verdict; and that upon such findings of fact the defendant was entitled to judgment. The case was thereafter taken to the Supreme Court of the Territory, by which court, on August 26, 1893, the judgment was affirmed, 34 Pac. Rep. 43, and thereupon the plaintiff sued out this writ of error.

Mr. Neill B. Field for plaintiff in error. *Mr. James G. Fitch* was on his brief.

Mr. Robert Dunlap for defendant in error. *Mr. E. D. Kenna* was on his brief.

Mr. Justice Brewer delivered the opinion of the court.

The testimony was not preserved, and the case is submitted to us upon the pleadings, the verdict, the special findings of

fact and the judgment; and on the record as thus presented plaintiff in error rests her claim of reversal upon three propositions: First, that the act of the territorial legislature, authorizing special findings of fact and providing for judgment on the special findings, if inconsistent with the general verdict (Laws of New Mex. 1889, c. 45, page 97), is in contravention of the Seventh Amendment to the Constitution of the United States, which reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law."

Second, that there is no such conflict between the general verdict and the special findings as authorized a judgment contrary to the general verdict; and, third, that if there be any conflict between the special findings and the general verdict, the special findings are so inconsistent with each other as to neutralize and destroy themselves.

First, with regard to the constitutional question, the specific objection is thus stated in the brief:

"It is not contended, although the English authorities would appear to warrant the contention, that at the common law the judge might not require the jury to answer special questions, or interrogate the jury as to the grounds upon which their general verdict was found; but it is most earnestly contended that the extent of the power of the judge, if in his opinion the special findings or answers of the jury to interrogatories were inconsistent with the general verdict, was to set aside the general verdict and award a *venire de novo*, while under this statute authority is attempted to be conferred upon the judge to render final judgment upon the special findings."

We deem it unnecessary to consider the contention of defendant in error that the territorial courts are not courts of the United States, and that the Seventh Amendment is not operative in the Territories, for by the act of April 7, 1874, c. 80, 18 Stat. 27, Congress, legislating for all the Territories, declared that no party "shall be deprived of the right of trial

by jury in cases cognizable at common law"; and while this may not in terms extend all the provisions of the Seventh Amendment to the Territories, it does secure all the rights of trial by jury as they existed at common law.

The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action — the mere manner in which questions are submitted — is different from that which obtained at the common law.

Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact, and no one to-day doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guarantee of right of trial by jury. Beyond this, it was not infrequent to ask from the jury a special rather than a general verdict, that is, instead of a verdict for or against the plaintiff or defendant embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court

the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties.

It was also a common practice when no special verdict was demanded and when only a general verdict was returned to interrogate the jury upon special matters of fact. Whether or no a jury was compelled to answer such interrogations, or whether, if it refused or failed to answer, the general verdict would stand or not, may be questioned. *Mayor &c.* v. *Clark*, 3 Ad. & Ell. 506. But the right to propound such interrogatories was undoubted and often recognized. *Walker* v. *Bailey*, 65 Maine, 354; *Spurr* v. *Shelburne*, 131 Mass. 429. In the latter case the court said (page 430): "It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion. *Dorr* v. *Fenno*, 12 Pick. 521; *Spoor* v. *Spooner*, 12 Met. 281; *Mair* v. *Bassett*, 117 Mass. 356; *Lawler* v. *Earle*, 5 Allen, 22." So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law, and has been recognized independently of any statute. Beyond this we cannot shut our eyes to the fact that in many States in the Union, in whose constitutions is found in the most emphatic language an assertion of the inviolability of trial by jury, are statutes similar to the one enacted by the territorial legislature of New Mexico; that those statutes have been uniformly recognized as valid, and that a large amount of the litigation in the courts is carried through in obedience to the provisions of such statutes. It would certainly startle the profession to be told that such statutes contravene a constitutional requirement of the inviolability of jury trials.

Indeed, the very argument of counsel for plaintiff in error is an admission that up to a certain extent those statutes are undoubtedly valid. That argument is practically that when the specific findings are returned and found to be conflicting

with the general verdict the court is authorized to grant a new trial, but can do no more. But why should the power of the court be thus limited? If the facts as specially found compel a judgment in one way, why should not the court be permitted to apply the law to the facts as thus found? It certainly does so when a special verdict is returned. When a general verdict is returned and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a specific fact? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial — to end the controversy so far as the trial court is concerned upon that single response from the jury.

We are clearly of opinion that this territorial statute does not infringe any constitutional provision, and that it is within the power of the legislature of a Territory to provide that on a trial of a common law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.

For a full understanding of the second question it is necessary to notice the pleadings. The original declaration — after stating that the Rio Grande River runs in its regular channel about half a mile east of the plaintiff's premises, and that the waters from rainfalls pass and flow in their natural

fall from the surrounding and adjacent country over the plaintiff's and other lands in the vicinity and empty into the river, and that by that means the surface water, up to the time of the grievances complained of, had been carried off without injury to the plaintiff, or his property — charged that on May 1, 1885, the defendant, in and by the construction of its roadbed, did dam and close up all of the natural and usual outlets and places through which the surface-water had been accustomed to make its escape, thereby causing such surface-water theretofore flowing to the river as aforesaid to be dammed up and set back upon the premises of the plaintiff and other property owners; that on September 7, 1886, there was a heavy rainfall and the surface-water, unable by reason of the obstruction to reach the river, was set back on the premises of the plaintiff, making a lake or pond of waters three to four feet in depth, and doing great injury to his property. A demurrer to this declaration having been sustained, an amended declaration was filed, which, omitting all reference to rainfalls and surface-water, charged that the defendant obstructed the natural and artificial watercourses by which the waters from the north and west of the plaintiff's property, and from the Socorro and Magdalena Mountains, in their natural flow and fall passed over the lands of the plaintiff and other lands and emptied into the Rio Grande. A demurrer to this declaration having been overruled the plaintiff was directed to file a bill of particulars showing the places and courses of the alleged natural and artificial watercourses, and did so, describing three or four beds or channels through which in a natural fall, as he averred, the waters passed from the Socorro and Magdalena Mountains into the Rio Grande.

Now, the contention of the defendant in error is that it is apparent, from the answers given to the special questions, that there were no natural watercourses obstructed by defendant's roadbed, and that the water which did the damage was simply surface-water. The second, third, fourth and fifth are as follows:

"Q. 2. Was there a cloudburst in the Magdalena or Socorro

Mountains on September 8, 1886; and if so, was the water therefrom the water which ran over plaintiff's land? — A. Yes.

"Q. 3. Was the water which came down the arroyos from the Magdalena and Socorro Mountains on September 8, 1886, surface-water? — A. Yes.

"Q. 4. Was it customary for water to collect and stand on plaintiff's land, and land in the immediate vicinity thereof, in the times of heavy rains or floods? — A. No.

"Q. 5. How often upon an average in any one year did the water come down the arroyos leading toward the valley in the vicinity of Socorro from the Magdalena and Socorro Mountains prior to September 8, 1886? — A. According to the rain which fell."

This is very clear. There was a cloudburst in the mountains, and it was the water from that which did the damage. It was simply surface-water. And the arroyos through which the water flowed after leaving the mountains were not running streams, natural watercourses, but simply passageways for the rain which fell. Counsel for plaintiff in error, not questioning that the injury done to the property of their client was by surface-water — the large fall which came from the cloudburst in the Socorro or Magdalena Mountains on September 8, 1886 — insist that it does not appear that such cloudbursts were unusual, and also that there had been created through the lapse of years distinctive channels by which the waters from the mountains passed down to the river and that the railroad embankment operated to obstruct such channels; that although these channels were not the beds of constantly flowing streams they were wrought by natural processes and through the flowing of water, not continuous but at frequent intervals, until they had become natural outlets for the often accumulating waters in the Socorro and Magdalena Mountains. In view of this contention it is well to consider other findings so far as they disclose the character of these waterways. The sixth, eighth, ninth, fourteenth, fifteenth, twenty-second, twenty-third and twenty-fifth questions and answers may be referred to:

"Q. 6. How far is the mouth of the main arroyo which

runs through the western part of the city of Socorro in a northerly direction from the main line of the railroad? — A. Three quarters of a mile, more or less.

"Q. 8. Does the railroad of the defendant cross any arroyo leading from the Magdalena or Socorro Mountains at any place north of the Magdalena branch of the New Mexican Railroad Company at its junction with the main line one and one half miles? — A. Yes.

"Q. 9. If you state in answer to the last question that there was such an arroyo, state where it is, its length, breadth and the height of its banks. — A. West of the city of Socorro and east of the Catholic graveyard; its banks are about two feet, its width about sixty feet, and about a mile in length, more or less.

"Q. 14. How far from the main line of the railroad, in a westerly direction, are the mouths of the arroyos testified to by the witnesses? — A. Three quarters mile to main arroyo, and one quarter of a mile to lower arroyo.

"Q. 15. What is the character of the land lying between the mouths of the arroyos and the main line of the railroad, is it level or sloping, and for what purposes was it used in 1886? — A. It is level now and in 1886 it was an arroyo, and there is no ditch now excepting the company drain.

"Q. 22. How far is it from the mouths of the arroyos testified to by the witnesses to the Magdalena and Socorro Mountains? — A. To the Socorro Mountains four miles, and to the Magdalena Mountains eighteen miles.

"Q. 23. How far is it from plaintiff's property to the Socorro or Magdalena Mountains? — A. More or less, the same distance as in the foregoing answer.

"Q. 25. Which was constructed first, the railroad company embankment or the houses of plaintiff which were damaged by the water? — A. Railroad."

It is obvious not only that it was mere surface-water whose flow was obstructed, not only that no natural watercourses were filled up, but also that the channels which were obstructed were not such ravines, gorges and outlets as in a mountainous district must be left open to prevent the forming

of lakes and reservoirs therein, but simply the ordinary ditches and passageways which surface-water will cut in a generally level district in its effort to reach some flowing stream. It also appears from the answer to the twenty-fifth question that the railroad embankment was constructed before the buildings of the plaintiff. It will be borne in mind that the mountains from which this surface-water flowed were from 4 to 18 miles distant, and from the foot of those mountains to the Rio Grande River, naturally, the flowing water had dug channels and ditches through such portions of the soil as afforded the least obstruction to its passage, and such channels and ditches were all that the railroad embankment in any way obstructed.

Does a lower land owner by erecting embankments or otherwise preventing the flow of surface-water on to his premises render himself liable to an upper land owner for damages caused by the stopping of such flow? In this respect the civil and common law are different, and the rules of the two laws have been recognized in different States of the Union — some accepting the doctrine of the civil law, that the lower premises are subservient to the higher, and that the latter have a qualified easement in respect to the former, an easement which gives the right to discharge all surface-water upon them. The doctrine of the common law on the other hand is the reverse, that the lower land owner owes no duty to the upper land owner, that each may appropriate all the surface-water that falls upon his own premises, and that the one is under no obligation to receive from the other the flow of any surface-water, but may in the ordinary prosecution of his business and in the improvement of his premises by embankments or otherwise prevent any portion of the surface-water coming from such upper premises. In *Atchison, Topeka & Santa Fé Railroad* v. *Hammer*, 22 Kansas, 763, it was held that " the simple fact that the owner of one tract of land raises an embankment upon it which prevents the surface-water falling and running upon the land of an adjoining owner from running off said land, and causes it to accumulate thereon to its damage, gives to the latter no cause of

action against the former, nor is the rule changed by the fact that the former is a railroad corporation, and its embankment raised for the purpose of a railroad track, nor by the fact that a culvert could have been made under said embankment sufficient to have afforded an outlet for all such surface-water."

In *Gibbs* v. *Williams*, 25 Kansas, 214, 216, it was said: "Now the ordinary rule concerning surface-water is settled and familiar; the lower estate owes no duty to the higher, and the owner of each may use or abandon surface-water as he pleases."

In *Kansas City & Emporia Railroad* v. *Riley*, 33 Kansas, 374, 376, 377, it was said: "The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, is in force in this State in aid of the general statutes. Therefore, the doctrine of the common law, with respect to the obstruction and flow of mere surface-water, prevails as a general rule. Under this rule surface-water is within the control of the owner of any land upon which it falls, or over which it flows; he may use all that comes upon his own, or decline to receive any that falls on his neighbor's land. . . . The doctrine of the common law with respect to the obstruction and flow of mere surface-water is not only in force in England, but in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont and Wisconsin. . . . The rule of the civil law seems to be in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and is referred to with approval in Ohio."

In *Hoyt* v. *Hudson*, 27 Wisconsin, 656, 659, the difference between the civil and the common law was thus stated in a carefully prepared opinion by Chief Justice Dixon: "The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the water cannot be inter-

rupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor. . . . The doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface-water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion."

It would be useless to cite the many authorities from the different States in which on the one side or the other these doctrines of the civil and the common law are affirmed. The divergency between the two lines of authorities is marked, springing from the difference in the foundation principle upon which the two doctrines rest, the one affirming the absolute control by the owner of his property, the other affirming a servitude, by reason of location, of the one premises to the other. Washburn, in his treatise on Easements and Servitudes (3d ed. side page 353 and following), treats at length on these two lines of authorities. So also in Angell on Watercourses (7th ed. § 108 and following) is the matter discussed.

If a case came to this court from one of the States in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law, to follow the decisions of that State. And in like manner we should follow the adverse ruling in a case coming from one of the States in which the common law rule is recognized. New Mexico is a Territory, but in it the legislature has all legislative power except as limited by the Constitution of the United States and the organic act and the laws of Congress appertaining thereto. There it was enacted in 1876, Laws of New Mex. 1876, p. 31, c. 2, § 2, that "in all the courts in this Territory the common law as recognized in the United States of America shall be the rule of practice and decision." *Browning* v. *Browning*, 9 Pac. Rep. 677, 682. The legislature of

New Mexico having thus adopted the common law as the rule of practice and decision, and there being no special statutory provisions in respect to this matter, it is not to be wondered at that the Supreme Court of the Territory in its opinion in the present case disposed of this question in this single sentence: "If the act of the territorial legislature of 1889 is constitutional, then we can find no error in the action of the court in setting aside the general verdict and entering judgment upon the special findings." Obviously the only question deemed of any moment by that court was the question in respect to the matter of special findings.

It may be proper to notice that the exception suggested by Chief Justice Beasley in *Bowlsby* v. *Speer*, 31 N. J. Law, 351, 353, in these words: "How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question," and noticed afterwards in *Hoyt* v. *Hudson*, *supra*, and *Palmer* v. *Waddell*, 22 Kansas, 352, has no application to the case before us, for, as appears from the findings, the mountainous district from which these waters flowed was from four to eighteen miles distant from the place of the embankment and the damage. We must, therefore, overrule the second contention made by counsel for plaintiff in error.

The third requires little notice. It does not seem as though there were any particular inconsistency between the various special findings. The only one that deserves any notice is that which is suggested by the first question and the answer thereto, as follows:

"Q. 1. At the time of the injury complained of did any of the water flow or run over the plaintiff's land, except the water which fell from the clouds as rain? — A. It did run."

It is a little difficult to understand exactly what is meant by this. It may be that the jury meant that the water came from the cloudburst as distinguished from an ordinary rain-

fall, or it may be that their purpose was simply to affirm that this water coming down the arroyos did run over the land of the plaintiff. Considering the uncertainty as to the import of this question and answer, and in view of the clear and positive answers to other direct questions, and also in view of the averments in the original declaration, we think it would be going too far to hold that this is to be taken as a finding that there was a natural watercourse whose waters, increased by the rainfall and cloudburst, overflowed their banks and injured the plaintiff's property. These are all the questions in the case, and, finding no error in the record, the judgment is

Affirmed.

PAULY *v.* STATE LOAN AND TRUST COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 201. Argued January 29, 1897. — Decided March 1, 1897.

A creditor who receives from his debtor a transfer of shares in a national bank as security for his debt, and who surrenders the certificates to the bank, and takes out new ones in his own name, in which he is described as pledgee, and holds them afterwards in good faith as such pledgee and as collateral security for the payment of his debt, is not a shareholder, subject to the personal liability imposed upon shareholders by Rev. Stat. § 5151.

The previous cases relating to the liability of such shareholders examined and held to establish:

(1) That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151;

(2) That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association;

(3) That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed;

(4) That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor — the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder — he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151; and,

(5) That the pledgee of personal property occupies towards the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor.

THE case is stated in the opinion.

Mr. Edward Winslow Paige for plaintiff in error. *Mr. J. Wade McDonald* filed a brief for same.

Mr. Edward W. Hutchins and *Mr. Henry Wheeler*, by leave of court, filed a brief on behalf of Thomas P. Beal, receiver.

Mr. W. P. Gardiner for defendant in error. *Mr. W. A. Harris* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action to recover the amount of an assessment made on the shareholders of a national banking association in the hands of a receiver.

Is the defendant in error, the State Loan and Trust Company, a "shareholder" of the California National Bank of San Diego within the meaning of the statute relating to national

banking associations? That is the sole question presented by the pleadings.

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

"SEC. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired."

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

"SEC. 5152. Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such funds would be, if living and competent to act and hold the stock in his own name."

"SEC. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year,

verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

The Comptroller of the Currency appointed the plaintiff in error receiver of the California National Bank of San Diego, California. Rev. Stat. § 5234. He gave bond as required by law, and thereafter entered upon the discharge of the duties of his trust.

In virtue of the authority conferred upon him by law, the Comptroller made an assessment on the shareholders of the bank for five hundred thousand dollars, to be paid by them on or before the 18th day of June, 1892. The assessment was equally and ratably upon shareholders to the amount of one hundred per centum of the par value of the shares of the capital stock of the bank held and owned by them respectively at the time of its failure or suspension, and the receiver was required by an order of the Comptroller to institute suits to enforce against each shareholder his personal liability to that extent.

The receiver gave due notice of the assessment, in writing, to the State Loan and Trust Company — which is a corporation of California, having its principal place of business at the city of Los Angeles in that State — and made demand upon it therefor, but the company did not pay the same or any part thereof.

The facts upon which the claim against the defendant company is based are these: S. G. Havermale and J. W. Collins, owners and holders respectively of certificates numbered 286 and 297 issued to them for one hundred shares, each, of the capital stock of the California National Bank of San Diego, were indebted to the State Loan and Trust Company upon their promissory note for $12,500, besides interest. These certificates having been endorsed by the respective holders by writing their names across the back thereof, were transferred and delivered to the State Loan and Trust Company as collateral security for the payment of the above note, and, so endorsed, were, in ordinary course of mail, transmitted and surrendered to the California National Bank of San Diego. New certificates, numbered 308 and 309, respectively, were

thereupon issued to the State Loan and Trust Company of Los Angeles, as "pledgee," in lieu of certificates 286 and 297.

Each of the new certificates showed upon its face that it was issued to the "State Loan and Trust Company of Los Angeles, pledgee," and each purported to be for one hundred shares of the capital stock of the California National Bank of San Diego.

The defendant, after receiving certificates 308 and 309, held them "as pledgee, and as collateral security for the payment of said note, and for the unpaid balance of the debt thereby represented."

Otherwise than as just stated, the State Loan and Trust Company of Los Angeles never had owned or held any shares of the capital stock of the California National Bank of San Diego, and never was entitled to hold the usual stock certificate as such shareholder to the amount of two hundred shares or to any other amount.

Except as pledgee of the stock represented by certificates 308 and 309, respectively, the name of the State Loan and Trust Company never appeared upon or in the stock or other corporate books of the California National Bank of San Diego as a shareholder. The entries in the books of the bank showed that the new certificates were issued to the State Loan and Trust Company as pledgee, and not otherwise.

A jury having been waived by the parties in writing, the case was tried in the Circuit Court, and judgment was rendered for the defendant. 56 Fed. Rep. 430. Upon appeal to the Circuit Court of Appeals that judgment was affirmed. 15 U. S. App. 259.

Is one who does not appear upon the official list of the names and residences of the shareholders of a national banking association otherwise than as "pledgee" of a given number of shares of the capital stock of such association — nothing else appearing — liable as a "shareholder" of such association under section 5151 of the Revised Statutes of the United States declaring that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts

and engagements of such association, to the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares"?

As both sides contend that their respective positions are in harmony with decisions heretofore rendered in this court, it will be necessary to refer to some of the cases cited by counsel.

In *Pullman* v. *Upton*, 96 U. S. 328, 330, which was an action by the assignee in bankruptcy of an insurance company to compel a holder of shares of its stock to pay the balance due thereon, the court said: "The only question remaining is, whether an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company, after it has become bankrupt. That the original holders and the transferees of the stock are thus liable we held in *Upton* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; and *Webster* v. *Upton*, 91 U. S. 65; and the reasons that controlled our judgment in those cases are of equal force in the present. The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they cannot have, if the transferee of the shares is not responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner — that is, the one in whose name the stock stands on the books of the corporation — is in fact only, as between himself and his debtor, a holder for security of the debt, or even that he has no beneficial interest therein."

In *National Bank* v. *Case*, 99 U. S. 628, 631, 632 — which was an action to make the Germania National Bank of New Orleans liable as a shareholder of another national bank that had become insolvent — it appeared that Phelps, McCullough & Co. borrowed money from the defendant bank, and to secure the payment of the loan, evidenced by note, pledged one hundred shares of the stock of the Crescent City National Bank, with power on non-payment of the sum borrowed to

dispose of the stock for cash without recourse to legal proceedings, and to that end to make transfers on the books of the latter corporation. The note not having been paid, the stock was transferred on the books of the Crescent City National Bank to the Germania National Bank. The latter subsequently caused the stock to be transferred, on the books of the former, to one of its clerks, who acquired no beneficial interest in it, and between whom and the officers of his bank it was understood that he would retransfer the stock at their request. This court, observing that notwithstanding the transfer to the clerk the stock remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners, said: "It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* v. *Upton*, 96 U. S. 328; and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly* v. *Storm*, 6 Hill, 624; *Roosevelt* v. *Brown*, 11 N. Y. 148; *Holyoke Bank* v. *Burnham*, 11 Cush. 183; *Magruder* v. *Colston*, 44 Maryland, 349; *Crease* v. *Babcock*, 10 Met. (Mass.) 525; *Wheelock* v. *Kost*, 77 Illinois, 296; *Empire City Bank*, 18 N. Y. 199; *Hale* v. *Walker*, 31 Iowa, 344. For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. . . . When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the

transfer was made." After referring to some of the English cases, the court proceeds: "The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect of such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out.' *Nathan* v. *Whitlock*, 9 Paige, 152; *McClaren* v. *Franciscus*, 43 Missouri, 452; *Marcy* v. *Clark*, 17 Mass. 329; *Johnson* v. *Laflin*, by Dillon, J., 6 Cent. Law Jour. 131; 5 Dillon, 65. The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferrer. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder."

It may be here observed that in *Pullman* v. *Upton* the person who sought to escape liability as a shareholder appeared on the books of the insolvent insurance company *as the owner* of the stock; and that in *National Bank* v. *Case* the Germania National Bank, after the original transfer under the power of attorney executed by its debtor, appeared on the books of the other bank *as the owner* of the stock, and that the liability arising therefrom could not be defeated or avoided by a transfer, however regular in form, to another who acquired no beneficial interest in it, and was to hold the stock simply for its benefit. Nothing appeared upon the stock list, in either case, to indicate that the person or corporation who appeared on such list as a shareholder was not, in fact, the actual owner.

In *Bowden* v. *Johnson*, 107 U. S. 251, 261, which involved the liability as a shareholder of a national bank of one who became the purchaser and owner of some of its shares, and who, in apprehension of the bank's failure, and in order to escape liability, transferred his stock to an irresponsible person, the court said: "The answer sets forth that Johnson became the purchaser and owner of the one hundred and thirty shares in 1869. As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any liability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or partial consideration for the transfer, as between him and the transferee. The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that, therefore, the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this court in *National Bank* v. *Case*, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and

collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors."

But the case to which our attention has been particularly called is *Anderson* v. *Philadelphia Warehouse Company*, 111 U. S. 479, 483–485, in which the question was as to the liability of the Philadelphia Warehouse Company as a shareholder of a national bank that had become insolvent. The facts in that case were these: Blumer & Co. (the senior member of that firm being president of the bank) arranged with the Warehouse Company for a loan or banker's credit, to be secured by collaterals. Kern, a member of the firm, transferred 450 shares of the stock of the bank, standing in his name on the books of the bank, and caused a new certificate to be issued in the name of Henry, as president of the Warehouse Company, and it was taken or sent to that company as further security for the credit extended to Blumer & Co. The fact of this transfer of stock to the name of Henry, as president, having come to the knowledge of the directors and executive committee of the Warehouse Company, they caused a transfer to be made on the books of the bank to one McCloskey, an irresponsible person and a porter in its employment, and a new certificate to be issued in his name, because they deemed it inadvisable to have the stock stand in the name of the company's president, and thus incur the liability imposed upon shareholders of national banks. McCloskey never had possession of the certificate, and gave to the Warehouse Company an irrevocable power of attorney for the sale and transfer of stock. Upon McCloskey's death the stock was transferred on the books of the bank to Ferris, also an irresponsible person and an employé of the Warehouse Company. A new certificate was issued to him, and delivered to the company, Ferris endorsing thereon an irrevocable power of attorney for its transfer. When the bank failed, the stock stood in the name of Ferris, the Warehouse Company holding the certificate. That company never received any dividends on the stock, and never acted as a shareholder, but held the stock as security for the debt due it.

This court in that case recognized it to be well settled that

one who allows himself to appear on the books of a national bank as an "owner" of its stock is liable to creditors as a shareholder, whether he be, in fact, the absolute owner or only a pledgee, and that, if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors — citing *National Bank* v. *Case*, 99 U. S. 628; *Bowden* v. *Johnson*, 107 U. S. 251. It was further said to be beyond question that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder; "but," the court observed, "it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered *as owner*."

It appeared, according to the opinion in that case, that there was no evidence of actual fraud or bad faith; that the Warehouse Company never was the owner of the stock in question, and never held itself out as such; that the transfer of Kern and Blumer & Co. was only by way of pledge, and the company was bound to return the stock whenever the debt, for which it was held, was paid; that the company never consented to a transfer of the stock to its name on the books, or to that of its president, and that for seven years before the failure of the bank, and at least five years before its embarrassments were known to the company or the public, the stock, with the assent of Kern, Blumer & Co. and the officers of the bank, stood in the name of McCloskey or Ferris; that during all that time neither the registered holders nor the Warehouse Company claimed dividends or in any way acted as shareholders; that either Kern or Blumer & Co. took the dividends as they were paid, and to all intents and purposes controlled the stock; that there was no concealment on the part of the Warehouse Company, and no effort to deceive; that it had possession of the certificates representing the stock, with full power to control them for all the purposes of its security, but never was or pretended to be anything else than a mere pledgee; that those who examined the list of shareholders

would have found the name of McCloskey or of Ferris as the registered holder of four hundred and fifty shares; there was nothing on the books of the bank to connect them, or either of them, with the Warehouse Company, and, therefore, no credit could have been given on account of the apparent liability of the company as a shareholder.

"If," the court said, "inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. Blumer & Co. and the bank were fully advised who McCloskey was, and of his probable responsibility, when they allowed the transfer to be made to him, and they undoubtedly knew who Ferris was when the stock was put in his name after McCloskey's death. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as pledgee, without making itself liable as an apparent owner. Kern or Blumer & Co. still remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt. They consented to the transfer, not to escape liability as shareholders, but to save the company from a liability it was unwilling to assume, and at the same time to perfect the security it required for the credit to be given. As between Blumer & Co. and the Warehouse Company, Blumer & Co. or Kern were the owners of the stock and the company the pledgee. As between the company and the bank, or its creditors, the company was a pledgee of the stock and liable only as such. The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer & Co., who were always the real owners. To our minds the fact that the stock stood registered in the name of Henry, President, from December 27th to January

10th, is, under the circumstances of this case, of no importance. The Warehouse Company promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose. It asked that the transfer might be made to McCloskey. To this the owners of the stock and the bank assented, and from that time the case stood precisely as it would if the transfer had originally been made to McCloskey instead of Henry, President, or if Henry had retransferred to Kern or Blumer & Co., and they had at the request of the company made another transfer to McCloskey. The security of the Warehouse Company was perfected without imposing on the company a shareholder's liability. All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment. So far as the company was concerned, the transfer was not made to escape an impending calamity, but to avoid incurring a liability it was unwilling to assume, and which it was at perfect liberty to shun."

Another of the cases referred to, although it did not relate to the liability of the shareholders of national banking associations, is *Easton* v. *German-American Bank*, 127 U. S. 532, 536–537, in which it was said: "Where personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgor, but, if so, it can be only where the pledgor holds as agent of the pledgee. By virtue of the pledge, the pledgee has the right by law, on default of the pledgor, to sell the property pledged in satisfaction of the pledgor's obligation. As in that transaction the pledgee is the vendor, he cannot also be the vendee. In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale. The same principle applies with a like result where real estate is conveyed by a debtor directly to a creditor as security for the payment of

an obligation, with a power to sell in case of default. There the creditor is also a trustee to sell, and cannot purchase the property at his own sale for his own use."

It is apparent that the precise question before us was not involved in any of the above cases, although the principles announced in them bear upon the issue here presented.

From those cases the following rules relating to the liability of shareholders of national banking associations may be deduced:

That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151;

That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association;

That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed;

That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor — the latter acting in good faith and for the pur-

pose only of securing the payment of that debt without incurring the responsibility of a shareholder — he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151; and,

That the pledgee of personal property occupies towards the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor.

The present case differs from those cited in the important particular that the stock list of the bank gave information to all who examined it that the State Loan and Trust Company was not the real or absolute owner of the shares in question, but held them only as "pledgee"; that there was no "out and out" transfer of the stock, whereby the transferrer, as between him and the transferee, parted with his interest; and that the real ownership remained with the pledgor, the pledgee acquiring only a lien upon the stock to secure its debt.

In the case of *Finn* v. *Brown*, 142 U. S. 56, 71, the question was as to the liability as a shareholder of a director of a bank who appeared upon its books to be the owner of a given number of shares of stock. The court said: "It appears by the evidence that the bank had a stock register and a book of certificates of shares, and that a list of stockholders and of transfers was kept in one of its books, although it had no regular stock book. The jury would not have been justified in holding the defendant not liable for the assessment on the 50 shares or for the $1750 dividend. The dividend was undoubtedly fraudulent, and the records of the bank were falsified in showing that the defendant was present at the meeting at which the dividend was declared. It was declared, probably, by De Walt himself alone, for the purpose of showing a fictitious prosperity and of concealing from the public and the directors the real condition of the affairs of the bank. The defendant had had no previous connection with a banking business, and was deceived by De Walt. But all this cannot relieve him from liability. The statutes of the United States are explicit as to the necessary ownership of stock in a national bank by a director thereof, and as to his taking

an oath to that effect, and as to the keeping by the cashier of a correct list of the shareholders and of the number of shares each of them holds; and it cannot be held, with any safety to the interests of the public and those who deal with national banks, that a director, who also is vice president and acts as cashier, can shield himself from liability by alleging ignorance of what appears by the books of which he has charge."

Does the statute, in letter or spirit, require that the word "pledgee," appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the transferee? The statute requires that there shall be kept, at all times, in the office where the business of a national banking association is transacted, and subject, during business hours, to the inspection of shareholders and creditors of the association, as well as of officers authorized to assess taxes under state authority, a full and correct list of the names and residences of all the shareholders of the association, and of the number of shares held by each. Section 5210. Manifestly, one, if not the principal, object of this requirement, was to give creditors of the association, as well as state authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements. Referring to this provision this court said, in *Waite* v. *Dowley*, 94 U. S. 527, 534, that the act of Congress "was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank." And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, "in addition to the amount *invested in* such shares." The word "invested" plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and cannot refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as

collateral security for debts or obligations already or to be contracted.

It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value.

But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued was not in fact, and did not assume to be, the owner of the shares represented by them, but was and assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation. Upon inspecting the stock registry or any list of shareholders or of transfers kept by the bank, creditors will know that they cannot regard a pledgee as the actual owner. If the certificates in question had been extended so as to give the name of the pledgor, it would not be supposed that, upon any principle of justice, or upon grounds of public policy, the pledgee could have been held to the liability imposed by section 5151 upon shareholders. But the liability being purely statutory, the result ought not to be different because of the circumstance that the name of the pledgor was omitted from the certificates, since that which did appear in them was sufficient to inform creditors that the State Loan and Trust Company was only a pledgee, and by slight diligence they could have ascertained the name of the pledgor.

It may be suggested that if the pledgee is not held liable

as a shareholder, in respect of the shares of stock standing in its name as pledgee, then no one is liable to assessment as the owner of such stock. But it is a mistake to suppose that Havermale and Collins ceased to be shareholders for the purposes of the liability imposed by section 5151. They remained, notwithstanding the pledge, the actual owners of the stock, a right which they would have promptly asserted if the pledgee had assumed to be the owner and had sold the stock, appropriating to itself all the proceeds of sale. The object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. The courts will look at the relations of parties as they actually are, or as, by reason of their conduct, they must be assumed to be for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for the contracts, debts and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. A mistake or error in keeping the official list of shareholders would not prevent creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association. As already indicated, those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners.

It was under this construction of the statute that one was held liable as a shareholder who, in the belief that the bank was about to fail, and whose liability as a shareholder had equitably attached, collusively transferred his stock to an irresponsible person, in order to escape responsibility as a shareholder. This was held to be a fraud upon the statute, and the transferrer was held, as between him and the creditors, as the real owner of the stock, and, therefore, liable, although the transferee appeared on the stock registry as the shareholder. *Bowden* v. *Johnson*, above cited. Under the

same interpretation a corporation was treated as a shareholder who held shares of stock only as collateral security, but who allowed its name to appear and remain on the stock registry of the insolvent national bank association *as owner*, without anything indicating that it held such stock as collateral security. *National Bank* v. *Case*, above cited. So, in another case, it was held that the transferrers "remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt." *Anderson* v. *Philadelphia Warehouse Co.*, above cited.

Our conclusion is that the defendant in error cannot be regarded otherwise than as a pledgee of the stock in question, is not a shareholder within the meaning of section 5151 of the Revised Statutes, and is not, therefore, subject to the liability imposed upon the shareholders of national banking associations by that section.

This view of the case makes it unnecessary to consider whether the State Loan and Trust Company, being a pledgee of the stock, was a "trustee" within the meaning of section 5152, providing that "persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders."

The judgment is

Affirmed.

WADE *v.* LAWDER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 172. Argued January 26, 1897. — Decided March 1, 1897.

Where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws; and, if brought in a state court, this court is without appellate jurisdiction to review the judgment unless it appears that a right under the laws of the United States was properly set up and claimed which was denied by the state court.

This was a bill in equity brought by Charles Wade against

Birt Ringo, in the Circuit Court of Audrain County, Missouri, for the rescission of a contract. After hearing had on pleadings and proofs that court dismissed the bill, whereupon the cause was carried by appeal to the Supreme Court of Missouri, Division No. 1, and the decree affirmed. 122 Missouri, 322. Appellant then moved that the case be transferred to the Supreme Court in banc, under the constitution of Missouri in that behalf, *Duncan* v. *Missouri*, 152 U. S. 377, on the ground that the record involved the decision of a Federal question arising under the laws of the United States, namely, "the construction of the patent and specifications of the patent, as they appear in evidence in said cause." This motion was denied and a writ of error from this court was afterwards allowed.

Mr. John M. Barker for plaintiff in error. *Mr. Samuel W. Bickley* was on his brief.

Mr. W. W. Fry for defendants in error. *Mr. George Robertson* filed a brief for same.

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

On the twenty-seventh of July, 1891, Wade and Ringo entered into the following contract:

"Whereas, B. Ringo, of Mexico, Mo., has invented a new folding bed known as the Ringo folding bed for which he has made application for a patent from the United States of America in his name, and whereas B. Ringo owns an undivided one half interest of and in said patent with one J. C. Buckner, of Mexico, Mo. Now be it known that the undersigned, B. Ringo, has this day sold and does hereby sell and assign to C. Wade, of Mexico, Mo., all of his said undivided one half interest in said invention and the letters-patent applied for and to be issued to said B. Ringo for and to said Ringo folding bed. And said B. Ringo obligates himself to assign his undivided one half interest in said letters-patent to said C. Wade as soon as the same are issued by and at the

Patent Office of the United States, in such manner as any additional assignment of the same may be necessary other than this writing to convey to said C. Wade an undivided one half interest in said invention and letters-patent. And the said B. Ringo does hereby further sell and assign to C. Wade my undivided one half interest in all patterns, and all of said Ringo folding beds completed or being constructed at J. H. Heitland's in Quincy, Illinois. For and in consideration of the sale and transfer of the above undivided one half interest in said invention and letters-patent, said C. Wade does hereby sell, transfer and deliver to said B. Ringo his entire stock of furniture, coffins, fixtures, one furniture wagon, two hearses and three sets of harness with said wagon and hearses, said stock of furniture being the same now in the building occupied by said C. Wade on Jefferson Street, in Mexico, Mo., which stock of furniture, fixtures, coffins, wagon and harness, etc., is this day delivered by said C. Wade to said B. Ringo.

"Said B. Ringo further obligates himself to assign, transfer, for no other or further consideration than herein named, any further patent or improvement on said Ringo folding bed or other folding bed that he may obtain letters-patent for at any time in the future.

"If said letters-patent on this application or other different application should for any cause not be issued to said B. Ringo for said folding bed, then said B. Ringo hereby obligates himself, when it is definitely known that said letters-patent will not be issued, if at all, to return to said C. Wade said stock of furniture, fixtures, wagon, hearses and harness, with the stock of furniture as full, as near as practicable, as it now is and less the wear and tear of said fixtures, wagon, hearses and harness from use.

"But it is understood if such transfer should for said cause be necessary, said B. Ringo is to retain all proceeds of sales made by him in said furniture business, and said C. Wade to retain proceeds of sales made by him in said furniture business and said C. Wade to retain proceeds of sales of such folding beds as he may make during said time."

The application for letters-patent was then pending and

under an assignment of his interest in the invention by Ringo to Wade, a patent issued September 22, 1891, to Wade, and Buckner, Ringo's coöwner.

The gravamen of the bill was that plaintiff was induced to enter into the contract by certain false and fraudulent representations by defendant as to the utility and value of the invention in question; and also that various matters and things were fraudulently omitted from the contract by the defendant. Any other grounds of complaint indicated are unimportant. It was averred that the bed was worthless, and in a replication plaintiff alleged "that the patent, as set out in defendant's answer as having been issued to C. Wade and J. C. Buckner, at the instance of said Ringo, is void for the reason that the said patent so issued has neither novelty of invention nor utility of purpose." But the utility of the invention was only involved on the question of the falsity of the alleged representations.

The Circuit Court of Audrain County held upon the evidence that the contract was exactly as both parties desired and intended it to be; that the charges of fraud were not substantiated; that it did not appear that the folding bed was wholly worthless; and that, as plaintiff was experienced in the sale of the article; had every opportunity to test it, and the opinion of friends and of an expert to aid him; had advised and suggested changes and supposed improvements to defendant during the working out of the idea; inspected the models at various times; proposed the trade first himself and again a second time; and at the time of the trade knew or ought to have known far more about folding beds than defendant, who was wholly ignorant of them prior to the time he began work on the invention, representations as to the utility of the improvement even if in fact untrue, would not constitute sufficient ground for rescission. In these conclusions the Supreme Court of the State concurred. 122 Missouri, 322.

The general rule is that "where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws." *Dale*

Counsel for Plaintiff in Error.

Tile Manufacturing Co. v. *Hyatt*, 125 U. S. 46, and cases cited; *Wood Mowing Machine Co.* v. *Skinner*, 139 U. S. 293; *In re Ingalls, Petitioner*, Id. 548; *Marsh* v. *Nichols, Shepard & Co.*, 140 U. S. 344.

We are unable to discover in this case that plaintiff specially set up and claimed, at the proper time and in the proper way, any right under the laws of the United States, or that any such right was denied him by the decision of the state courts. The controversy was in respect to the rescission of a contract for the exchange of an invention for a stock of merchandise. The decree rested on grounds broad enough to sustain it without reference to any Federal question. Application for letters-patent was pending when the contract was entered into, and letters-patent were issued so that Wade obtained a half interest therein as provided. The state courts held, for the reasons given, that Wade got what he had bargained for, and was not deceived or misled in the premises. Under these circumstances the writ of error cannot be maintained. Rev. Stat. § 709.

Writ dismissed.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY *v.* NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 128. Argued January 4, 1897. — Decided March 1, 1897.

The statutes of New York regulating the heating of steam passenger cars, and directing guards and guard-posts to be placed on railroad bridges and trestles and the approaches thereto (Laws of 1887, c. 616, Laws of 1888, c. 189), were passed in the exercise of powers resting in the State in the absence of action by Congress, and, when applied to interstate commerce, do not violate the Constitution of the United States.

THE case is stated in the opinion.

Mr. John M. Bowers for plaintiff in error.

Mr. Theodore E. Hancock, Attorney General of the State of New York, and *Mr. W. H. Dennis* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

A statute of New York passed June 18, 1887, regulating the heating of steam passenger cars and directing guards and guard-posts to be placed on railroad bridges and trestles and the approaches thereto, Laws of N. Y. 1887, c. 616, p. 828, provides: "§ 1. It shall not be lawful for any steam railroad doing business in this State, after the first day of May, eighteen hundred and eighty-eight, to heat its passenger cars, on other than mixed trains, by any stove or furnace kept inside of the car or suspended therefrom, except it may be lawful, in case of accident or other emergency, to temporarily use such stove or furnace with necessary fuel. Provided, that in cars which have been equipped with apparatus to heat by steam, hot water or hot air from the locomotive, or from a special car, the present stove may be retained, to be used only when the car is standing still. And provided also that this act shall not apply to railroads less than fifty miles in length, nor to the use of stoves, of a pattern and kind to be approved by the railroad commissioners, for cooking purposes in dining-room cars. § 2. After November first, eighteen hundred and eighty-seven, guard-posts shall be placed in the prolongation of the line of bridge trusses so that in case of derailment the posts and not the bridge trusses shall receive the blow of the derailed locomotive or car. § 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of one thousand dollars, and to the further penalty of one hundred dollars for each and every day during which such a violation shall continue. § 4. Upon the application of any railroad covered by the provisions of this act, the board of railroad commissioners may approve of any proposed safeguard or device to be used under the provisions of this act, and thereafter the railroad using such safeguard or device so approved shall not be liable to any of the penalties prescribed by this act for a violation thereof in regard to any such safe-

guard or device. § 5. The violation of any of the provisions of this act will be deemed a misdemeanor. § 6. This act shall take effect immediately."

A subsequent statute, passed April 27, 1888, Laws of N. Y. 1888, c. 189, p. 250, so amended the first section of the act of 1887 that the heating of passenger cars on other than mixed trains by a stove or furnace kept inside the car or suspended therefrom did not become unlawful until after November 1, 1888. The amendatory act further provided that in special cases, the board of railroad commissioners could extend the time for a period not exceeding one year from November 1, 1888, for any steam railroad doing business in New York to heat its passenger cars by stoves or furnaces kept inside the car or suspended therefrom.

The present action was brought to recover penalties imposed for the violation of the above statutes.

The complaint filed in behalf of the People of New York charged the defendant, the New York, New Haven and Hartford Railroad Company, a corporation of Connecticut, with having, in the operation of its railroad, on the 2d day of November, 1888, and on every subsequent day down to and including December 31, 1888, run trains of passenger cars over its route from the city of New York to Hartford and from Hartford to that city, and heated said cars, both on through trains and over that part of its road in New York on other than mixed trains, by stoves and furnaces kept within such cars, "as the regular and usual method of heating said cars and in cases other than those of accident and other emergency"; and that the board of railroad commissioners of New York had not extended the time of the defendant to heat its passenger cars by any stove or furnace kept inside its cars.

There was a verdict and judgment against the railroad company for the sum of $7000 and $479.81 costs, disbursements and allowance; in all, $7479.81. That judgment was affirmed by the Court of Appeals of New York, 142 N. Y. 646.

It is contended that the above statute of New York is repugnant to section 8 of Article I of the Constitution of the United

States providing that Congress shall have power to regulate commerce among the several States, and to make all laws necessary and proper to carry such power into execution, and also to the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any one of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

As these questions were properly raised in the state court, there is no doubt of our jurisdiction to reëxamine the final judgment against the railroad company. Rev. Stat. § 709.

According to numerous decisions of this court (some of which are cited in the margin[1]) sustaining the validity of state regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that State, by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, *Gibbons* v. *Ogden*, 9 Wheat. 1, 211, the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people. The statute in question had for its object to protect all persons travelling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particu-

[1] *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 211; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Cooley* v. *Philadelphia Board of Wardens*, 12 How. 299, 320; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Sherlock* v. *Alling*, 93 U. S. 99, 104; *Mobile* v. *Kimball*, 102 U. S. 691; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Morgan* v. *Louisiana*, 118 U. S. 455, 463; *Huse* v. *Glover*, 119 U. S. 543; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96, 100; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 662; *Hennington* v. *Georgia*, 163 U. S. 299, 317.

lar mode of heating such cars. There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the State to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the State is competent to legislate, namely, the personal security of those who are passengers on cars used within its limits. Why may not regulations to that end be made applicable, within a State, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such State? Persons travelling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several States, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned.

Counsel for the railroad suggests that a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its trip from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode as required by the laws of that Commonwealth, would be a hardship on travel that could not be endured. These possible inconveniences cannot affect the question of power in each State to make such reasonable

regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground.

Our attention is called to the clause in the act of June 15, 1866, c. 124, 14 Stat. 66, now a part of section 5258 of the Revised Statutes of the United States, providing "that every railroad company in the United States whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges and ferries, passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." We fail to perceive that this statute has any bearing upon the question now before the court. The authority conferred by it upon railroad companies engaged in commerce among the States, whatever may be the extent of such authority, does not interfere in any degree with the passage by the States of laws having for their object the personal security of passengers while travelling, within their respective limits, from one State to another on cars propelled by steam.

But it is contended that the statute is repugnant to the clause of the Fourteenth Amendment forbidding a State from denying to any person within its jurisdiction the equal protection of the laws. This contention is based upon that clause of the statute declaring that it shall not apply to railroads less than fifty miles in length. No doubt the main object of the statute was to provide for the safety of passengers travelling on what are commonly called trunk or through lines, connecting distant or populous parts of the country, and on which the perils incident to travelling are greater than on

short, local lines. But as suggested in argument, a road only fifty miles in length would seldom have a sleeping car attached to its trains; and passengers travelling on roads of that kind do not have the apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger coaches, on account of the burning of cars in case of their derailment or in case of collision. In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable.

One of the assignments of error questions the validity of the statute upon the ground that it deprives the plaintiff in error of its property without due process of law. As the action against the company was instituted and conducted to a conclusion under a valid statute, the defendant being before the court, there is no reason to hold that there was any want of the due process of law required by the Fourteenth Amendment.

The judgment is

Affirmed.

Mr. Justice Gray did not sit in this case or take any part in its decision.

FOURTH STREET BANK (*of Philadelphia*) *v.* YARDLEY.

CERTIFICATE FROM THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 147. Argued January 12, 13, 1897. — Decided March 1, 1897.

As between a check holder and the bank upon which such check is drawn, it is settled that, unless the check be accepted by the bank, an action cannot be maintained by the holder against the bank.

Statement of the Case.

It is also settled that a check, drawn in the ordinary form, does not, as between the maker and payee, constitute an equitable assignment *pro tanto* of an indebtedness owing by the bank upon which the check has been drawn, and that the mere giving and receipt of the check does not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors.

That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court.

The Keystone Bank, through its president, solicited the Fourth Street Bank to give to the former $25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York City. At the same time that this request was made the president of the Keystone Bank made the further statement that his bank owed a balance at the clearing-house which it could not meet "because its funds were in the city of New York," and exhibited a memorandum showing the amount to its credit with the Tradesmen's Bank to be in the neighborhood of $27,000. In reliance upon such representations and the statements made supported by the memorandum exhibited, the Fourth Street Bank delivered to the Keystone Bank the certificates requested, and there was delivered a check for $25,000 upon the Tradesmen's National Bank of New York. The draft in question was at once forwarded to the city of New York, and was presented for payment at the Tradesmen's Bank on the following morning, when payment was refused. At the time of presentment the Tradesmen's Bank had to the credit of the Keystone Bank $19,725.62 in cash and collection items amounting to $7181.70, in all $26,907.32. Of this amount $18,056.21 had been remitted by the Keystone Bank on the day previous. *Held*,

(1) That, it being established that it was the intention and agreement of the parties to the transaction that the check drawn generally should be paid out of a particular fund, such check, as between the parties, is to be treated as though an order for payment out of the specific, designated fund;

(2) That as the Fourth Street Bank contracted and parted with its money on the faith of the representations of the Keystone Bank that there was to its credit, in the Tradesmen's Bank, a specific sum, and the fund which came into the hands of its voluntary assignee was the fund as to which the representations were made, the Keystone Bank and its assignee were in equity estopped from asserting, to the prejudice of the Fourth Street Bank, that the character and condition of the fund was otherwise than it was represented to be.

By a bill filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, appellant sought to sub-

ject moneys in the hands of the receiver of the Keystone National Bank to the satisfaction of an alleged equitable charge or lien thereon. From a decree dismissing the bill an appeal was taken to the Circuit Court of Appeals for the Third Circuit. The latter court thereafter certified to this court two questions of law arising upon the facts stated, which facts are set out in the margin hereof.[1]

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[1] On the 19th day of March, 1891, the said Fourth Street National Bank advanced twenty-five thousand dollars ($25,000) in clearing-house gold certificates to the said Keystone National Bank to enable it to meet its debtor balance in the Philadelphia clearing-house under these circumstances. On said date Gideon W. Marsh, the president of the Keystone National Bank, acting on its behalf and by its authority, came to the banking room of the said Fourth Street National Bank, in the city of Philadelphia, and there represented to the officials of that bank that the Keystone National Bank owed a balance at the clearing-house which it could not meet, because its funds were in the city of New York, and exhibited to them a memorandum showing a balance to the credit of the Keystone National Bank in the Tradesmen's National Bank of the city of New York of about twenty-seven thousand dollars ($27,000), stating that his bank wished to draw against it and get clearing-house certificates; and he asked the Fourth Street National Bank to accept the draft of the Keystone National Bank for twenty-five thousand dollars ($25,000) against this "reserve account in the New York bank" — that is to say, against the said fund in the Tradesmen's National Bank — and give his bank clearing-house gold certificates therefor. Relying upon these representations of Marsh, and on the faith of his statement, supported by the said memorandum, that the Keystone National Bank had in the Tradesmen's National Bank the specified fund against which it proposed to draw, the Fourth Street National Bank gave Marsh, for the use of the Keystone National Bank, clearing-house gold certificates to the amount of twenty-five thousand dollars ($25,000) and took its draft, of which the following is a copy:

"Keystone National Bank. No. 5086.

"PHILADELPHIA, *March* 19, 1891.

"Pay to the order of R. H. Rushton, cashier, ($25,000) twenty-five thousand dollars.

"JOHN HAYES, *Cashier.*

"To the Tradesmen's National Bank, New York."

R. H. Rushton was the cashier of the Fourth Street National Bank.

The books of the Keystone National Bank show that on the 19th day of March, 1891, it had to its credit in the Tradesmen's National Bank of the city of New York the sum of twenty-six thousand nine hundred and seven and $\frac{32}{100}$ dollars ($26,907.32), and on the same day an entry was made therein

Counsel for Appellant.

The following are the questions propounded:

"First. Do the above stated facts show an equitable assignment by the Keystone National Bank to the Fourth Street National Bank of twenty-five thousand dollars of the fund, consisting of cash and collection items or drafts as aforesaid, belonging to the Keystone National Bank in the hands of the Tradesmen's National Bank?

"Second. If the stated facts do not show such equitable assignment of the whole twenty-five thousand dollars, do they show such equitable assignment of the cash so in the hands of the Tradesmen's National Bank, namely, the sum of nineteen thousand seven hundred and twenty-five and $\frac{62}{100}$ dollars?"

Mr. Samuel Dickson and *Mr. Richard C. Dale* for appellant.

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charging against that credit the said draft for twenty-five thousand dollars ($25,000) it had given to the Fourth Street National Bank.

The draft for twenty-five thousand dollars ($25,000) was duly forwarded to New York for collection and was presented for payment to the Tradesmen's National Bank on the morning of March 20, 1891. Payment thereof was refused upon the ground that the drawee had not in hand funds of the drawer sufficient to pay the same. In fact, the Tradesmen's National Bank had in cash and in collection items (drafts) for the Keystone National Bank the sum of twenty-six thousand nine hundred and seven and $\frac{32}{100}$ dollars ($26,907.32), of which eighteen thousand and fifty-six and $\frac{21}{100}$ dollars ($18,056.21) were remitted by the latter-named bank to the former on March 19, 1891, and the rest previously. The Tradesmen's National Bank then had in hand in cash to the credit of the Keystone National Bank the sum of nineteen thousand seven hundred and twenty-five and $\frac{62}{100}$ dollars ($19,725.62), and had in addition the said collection items to make up the full sum of twenty-six thousand nine hundred and seven and $\frac{32}{100}$ dollars ($26,907.32). Afterwards this money was paid and the said collection items or drafts were turned over to Robert M. Yardley, the receiver of the Keystone National Bank, and out of the collection items he realized sixty-one hundred dollars ($6100), and he thus had in his hands from this source when the bill in this case was filed the sum of twenty-five thousand eight hundred and twenty-five and $\frac{62}{100}$ dollars ($25,825.62) in cash.

On the 20th day of March, 1891 (some time during the morning), by the order of the Comptroller of the Currency of the United States, the Keystone National Bank was closed, and thereafter Robert M. Yardley was appointed receiver thereof.

Argument for Appellee.

Mr. Silas W. Pettit for appellee.

I. The paper given by the Keystone to the Fourth Street Bank was a check in ordinary form on the Tradesmen's Bank for $25,000, and was represented by Marsh to be drawn against the balances which he alleged the Keystone had with the Tradesmen's Bank upon a deposit account such as banks usually keep between themselves. Under the Banking Act Philadelphia national banks can count as part of their reserve against the amount of their notes in circulation and deposits the amounts they have to their credit with New York national banks. Rev. Stat. §§ 5191, 5195.

So far, therefore, the check in question is the same as any check drawn by any depositor upon a bank in which he has a deposit account.

Although many respectable authorities, such as Chancellor Kent, Mr. Byles and Mr. Morse, have held that the holder of a check drawn against sufficient funds has a right of action against the drawee, the weight of authority is the other way. *Saylor* v. *Bushong*, 100 Penn. St. 23, 27; *Bank of Republic* v. *Millard*, 10 Wall. 152, 157; *Florence Mining Co.* v. *Brown*, 124 U. S. 385. Mr. Morse himself, although strongly arguing the other way, concedes that "the most numerous body of decisions sustains the view that a check is neither a legal or an *equitable assignment as between drawer and payee*, nor a sufficient foundation for *any action* by a holder against the bank." Morse on Banks, § 493.

A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor the check when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice Byles in the case of *Keene* v. *Beard*, but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder. *Hopkinson* v. *Forster*, L. R. 19

Eq. 74. See also *First National Bank* v. *Whitman*, 94 U. S. 343; *Laclede Bank* v. *Schuler*, 120 U. S. 511; *St. Louis & San Francisco Railroad* v. *Johnston*, 133 U. S. 566, 574.

Bills of exchange and checks do not stand on the footing of orders drawn upon a particular fund with a manifested intention to create a lien thereupon, and the tendency and preponderancy of authorities seem in favor of the rule that neither a bill of exchange nor a check on a bank can operate as an assignment or appointment of the fund in the drawee's hands, or create any manner of lien upon it. *Dana* v. *Third National Bank*, 13 Allen, 445–448. As this case arises between a Pennsylvania and a New York bank, it may not be out of place to note that the rule of this court has been fully adopted by the courts of both those States. *Saylor* v. *Bushong*, 100 Penn. St. 23; *First National Bank* v. *McMichael*, 106 Penn. St. 460; *Ætna Bank* v. *Fourth National Bank*, 46 N. Y. 82; *People* v. *Merchants' Bank*, 78 N. Y. 269; *Risley* v. *Phœnix Bank*, 83 N. Y. 318.

It is to be remembered, however, that in many of the States the rule is that the giving of a check does in law operate as an equitable assignment *pro tanto* of the fund against which it is drawn. This is (or formerly was) the law in Missouri (see *First National Bank* v. *Coates*, 3 McCrary, 9), and hence it is contended that the cases of checks on banks cited by appellant are not in point here because governed by the law then prevailing in that forum.

No doubt no writing, and no particular form of words written or verbal, is needed to constitute a valid assignment in equity of a debt or other chose in action; any expression, written or verbal, is sufficient which shows the intention to transfer or appropriate a particular debt or fund to the assignee for a valuable consideration, and this is true likewise of most forms of personal property.

That ordinarily a check drawn in the usual course of business upon a deposit in a bank would operate as such an assignment is quite clear from the reasoning of the cases in those States which hold it to be such, but for reasons of commercial convenience too well established to need to be stated or

defended it has been thoroughly established by this court and in the courts of many of the United States, that where the depositor is a bank or banker a check or bill of exchange drawn on it or him is not an equitable assignment in favor of the payee of the check.

A check drawn generally is not considered to be drawn on a particular fund, and, except in those States in which it is considered to be an equitable assignment of the amount mentioned therein, the legal right of the drawee of the check to countermand it and forbid its payment, or to forestall it by drawing other checks and having them presented, is well established, and however dishonorable and fraudulent the drawer's conduct may be, it is confidently believed that in no case has a holder of the check been permitted to recover, either at law or in equity, against the drawee, except in those States in which he has a right of action against the drawee upon the check itself, irrespective of any other circumstance. On the contrary, the general practice has been, as shown by the reports, for the payee of the check to attach the funds in the hands of the drawee as the property of the drawer of the check, a method of procedure clearly inapplicable if the giving of the check operated as an assignment.

On the other hand, if the check does operate as an assignment as between the drawee and the payee, even if it did not do so as against the bank or banker on whom it is drawn, it is clear that upon presentation and notice to the drawee, the right of action by the payee against the drawee would accrue, and that such action does not accrue is the exact point decided by numerous cases in the Supreme Court of the United States, which have been followed by the courts of many other States, including those of Pennsylvania and New York, where the transaction now in controversy took place.

On the one hand, it is held that where the check is drawn against funds in a bank, of course that particular fund is the fund designated in the check, and that the holder of the fund is under an implied promise, arising from the well-known usage of the business, to pay the check upon demand — that the banker when he receives the deposit agrees with the deposi-

tor to pay it out on the presentation of his checks in such sums as those checks may call for, and to the person presenting them, and agrees with the whole world that the owner of such check shall, upon presentation, thereby become the owner and entitled to receive the amount called for by the check, provided the drawer shall have funds on deposit to meet it, and that there thus arises a privity of contract upon which the holder of the check may at once sue the banker in case it is dishonored. On the other hand, however, it is held that there is no privity of contract between the banker and holder of the check when it is given; that, obviously, the check is given and accepted on the credit of the drawer alone, and not on that of the drawee, and that the payee, or owner of the check, has no rights against the bank holding the deposit until presentment and acceptance, and that otherwise great inconvenience would arise in the conduct of the business of banking.

Except for the inconveniences, the first rule would seem to be the logical one, and has in fact been frequently applied by all the courts where a check, or an order equivalent thereto, is given upon an agent or consignee or other depositary of money or property belonging to him who gives the check or other order to pay, transfer or deliver the money or property designated therein, as the cases cited by the appellant abundantly establish. The difficulty of the appellants, is not from the want of analogy between the cases they cite and the appeal they prosecute here, but arises because of the rule already referred to, now thoroughly established as law by the decisions of this court and adopted by most of the States in accordance with those decisions; whatever may be the rule governing equitable assignments of money or property in general, it is now held that a check on a banker is not an assignment of the fund on which it is drawn.

II. Nor was there in this case any special circumstance which would take it out of the general rule.

The representation by Marsh that the check was drawn against funds was only the verbal expression of that which is necessarily implied by the giving of the check itself, an im-

plication so strong that it has been held that the drawer of a check drawn on a bank where he has no funds is liable, criminally, for a false pretence; and the cases are numerous where the vendor of merchandise has been permitted to rescind the sale on the ground of fraud when he has made delivery upon the faith of a check drawn against a bank in which the drawer had not sufficient funds to meet it.

Nor does it seem that the fact that the check was entered by the Keystone Bank in its account against the Tradesmen's Bank should affect the question. Such entry would almost certainly be found in every case where a check is drawn, and in no case could it have less weight than in the one under consideration, because in this case the bank did not, as matter of fact, have the balance in the Tradesmen's Bank which its books pretended it had, and such check was in fact an overdraft when made.

III. The point that the receiver has no rights other than those of the Keystone Bank does not seem to affect the question here.

By Rev. Stat. section 5242, all transfers by national banks of deposits to its credit, for its use "or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof," are declared to be utterly null and void. The Keystone Bank was closed on March 20, 1891, and thereafter any payment on a check theretofore drawn by it was prohibited by law, and the receiver, representing all its creditors, was entitled to all sums on deposit to its credit at the time the bank was closed, for equal distribution among them. The same rule is of familiar application in practice in other cases of insolvency, and it is believed that no case can be found, except, perhaps, some where the circumstances were extraordinary, in which the holders of any unpresented check have been held to be entitled to the bank balances standing to the credit of the insolvent at the time of the insolvency as against the assignee; certainly the every-day practice is for the assignee to take over all the bank balances of the assignor in preference to the holders of unpresented checks, who come

in only for their dividend thereon out of the general fund. And that this is the usual practice is again shown by the numerous cases in which the right of stoppage *in transitu* has been exercised by the holders of such checks upon the ground of the failure of the consideration for which they had sold their merchandise.

IV. The appellant's contention is that the check given was an equitable assignment; but an equitable assignment of what?

It is submitted that it is impossible to designate exactly of what the check can be considered to have been an assignment, equitable or legal, and that the case presented shows no "particular fund" to have existed at all, but that it presents the ordinary case of a check drawn on a bank partly on funds on deposit and partly on funds to be deposited in the ordinary course of business, presented for payment, and dishonored because the funds to be sent had not in fact been received, or accepted as cash, by the drawee, and in respect to such a case it cannot be said that the check is an assignment of anything, or is other than a mere order to pay, subject to countermand by the assignment or insolvency of the drawer, without overruling a long line of decisions of this court which have now become the rule of decision in most of the States of the Union. It seems to be peculiarly a case in which the maxim of *stare decisis* should be applied.

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

As between a check holder and the bank upon which such check is drawn, it is settled that, unless the check be accepted by the bank, an action cannot be maintained by the holder against the bank. *Bank of Republic* v. *Millard*, 10 Wall. 152; *First National Bank* v. *Whitman*, 94 U. S. 343.

It is also settled that a check, drawn in the ordinary form, does not, as between the maker and payee, constitute an equitable assignment *pro tanto* of an indebtedness owing by the bank upon which the check has been drawn, and that the

mere giving and receipt of the check does not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors. *Florence Mining Company* v. *Brown*, 124 U. S. 385; *Laclede Bank* v. *Schuler*, 120 U. S. 511.

That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court. *Trist* v. *Child*, 21 Wall. 441, 447; *Peugh* v. *Porter*, 112 U. S. 737, 742. For recent cases maintaining this principle and referring to the present state of the law on the subject in the various States, see *James* v. *Newton*, 142 Mass. 366; *National Exchange Bank* v. *McLoon*, 73 Maine, 498; and *Lanigan* v. *Bradley and Currier Co.*, 50 N. J. Eq. 201.

Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice.

This is but an application of the general doctrine of equitable assignments or liens announced by this court in *Ketchum* v. *St. Louis*, 101 U. S. 306, where it was held, citing various authorities and text writers, that: "A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement." It is immaterial, for the purposes of this case, to draw a line of distinction between equitable assignments and equitable liens or charges.

In *Risley* v. *Phœnix Bank*, 83 N. Y. 318, two counts of a complaint were based upon a check drawn upon the defendant

bank by a depositor, in favor of plaintiff, while the third count based the right to recover upon an alleged oral assignment of a part of an indebtedness owing by the bank to such depositor, to the amount of the check. The check in question was drawn May 20, 1861, by a bank in South Carolina upon a bank in New York. The trial court ruled that the plaintiff was not entitled to recover upon the causes of action founded upon the check and the verbal promise of payment, but that plaintiff was entitled to recover upon the third cause of action if the jury should find the facts to be as therein averred. A judgment upon a verdict in favor of plaintiff was affirmed, it being held (p. 327), to quote the language of the Court of Appeals in the subsequent case of *Coates* v. *First National Bank of Emporia*, 91 N. Y. 26, "in substance that when in addition to the check there was an oral agreement between the drawer and payee, by which the former for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and recover the portion of the debt assigned, the agreement operated as an assignment, and was sufficient to vest in the payee a title to that portion of the debt."

In the *Coates case*, the Emporia Bank interpleaded in an action brought by the assignee in insolvency of the Mastin Bank against Donnell, Lawson & Co., bankers in New York City, to recover a balance of a deposit account kept by the Mastin Bank with Donnell, Lawson & Co. The intervenor, the Emporia Bank, claimed to be entitled to a part of such balance on the ground of an assignment thereof made to it by the Mastin Bank, under the following circumstances: The Mastin Bank owed the Emporia Bank, and was requested by the latter to transfer on account thereof funds to the credit of the Mastin Bank with Donnell, Lawson & Co. The Mastin Bank replied it would do so, and at once charged the Emporia Bank, and credited themselves with $5000, and on the same day, by letter, informed the Emporia Bank that this had been done, and by letter also notified Donnell, Lawson & Co. to credit the account of the Emporia Bank with the sum named.

The Emporia Bank also gave the Mastin Bank credit for the amount. The Court of Appeals said (pp. 27–28):

"These circumstances in the conduct of both parties establish an agreement, the effect of which, as between the Mastin Bank and the Emporia Bank, was to estop the former from setting up that so much of the credit to which they were before entitled from Donnell, Lawson & Co. did not belong to the Emporia Bank, and the Emporia Bank from saying that so much of the debt before due from the Mastin Bank to it had not been extinguished. *Allen* v. *Culver*, 3 Den. 284–292. Written out, the contract indicated by the bank entries and the correspondence is one of assignment of so much of the credit, or funds then to its credit with Donnell, Lawson & Co. to the Emporia Bank, and a discharge of a debt due by it to that bank. The whole was completed the moment the letter of the Mastin Bank to the Emporia Bank was placed in the post office. *Graves* v. *American Ex. Bk.*, 17 N. Y. 205; *Brogden* v. *Metropolitan Ry. Co.*, L. R. 2 App. Cas. 666, 692; *Ex parte Harris*, L. R. 7 Ch. App. 596; *Barry* v. *Equitable Life Assurance Society*, 59 N. Y. 587, 594; *Wayne Co. Savings Bk.* v. *Low*, 81 N. Y. 566; 37 Am. Rep. 533. . . . As between these parties the credit or funds had ceased to be the property of the Mastin Bank. The Emporia Bank was no longer creditor, because it was paid. The credit, or right to call upon Donnell, Lawson & Co. for the same amount, was the means of payment."

It was also held (p. 29), upon the authority of *Heath* v. *Hall*, 2 Rose, 271, and *Burn* v. *Carvalho*, 4 M. & C. 690, that, as rights of third parties were not involved, it was immaterial to plaintiff's right to recover that the Mastin Bank became insolvent and made a general assignment for the benefit of its creditors, of which Donnell, Lawson & Co. were notified before receipt by them of the notice from the Mastin Bank to credit the Emporia Bank. The court found (p. 30) that the entries made by the Mastin Bank on its books showed an intention on the part of the Mastin Bank to transfer to the Emporia Bank a specific amount of the deposit with Donnell, Lawson & Co., and, "taken in connection with the letters

between the parties, and the order and letter of advice sent to Donnell, Lawson & Co., they are equivalent to an actual transfer of credit, or account; to an assignment, therefore, at least in equity, of the fund in the hands of Donnell, Lawson & Co."

In *Throop Grain Cleaner Co.* v. *Smith*, 110 N. Y. 83, 88, it was again held, to quote from the syllabus in the case, that (p. 83): "While the mere delivery to a third person of a check or draft drawn by a creditor upon his debtor does not affect a legal transfer of the debt, where it appears that the intent was to make such a transfer, it is the duty of the court to carry out the intent." The court, in that case, from a review of the evidence deduced therefrom, as matter of law, an actual transfer of the debt owing by the parties upon which a check or draft had been drawn.

In the still more recent case of *First National Bank* v. *Clark*, 134 N. Y. 368, the doctrine of *Risley* v. *Phœnix Bank*, and *Throop Grain Cleaner Co.* v. *Smith*, was expressly approved. (p. 373.) The controversy was between the payee of a check and a private banker upon whom it had been drawn, the defendant denying having been at any time indebted to the maker of the check. In affirming a judgment entered upon a verdict in favor of defendant, the Court of Appeals held, despite the fact that a check had been given, that the trial judge properly left it to the jury to determine under the particular circumstances whether the alleged debt had been assigned to the plaintiff.

In *First National Bank* v. *Dubuque, Southwestern &c. Railway*, 52 Iowa, 387, the Supreme Court of Iowa held that a bill of exchange drawn upon a general fund, and not accepted by the drawee, does not operate as an assignment of the fund, but is evidence to be considered with other circumstances in determining the intention of the parties.

In *Harrison* v. *Wright*, 100 Indiana, 515, a similar ruling was made. The Supreme Court of Indiana there reached the conclusion (p. 538) "that a check in the ordinary form upon the drawer's banker, without words of transfer, and drawn upon no particular designated fund, does not, of itself, operate

as an appropriation or equitable assignment of a fund in the hands of the drawee, nor does it operate as an assignment of a part of the drawer's chose in action against the drawee."

Among the considerations upon which this holding was based was the following (p. 539):

"Second. In the absence of evidence to the contrary, or a showing of an intention to assign a part of a fund in the hands of the drawee, or a part of the drawer's chose in action against the drawee, it should be presumed that the payee or holder of a check takes it upon the credit of the drawer, of whom he may collect, if payment be refused by the drawee."

In *Gardner* v. *National City Bank*, 39 Ohio St. 600, the controversy was between assignees in insolvency and the owners and payees of a check or draft made by the insolvents. The assignees in insolvency were held to stand in the shoes of the insolvent debtors and to have only their rights in the premises, and it was adjudged that parol evidence, that the draft was for the exact amount owing by the drawers, in connection with other facts appearing from the evidence, sufficiently established the intention to transfer the property in the fund and constituted an equitable assignment thereof, good as against the general creditors of the insolvent.

In the subsequent case of *Covert* v. *Rhodes*, 48 Ohio St. 66, it was held that where a check had been given for a part of a sum on deposit, which was not presented for payment until after the maker had made a general assignment for the benefit of creditors, the holder acquired no priority over general creditors in the amount to the depositor's credit which had been surrendered to the assignee in insolvency. There were, however, no special circumstances existing in the case to take it out of the operation of the general rule applicable to a check or draft given in the ordinary course of business.

In *Hopkinson* v. *Forster*, L. R. 19 Eq. 74, it was held that a check is not an equitable assignment of the drawer's balance at his bankers, but that circumstances might coexist to create a charge upon the amount owing. Thus, in answering the contention that a letter forwarded by the maker of a check to the payee created a charge on the debt owing, the Master of

the Rolls observed (p. 75): "You can have no charge in equity without an intent to charge. The letter on which you rely was not written with any intent to charge the fund; it was a mere letter of instructions to the bankers." So, also, in *Shand* v. *Du Buisson*, L. R. 18 Eq. 283, it was held that a bill of exchange drawn for the exact amount of a fund was not an equitable assignment of the fund. It was urged, however, (pp. 288 and 289) that the defendant was entitled to the fund, because he "advanced money of his own for the payment of the debt of the debtor, and that upon a contract then entered into, he was entitled to the money, and that the bill of exchange is only evidence of that contract." The Vice Chancellor, after observing that the claim thus urged "must rest upon evidence," proceeded to consider the evidence adduced, and held it to be insufficient.

In *Thompson* v. *Simpson*, L. R. 5 Ch. 659, it was sought to establish a lien on funds by reason of the purchase of a bill of exchange drawn upon the holder of the fund. Lord Hatherley said (p. 660): "It is extravagant to say that a man who has an agent employed to pay bills creates a charge on the funds in the agent's hands by the mere drawing of a bill. It is necessary to make out a contract to charge specific funds which were with the Liverpool Bank, or which were on their road thither; for if there was only a personal contract, that would give nothing but a right of action." In the same case, Lord Justice James observed (p. 662) that "when it is attempted to make out, in addition to the written contract contained in a bill of exchange, a collateral parol agreement, it is most important to have clear and satisfactory evidence as to the exact words used."

In the case of *Citizens' Bank of Louisiana* v. *The First National Bank of New Orleans*, L. R. 6 H. L. 352, it was attempted to establish a parol contract that certain bills of exchange payable sixty days after sight should be paid out of a specific fund. The House of Lords, however, held that the evidence exhibited merely an ordinary mercantile transaction for the purchase of a bill of exchange, and did not establish that it was intended to specifically appropriate a portion

of a particular fund to the payment of the bills in question. It was, however, clearly recognized that an oral understanding, entered into in a transaction where a bill of exchange was delivered, might constitute an equitable assignment of a fund, for, in commenting upon the averments of certain facts on the subject of an assignment, Lord Chancellor Selborne said (p. 359): "That is the first part of the case, and of course, if proved, it would have been a very clear case of a contract for an equitable assignment."

In the light of these principles, we proceed to consider the facts certified, in order to ascertain whether in the transaction connected with the giving of the check in question there was either an express agreement to assign the fund, or to give a lien or charge thereon, or whether, if not express, such agreement is necessarily to be implied from the conduct of the parties, the nature of their dealings and the attendant circumstances. The facts, succinctly stated, are that the Keystone Bank, through its president, solicited the Fourth Street Bank to give to the former $25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York City. At the same time that this request was made the president of the Keystone Bank made the further statement that his bank owed a balance at the clearing-house which it could not meet "because its funds were in the city of New York," and exhibited a memorandum showing the amount to its credit with the Tradesmen's Bank to be in the neighborhood of $27,000. In reliance upon such representations and the statements made supported by the memorandum exhibited, the Fourth Street Bank delivered to the Keystone Bank the certificates requested, and there was delivered a check for $25,000 upon the Tradesmen's National Bank of New York. The draft in question was at once forwarded to the city of New York, and was presented for payment at the Tradesmen's Bank on the following morning, when payment was refused. At the time of presentment the Tradesmen's Bank had to the credit of Keystone Bank $19,725.62 in cash and collection items amounting to $7181.70, in all $26,907.32.

Of this amount $18,056.21 had been remitted by the Keystone Bank on the day previous.

When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties. Both were banking institutions — banks of deposit. They were located in the same city. They were not correspondents the one with the other, and there was no deposit account kept by the one with the other; indeed, so far as the usual course of commercial transactions was concerned, the banks were strangers. The application therefore by the Keystone Bank to the Fourth Street Bank for accommodation under these circumstances precludes the conception that the relation between the parties was purely one of a usual and customary nature.

It cannot be doubted that a mere request for the loan by the Keystone Bank from the Fourth Street Bank would have been so surprising that the contract would not possibly have been made without a statement of the reason which rendered the request necessary. It is equally clear that the mere statement of the situation which caused the request to be made would, in itself, from any standpoint of business prudence, have made it the duty of the Fourth Street Bank to refuse without full security. It follows that the same reason which imperatively required the Keystone Bank to disclose the cause for its request, also rendered it absolutely essential, in order to obtain the loan, that it indicate a specific source or means of payment outside of and beyond its mere general credit. In other words, that it should tender ample security for the loan which it requested. The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without the reference to and assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge or lien on the property upon the faith of which they both dealt. The transaction, therefore, was a proposition to borrow on the one hand, accompanied with the disclosure that security was neces-

sary and tendering the security, and on the other hand an acceptance of such proposal and an advance made on the faith of it. Not to conclude that such was the agreement and contract contemplated and actually entered into by the parties, would lead to the impossible and contradictory theory that the minds of the parties could not and would not have met on the subject of the loan unless a prerequisite link to that meeting of minds existed, and yet at the same time to hold that the minds had met without the existence of that prerequisite which was the very essence and necessary foundation of the agreement.

Considered in other respects, a like conclusion follows. The Fourth Street Bank, as stated, was under no obligation to grant the request of the Keystone Bank; it was to derive no pecuniary advantage whatever from the proposed transaction; it was not in any sense for the convenience of the Fourth Street Bank that the contract was made, and the bank clearly contemplated an immediate reimbursement, if it delivered the certificates asked for. Had the transaction been an ordinary one, that of a time or even demand loan made with a person in good credit in the line of his business, and not, as it was, an extraordinary transaction, we might well presuppose that it was the expectation of the Fourth Street Bank that the borrower should merely have on hand with the Tradesmen's Bank when the check was presented a sufficient amount to pay it.

But the Keystone Bank, in disclosing its hazardous situation and indicating the specific fund dedicated to the payment of the solicited accommodation, did not represent that it expected to further check against the Tradesmen's Bank before the check which it proposed to give might be presented. The statements made clearly implied to the contrary, exhibiting as they did the embarrassment of the borrowing bank, arising from the need of available cash to meet its clearings, and proposing a transaction by which the Fourth Street Bank would obtain from a bank, but a few hours distant, the prompt and certain payment of its advance.

As stated, this was manifestly not an ordinary mercantile transaction, but one of an extraordinary character, and when

we consider the situation and conduct of the parties, the disclosures made at the time of the contract, and weigh the probabilities of the case, it is impossible to infer otherwise than that it was intended that the particular fund in the Tradesmen's Bank should be not only the source from which payment of the check to be given should be made, but that the fund should be transferred and appropriated *pro tanto* for that purpose. It is of course true that the method adopted to evidence the appropriation was a check drawn generally upon the Tradesmen's Bank, but, as already stated, the authorities are clear that when it is established that it was the intention and agreement of the parties to a transaction that a check drawn generally should be paid out of a particular fund, such check, as between the parties, will be treated as though an order for payment out of a specific, designated fund.

It is not material, as affecting the rights of the Fourth Street Bank in the fund, that the sum with the Tradesmen's Bank was not exclusively a cash indebtedness, but in fact consisted partly of cash then owing and of money or drafts in the course of transmission to or collection by the New York bank. The receiver took no greater rights in the property of the insolvent bank, which came into his possession than that which the insolvent bank possessed. *Scott* v. *Armstrong*, 146 U. S. 499, 507.

As the Fourth Street Bank contracted and parted with its money on the faith of the representations of the Keystone Bank that there was to its credit, in the Tradesmen's Bank, a specific sum, and the fund which came into the hands of its voluntary assignee is the fund as to which the representations were made, the Keystone Bank and its assignee are in equity estopped from asserting, to the prejudice of the Fourth Street Bank, that the character and condition of the fund was otherwise than it was represented to be.

In answer to the suggestion, made in the argument at bar, that possibly the collection items may not have belonged to the Keystone Bank, but may have been the property of others for whom the bank merely held them for collection account, it suffices to say there is no intimation to this end in the facts

stated. It is, consequently, unnecessary to determine any question as to priority of payment out of the fund, except that presented by the conflict between the Fourth Street Bank and the assignee in insolvency representing the general creditors of the Keystone Bank.

The first question propounded will therefore be answered in the affirmative, thus rendering it unnecessary to pass upon the second question certified, and

It is so ordered.

MR. JUSTICE GRAY, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

WALKER *v.* BROWN.

CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 193. Submitted January 13, 1896. — Decided March 1, 1897.

Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers, or encumbrancers with notice.

On the facts stated in the opinion of the court, which can with difficulty be condensed without omitting something which might be deemed essential, and applying to those facts the principle of law stated in the preceding paragraph, *Held*, that Walker & Co. had an equitable lien upon the bonds of Brown pledged to the Union National Bank, and that those bonds had been returned to Brown under such circumstances as to continue the lien against them in the hands of Mrs. Brown, to whom they had been given by him.

To dedicate property to a particular purpose, to provide that a specified creditor, and that creditor alone, shall be authorized to seek payment from it or its value, is to create an equitable lien upon it.

For reasons stated in the opinion interest is to be computed at the rate of six per cent, not at the rate of ten per cent.

Opinion of the Court.

THE case is stated in the opinion.

Mr. Henry S. Robbins for appellants.

Mr. Nathaniel T. Guernsey for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

The complainants, who are appellants here, all citizens of the State of Illinois, members of the firm of J. H. Walker & Company, established in the city of Chicago, filed their bill in the Circuit Court of the United States for the Southern District of Iowa, Central Division, against Anna L. Brown, widow of Talmadge E. Brown, as administratrix of her deceased husband's estate, and against Willis S. Brown and Edward L. Marsh, coadministrators, all of whom were alleged to be citizens of the State of Iowa and to have been duly appointed as aforesaid by the District Court of Polk County, Iowa.

Omitting reference to matters which have become irrelevant to the controversy in its final aspect, the bill substantially averred that Talmadge E. Brown, being desirous of assisting an Iowa corporation known as the Lloyd Mercantile Company, delivered to said company $15,000 bonds of the city of Memphis worth their face value: That between May and July, 1889, Walker & Company sold to the Lloyd Mercantile Company merchandise to a considerable amount, on the price of which there remained due on the 1st of August, 1889, $1524.78: That on or about that date the corporation was dissolved and a firm composed of J. Collins Lloyd and Copeley Lloyd was formed under the name of J. C. Lloyd & Company, for the purpose of continuing the business of the Mercantile Company, the new business to be carried on at Ellensburg, State of Washington; and that the firm assumed the debts and liabilities of the Lloyd Mercantile Company. It was further alleged that the firm just formed proposed to buy from Walker & Company a considerable amount of merchandise on credit, but that Walker &

Company declined to give this asked for credit unless Brown would agree that the fifteen thousand of Memphis bonds, lent by him to the Lloyd Mercantile Company, should not be withdrawn by Brown from the assets of the new firm, or be returned to Brown as long as there remained a debt due to Walker & Company by Lloyd & Company on account of the purchase of goods: That thereupon Brown entered into a written agreement to the effect stated, and that on the faith of this written agreement the firm of Walker & Company had not pressed the collection of the old debt, and had sold Lloyd & Company merchandise on credit to the value of $12,391.61, which, added to the sum previously due and assumed by Lloyd & Company, made the debt due to Walker & Company $13,916.39, the whole of which sum the bill averred to be due at the time of the commencement of the suit. The bill charged that the intent of the parties and the legal result of the agreement made by Brown was to cause the fifteen thousand Memphis bonds or their value to become a security for this debt of Walker & Company, and that thereby there was created an equitable lien on the bonds to the amount of the debt in favor of Walker & Company.

It was further alleged that on the 25th day of December, 1889, the firm of Lloyd & Company became wholly insolvent, and so remained up to the time of the filing of the bill: That after the making of the agreement by Brown, in order to escape the effect of the contract, Brown induced Lloyd & Company to return to him (Brown) the Memphis bonds, and that from the time of such return neither the said bonds or the value thereof formed part of the assets of Lloyd & Company: That Walker & Company did not know of the return of the bonds until after the credit had been extended to Lloyd & Company. It was alleged that complainants did not know the true condition of the estate of Brown, or whether the Memphis bonds were yet among its assets, and that a discovery and accounting was necessary in order to enable them to reach the property upon which the lien was asserted to exist or the proceeds thereof in the hands of the administrators.

The relief prayed was that if on discovery it be found that

the Memphis bonds or any portion thereof were a part of the assets of the estate of Brown, an equitable lien be recognized thereon, and the bonds be ordered to be sold and the proceeds applied, as far as necessary, to the payment of the debt due by Lloyd & Company to the complainants : That if the Memphis bonds had been sold or exchanged by Brown for other properties, which could be traced to the hands of the administrators, that a like lien might be adjudged thereon : That if the bonds, or any part thereof, did not form a part of the estate of Brown in the hands of his administrators, the complainants might be adjudged to be creditors of the estate for the amount of the value of the bonds to the extent necessary to pay their debt: and that the administrators be ordered to pay this sum in due course of administration and be ordered to render, under the supervision of the court, an account of all properties received by them as administrators and of all their acts and doings as such. There was a prayer for an injunction restraining the disposing or encumbering of the Memphis bonds referred to or the proceeds thereof in the hands of the administrators. In addition to this claim there was an averment as to a debt due by Brown's estate for $560.14, asserted to have been expended in an endeavor to collect the debt due by Lloyd & Company, and for which it was alleged Brown had agreed to be responsible.

The answer, in so far as it relates to the matters above stated, averred that about February, 1889, the Lloyd Mercantile Company, being in need of money, induced Brown, the deceased, to loan fifteen one thousand dollar bonds of the city of Memphis, to be used as collateral security for a loan which the company was then about to make; that the company received the bonds and used them by pledging them to secure the debt, all of which facts were known to the complainants: That this transaction with the company was the only one the deceased had with it on the subject of the Memphis bonds. The answer specifically denied that the bonds of the city of Memphis thus loaned to the Mercantile Company were at any time an asset of said company, and also expressly denied that the bonds were ever loaned to the Mercantile Company or

to Lloyd & Company, its successor, for any other than the express purpose above stated, that is, to be used as collateral back of the particular loan referred to; denying all knowledge of the existence of the alleged debt in favor of Walker & Company, it was averred that no other contract or agreement on the subject of the bonds was made by Brown, with Walker & Company, except such contract as might result from the terms of a letter on the subject of the Memphis bonds, dated Chicago, December 21, 1889, written by Brown, to Walker & Company, which letter was set out in the answer.

After denying that the credit given to Walker & Company was extended to Lloyd & Company on the faith of the bonds, and after charging that the bonds were, at the time of the writing of the letter, held as collateral back of a loan of the Union National Bank of Chicago, and that no equitable lien thereon resulted from the writing of the letter by Brown, the answer, in addition, averred, that after the writing of the letter, to wit, some time during the month of November, 1889, the bank, in whose hands the Memphis bonds of Brown had been deposited as collateral for Lloyd & Company's debt, pressed for payment of the principal obligation and threatened in default to sell the bonds: That Brown thereupon, in order to prevent the sale of his bonds, paid the debt with his own funds and withdrew the bonds, and that thus he had been discharged of his obligations under the terms of the letter referred to, if any obligation thereby arose: That no part of the money which made this payment was that of Lloyd & Company, or was taken from the assets of the firm, but the payment was made wholly and exclusively with the money of Brown in order to prevent the sale of his bonds. It was also charged in the answer that if any debt existed in favor of Walker & Company it was extinguished, this being predicated on a recital of the following facts: That on the failure of J. C. Lloyd & Company in December, 1889, Walker & Company had taken a chattel mortgage on the stock of goods of the firm at Ellensburg, Washington, to secure the payment of their debt, and had entered with other creditors having a like mortgage into

possession of the stock of goods, which largely exceeded the value of the mortgages resting upon it: That thereafter creditors of Lloyd & Company had levied upon the stock and had actually disturbed, or threatened to disturb, the possession of the mortgagees: That the mortgagees then acquired the rights of certain of these creditors who had levied upon the stock, and had, then, under process issued in the name of the creditors, sold and bought in the equity of the creditors in the stock, and subsequently, without any foreclosure of their mortgages, taken entire charge of the stock and disposed of it at private sale. These facts, the bill averred, had, under the laws of Washington, operated to extinguish the claim of the mortgage creditors.

The answer moreover admitted that at the time of Brown's death "there were fifteen one thousand dollar bonds of the city of Memphis in his possession as his property, and that the same passed with his other estate into the hands of his administrators as part of his said estate. But this respondent avers that the bonds were, prior to the death of Brown, given by him as a gift to his wife, Anna L. Brown, who now holds and owns the same." Replication to the answer was filed on the 5th of March, 1892.

The issues as to the main controversy presented by these pleadings were therefore clearly as follows: An assertion on the part of complainants that they had extended credit upon their old debt due by the Lloyd Mercantile Company and assumed by Lloyd & Company, and had given further credit to the new firm of Lloyd & Company, by selling merchandise to it on the faith of an agreement by Brown that his Memphis bonds should be a security for the debt, and that this agreement was evidenced by a written contract on the part of Brown, the result of which was to create an equitable lien upon the bonds or the value thereof, that Brown had unlawfully withdrawn the bonds, and that the lien was therefore operative upon the bonds in his possession or upon their proceeds if he had disposed of them, and if the proceeds could be traced to his estate, and if not that the estate was liable for the debt. A denial on the part of the defendants that

there was any contract but the letter above referred to, the the terms of which it was asserted did not give rise to a lien upon the bonds or their value, which was followed by the allegation that all Brown's obligations under the contract, if any arose from it, had been extinguished by his being compelled to pay, in order to prevent the sale of the bonds, solely from his own money the debt for which the bonds were pledged, the further defence being an assertion that the claim of Walker & Company against Lloyd & Company was extinguished in consequence of the acts in relation to the mortgage subsequently taken, is referred to in the answer.

In support of these various issues both parties took testimony, under commissions, the last deposition having been opened on October 18, 1892. When all the testimony had been taken and its result was known to the parties, on November 14, 1892, the complainants by leave of court amended their bill by averments charging that the Memphis bonds referred to were in the possession of Mrs. Anna L. Brown, she having received them as a gift from Talmadge E. Brown, and praying the recognition of an equitable lien on the bonds in her hands. The defendants amended their answer by additional averments concerning the conduct of Walker & Company in relation to the mortgage taken to secure their debt. The amended answer besides averred that "the said T. E. Brown, deceased, contributed in value to the said J. C. Lloyd & Company and their funds and assets the full sum or value of fifteen thousand ($15,000) dollars, being the actual value of the Memphis bonds loaned to said J. C. Lloyd & Company; and that the estate of T. E. Brown through these defendants likewise contributed more largely in amount than the value of said Memphis bonds to the assets and to the payment of the indebtedness of J. C. Lloyd & Company." The result of these amendments was that the complainants, finding the bonds in the possession of Mrs. Brown under a gift from her husband, elected to proceed against her for the enforcement of the equitable lien which they asserted, and the defendants added a new ground to their original defence by asserting, not that the bonds had been returned to Brown

in consequence of the payment by him of the debt for which they had been pledged, but that Brown and his estate had contributed more than the value of the bonds to the payment of the debts of Lloyd & Company. The Circuit Court, finding that the contract between Walker & Company and Brown created no equitable lien on the bonds, but only an ordinary contract relation, concluded that the remedy of the complainants was not within the cognizance of a court of equity, and, therefore, dismissed the bill, reserving the right of Walker & Company to seek relief against the estate of Brown in an action at law. 56 Fed. Rep. 23. The Circuit Court of Appeals for the Eighth Circuit, to which court the case was taken on appeal, rested its decree of affirmance upon substantially the same grounds. 27 U. S. App. 291. A writ of certiorari was allowed and the record has been brought here for review.

The following facts are established by the proof:

In 1888 J. C. Lloyd and Copeley Lloyd were engaged in business at Des Moines, Iowa. T. E. Brown was also a resident of Des Moines and a man of large fortune. His adopted or foster daughter was the wife of J. C. Lloyd. In February, 1889, J. C. Lloyd and Copeley Lloyd organized a corporation under the laws of Iowa, called the Lloyd Mercantile Company, and this company, either with the stock of goods purchased in its own name after its organization or with a stock which had been purchased previously by J. C. and Copeley Lloyd and by them transferred to the corporation, commenced business in March, 1889, at Tacoma, Washington Territory. In May, 1889, part of the stock of merchandise of the company was moved to Ellensburg, Washington Territory, where a store was opened in the name of the corporation, and the remainder of the stock was taken to Davenport, in the same Territory, where a branch store was also opened. Between July and the 1st of August, 1889, J. C. Lloyd and Copeley Lloyd issued a circular, announcing the formation of a commercial firm under the name of J. C. Lloyd & Company, which, it was stated, had assumed all the debts of the Lloyd Mercantile Company. In the autumn of 1888, preceding the formation of the Mercantile Company, the Lloyds bought from the firm of Clement, Bain

& Company merchandise to the extent of $50,000, part of which was paid for in money and the balance evidenced by notes. In February, 1889, there were outstanding and unpaid notes, thus given for the purchase price of the merchandise bought from Clement, Bain & Company, to the amount of $15,000. Upon these notes T. E. Brown was the endorser or surety. The makers of the notes being unable to pay them, Brown handed to Lloyd fifteen bonds of the denomination of one thousand dollars each of the city of Memphis for the express and only purpose of enabling Lloyd to use the bonds as collateral security for a loan to be procured with which to pay the outstanding notes upon which he (Brown) was surety. Lloyd called upon the firm of James H. Walker & Company of Chicago to assist him in obtaining this loan. Mason, a confidential employé, managing the credits of Walker & Company, coöperated with Lloyd in his effort to borrow money on the security of the bonds of Brown. The Union National Bank of Chicago, whose president was a member of the firm of Walker & Company, lent Lloyd the money, and the fifteen Memphis bonds were pledged as collateral for this loan. Subsequently, from May to July, 1889, Walker & Company sold and shipped to the Lloyd Mercantile Company a very considerable amount of merchandise, and at the time of the dissolution of the corporation and the formation of the firm the Lloyd Mercantile Company owed Walker & Company a balance of account to the extent of $1524.78. During the course of these dealings the note which had been given by Lloyd to the Union Bank, supported by the Memphis bonds as collateral, reached maturity and through the friendly coöperation of Walker & Company the bank which held it, at the request of Lloyd, extended the term for its payment. After the formation of the partnership of Lloyd & Company, Lloyd desired to purchase on credit a large amount of goods from Walker & Company, and furnished, on being called upon, a statement of the condition of the firm. This statement indicated the solvency of the firm, but contained no mention of a claim in favor of Brown resulting from the Memphis bond transaction. Upon inquiry being addressed by Mason to Lloyd on the sub-

ject, he declared that he had not included in his statement a debt in favor of Brown growing out of the lending of the Memphis bonds, because it was a mere friendly arrangement between himself and Brown, and "he did not regard it exactly as a debt." Mason thereupon made a memorandum on the bottom of the statement as follows: "In addition to above liability, owe Mr. T. E. Brown, Des Moines, Ia., $15,000, payable at our convenience. This is in the city of Memphis, Tenn., bonds, now hypothecated Union National Bank for loan equal in amount." Mason thereupon informed Lloyd "that those bonds or the proceeds of those bonds were not to be returned or paid to Mr. Brown until our debt is paid," and Lloyd requested Mason to dictate such a letter as he might wish Brown to sign and it would be signed. Mason then dictated a letter, which is the one referred to in the bill of complaint as evidencing the contract, and which, as already stated, was set out in full in the answer:

"CHICAGO, Sept. 21st, 1889.

"Messrs. James H. Walker & Co., Chicago, Ill.

"GENTLEMEN: I beg to advise you that the loan of fifteen thousand dollars, Memphis bonds, made by me to Mr. J. C. Lloyd for the use of Messrs. Lloyd & Co., Ellensburgh, Wash. Ter., is with the understanding that any indebtedness that they may be owing you at any time, shall be paid before the return to me of these bonds, or the value thereof, and that these bonds or the value thereof are at the risk of the business of Lloyd & Co., so far as any claim you may have against said Lloyd & Co. is concerned.

"Yours truly,

"T. E. BROWN."

Pending the sending of this letter by Lloyd to Brown, and its return to Walker & Company, with the signature of Brown affixed to it, the goods which had been ordered by Lloyd were prepared for shipment, but were retained and were only shipped on the receipt of the letter. Subsequently in December, 1889, Lloyd & Company became insolvent, and the debt to Walker & Co., amounting to $13,916.39, remains unpaid.

The questions which first require solution are, did the agreement embodied in the letter create an equitable lien, in favor of Walker & Company upon the bonds of Brown pledged to the Union National Bank, and if so, were they returned to Brown under such circumstances as to cause the lien, if any existed, to be operative against the bonds in the hands of Mrs. Brown, who holds them under a gift from Brown, and, therefore, subject to such lien, if any, attached to them in the hands of Brown? Before considering the contract itself, and the issue of fact which arises, it is necessary to fix the legal principles by which the question of equitable lien is to be determined. It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers or have notice. It is well settled, said the court in *Pinch* v. *Anthony*, 8 Allen, 536, "that a party may by express agreement create a charge or claim in the nature of a lien on real as well as on personal property, of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation." The subject was very fully reviewed with reference to the English and American authorities in *Ketchum* v. *St. Louis*, 101 U. S. 306, where the language just cited was approved and that ruling was considered and reaffirmed, during this term, in *Fourth Street Bank* v. *Yardley*, *ante*, 634. Pomeroy in his work on Equity Jurisprudence, (vol. 3, par. 1235,) condenses and states the general result of the authorities on the subject, as follows:

"The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make

some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice. . . . The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done."

The words of the contract, embodied in the letter, are as follows: "I beg to advise you that the loan of fifteen thousand dollars, Memphis bonds, made by me for the use of Messrs. Lloyd & Company, Ellensburg, is with the understanding that any indebtedness that they may be owing to you at any time, shall be paid before the return to me of these bonds or the value thereof, and that these bonds or the value thereof are at the risk of the business of Lloyd & Company, so far as any claim you may have against said Lloyd & Company is concerned." This language certainly designates the bonds or the value thereof as a security for the debt to Walker & Company. It says that the bonds belonging to Brown shall not be returned to him so long as the debt to Walker is unpaid. It thus provides for the keeping in the hands of Lloyd & Company of the bonds until the debt of Walker is discharged. Having stipulated for retaining the bonds as long as Walker's debt existed, the agreement proceeds to dedicate the property thus retained exclusively to the payment of Walker's debt, for it says, not that the property so held shall become an asset of the firm, not that it shall be liable to the general creditors of Lloyd & Company, but that the bonds or the value thereof are to remain at the risk of the business of Lloyd & Company *so far as any claim that you* (*Walker & Company*) *may have.* To construe the contract as making the bonds a mere general asset of the firm would not only eliminate the words "in so

far as you (Walker & Company) are concerned," but would operate an injustice to Brown by presupposing that he had given up his property for the general purposes of the firm of Lloyd & Company, when on the contrary, in express language, the contract provides that only one creditor of Lloyd & Company, to wit, Walker & Company, should exercise recourse on the bonds. To dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien.

Nor does the fact that the letter provides that these bonds or the value thereof shall be "at the risk of the business of Lloyd & Company" change the manifest significance of the contract, for these words are followed by the qualifying language "so far as any claim you may have against Lloyd & Company is concerned." The bonds were at the risk of the business in a twofold sense, viz., the debt of Walker and the sum for which they were pledged. Manifestly, the dedication of Brown's bonds to the particular and special payment of Walker's debt, a debt due by the business of Lloyd & Company, left the bonds as a necessary consequence of the equitable lien which the contract created at the risk of the business, that is to say, if the business did not pay the debt which it owed to Walker & Company, the bonds or their value were submitted to the risk of such non-payment, and therefore subject to the equitable lien, if the risk of the business made it necessary for Walker & Company to exercise the lien which the contract gave that firm. The contention that the words "at the risk of the business" indicates that the parties to the contract did not intend a lien on the bonds, since that provision submitted the bonds to the entire risk of the business of Lloyd & Company for every purpose, and therefore authorized that firm, if they recovered possession of them, to use them for any other debt which they might owe, or to sell them and apply the proceeds to their business generally, is unsound, since it entirely overlooks the express averment of the answer that the bonds were lent by Brown to Lloyd & Company for one purpose alone, that is, to be used

as collateral for a particular debt and none other. The existence of this debt at the time the letter was written is also averred in the answer, and this fact additionally elucidates not only the meaning of the words "at the risk of the business," but also the stipulation that the bonds "or their value" should be at such risk. The loan for which the bonds had been placed as security was a debt of Lloyd & Company. The ability of Lloyd & Company to pay this debt was a risk upon which the coming back of the bonds into the possession of Lloyd & Company depended. The contract considering the possibility of the payment of the debt by Lloyd & Company, and the arising therefore of the right of that firm to retake possession of the bonds, stipulates for their non-return in that event to Brown. On the other hand, considering that the firm of Lloyd & Company might be unable to pay the debt, and therefore fail to recover possession of the bonds, the contract provides that the claim in favor of Brown for the value of his bonds, lost by the failure of the firm to pay the debt for which they were pledged, should not be preferred against the assets of Lloyd & Company to the detriment of Walker's claim. Now, the restriction placed on Brown as to the non-exercise of his claim for the value in consequence of the risk to which the bonds were subjected from the outstanding pledge cannot destroy the express provision against the return of the bonds to Brown in the event that the risk of the business did not prevent their coming back into the possession of Lloyd & Company.

Equally without force is the assertion that, inasmuch as the face value of the bonds was $15,000, and the debt for which they were then pledged was $15,000, therefore the parties could not have contemplated the coming back of the bonds into the possession of Lloyd & Company and their return to Brown. This argument, if accepted, would read out of the contract its express language providing against the return to Brown in the contingency stated. Of course, the lien in favor of Walker & Company was subordinate to the prior and outstanding claim resulting from the pledge; but the obvious purpose of the contract, while considering that fact, was to

give to Walker & Company the benefit of the bonds as a security for their claim in the event Lloyd & Company discharged the debt for which they were pledged, from their assets and thereby became entitled to the possession of the bonds. This construction of the contract and of the rights of the parties under it was that entertained when the answer was filed and before the proof had been taken, since the answer expressly asserts that the pledged debt had not been paid by Lloyd & Company, but was made solely from the assets of Brown in order to prevent the sale of the bonds, and therefore his obligation under the contract had been discharged. The subsequent amendment to the answer, which gave a different view of the contract, was made after the coming in of the proof, which demonstrated the fact, as we shall hereafter see, to be that the payment of the debt had not been made by Brown, but by Lloyd & Company. If there be ambiguity in the contract resort may be had to the situation of the parties and the circumstances under which it was entered into for the purpose, not of changing the writing, but of furnishing light by which to ascertain its actual significance. *Runkle* v. *Burnham*, 153 U. S. 216, 224.

Resorting to these means, the purpose of the parties to create a lien upon the bonds or their value is clearly manifest. At the time the contract was entered into, the bonds were held as collateral security for a loan obtained by Lloyd to pay off a debt, for which Brown was bound, contracted for the purchase price of merchandise. The proof conclusively sustains the averments of the answer that the bonds had been given by Brown, not for the general purpose of the business of Lloyd & Company, but exclusively to enable that firm to pay this particular debt. This refutes the theory that the bonds were in the hands of Lloyd & Company for every purpose, and suggests the intention of the parties that on the payment of the old debt by Lloyd & Company for the purchase of goods, for which the bonds were pledged, they should occupy the same relation to the new debt for the same purpose which was about to be created. Nor is there force in the argument that the statement made by Mason to Lloyd &

Company preceding the writing of the letter conclusively shows that Walker & Company did not contemplate a lien upon the bonds, and therefore that the letter embodying the contract which they exacted before giving the credit must be held not to have given rise to the lien. This suggestion is predicated upon the fact that in the conversation the words "or proceeds" of the bonds were used by Mason. But the contract contains no such words; it stipulates against the return of the bonds to Brown, and against the use by Brown of his claim against the assets for the value of the bonds. The use by Mason of the word "proceeds" cannot be held to obliterate the written contract, and if resort is to be had to the attendant circumstances, it must be so had, not to a particular word used in a conversation, but the whole of the situation must be considered. If this is done, it becomes clear that as Walker & Company were familiar with the transaction by which the bonds had been delivered to Lloyd & Company by Brown for the purpose of being used as collateral for a particular debt, which was confirmed by the statement made to them by Lloyd at the time of the transaction, we cannot presume that they treated with Lloyd as having other power over the bonds than the limited purpose for which Brown had loaned them. From these considerations we conclude that the contract provided for a lien upon the bonds to secure Walker's debt subordinate to the then outstanding lien resulting from the existing pledge, and stipulated against a return of the bonds in the event of the payment of the debt by Lloyd & Company, and imposed upon Brown the obligation not to assert *quoad* the debt of Walker & Company, a claim against the assets of Lloyd & Company for the value in the event the risk of the business, the outstanding pledge, prevented the return of the bonds to the possession of Lloyd & Company.

The question then arises were the bonds absorbed by the risk of the business, or were they, on the contrary, returned to Brown in violation of the contract and subject to the equitable lien which the contract created to secure the payment of the debt due Walker & Company? Shortly after the making of the contract, that is, on October 26 and 29,

1889, two payments, one for $7300, and the other for $2700, were made on account of the debt due the Union National Bank for which the bonds were held as collateral. When these two payments, aggregating $10,000, were made, ten of the Memphis bonds were delivered by the bank to Lloyd and by him returned to Brown. Subsequently, on December 17, 1889, the balance of the debt, $5000, was paid to the bank, and the remainder of the bonds were also returned to Brown. As to the source whence the money wherewith the payment of October 26 of $7300 was made, the testimony of Lloyd is, to speak mildly, of an evasive character. The proof, however, conclusively establishes that this payment was made as follows: Lloyd and Brown called at the Polk County Savings Bank of Des Moines, Iowa, and a loan was asked, in the name of Lloyd, for $7500, and a ninety-day note for that amount was drawn by Lloyd to the order of the bank. This note after being endorsed by Brown was discounted by the savings bank, the bank giving for the net amount of the discount a draft on New York, which was used to make the payment to the Union National Bank. The payment of October 29 of $2700 is, by the uncontradicted testimony, shown to have been made solely from the assets of Lloyd & Company. The payment on December 17 of the $5000 was made in this way. Brown drew two drafts for $2500 each on Lloyd & Company at Ellensburg to the order of the Iowa National Bank of Des Moines, and these drafts were discounted by that bank and the proceeds put to Brown's credit in account. He then purchased a draft to the order of the Union National Bank for $5000, giving his check on his own bank account in payment of the draft. The draft so purchased was used for the payment of the balance due the Union National Bank, by which final payment the release of the remainder of the bonds was accomplished. The two drafts drawn by Brown on Lloyd & Company were forwarded by the Iowa bank to Ellensburg for collection. One of them was paid in full from the assets of Lloyd & Company before their failure, the other remained unpaid at the date of the failure, and was treated by Brown as a liability of the firm, and was used for the purpose

of absorbing its assets in the manner to be hereafter stated. On the drawing of these drafts Brown credited Lloyd & Company in account with the amount thereof, and against this credit he debited Lloyd & Company with the $5000, which he paid for account of Lloyd for the final payment on the note due the Union National Bank.

Near the middle of December, 1889, Brown was in Ellensburg, and on the 26th of December, at the instigation of Brown, a chattel mortgage upon the stock of goods of J. C. Lloyd & Company was executed in favor of the Iowa National Bank of Des Moines for $17,500, and on the same day, a mortgage second in rank, also at the instigation and request of Brown, was executed by the firm in favor of the Polk County Savings Bank for $7500. Included in the amount of the debt secured by the mortgage to the Polk County Savings Bank were the notes for $7500 given by Lloyd and endorsed by Brown, from the proceeds of which the first payment of $7300 was made. Included in the debt of the Iowa National Bank, for which the mortgage was given, was the draft for $2500, which, as has been already stated, was not paid at that date by Lloyd & Company. The balance of the debt in favor of the Iowa National Bank represented renewal notes of Lloyd endorsed by Brown, which were held by the Iowa National Bank, the original notes having been prior in date to the formation of Lloyd & Company.

The proof leaves no doubt that the execution of these mortgages was brought about by Brown, who thus sought to secure the stock of goods of Lloyd & Company for the purpose of paying the debts for which he asserted himself to be indirectly liable. Indeed, as to the mortgage taken in favor of the Iowa National Bank, the unchallenged proof is that Brown acted in procuring the mortgage without reference to or instructions from the bank, but solely in his own interest. Having thus obtained the two mortgages upon the stock of goods, he proceeded by way of procuring a mortgage on real estate of Lloyd, of assignments of a leasehold held by him or his firm, assignment of a mortgage claim existing in favor of Lloyd & Company, and by receipt of $7600 in cash procured by

Lloyd by mortgage upon real estate to make himself master of the situation so as to apply practically all the property of Lloyd & Company and Lloyd individually to the payment of debts claimed to be due him by Lloyd & Company, including those debts for which he was contingently liable. Having thus secured, to the utmost, all his claims against Lloyd & Company by treating the debts upon which he was contingently liable, as the debts of Lloyd & Company, a chattel mortgage inferior in rank to those taken in the name of others, was executed in favor of Walker & Company for a part of the debt due them, and they were advised by telegram of the fact. The failure of Lloyd & Company at once followed these occurrences. Attachments were sued out by many general creditors and the business was wrecked. Without going into details as to the result of the mortgages and attachments, it suffices to say that nothing was paid on account of Walker & Company's debt.

The contention that $9800 of the money paid on account of the debt of the Union National Bank for $15,000 must be considered as solely made by Brown, is without merit. This claim is based on the fact that the notes for $7500 which were discounted by the Polk County Savings Bank, and from which discount the money was derived to make the payment of $7300, were endorsed by Brown, and upon the further fact that one of the two drafts of $2500 each which were drawn upon Lloyd & Company to make up the $5000 and which was discounted by the Iowa National Bank was drawn by Brown. The notes and the draft were primarily obligations of Lloyd & Company. The contract between Brown and Walker & Company from which the lien on the bonds arose forbade the return of the bonds, and besides stipulated, in the event of their being lost by the risk of the business, that the claim for their value, in favor of Brown, as against Lloyd & Company, should not be urged until the payment of the debt of Walker & Company. It would be against the most elementary rules of good conscience and of fair dealing to allow Brown to treat the payment of the debt as having been made by Lloyd & Company, and therefore to enforce against the

assets of that firm, the entire claim, to the detriment of Walker & Company, and at the same time to allow Brown to defeat the lien on the bonds upon the contrary hypothesis that the entire payment had been made by him, Brown, and not by Lloyd & Company. No court of conscience can permit Brown to speculate on his chances of securing himself for all his claims by defeating the lien of Walker & Company on the one hand, and then on the other to allow him to assume a conflicting attitude in order to destroy the lien. Having asserted the claims as debts of Lloyd & Company, having sought to absorb the assets on this theory, Brown is concluded by his conduct.

The claim set up in the amended answer, that because Brown had other debts of Lloyd & Company which are unpaid, therefore he had contributed to the amount of $15,000 to the assets of Lloyd & Company, and thus performed his contract, is as wanting in equity as the contention which we have just considered. It is far from clear from the record whether these asserted debts have not really been paid or secured, but if they have not, the stipulation of the contract which forbade the return of the bonds was for the benefit of Walker & Company, not for that of all the creditors of Lloyd & Company. Having dedicated the bonds belonging to him to the payment of the debt, Brown cannot be heard to make an exception in favor of claims held by himself, if any such then existed or thereafter arose, so as to destroy the security created by him in favor of Walker & Company, and upon the faith of which they contracted. If there were debts due Brown by Lloyd & Company they were as completely excluded from interfering with the lien of Walker & Company upon the bonds as if they had been held by third persons.

The contention that the debt of Walker & Company was extinguished from the fact that after having accepted the mortgage security for a part of their debt, they united with other mortgage creditors in buying the rights of certain attaching creditors, and thereafter sold the stock of goods without foreclosure, is fully answered by the statement that there is no proof whatever of any agreement that the taking

of security should extinguish the original claim, and the proof is also clear that the acts of Walker as to the purchase of the rights of the attaching creditors and the subsequent dealings with the property were upon the express understanding with Brown that these transactions should in no way impair the rights of Walker & Company under the contract which we have considered.

The asserted right of Walker & Company to enforce against the estate of Brown a claim for $560.14, averred to have been expended in an effort to collect the debt due by Lloyd & Company upon an alleged agreement of Brown to repay the same, was not pressed at the hearing, and we do not therefore determine whether the sum was really due, and whether, if due, it is enforceable in a court of equity.

There was a claim made in the discussion at bar that the interest on the portion of the debt due Walker & Company, which was embraced within the mortgage executed in Washington, bears ten per cent interest, and therefore should be allowed at that rate. But this claim overlooks the fact that the bill is founded upon the general account due Walker & Company, and not upon the mortgage executed in Washington, which represented only a part of the debt. Besides, the account due by Lloyd & Company to Walker & Company, taken from the books of the latter firm, was offered in evidence on the trial, and there is therein made only a charge of six per cent interest, computed to a short time before the filing of the bill. This is conclusive against the claim of interest at the rate of ten per cent. There is also a reference in the record to several interest coupons collected on the Memphis bonds by Brown prior to his death and subsequent to the unlawful return of the bonds to him, but the averments of the bill taken in connection with the amendment electing to assert the lien against the bonds in the hands of Mrs. Brown, as they were when received from her husband, precludes any questions which might otherwise arise on this subject.

As the Memphis bonds are admittedly in the hands of Mrs. Brown as a gift from her husband, the enforcement of the

lien thereon presents no question as to the jurisdiction of a court of equity over the estate of a decedent.

It follows from the foregoing that the court below erred in refusing to recognize the claim of the complainants and to enforce in their favor a lien on the Memphis bonds in the hands of Mrs. Brown, and for the errors in these particulars the decree must be

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

UNITED STATES *v.* SANTA FÉ.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 208. Argued January 7, 8, 1896. — Decided March 1, 1897.

The Spanish law did not, *proprio vigore*, confer upon every Spanish villa or town, a grant of four square leagues of land, to be measured from the centre of the plaza of such town.

Although, under that law, all towns were not, on their organization, entitled by operation of law, to four square leagues, yet, at a time subsequent to the organization of Santa Fé, Spanish officials adopted the theory that the normal quantity which might be designated as the limits of new pueblos, to be thereafter created, was four square leagues.

The rights of Santa Fé depend upon Spanish law as it existed prior to the adoption of that theory.

An inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims; but the duty of protecting such imperfect rights of property rests upon the political department of the government.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dickinson and *Mr. Matthew G. Reynolds* for appellants.

Mr. T. B. Catron and *Mr. William H. Pope* for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

This case comes on appeal taken by the United States from a decree of the Court of Private Land Claims confirming to the lot holders in privity with the city of Santa Fé the lots held by them in severalty in that city, and confirming to the city itself in trust for the use of its inhabitants a tract of four square leagues claimed by the city, except mines of gold, silver and quicksilver, and property appropriated, used, occupied, possessed or owned by the United States.

It is conceded or shown that prior to 1680 there existed a Spanish town known as La Villa de Santa Fé, which was the seat of government of the Spanish province of New Mexico, and that there was also prior to that date the official mechanism required by the Spanish law to direct the affairs of a Spanish villa or town. The origin of the town or villa is obscure, but the record indicates that as early as 1543 the settlement was made by deserters from the Spanish military force under Coronado, who refused to accompany their commander on his return to Mexico, and settled at Santa Fé. In 1680 the Spaniards were driven out by an Indian insurrection and Santa Fé was destroyed, the Spaniards retreating to Paso del Norte, where they remained until 1692, when Diego de Vargas reconquered the country. In 1693 de Vargas reëstablished Santa Fé. From that time to the American occupation — although the record does not fix the precise character of the municipal government — there is no doubt that there was a settlement on the site of the old villa of Santa Fé, and that it was also the capital of the province. In 1851 Santa Fé was incorporated and its boundaries defined by act of the territorial legislature of New Mexico. Laws of New Mexico, 1851–52, Kearney's Code, 112. The municipal charter granted in 1851 was shortly thereafter repealed, and the probate judge of the county became, by operation of law, the custodian of the records of the corporation and was a trustee to wind up its affairs. Laws of New Mexico, 1851–52, Kearney's Code, 272. No municipal body existed from this time until the year 1891, when Santa Fé was again organized pursuant to the laws of New Mexico.

Under the eighth section of the act approved July 22, 1854,

c. 103, 10 Stat. 308, the probate judge of the county of Santa Fé presented to the surveyor general of New Mexico a claim on behalf of the city for four square leagues of land. This claim was substantially based upon the averment that as the city of Santa Fé was in existence during the whole period of Spanish sovereignty over New Mexico, it was certain that "under the Spanish laws, usages and customs the inhabitants thereof were, as a community, entitled to receive, and your petitioners believe and claim did in fact receive, a grant from the crown for at least four square leagues of land and commons which they now claim." As the legal authority for this asserted right of the city, reference was made to specified provisions of the law of Spain, and the prayer of the petition was "that said land be surveyed, and that a patent therefor be issued by the United States, to the probate judge for the time being of said county of Santa Fé, in trust for the use and benefit of the landholders and inhabitants within said tract, and for the city of Santa Fé until the same be by law incorporated under charter, and thereby become the rightful custodian of the patent for said tract of land." The surveyor general reported to Congress for confirmation the claim thus made (H. of R. Ex. Doc. 239, 43d Congress, 1st session), and the recommendation not having been acted upon, this suit was commenced, by the city of Santa Fé, under the provisions of the act of March 3, 1891, creating the Court of Private Land Claims. 26 Stat. 854, c. 539.

The petition originally filed on behalf of the city, after setting out the existence of the Spanish villa known as La Villa de Santa Fé, substantially averred that the municipality of Santa Fé occupied the situs of the Spanish villa and possessed jurisdiction over the same territory, and, therefore, was, in law, the successor to all the rights enjoyed by the Spanish villa. It alleged that, prior to the Indian insurrection in 1680, the villa had received a pueblo grant of four square leagues of land, the central point of which was in the centre of the plaza of the city of Santa Fé; that the grant was made by the King of Spain; that juridical possession was given thereunder, and that such facts were evidenced by a valid *testimonio;* that

the archives and records of the villa were destroyed in the Indian insurrection of 1680, and, therefore, the title could not be produced. The fact was also averred that the claim had been submitted to the surveyor general, and had been by him recommended favorably to Congress. The prayer was for a confirmation of the grant to the city "in trust for the use and benefit of the inhabitants thereof, and of such grantees and assignees of parts of the said lands as have derived, or may hereafter acquire by due assignments, allotments and titles in severalty to said parts respectively." The defendant demurred on the ground that the petition stated no cause of action, and also because it failed to disclose the fact that there were many adverse claimants, under Spanish grants, to the land sued for, and that such claimants were necessary parties defendant.

Appearances were thereafter filed by seventeen persons, alleging that they were the holders of Spanish titles to land within the area claimed, and that their interests were, therefore, adverse to those of the city. Thereupon an amended petition was filed by the city, which in its caption mentions as defendants not only the original defendant, the United States, but the seventeen persons who had made appearance as having adverse interests. This amended petition substantially reiterated the averments of the original petition as to the foundation and existence of the villa of Santa Fé, but omitted the allegations on the subject of an express grant to La Villa de Santa Fé, the delivery of juridical possession thereunder and the issuance of a *testimonio*. The allegation on these subjects was that prior to the insurrection in 1680, "La Villa de Santa Fé was entitled to, and had under the laws of the kingdom of Spain in force in that territory at that time, a municipal or pueblo grant, conceding to and vesting in said Spanish town or villa a certain tract of land containing four square Spanish leagues." The positive averment in the original petition as to the destruction during the insurrection of 1680 of the evidence showing the existence of an express grant was replaced by a qualified averment that "all the muniments of title of such municipal grant, *if any such existed*, were utterly destroyed by the hostile Indians engaged in such insurrection."

The amended petition also averred that within the boundaries of the grant claimed there "are now living about seven thousand people, and about fifteen hundred heads of families, nearly all of whom own, occupy and have improved lands which they claim to hold under the said grant to the Villa de Santa Fé, and there is erected thereon buildings and improvements in public and private ownership, claiming under said grant to the value of several millions of dollars, and that none of said claimants and occupants are in any sense adverse claimants to your petitioner. And your petitioner further shows that there are claimed to be certain private land grants to individuals named as defendants in this proceeding, of tracts of land within the exterior line of said four square leagues granted to your petitioner as aforesaid. But your petitioner avers that if any such exist each and all of them are junior in date, subordinate and subject to the said municipal grant to your petitioner's predecessor as a town and villa, and whether the said private land grants are claimed adversely to your petitioner or not, your petitioner is not advised, but it states that all of said private land grants have been filed before this court for adjudication and have already been set for hearing in this court for the same date as this case, and that all of said claimants have subjected themselves to this court, with their alleged private land grants for its determination and decision, when the matter of their interests as against those of your petitioner can be fully and finally determined."

The answer of the United States denied the alleged facts as to the foundation and organization of La Villa de Santa Fé; denied that the plaintiff, a municipal corporation, existing under the laws of New Mexico, was the successor or entitled to assert the rights, if any, of the Spanish villa; it also denied that the Spanish villa had received title to or was by operation of the Spanish law entitled to claim the four square leagues of land; averred that title to a large portion of the land embraced within the four square leagues was claimed under Spanish grants by others than the plaintiff, the validity of which claims was not, however, admitted, and that other portions of the four square leagues were in control, occupancy

and possession of the United States for a military post, known as Fort Marcy, for a building known as the "Federal building," and for an establishment known as the Indian Industrial School, and that another portion was in possession of the territorial executive officers under the authority of the United States.

The persons holding conflicting grants, who were made defendants, also filed answers specially denying the making of the Spanish grant to La Villa de Santa Fé, or the right of that villa to a grant of four square leagues by operation of the Spanish law. It was moreover specially denied that the heads of families, residents or other persons who occupy or own house lots or lands in the city of Santa Fé, claim to hold the same under the alleged grant of the villa of Santa Fé, whether express or implied, and specially denied that the holders of lots in the city of Santa Fé were not adverse to the claim asserted by the city to the four square leagues. It was moreover alleged the various grants, eighteen in number, alleged to have been made by the Spanish authorities to the respective parties, averred their conflict with the asserted rights of the city, and prayed that as such claims had been filed and had been previously presented to the court, they be considered and approved, and that the claim of the city be rejected. The issues made up by these pleadings were tried. In the opening of the trial the counsel for the plaintiff made the following statement:

"After consultation with most of the counsel for the city, the disposition seems to be to respect the claims of the United States, either under its original disposition or under its purchases from private individuals. There is no disposition to deny the right of the United States to those properties which it has occupied since the change of sovereignty; we are willing to concede that to the United States attorney."

"I desire to make a statement to the court as to what our evidence is to be, and as to how we are claiming we are entitled to the grant under which we claim to represent here. Our claim is analogous to the claim made in the city of San Francisco case, and is analogous to the claim which is known as the Brownsville, Texas, claim. If the court please, we claim our grant on, not so much as to the existence of papers of title,

or documentary evidence, but through operation of law, as was claimed and held in the case of the town of Albuquerque, which this court has already decided, and as was held in San Francisco and town of Brownsville, Texas. The case of the city of San Francisco was decided by the Supreme Court of the United States after the city of San Francisco produced evidence sufficient to show that it was a corporation under the Mexican and Spanish governments; that as such corporation it possessed an ayuntamiento and other city officials which belonged to it; and on this evidence the court presumed and said it was entitled to four square leagues. It was so held in the town of Brownsville, and was so decided by this honorable court in the town of Albuquerque against the United States, case No. 8.

"In our case we expect to show that we had an existence in the year 1680, and that as far back, at least, as 1704, we had a corporate existence, and that as having such corporate existence, and having duly constituted officials, an ayuntamiento and alcalde of that corporation, that this court will presume that we are entitled to four square leagues of land, to be measured from the centre of the plaza of this town.

"In regard to these adverse claims presented here, I do not just now desire to call the attention of the court to what we think is the law fixing their rights. I will, however, say that we will combat the idea that the governors of this territory had any power to make grants within the exterior boundaries of the Santa Fé grant; whether they have been made I do not pretend to admit, and we will combat the idea that they were made through lawful authority by the persons granting them."

The proof established the settlement and organization of the city of Santa Fé in accordance with the facts already stated. The various grants referred to in the answer of the several defendants were offered in evidence and testimony adduced tending to show that they covered territory embraced within the claim to the four leagues, and were, therefore, adverse to the claims of the city.

There was no evidence whatever introduced showing that

La Villa de Santa Fé, in any of its forms of organization under the Spanish government, or that the city of Santa Fé itself, had ever possessed the four square leagues to which it asserted title, or that any lotholder in the city claimed to own or hold by virtue of any title derived under the supposed right of the city. Indeed, there was an entire absence of any proof showing that any right by possession or otherwise within the area claimed was held under or by virtue of the implied grant of four square leagues, upon which the city relied. On the contrary, there was proof that in 1715 the city of Santa Fé petitioned for a grant of a tract of swamp land situated within the boundaries of the four square leagues, to which it now asserts title by operation of law, and that this prayer was granted.

The judgment of the court, which allowed the claim of the city, with the reservations and conditions stated in the opening of this opinion, rejected the claims of the defendants who appeared and asserted the various adverse Spanish grants, so far at least as they were in conflict with the claim of the city to which we have referred. As, however, the United States has alone appealed from the decree in favor of the city, we are concerned on this appeal only with the issues which arise between the United States and the city of Santa Fé.

The fundamental question in the case is, did the Spanish law, *proprio vigore*, confer upon every Spanish villa or town a grant of four square leagues of land to be measured from the centre of the plaza of such town. The claim that the law of Spain conferred such right is based on certain provisions of that law applicable to the possessions of that government on this continent, and which are to be found in a compilation promulgated in 1680, and known as the "Recopilacion de las Indias."

The compilation itself is thus described by Schmidt in his treatise on the Civil Laws of Spain and Mexico, who says (p. 94):

"The method adopted in this code is the same as that pursued in the Nueva Recopilacion of the Laws of Spain. It is divided into nine books, comprising two hundred and eighteen

titles, which contain six thousand four hundred and forty-seven different legal enactments, all of which, derived from the orders, decrees and regulations of different sovereigns, and often temporary in their character, are dignified with the title of laws. Hence, there is found united in this compilation many laws on the same subject, in which the preceding law is only repeated, others in which it is modified, and still others in which it is abrogated, either in whole or in part. The veneration of the compilers for laws which once had received the royal sanction seems to have been so great, that they did not consider themselves at liberty to omit them. This mode of proceeding has swelled this code to its present dimensions, when, if a more rational method had been adopted, it could readily have been compressed into one third of the space it actually occupies."

The reliance of the city of Santa Fé is — first, on the text of the Spanish law; second, on the contention that if there be ambiguity in the text, the right of the city to the four square leagues results from a construction given to the Spanish law in proceedings with reference to the claim of the city of San Francisco to a grant of land and from acts of Congress in relation to such claim; and, third, upon the contention that the interpretation of the Spanish law upon which the city bases its right is sanctioned by previous adjudications of this court. We will examine these propositions in the order stated.

First. *The Spanish law relied upon.*

The only provisions of the Recopilacion, to which we are referred as sustaining the claim of the city, are laws 6, 7 and 10, of title 5, book 4, which are found in 2 White, New Recopilacion, pp. 44 and 45. They read as follows:

Law 6. "If the situation of the land be adapted to the founding of any town to be peopled by Spaniards, with a council of ordinary alcaldes and regidores; and, if there be persons who will contract for their settlement, the agreement shall be made upon the following conditions: That, within the prescribed time, it shall comprise at least thirty heads of families, each of whom to possess a house, ten breeding cows, four

steers, or two steers and two young bullocks, a breeding mare, a breeding sow, twenty breeding ewes from Castile, and six hens and a cock; he shall, moreover, appoint a priest to administer the sacraments, who the first time shall be of his choice, and, afterwards, according to our royal patronage: he shall provide the church with ornaments and articles necessary for Divine worship; and he shall give bond to perform the same within said period of time; and if he fail in fulfilling his agreement, he will lose all that he may have built, worked or repaired, which shall be applied to our royal patrimony, and incur the forfeiture of one thousand ounces of gold to our chamber [camera]; and if he should fulfil his obligations, there shall be granted to him four square leagues of territory, either in a square or lengthwise, according to the quality of the land, in such a manner, that, when located and surveyed, the four leagues shall be in a quadrangle, and so that the boundaries of said territory be at least five leagues distant from any city, town or village, inhabited by Spaniards, and previously settled, and that it cause no prejudice to any Indian tribe, nor to any private individual."

Law 7. "If any one should propose to contract for a settlement, in the prescribed form, to consist of more or less than thirty heads of families, provided it be not below ten, he shall receive a grant of a proportionate quantity of land, and upon the same conditions."

Law 10. "Whenever particular individuals shall unite for the purpose of forming new settlements, and among them there shall be a sufficient number of married men for that purpose, license may be granted to them, provided there be not less than ten married men, together with an extent of territory proportioned to what is stipulated; and we empower them to elect, annually, from among themselves, ordinary alcaldes and officers of the council."

Law 6 as we have quoted it from White's work varies from the translation of Reynolds in his work on Mexican Law, the latter version, instead of saying that the land "shall be granted," being, that it "may be given." No importance, however, is to be attached to this difference, since it is evi-

dent from either translation of the law, as a whole, that it was optional and not obligatory on the representative of the King to enter into the contracts which the law authorized to be made. It is apparent also from the text of these laws that they provided solely for the allotment of lands for the purpose of a settlement to be made under contract, and on the performance of certain conditions; in other words, that these laws delegated authority to contract for certain specific quantities of land to accomplish the particular results which the laws contemplated. The effect of law 7 was to forbid contracts for the establishment of towns unless the settlement was to be made by ten persons, and to vary the amount of land to be granted according as the number of heads of families might exceed ten and be less than thirty, which latter is treated by law 6 as being normally required for a contract settlement. Looking at the text of the laws, it is difficult to understand upon what theory the claim is advanced that every Spanish town, whether settled under contract or not, was entitled to four square leagues. It cannot be denied that this quantity of land was not the right of every town settled under contract, since the amount varied with the number of heads of families with whom the contract was made and who were to constitute the settlement.

The argument however is pressed that law 10 embraces all towns not settled under contract, since it says "whenever particular individuals shall unite for the purpose of forming new settlements." From this expression is deduced the proposition that as the provisions for contract related to settlements of towns made by a particular contractor, therefore they were inapplicable to settlements made by individuals united for that purpose, in which latter case it is claimed the right to the land arose, not by virtue of a contract, but by operation of law. Granting for argument's sake the correctness of the contention, it fails to justify the claim of the city, because law 10 does not specify the quantity of land to be enjoyed by a settlement made by individuals uniting for the purpose of settling a new town; but simply says that they shall have an extent of territory "proportioned to what is stipulated."

This reference to what is stipulated must either be to the requirements of laws 6 and 7, or to some other regulation on the subject. If it relates to laws 6 and 7, then it would necessarily subject individuals uniting to form a settlement to the terms of laws 6 and 7, and therefore render it necessary that the right to land should arise from contract. Indeed, the argument in favor of the claim of the city logically leads to the inconsistent position that laws 6 and 7 are read into law 10 for the purpose of the quantity of land to be granted, and are read out of that law in so far as the prerequisite necessity of a contract is concerned.

But reference to the ordinances of Philip II (promulgated more than one hundred years prior to the Recopilacion), in which law 10 was found, makes its meaning perfectly clear, and demonstrates that the construction now sought to be given law 10 has no other foundation than the confusion in compiling the Recopilacion, of which we have made mention in citing the language contained in the treatise of Schmidt on the subject. Thus, in the ordinance of Philip, law 6 of title 5, book 4 of the Recopilacion was numbered as ordinances 88 and 89. Following those ordinances down to 99 inclusive are various provisions regulating contract settlements. Then comes ordinance 100, which is now law 7 above referred to. The next ordinance (101) is identical with law 10. Ordinances 102 and 103 (now law 20, book 4, title 7; law 9, book 4, title 5, and law 21, book 4, title 7, of the Recopilacion) read as follows:

Law 20, book 4, title 7:

"A contract having been made under the authority of a colony, a governor, an alcalde mayor, a mayor, a town or village, the council and those who made the same in the Indies shall not be satisfied with having accepted and made the contract, but shall continue to control it and direct how it shall be carried into effect, and shall keep a record of all that is being done."

Law 9, book 4, title 5:

"In contracts for new settlements made by the government, or whoever shall be thereto authorized in the Indies, with cities, adelantado, superior alcalde or corrigidor, the

person entering into the agreement shall do so likewise with each individual who may enlist to join the settlement; and he will bind himself to grant building lots in the new settlement, together with pastures and lands for cultivation in a number of peonias and caballerias proportionate to the quantity of land which each settler shall obligate himself to improve; provided it shall not exceed, nor shall he grant more to each than five peonias or three caballerias, according to the express distinction, difference and measurement prescribed in the laws of the title concerning the distribution of lands, lots and waters."

Law 21, book 4, title 7:

"We direct that the governor and the magistrate of the town newly settled, *ex officio*, or on petition of a party, shall require the fulfilment of the contract with due diligence and care by all of those who may be bound to make new settlements, and the council and the corporation attorneys shall appear by petition against such settlers as have not fulfilled their contracts within the term agreed upon, in order that they be compelled, with all rigor of law, to carry out that which was stipulated, and that the judges shall proceed against those who may be absent, and that they be arrested and brought to the settlements, and that requisition be made for those who may be in other jurisdictions, and all judges shall grant them under penalty of our displeasure."

This retrospect at once demonstrates that the rights acquired under law 10 depended upon contract and could only arise therefrom, since that law was but one provision of a system providing for grants under contract alone. To illustrate, reviewing the provisions in the order in which they stood before their confused compilation in the Recopilacion, ordinances 88 and 89 (law 6) and ordinance 100 (law 7) provided for contracts with an individual for founding a town, for the quantity of land to be contracted for, and prescribed regulations for the new settlement. Ordinance 101 (law 10) provided for individuals uniting for the purpose of a settlement. Ordinance 102 (law 20, book 4, title 7) also in this latter case treated a contract with such united individuals or

colony as a necessary prerequisite, and the subsequent provisions ordain rules for the government of these settlements and the enforcement of the obligations arising under the contracts.

Various provisions in the Recopilacion moreover clearly establish that the power to make contracts for settlements, whether with one contracting person or with a community of individuals, was not unrestrained, and was subject to exception.

Thus law 6, book 4, title 7, provided as follows (2 White, New Recop. p. 46):

"No tract of land for new settlements shall be granted or taken by agreement in any seaport; nor in any part which might, at any time, be prejudicial to our royal crown or to the republic, our will being that they be reserved to us."

The same law is thus translated in the appendix to the brief for the government:

"Land and term for a new settlement shall not be granted or taken under contract in seaports, nor at any place where at any time damage may result to our royal crown or the community, because it is our will that they be reserved for us."

The object of these provisions was clearly not only to prevent contracts as to seaport settlements, but also such contracts as to places where it might be prejudicial to make grants of land, although there might be general authority to that end.

It may well also be implied from the provisions in the Recopilacion that the right of a town to hold land for public purposes was required to be evidenced by a grant from the viceroy or governor, and that such grant when made required confirmation by the crown. Thus, law 1, title 13, book 4, of the Recopilacion (2 White, New Recop. p. 55), is as follows:

"The viceroys and governors, being thereto authorized, shall lay out for each town or village which shall be newly founded and peopled, the lands and lots which they may want, and the same shall be granted to them as reservations [propios] without prejudice to third persons. They shall transmit to us information of what they shall have laid out, that we may order the same to be confirmed."

Whilst it may be that the necessity for confirmation was dispensed with at some date, much later than the establishment of Santa Fé, there is no question that this provision was in force at the time when it is claimed that the settlement came into existence as a Spanish town.

The theory, then, of the vesting by operation of law in every Spanish town at the time of its organization, of a title to four square leagues of land, finds no support in the text of the Spanish laws, and is repugnant to their general tenor, as it is in direct conflict with mandatory provisions of that law exacting a grant and its confirmation. Of course, the existence of power to make contracts for settlements in particular cases cannot be held to have deprived the proper authorities of the right to make grants in other cases where a general power to that effect was possessed. There are various texts of the Recopilacion showing not only that the Spanish crown itself by its supreme authority contemplated the making of gifts of land to individuals, but also that such gifts were expected to be made for the purpose of the settlement of towns where there was originally no contract therefor, either with colonies or with a particular contractor. To avoid prolixity as far as possible, we do not quote the text of the laws on this subject, contenting ourselves with establishing the existence of the power by showing some instances where it was undoubtedly exercised. The petition for and grant made to Santa Fé itself of the tract of swamp land, to which we have called attention, is one of such instances. We find in the record the petition of one Juan Lucero de Godoy, dated El Paso, January 15, 1693, addressed to the governor and captain general, and reciting, in substance, that, prior to the insurrection of 1680, he had taken up his residence in Santa Fé and received a grant of land, and praying for a regrant of the land, part of which was situated within the area of four square leagues to which the city now asserts title. There is also a recognition of the exercise of this power referred to in *Chouteau* v. *Eckhart*, 2 How. 344, where it appears that the village of St. Charles applied for an enlargement of its commons, and that the Spanish governor replied that the intendant of the province

must make such grant, but that he would provisionally allow the town to occupy the land prayed for. So, in *Lewis* v. *San Antonio*, 7 Texas, 288, it was shown that there had been an express grant, and that the boundaries had been duly marked and laid out covering six square leagues. But the concession that there was a power in the Spanish crown or its authorized officers to make grants of land, when considered by them to be proper, would not justify a holding that the authorities must have deemed it imperative to make a grant of a definite quantity to every town when established, no matter under what circumstances it was founded. To so conclude would amount to saying that it was the duty of the United States after the cession by Mexico, of the territory covered by the treaty, to presume, because the Spanish officials had the power to make grants, that they had actually exercised it in favor of every town and every individual within the territory ceded. If we were to make so preposterous an assumption the task would yet remain of determining how much land it would be presupposed had been given because the power to give existed in each case, a duty impossible of performance.

If, however, it were conceded, in plain violation of the letter of the Spanish law, that every town was entitled to a grant of land by operation of law, the quantity to which the town would be entitled would remain wholly undefined and undetermined, and would have, if allowed by inference, to be created by an arbitrary exercise of judicial power. Plainly, from the provisions of the Recopilacion, the quantity varied with the condition of the respective settlements, and to imply a grant of land to the extent of four square leagues in every case would be to suppose that every settlement was alike, whilst the law itself contemplated that they would be different and subject to different allowances. This consequence is shown by a statement in the treatise of Hall on Mexican Law, where it is said, sec. 117, p. 51:

"Limits of Pueblos. — There never existed any general law fixing four square leagues as the extent of pueblos or towns. That extent of land was assigned to pueblos founded by contractors for Spaniards, by law 6, title 5, book 4, of the

laws of the Indies. Those formed by the government, independent of contractors, were only limited by the discretion of the governors of the provinces, and viceroys, subject to approval or disapproval of the King. There are numerous pueblos in Mexico which have less and many that have more than four square leagues."

And in section 118, the same author declares that the jurists of Mexico are unacquainted with any such provision of Spanish jurisprudence as that four square leagues should be the superfice of pueblos.

These facts as to the condition of things in Mexico are in accord with the claims to land made against the United States under the law of Spain by villages and towns in Florida and Missouri, to which we shall hereafter take occasion to refer more particularly.

As the right which the city asserts is devoid of every element of proof tending to show a possession coupled with claim of title, but rests upon the mere assumption of a right asserted to have arisen by operation of law hundreds of years ago, of course there is no room for the application of a presumption of an actual grant, within the doctrine declared in *United States* v. *Chaves*, 159 U. S. 452. Even did the case present a claim of express grant, proof of the existence of which rested on presumptions arising from acts of possession, etc., there are many circumstances attending the history of Santa Fé and the nature of its establishment, which we have heretofore recited, which would strongly tend to rebut the presumption. The town was, it would seem, originally a colony of deserters from the Spanish army which was located in the midst of the native Indians; it became afterwards the capital seat of the province and a fortified town, and was presumably, in its permanent creation, the outcome and development of the success of the Spanish arms, rather than of the exercise of the power to induce settlements by contracts with individuals or otherwise. It is impossible, on the theory of the petitioner, to explain the petition presented by the city to the Spanish governor, in 1715, for a concession of a tract of swamp land situated within the four square leagues now claimed,

for if the right to the entire four square leagues then existed it was complete. At the time of this petition, if the claim here advanced had any foundation or was deemed by any one to exist, such fact would of course have been then known and have rendered the petition for the grant of the swamp wholly unnecessary.

We now proceed to examine the next proposition advanced to support the claim of the city of Santa Fé, which is as follows:

Second. *Whatever, as an original question, may be the correct interpretation of the Spanish law, the right of every town to four square leagues of land under that law is no longer a subject of controversy, but is concluded in favor of such right by the report of the board of land commissioners, which passed upon the claim of San Francisco, by the decision of the Circuit Court of the United States on the same subject, by the persuasive force of certain decisions of the Supreme Court of California, referring to the title of San Francisco, and finally by the action of Congress on the subject.*

The history of the San Francisco claim, however, does not justify the contention thus urged. The pueblo of San Francisco, in the first place, was not a Spanish but a Mexican town, and its claimed rights were asserted to have been obtained from the supreme government of Mexico. Thus, as stated in the report of the board of land commissioners, the petition alleged (Dwinelle, Colonial History of San Francisco, App. p. 121) "that in pursuance of the laws, usages and customs of the government of Mexico, and an act of the departmental legislature of California of the ninth of November, 1833, (1834) and proceedings in pursuance thereof, the pueblo of San Francisco was duly created and constituted a municipal corporation, with a municipal government, and with all the rights, properties and privileges of pueblos under the then existing laws, during the said year 1833, (1834); and that there was then and there, by the supreme government of Mexico, in the manner by law prescribed, ceded and granted to the said pueblo for town lands and for common lands, all and singular the premises described in their said petition."

Opinion of the Court.

It may be conceded *arguendo* that there was in force at the time the pueblo of San Francisco was established laws of the government of Mexico and regulations based thereon expanding the law of Spain so as to entitle a newly established pueblo to have measured off and assigned to it by officers of the government four square leagues of land, without in any way implying that such right existed under early Spanish laws. The necessity for action by Congress in the case of San Francisco was produced by various causes, such as grants made by the officials of the pueblo while San Francisco was part of the territory of Mexico, and grants which purported to have been made after the occupation of the town by the forces of the United States by persons claiming to be the lawful successors of such Mexican officials. For these reasons, there was great confusion and uncertainty in the titles to land in the city. By the act of March 3, 1851, c. 41, 9 Stat. 631, Congress created a board of land commissioners to determine claims to land in California asserted "by virtue of any 'right' or 'title' derived from the Spanish or Mexican government." Section 14 of that act permitted the claims of lotholders in a city to be presented in the name of such city, *and authorized the presumption of a grant to a city which was shown to have been in existence on a date named.* The section is found in full in the margin.[1]

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[1] SEC. 14. *And be it further enacted*, That the provisions of this act shall not extend to any town lot, farm lot or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lotholders claim; and where any city, town or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village.

The city of San Francisco was incorporated in 1850, with municipal boundaries of less extent than four square leagues. It, however, presented to the board a claim for confirmation of title to a four square league tract. In December, 1854, the claim of the city was confirmed by the board to only a certain portion of the four square leagues claimed. The opinion of the majority of the commissioners is contained in the appendix to Dwinelle's History, pp. 121–147. The opinion makes clear the fact that the decree of confirmation was based upon the following conclusions, to wit:

"1st. That a pueblo or town was established under the authority of the Mexican government in California, on the site of the present city of San Francisco, and embracing the greater portion of the present corporate limits of said city.

"2d. That the town so established continued and was in existence as a municipal corporation on the 7th day of July, 1846.

"3d. That at or about the time of its establishment, certain lands were assigned and laid off in accordance with the laws, usages and customs of the Mexican nation, for the use of the town and its inhabitants, and the boundaries of said lands determined and fixed by the proper officers appointed for that purpose by the territorial government.

"4th. That the boundaries so established are those described in the communication from Governor Figueroa to M. G. Vallejo, dated November 4, 1834, a copy of which is filed in the case, marked Ex. No. 18, to the deposition of said Vallejo." (Dwinelle, App. 147.)

After the foregoing finding of facts, the board summed up the law in the following language:

"These conclusions bring the case, in our opinion, clearly within the operation of the presumption raised in favor of a grant to the town by the fourteenth section of the act of the 3d of March, 1851, and entitle the petitioner to a confirmation of the land contained within the boundaries described in the document above mentioned."

Whilst the ultimate finding of the board was thus rested upon the authority to presume a grant conferred by Congress

and upon the Mexican law and regulations and conduct of Spanish and Mexican officials, which were limited to particular localities, and which have no application to the Spanish law as it appears in the Recopilacion, its opinion yet contained a copious historical review of the Spanish and Mexican law on the subject of grants to towns. From the fact that both the early Spanish law and the Mexican law were considered, and growing out of some forms of expression contained in the opinion, it has sometimes been said, with inaccuracy, that the opinion sanctioned the proposition that every Spanish town, considering the Spanish law to which reference has been made, was entitled to a grant of four square leagues.

The want of foundation for this often reiterated misconception of the finding of the board of commissioners will be at once shown by a brief consideration of the instructions and documents, apart from the text of the Recopilacion itself, upon which the board acted. They were five in number, as follows:

(1.) Instructions, etc., of Don Antonio Bucareli Urusu, dated Mexico, August 17, 1773. (Dwinelle, App. p. 2; 1 Rockwell, 444.)

(2.) Regulations of Don Felipe de Neve, approved by the King, October 24, 1781. (Dwinelle, App. p. 3; 1 Rockwell, 445.)

(3.) Instructions made for the establishment of the new town of Pitic, dated Chihuahua, November 14, 1789. (Dwinelle, App. p. 11.)

(4.) Decree of Don Pedro de Nerva, dated Chihuahua, March (October) 22, 1791. (Dwinelle, App. 17; 1 Rockwell, 451), and

(5.) Opinion of the assessor or legal adviser of that comandacia, dated in 1785.

Document No. 1 makes no reference to a designation or granting of lands for the use of pueblos.

No. 2 — to wit, Regulations of 1781 for the government of the Province of California — referred to the existence of the new establishments of the presidios and the respective ports of San Diego, Monterey and San Francisco, and the founding and building of the pueblo of San José, and prescribes certain

regulations for carrying into effect the expected establishment of proposed new settlements. These regulations rested undoubtedly on the laws of the Indies, but make material additions and modifications thereto. Section 4 provides that conformably to the provisions of the laws of the kingdom competent common lands shall be "designated" for the pueblos, but there is no statement as to the law governing the quantity of land to be marked out. The regulations, however, were specially approved by the King of Spain.

No. 3 — the Plan of Pitic — commences with the following statement:

"Instructions approved by His Majesty, and made for the establishing of the new town of Pitic, in the Province of Sonora, ordered to be adopted by the other new projected settlements (Poblaciones) and by those that may be established in the district of this General 'Comandancia.'"

The second section of the instruction reads as follows:

"2d. In conformity with the decree of the law 6th, title 5th, of the same book 4th, relative to the towns of Spaniards that may be founded by agreement or contract, and first in relation to those which for want of contractors shall be erected by private settlers (Pobladores) who may establish themselves and agree to found them, there may be granted to the town in question four leagues of bounds or territory in a square or in length, (que se fundaren y concordaren enformarlas se podrá conceder á la de que se exara quatro leguas determino ó territorio en quadro ó prolongado,) as shall be adapted to the better location of the land that shall be selected or marked out so that its true boundaries shall be known, wherein there can be no inconvenience, and, inasmuch as it is distant more than five leagues from any other town, city or village of Spaniards, there shall not result injury to any private individual, nor to any 'pueblo' of Indians, on account of that (the village) 'de los Seris' remaining within the demarcation as part or suburb of the new settlement, subject to its jurisdiction, and with the advantage of enjoying as neighbors the same benefits public and common that the settlers may have, and of which at present those same natives are wanting, owing to their indo-

lence, their default of application, and of intelligence, reserving to them the faculty of choosing their 'Alcaldes and Regidores,' with the jurisdiction, economy and other circumstances prescribed by the laws 15 and 16, title 5, book 6."

It is obvious from the most casual examination of this section that it not only does not support the theory that under the Recopilacion the right to four square leagues was granted to each and every settlement, but, on the contrary, that its plain purpose was simply to grant the discretionary power to allot four square leagues to settlements not under contract and to exempt such grants from many requirements of the Recopilacion, such as that as to the number of residents and the conditions to be performed on the part of the founder of the settlement. In other words, this decree, which was approved by the King of Spain, was substantially an act of new and supplementary legislation, adding to the provisions of the Recopilacion, and conferring rights not covered by its text. The fact of the making of this decree conveying the authority to give four square leagues in cases where there was no contract, demonstrates of course that the power thus given was not deemed theretofore to have existed by the specific terms of laws specially applicable to town settlements. For how can it be supposed that a solemn order would have been required from the King to sanction the doing of that which the law already expressly permitted. It is to be observed, also, that the delegation of power to make a grant of four square leagues in cases of non-contract does not import the significance that by operation of law such a grant was made in every case. The language is, there "may be" granted to the town in question, not that there "shall be" granted in every case, or that the governor "shall be" obliged to do so.

No. 4 — the Decree of Pedro de Nerva, under date of October 22, 1791 — refers to an opinion of an official styled the assessor of the comandancia general. The portion of the decree having pertinency here reads as follows:

"And considering the extent of four common leagues measured from the centre of the presidio square, viz., two leagues

in every direction, to be sufficient for the new pueblos to be formed under the protection of said presidios, (que van formandose á su abrigo) I have likewise determined, in order to avoid doubts and disputes in the future, that said captains restrict themselves henceforward to the quantity of house-lots and lands within the four leagues already mentioned, without exceeding in any manner said limits, leaving free and open the exclusive jurisdiction belonging to the intendentes of the royal hacienda, respecting the sale, composition and distribution of the remainder of the land in the respective districts."

The language of this decree, instead of confirming the theory that every town was entitled to four square leagues under the law of Spain, on the contrary, would seem to indicate that De Nerva considered that the extent of the boundaries of the new pueblos should be subject to his uncontrolled discretion. Indeed, in *Welch* v. *Sullivan*, 8 California, 165, this decree was interpreted as largely extending the limits of pueblos beyond four square leagues.

No. 5 — the opinion of one Galindo Nevara — is printed on pages 10 and 11 of the appendix to Dwinelle's work, and is treated as the opinion cited in De Nerva's decree of October 22, 1791. It was addressed to the honorable commandant general, and is dated October 27, 1785. It considers the question of the right to make requested allotments of lands for cattle ranches, and in the course of the document the writer observes that such allotments should not be made within the boundaries assigned to pueblos, which, in conformity to law 6, title 5, lib. c. 4, of the Recopilacion, must be four leagues of land in a square or oblong body according to the nature of the ground. This cannot be the opinion to which De Nerva referred in 1791, for the one to which he alludes related to the authority which was possessed over the distribution of lands of a presidio. Nor can this mere opinion, if authentic, be considered as conclusive, or even as persuasively determining the meaning of law 6, since it cannot be reconciled with the subsequent decree of 1791, declaring that, "in order to avoid doubts and disputes in future," it was necessary to specify the precise quantity of land to constitute the limits of the

pueblos to be subsequently established. The inference to be deduced from all these documents supports the theory that under the Spanish laws, as found in the Recopilacion, all towns were not entitled by operation of law to four square leagues, but that at a late date the Spanish officials had adopted the theory that four square leagues was the normal quantity which might be designated as the limits of new pueblos to be thereafter created.

Whether from these amendments or supplements to the Spanish law it was correctly held that a fixed quantity of land passed to every new pueblo by effect of law, is not relevant to the matter now under consideration, as the rights of Santa Fé, if any, arose long prior to the period to which these documents relate, and depend upon the Spanish law and that law exclusively. It would seem, however, from the statement of Hall, already quoted, *supra*, that the implication that every new Mexican town was entitled to four square leagues was a misconception. This review has been made in order, at the outset, to remove the erroneous conception which has been so often reiterated, as to the right of towns, by mere operation of law, under the Spanish law, to four square leagues. It is really unnecessary, however, to analyze the opinion of the board of land commissioners for the purpose of showing that no recognition of a right, by operation of law, to four square leagues was contained in it, for the reason that it is obvious that the decision of the board confirming only a portion of the claim of the city of San Francisco was a rejection of the four square league theory. That San Francisco so interpreted the decree is manifested by the fact that it was not accepted by that city as final, but an appeal was taken to the District Court, to which court also the United States appealed. Moreover, the action of Congress in confirming, in 1864, under certain conditions, a limited right in favor of San Francisco, and its final action, in 1866, in confirming the right of that city to four square leagues, with many important reservations, and upon conditions wholly incompatible with the existence, in that city, of a primordial right to four square leagues, amounted to a refusal by Congress to recognize the theory that every

town was entitled to four square leagues. On the contrary, those acts were tantamount to an assertion by Congress of its undoubted right to control the disposition of the land so far as it deemed best to do so. Acts July 1, 1864, c. 194, sec. 5, 13 Stat. 332, 333, and March 8, 1866, c. 13, 14 Stat. 4.

In passing, we also observe that the same reasons which cause it to be unnecessary to examine, in detail, the opinion of the board of land commissioners, also renders it unessential to analyze and determine the persuasive effect of the cases subsequently decided by the Supreme Court of California, cited in argument by the city, viz., *Welch* v. *Sullivan*, 8 California, 165, 168; *Hart* v. *Burnett*, 15 California, 530. The issue which those cases presented was the nature of the title of San Francisco, on the conceded premise that it possessed a title of some kind. This question was solved by a full reference to the Spanish and Mexican law, much in the same manner as the board of land commissioners had previously done.

An appeal was taken from the decision of the board of land commissioners to the District Court of the United States. We quote, as to subsequent steps in the controversy, from the opinion in *San Francisco* v. *LeRoy*, 138 U. S. 656, 666:

"In April, 1851, the charter of San Francisco was repealed and a new charter adopted. Pending the appeal of the pueblo claim in the United States District Court, the Van Ness ordinance, above mentioned, was passed by the common council of the city, by which the city relinquished and granted all its right and claim to land within its corporate limits as defined by its charter of 1851, with certain exceptions, to parties in the actual possession thereof by themselves or tenants on or before the first of January, 1855; provided such possession was continued up to the time of the introduction of the ordinance into the common council, which was in June, 1855, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that for the purposes contemplated by the ordinance persons should be deemed possessors who held titles to land within those limits by virtue of a grant made by any ayuntamiento, town council, alcalde or justice of the peace of the former pueblo

before the 7th of July, 1846, or by virtue of a grant subsequently made by the authorities, within certain limits of the city previous to its incorporation by the State, provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the recorder of the county previous to April 3, 1851. The city, among other things, reserved from the grant all the lots which it then occupied or had set apart for public squares, streets and sites for school houses, city hall and other buildings belonging to the corporation, but what lots or parcels were thus occupied or set apart does not appear.

"Subsequently, in March, 1858, the legislature of the State ratified and confirmed this ordinance (Stat. of Cal. of 1858, c. 66, p. 52), and by the fifth section of the act of Congress to expedite the settlement of titles to lands in the State of California, the right and title of the United States to the lands claimed within the corporate limits of the charter of 1851 were relinquished and granted to the city and its successors for the uses and purposes specified in that ordinance. 13 Stat. 333, c. 194, § 5."

But that the relinquishment thus referred to was not considered by Congress as equivalent to a recognition of an absolute title in the city of San Francisco, but was deemed to be an act of grace and grant on the part of Congress, is shown by the fact that the fifth section contained, in addition to the relinquishment referred to in the foregoing quotation, the following provision: "There being excepted from this relinquishment and grant all sites or other parcels of lands which have been, or now are, occupied by the United States for military, naval or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office by the surveyor general, of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys." It was also further provided: "That the relinquishment and grant by this act shall in no manner interfere with or prejudice any *bona fide* claims of others whether asserted

adversely under rights derived from Spain, Mexico or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

This act of Congress transferred the appeal which had been taken to the District Court from the decision of the board of land commissioners from that court to the Circuit Court of the United States. The latter court, in its opinion rendered on the hearing of the appeal, *San Francisco* v. *United States*, 4 Sawyer, 553, 561, 573, accepted as admitted "the existence of an organized pueblo at the present site of the city of San Francisco upon the acquisition of the country by the United States on the 7th of July, 1846; the possession by that pueblo of proprietary rights in certain lands and the succession to such proprietary rights by the city of San Francisco." It was also assumed to be conceded (pp. 561–574): "That the lands appertaining to the pueblo were subject, until by grant from the proper authorities they were vested in private proprietorship, to appropriation to public uses by the former government and, since the acquisition of this country, by the United States." The Circuit Court, contrary to the holding of the board, found that the limits of the pueblo had never been measured or marked off, and considered the question as to the extent of lands in which a pueblo acquired an interest under Mexican laws, and determined it to be four square leagues. But although the opinion referred to the Spanish law, the conclusion as to the right of San Francisco was based upon Mexican laws, customs and usages, and the reasoning of the opinion was in accord with that of the board of land commissioners, to which we have already referred. The claim of the city was confirmed "in trust, for the benefit of the lotholders under grants from the pueblo, town or city of San Francisco, or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the city." There was excepted, however, from the confirmation such parcels of land within the four square leagues, "as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private pro-

prietorship, and have been finally confirmed to parties claiming under said grants, by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose." *San Francisco* v. *United States*, *supra*, 577.

That this decision was in conflict with the claim of the city that under the Mexican law it was entitled, as a matter of right, to four square leagues, is shown by the finding of the court that whatever was the right in the city it was so inchoate that up to the time of confirmation by the United States all the ungranted land within the area claimed was subject to such dedication for public purposes as the United States saw fit to make. That is, that the whole ungranted land covered by the claim was substantially public domain at the entire disposition of the United States for public purposes. That this decision was not in accord with the asserted claims of the city of San Francisco, is also again shown by the fact that appeals were taken therefrom to this court by both the city and the United States. Pending these appeals, Congress passed an act to quiet titles to the land within the city limits, which was approved March 8, 1866, c. 13, 14 Stat. 4. At that time the limits of the city were coterminous with those of the county, and embraced the whole of the four leagues to which the city asserted rights. The act of 1864, it must be remembered, merely released the right and title of the United States to the lands within the then corporate limits of the city of San Francisco, as defined in the charter of April 15, 1851, which was much less than the four square leagues.

By the act of 1866 the United States relinquished and granted to the city all the land embraced in the decree of the Circuit Court subject to the reservations and exceptions designated in that decree, and upon the following further conditions and trusts, viz.:

"That all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon

such terms and conditions as the legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set aside by ordinance of said city for public uses."

The act moreover provided that such relinquishment and grant should not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination thereof.

It will thus be seen that the act of 1866 again asserted the power of Congress over the entire subject by materially modifying the decree of the Circuit Court of the United States, inasmuch as it placed restrictions on the power of disposition of the lands, and practically imposed a trust, not only upon the city of San Francisco, but upon the legislature of the State of California. In consequence of the passage of this act, the appeals of both the city and the United States which were pending in this court were withdrawn. *Townsend* v. *Greeley*, 5 Wall. 326; *San Francisco* v. *LeRoy*, 138 U. S. 656, 667.

Subsequent to the passage of the act of Congress, an act was passed by the legislature of California known as the "San Francisco Outside Land Bill," but it was vetoed by the governor of California, because in his opinion it was in conflict with the act of Congress of March 8, 1866. (Dwinelle, App. p. 352.)

We are now brought to consider the last proposition advanced by the city, which is —

Third. *That the interpretation of the Spanish law upon which the city bases its right, is sanctioned by previous adjudications of this court.*

The decisions relied upon are *Townsend* v. *Greeley*, 5 Wall. 326; *Grisar* v. *McDowell*, 6 Wall. 363; *Brownsville* v. *Cavazos* 100 U. S. 138; and *San Francisco* v. *LeRoy*, 138 U. S. 656.

An examination, however, of these cases will show that they cannot be held to sustain the proposition.

Townsend v. *Greeley* came to this court on error to a judgment of the Supreme Court of California, affirming a judgment in favor of Greeley, who had acquired a title to land

within the limits confirmed to San Francisco by the board of land commissioners, under an ordinance of the city. The defendant claimed title under a sale on execution upon a judgment recovered against the city. The rights of both parties, therefore, depended upon the existence of a title in the city, and the only question at issue between them was which had derived the paramount right from the city, the defendant disputing the possession which plaintiff claimed had been in his grantors. Under this state of the record it was, of course, absolutely impossible for the question to arise whether or not there was title in the city to the land in dispute, or the extent of land which the title of the city, whatever it was, covered. The sole question presented in this court was whether the lower court had committed error in rejecting certain proffered evidence, and the determination of this question involved the ascertainment of whether the title which was in the city was of such a character as could be seized and sold under execution. In deciding this question the opinion, whilst referring to the facts out of which the controversy arose, contains the statement (p. 336) that "the laws and ordinances of Spain for the settlement and government of her colonies on this continent provided for the assignment to pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land." But this language was not material to the question before the court, and was not, therefore, a decision settling the matter.

The decision in *Grisar* v. *McDowell*, *supra*, was, in fact, a denial of any right in San Francisco by operation of law, Spanish or Mexican, to four square leagues of land. The case involved a controversy between one holding a title under San Francisco and an officer of the United States in possession of a military reservation within the four square leagues. The court simply decided that, conceding some right or interest or claim in the city to land, it was subject to appropriation by the government for public uses. In a general reference to the claims of the city, there are dicta to the effect that by the laws of Spain a pueblo acquired some right in four square leagues

of land, but the decision did not necessarily determine that question, as it was not before the court.

In *Brownsville* v. *Cavazos*, *supra*, the question at issue was the title to land of Brownsville derived under Mexican laws. The action was ejectment by the city of Brownsville as the successor in the United States of the Mexican town of Matamoras, claiming title to a tract of land, to obtain title to which the city of Matamoras had instituted proceedings in expropriation or condemnation. The decision was that the city of Matamoras had never acquired title to the land because compensation had not been made, and that Brownsville consequently possessed no title. It is obvious that in the determination of that question the rights of pueblos, under Spanish laws, were not involved. It follows, therefore, that the reiteration, in the course of the opinion in that case, of the dicta found in the previous cases on the subject of the rights of pueblos under Spanish law cannot be treated as authoritative on that question.

In *San Francisco* v. *LeRoy*, *supra*, the object of the bill filed was to quiet the title of complainant as against the city of San Francisco to certain lands within the city limits. There was no controversy as to the extent of land in which a Spanish pueblo acquired some right by its establishment, nor was the question considered by the court. In reciting the history of the litigation over the San Francisco claim to four square leagues, the learned justice who delivered the opinion of the court did not directly refer to the rights acquired under Spanish laws, but contented himself with an allusion to the rights which a Mexican pueblo acquired in lands by operation of Mexican laws.

In passing from this brief review of the decisions of this court relied on by the city of Santa Fé, we note the reference to the case of *Lewis* v. *San Antonio*, 7 Texas, 288. In that case the court found that there had been an express grant of six square leagues to the predecessor of the town of San Antonio, and refuted the attempt to destroy the express grant on the ground that as, by operation of law, towns were entitled to four leagues, the express grant of six was void, by saying that

no law had been referred to supporting such an assertion. The implication from this adjudication refutes rather than supports the claim here contended for.

But, in concluding the consideration of the foregoing contentions advanced by the city of Santa Fé, and which are shown by the review which we have made to be without merit, we will now demonstrate that the right to recover the land here claimed, is without foundation on other and distinct grounds.

It cannot be doubted that under the law of Spain it was necessary that the proper authorities should particularly designate the land to be acquired by towns or pueblos, before a vested right or title to the use thereof could arise. Thus, by law 7, book 4, title 7, of the Recopilacion which regulated the mode of distribution of a tract granted by agreement to a founder of a settlement, it was provided as follows (2 White, New Recop. p. 46):

"The tract of territory granted by agreement to the founder of a settlement shall be distributed in the following manner: They shall, in the first place, lay out what shall be necessary for the site of the town and sufficient liberties, [exidos,] and abundant pasture for the cattle to be owned by the inhabitants, and as much besides for that which shall belong to the town [propios]. The balance of the tract shall then be divided into four parts; one to be selected by the person obligated to form the settlement, and the remaining three parts to be divided in equal portions among the settlers."

Law 11 of the same book and title, provides also (2 White, New Recop. p. 46):

"The lots shall be distributed among the settlers by lot, beginning with those adjoining the main square, and the remainder shall be reserved to us, to give, as rewards, to new settlers, or otherwise, *according to our will;* and we command that a plan of the settlement be always made out."

And law 12 of the same book and title declares (2 White, New Recop. p. 47):

"We command that no houses be erected within the distance of three hundred paces from the walls or breastworks of

the town, this being necessary for the good of our service and for the safety and defence of the towns, as provided with regard to castles and fortresses."

And it is well to notice at this point that Santa Fé was a fortified town; it possessed a castle, and not only the land upon which it was erected but a considerable extent of land surrounding it was in any view a part of the public domain, and passed as such to the United States. *Mitchel* v. *United States*, 15 Pet. 52, 89, 91.

The Spanish understanding of the prerequisite designation is well illustrated by the following passages from Elizondo's Practica Universal Forense.

At vol. 3, p. 109, he says:

"The Kings, the fountains of jurisdictions, are the owners of all the *terminos* situated in their kingdoms, and as such can donate them, divide or restrict them, or give any new form to the enjoyment thereof, and hence it is that the pueblos cannot alienate their terminos and pastos without precedent royal license and authority."

And at vol. 5, p. 226, he says:

"There is nothing whatever designated by law as belonging to towns, other than that which by royal privilege, custom or contract between man and man, is granted to them, so that although there be assigned to the towns at the time of their constitution a *territorio* and *pertinencias*, which may be common to all the residents, without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the *terminos* of the provinces and towns, assigning to these the use and enjoyment, but the domain remaining in the sovereigns themselves."

Considering this subject, this court, speaking through Mr. Justice Field in *Grisar* v. *McDowell*, 6 Wall. 363, 373, said:

"These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues. Such assignment was to be made by the public authorities of the government upon the original establishment of the pueblo, or afterwards upon the petition of its officers or inhabitants; and the land was to

be measured off in a square or prolonged form, according to the nature and condition of the country. All lands within the general limits stated, which had previously become private property or were required for public purposes, were reserved and excepted from the assignment.

"Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one. It was a right which the government might refuse to recognize at all, or might recognize in a qualified form; it might be burdened with conditions and it might be restricted to less limits than the four square leagues, which was the usual quantity assigned."

Moreover, the general theory of the Spanish law on the subject indicates that, even after a formal designation, the control of the outlying lands, to which a town might have been considered entitled, was in the King, as the source and fountain of title, and could be disposed of at will by him or by his duly authorized representative, as long as such lands were not affected by individual and private rights. This is shown by the quotation from Elizondo, already made. The provisions of law 14, title 12, book 4, of the Recopilacion (2 White, New Recop. p. 52), which is reproduced in the margin, illustrates the absolute control thus exercised by the King of Spain over the subject.[1]

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[1] *Law* 14, *title* 12, *book* 4 *of Recopilacion.*

"Whereas we have fully inherited the dominion of the Indies; and, whereas the waste lands and soil which were not granted by the kings, nor predecessors, or by ourselves, in our name, belong to our patrimony and royal crown, it is expedient that all the land which is held without just and true titles be restored, as belonging to us, *in order that we may retain, before all things all the lands which may appear to us and to our viceroys, audiences and governors, to be necessary for public squares, liberties,* [*exidos,*] *reservations,* [*propios*] *pastures and commons, to be granted to the villages and councils already settled, with due regard as well to their present condition as to their future state, and to the increase they may receive,* and after distributing among the Indians whatever they may justly want to cultivate, sow and raise cattle, confirming to them what they now hold, and granting what they may want besides — all the remaining land may be reserved to us, clear of any incumbrance, for the purpose of being given as rewards, or disposed of according to our pleasure: For all this, we order and command the vice-

The existence of this power of control and disposition as to municipal lands in the supreme Spanish authority finds a further and cogent exemplification in the decree of the Cortes of January 4, 1813, referred to by Hall in his Mexican Law, p. 45. A like power, it is to be inferred, is now asserted to be lodged in and has actually been exercised by the general government of Mexico. The constitution of Mexico of February 5, 1857, which went into effect September 16 of the same year, prohibited the acquisition or administration of real property by civil or ecclesiastical corporations without any other exception than the buildings intended immediately or directly for the service or purpose of the institutions, and hence arose the necessity for the abolition of municipal commons (exidos) in order to comply with this constitutional provision. In discussing the subject, Orozco, a Mexican writer, in his "Legislation and Jurisprudence on Public Lands" (vol. 2, p. 1107), after pointing out the distinction between pueblo sites (fundo) and the ejidos or commons of a pueblo, says:

"The municipal commons, (ejidos,) as has been seen, were excluded by the laws abolishing mortmain; but, in view of the aforesaid constitutional precept, it was logical to infer that the municipal commons (ejidos) passed to the control of the Federal treasury, as successor by subrogation of the property of corporations, and with so much the more reason since, recalling the origin of the municipal commons (ejidos) as soon as their existence became impossible, nothing is more natural and consequential than that those lands should revert to the dominion of him who granted them for the common use of the residents of the settlements."

After reciting the fact that in order to "reconcile respect for the supreme law with the interest of these pueblos," the

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roys, presidents and pretorial audiences, whenever they shall think fit, to appoint a sufficient time for the owners of lands to exhibit before them and the ministers of their audiences, whom they shall appoint for that purpose, the titles to lands, estates, huts and caballerias, who, after confirming the possession of such as hold the same by virtue of good and legal titles, or by a just prescription, shall restore to us the remainder, to be disposed of according to our pleasure."

general law, after fixing the limits of the pueblos and dedicating to public uses the cemeteries and other public places therein, directed that the remainder of the land should be distributed among the fathers or heads of families, the author adds:

"In this way it has been carried into effect, titles signed by the president of the republic in favor of those residents of the pueblos being issued gratis by the department of public works, all of which proves that the Federal government and not the common councils, nor any other authority is that which, as competent in the matter, graciously grants the disposable part of the ancient municipal commons (ejidos)."

It was doubtless a consideration of this state of the Spanish law and the unquestioned power lodged in the King of Spain to exercise unlimited authority over the lands assigned to a town and undisposed of and not the subject of private grant (to all of which rights the United States succeeded as successor of the King of Spain and the government of Mexico), which caused Congress, in enacting the laws of 1864 and 1866, to carve out of the claim of San Francisco such land for public purposes as it saw fit, to authorize further reservations to be made within a period of one year, and to subject the lands relinquished to specific trusts imposed not alone upon the municipality of San Francisco, but also upon the general assembly of California. The power thus asserted by the act was not new, but conformed to and accorded with the practice of the government from the beginning. Thus, in 1812, Congress, by an act approved June 13 of that year, c. 99, 2 Stat. 748, for the settlement of claims to land in the Territory of Missouri (where rights under the laws of Spain existed), provided, by section 1, for the survey of the boundaries of towns and for the confirmation to individuals of such lots therein covered by actual possession, and for the confirmation of such commons to the towns as had been actually possessed and used by the town. So far as all the other commons, not so actually possessed, were concerned, and the lots within the town not possessed and claimed by individuals, the absolute right to dispose of the same was asserted by Congress, and a

portion thereof was dedicated by that body to public uses. The first section is reproduced in the margin;[1] and the second section, accomplishing the results just indicated, reads as follows:

"SEC. 2. And be it further enacted, That all town or village lots, out lots or common field lots, included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby reserved for the support of schools in the respective towns and villages aforesaid: Provided, that the whole quantity of land contained in the lots reserved for the support of schools in any one town or village, shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village."

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[1] *Section* 1 *of Act of June* 13, 1812 (2 *Stat.* 748).

"That the rights, titles and claims, to town or village lots, out lots, common field lots and commons, in, adjoining and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villago a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, Little Prairie and Arkansas, in the Territory of Missouri, which lots have been inhabited, cultivated or possessed, prior to the twentieth day of December, one thousand eight hundred and three, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto: *Provided*, that nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory. And it shall be the duty of the principal deputy surveyor for the said territory as soon as may be, to survey, or cause to be surveyed and marked (where the same has not already been done, according to law) the out boundary lines of the said several towns or villages so as to include the out lots, common field lots and commons, thereto respectively belonging. And he shall make out plats of the surveys, which he shall transmit to the surveyor general, who shall forward copies of the said plats to the Commissioner of the General Land Office, and to the recorder of land titles; the expenses of surveying the said out boundary lines shall be paid by the United States out of the moneys appropriated for surveying the public lands: Provided that the whole expense shall not exceed three dollars for every mile that shall be actually surveyed and marked."

The same course was adopted by Congress in the act of February 8, 1827, c. 9, 4 Stat. 202, providing for the settlement and confirmation of claims to lands in the former Spanish domain of East Florida. The third section of that act, confirming to the city of St. Augustine certain lands, is as follows:

"SEC. 3. *And be it further enacted*, That the commons in the city of St. Augustine be, and the same are hereby, confirmed to the corporation of said city, to the same extent that they were used, claimed and enjoyed under the Spanish government. And the parochial church and burying ground in possession of the Roman Catholic congregation are confirmed to them, and the old Episcopal Church lot is, hereby, relinquished and confirmed to the Incorporated Episcopal Church of St. Augustine: Provided always, That the grants in this section specified shall forever inure to the purposes for which they are confirmed, and shall not be alienated without the consent of Congress."

So, also, it may well be supposed that it was upon this aspect of the imperfect nature of right in land claimed by towns in territory formerly owned by Spain and Mexico, and the long established construction of such rights evidenced by the foregoing acts of Congress, which caused this court, speaking through Mr. Justice Field, in *Grisar* v. *McDowell*, *supra*, to say, p. 373:

"Even after the assignment the interest acquired by the pueblo was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. The interest . . . amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands or as a source of revenue, or for other public purposes. And this limited right of disposition and use was in all particulars subject to the control of the government of the country."

How completely this language applies to the case here presented is demonstrated when it is considered that there is no

proof of a single act of ownership by the city, either in its own right or by anybody else, claiming to hold under it, and that it is asserted in the brief of the counsel for the government and not denied that practically every foot of the area of four square leagues now claimed by the city is covered by grants made by the governors of the province of New Mexico to others. Whether these grants be valid or not of course is not before us for consideration.

An inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims, 26 Stat. 854, and, therefore, is beyond the reach of judicial cognizance.

The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the government. *Les Bois* v. *Bramell*, 4 How. 449, 461; *Ainsa* v. *United States*, 161 U. S. 208, 222. To the extent only that Congress has vested them with authority to determine and protect such rights, can courts exercise jurisdiction. Where, therefore, a tribunal of limited jurisdiction is created by Congress to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act, or relief cannot be given. *United States* v. *Clarke*, 8 Pet. 436, 444.

Section 13 of the act provides that all the proceedings and rights theretofore referred to in the act shall be conducted and decided subject to certain provisions therein enumerated and to the other provisions of the act. Among the provisions contained in section 13 is the following:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date

of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

By section 7 of the act the court was also required, in reaching a conclusion as to the validity of the claim, to be guided by the laws of nations, the stipulations of the treaties concluded between the United States and the Republic of Mexico of February 2, 1848, and December 30, 1853.

Although section 6 of the act also authorized the adjudication by the Court of Private Land Claims, of all claims which the United States "are bound to recognize and confirm by the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," the meaning of the words "complete and perfect" is to be derived by considering the context and not by segregating them from the previous part of the sentence exacting that the claim must be one which the United States was bound to recognize and confirm by virtue of the treaty. These words are moreover controlled by the mandatory requirements of section 13.

Indeed, the controlling nature of the provisions of section 13 of the act of 1891 was considered and settled by this court in *Ainsa* v. *United States*, 161 U. S. 208, 223, where, speaking by Mr. Chief Justice Fuller, it was said:

"Under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the Court of Private Land Claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could *by right*, and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States."

Although the act of 1891, in section 11, authorized a town

presenting a claim for a grant to represent the claims of lotholders to lots within the town, this provision does not override the general requirements of the statute as to the nature of the claim to title which the court is authorized to confirm. The difference between the act of 1891 and the California act of 1851, hitherto referred to, accentuates the intention of Congress to confine the authority conferred by the later act to narrower limits than those fixed by the act of 1851. The act of 1851 authorized the adjudication of claims to land by virtue of any "right" or "title" derived from the Spanish government, and conferred the power in express language on the board and court to *presume a grant in favor of a town*. The act of 1891 not only entirely omits authority to invoke this presumption, but, as we have seen, excludes by express terms any claim, the completion of which depended upon the mere grace or favor of the government of Spain or Mexico, and of the United States as the successor to the rights of these governments.

Nor do certain expressions contained in the opinion in *San Francisco* v. *LeRoy*, 138 U. S. 656, and *Knight* v. *United States Land Association*, 142 U. S. 161, when properly understood, conflict with the foregoing conclusions. Those cases dealt with the rights of San Francisco after they were recognized by Congress, and to the extent only of that recognition. The language referred to, therefore, simply amounted to saying that as Congress had to a certain extent recognized the claim of San Francisco, to the limit of this recognition, and no further, the rights of that city would be treated as relating back and originating from the nature of the claim presented, and which in part through the grace of Congress had been allowed. In the case at bar we are not concerned with considering or determining to what period of time or source of right the claim would relate if it were found to be within the reach of the provisions of the act of 1891.

The petition is framed upon the theory merely of a right to four square leagues, vested in the city by operation of law, and as the record contains no proof whatever as to the possessory claims of lotholders in the city of Santa Fé, or as to the

actual possession enjoyed by that city of public places, these latter rights, if any, as well as the asserted title of the city to the swamp tract to which reference has been made in the course of this opinion are not to be controlled by the rejection now made of the pretensions of the city to a title to the four square leagues tract asserted to have been acquired by operation of Spanish laws.

The decree below is reversed, and the cause remanded with instructions to dismiss the petition.

MR. JUSTICE BREWER concurs in the result.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 512. HURLBUT LAND AND CATTLE CO. *v.* TRUSCOTT. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted December 21, 1896. Decided February 1, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Smith* v. *Adams*, 130 U. S. 167; *McLish* v. *Roff*, 141 U. S. 661; *Hume* v. *Bowie*, 148 U. S. 245; *Gurnee* v. *Patrick County*, 137 U. S. 141; *Bender* v. *Pennsylvania Co.*, 148 U. S. 502. *Mr. J. M. Wilson* for appellant. *Mr. Jason W. Strevell* for appellee.

No. 174. ULMAN *v.* MAYOR & CITY COUNCIL OF BALTIMORE. Error to the Court of Appeals of the State of Maryland. Argued January 22, 1897. Decided January 25, 1897. *Per Curiam.* Judgment affirmed with costs on the authority of *Spencer* v. *Merchant*, 125 U. S. 345. *Mr. M. R. Walter* for plaintiff in error. *Mr. Thomas G. Hayes* for defendants in error.

No. 450. STALLCUP *v.* TACOMA. Error to the Supreme Court of the State of Washington. Submitted February 1, 1897. Decided February 15, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Newport Light Co.* v. *Newport*, 151 U. S. 527; *Gormley* v. *Clark*, 134 U. S. 338; *Marchant* v. *Pennsylvania Railroad Co.*, 153 U. S. 380; *Leeper* v. *Texas*, 139 U. S. 462; *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *Eustis* v. *Bolles*, 150 U. S. 361; and other cases. *Mr. B. S. Grosscup* in support of motion to dismiss. *Mr. E. O. Wolcott* and *Mr. J. F. Shafroth* opposing.

Decisions announced without Opinions.

No. 478. CHAPPELL *v.* CHAPPELL. Error to the Court of Appeals of the State of Maryland. Submitted February 1, 1897. Decided February 15, 1897. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Samuel Maddox* and *Mr. David Stewart* in support of motions to dismiss or affirm. *Mr. Thomas C. Chappell* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 676. SOUTHERN RAILWAY COMPANY *v.* CARNEGIE STEEL CO. Fourth Circuit. Granted January 11, 1897. *Mr. Henry Crawford* and *Mr. Willis B. Smith* for petitioner. *Mr. Nicholas P. Bond, Mr. P. C. Knox* and *Mr. David Willcox* opposing.

No. 684. RELIANCE MARINE INSURANCE COMPANY *v.* NEW YORK AND CUBA MAIL STEAMSHIP COMPANY. Second Circuit. Denied January 18, 1897. *Mr. William W. MacFarland* for petitioner. *Mr. Harrington Putnam* opposing.

No. 204. CAPITAL BANK OF ST. PAUL *v.* SCHOOL DISTRICT No. 26, BARNES COUNTY, NORTH DAKOTA. Eighth Circuit. Denied January 25, 1897. *Mr. William M. Jones* for petitioner. *Mr. Samuel L. Glaspell* and *Mr. William Small* opposing.

No. 683. CAMPBELL *v.* RICHARDSON. Third Circuit. Denied February 1, 1897. *Mr. Frederick P. Fish, Mr. W. C. Strawbridge* and *Mr. John G. Johnson* for petitioners. *Mr. Allen Webster* and *Mr. William L. Pierce* opposing.

No. 694. SAFETY INSULATED WIRE AND CABLE CO. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE. Fourth Circuit. Denied February 1, 1897. *Mr. William Pinkney Whyte* for petitioner. 42 U. S. App. 64.

Decisions announced without Opinions.

No. 701. UNITED STATES *v.* STEAMER "THREE FRIENDS." Fifth Circuit. Granted February 1, 1897. *Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* for petitioner. *Mr. W. Hallett Phillips* opposing. (See 166 U. S. 1.)

No. 682. STANDARD ELEVATOR CO. *v.* NATIONAL CO. Seventh Circuit. Granted February 15, 1897. *Mr. Frank T. Brown* for petitioners. *Mr. James H. Raymond* opposing.

No. 715. CLARKE *v.* STEAMSHIP "ELFRIDA." Fifth Circuit. Granted March 1, 1897. *Mr. D. W. Baker* for petitioners. *Mr. J. Parker Kirlin* opposing.

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ABATEMENT.

See PUBLIC LAND, 1.

ADMIRALTY.

One furnishing supplies or making repairs on the order simply of a person acquiring the control and possession of a vessel under a charter party requiring him to provide and pay for all the coals, etc., cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, and he fails to make the inquiry, and chooses to act on a mere belief that the vessel will be liable for his claim. *The Valencia*, 264.

See CONSTITUTIONAL LAW, 21, 22.

BANK.

1. As between a check holder and the bank upon which such check is drawn, it is settled that, unless the check be accepted by the bank, an action cannot be maintained by the holder against the bank. *Fourth Street Bank* v. *Yardley*, 634.
2. It is also settled that a check, drawn in the ordinary form, does not, as between the maker and payee, constitute an equitable assignment *pro tanto* of an indebtedness owing by the bank upon which the check has been drawn, and that the mere giving and receipt of the check does not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors. *Ib.*
3. That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court. *Ib.*
4. The Keystone Bank, through its president, solicited the Fourth Street Bank to give to the former $25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York City. At the same time that this request was made the president of the Keystone Bank made the further statement that his bank owed a balance at the clearing-house which it could not meet "because its funds were in the city of

CERTIORARI.

See JURISDICTION, A, 11.

CONSTITUTIONAL LAW.

1. A statute of a State, which enacts that every railroad corporation, owning or operating a railroad in the State, shall be responsible in damages to the owner of any property injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon its railroad; and which provides that it shall have an insurable interest in the property upon the route of its railroad, and may procure insurance thereon in its own behalf; does not violate the Constitution of the United States, as depriving the railroad company of its property without due process of law, or as denying to it the equal protection of the laws, or as impairing the obligation of the contract made between the State and the company by its incorporation under general laws imposing no such liability. *St. Louis & San Francisco Railway Co.* v. *Mathews*, 1.
2. Where a suit is brought against defendants who claim to act as officers of a State and under color of an unconstitutional statute commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, such suit is not an action against the State within the meaning of the Eleventh Amendment to the Constitution of the United States. *Scott* v. *Donald*, 58.
3. The statute of South Carolina of January 2, 1895, entitled "an act to further declare the law in reference to, and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the State of South Carolina, and to police the same," recognizes liquors and wines as commodities which may be lawfully made, bought and sold, and which must therefore be deemed to be the subject of foreign and interstate commerce, and is an obstruction to and interference with that commerce, and must, as to those of its provisions which affect the plaintiffs, stand condemned. *Ib.*
4. That statute is not an inspection law, and is not within the scope of the act of August 8, 1890, c. 728. *Ib.*
5. Whether those provisions of the act which direct that so-called contraband liquors may be seized without warrant by any state constable, sheriff or policeman, while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent or private person, and which subject common carriers to fine and imprisonment for carrying liquors in any package, cask, jug, box or other package, under any other than the proper name or brand known to the trade, and which forbid the bringing of any suit for damages alleged to arise by seizing and detention of liquors would be lawful in an inspection law otherwise valid, is not decided. *Ib.*

prior to the trial, to require the District Attorney to file the printed matter alleged in the indictment to be obscene, lewd, lascivious and indecent. *Dunlop* v. *United States*, 486.

23. There was no error in the admission of the advertisements of proprietorship of the Dispatch as it is difficult to see how the identity of the paper, which the indictment averred that the defendant deposited in the post office for mailing, could have been more conclusively proved than by the production of a newspaper called the Dispatch, and purporting to be the official paper of the city of Chicago. *Ib.*

24. There was no error in permitting government officers in the Post Office Department to testify as to the course of business in the respective offices with which they were connected, with a view of proving the customs of the post office, the course of business therein, and the duties of the employés connected with it. *Ib.*

25. Where a question is made whether a certain paper or other document has reached the hand of the person for whom it is intended, proof of a usage to deliver such papers at the house, or of the duty of a certain messenger to deliver such papers, creates a presumption that the paper in question was actually so delivered. *Ib.*

26. There was no error in permitting the government to prove that during the three years preceding the trial, and also during the period covered by the dates of the papers, admitted in evidence, namely, July 6 to October 19, 1895, a newspaper, purporting to be the Chicago Dispatch, was regularly on each day, except Sunday, received in great quantities at the Chicago post office for mailing and delivery. *Ib.*

27. Whether the matter is too obscene to be set forth in the record is a matter primarily to be considered by the District Attorney in preparing the indictment; and, in any event, it is within the discretion of the court to say whether it is fit to be spread upon the records or not; and error will not lie to the action of the court in this particular. *Ib.*

28. There is no merit in the assignment of error taken to the action of the court, in refusing to direct a verdict of not guilty at the close of the testimony. *Ib.*

29. In his argument to the jury the District Attorney said: "I do not believe that there are twelve men that could be gathered by the venire of this court within the confines of the State of Illinois, except where they were bought and perjured in advance, whose verdict I would not be willing to take upon the question of the indecency, lewdness, lasciviousness, licentiousness and wrong of these publications." To this language counsel for the defendant excepted. The court held that it was improper, and the District Attorney immediately withdrew it. *Held*, that the action of the court was commendable in this particular, and that this ruling, and the immediate withdrawal of the remark by the District Attorney, condoned his error in making it, if his remark could be deemed a prejudicial error. *Ib.*

See NATIONAL BANK, 1.

DAMAGES.

EQUITY.

1. When, while disputed matters of fact concerning a tract of public land, or the priority of right of claimants thereto, are pending unsettled in the land department, a patent wrongfully issues for the tract through inadvertence or mistake, by which the jurisdiction conferred by law upon the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere, and restore such lost jurisdiction by cancelling the patent. *Germania Iron Company* v. *United States*, 379.
2. The plaintiff's contention in this case was that, notwithstanding the action of the Department of the Interior in certifying the land in controversy to the State of Nebraska and the subsequent conveyances in the claim of title from that State to the appellees, such apparent legal title was absolutely void, because, by the acts of Congress the land was not subject to selection by the State, it being within the limits of the land grant to the Burlington & Missouri River Railroad Company, and reserved for homestead and preëmption, but not for private entry. All the facts upon which that contention rested were matters of statute and record, and any defence to the apparent legal title created by them was available in an action at law to recover possession. *Held*, that, without deciding whether the selection and certification of these lands were absolutely void or simply voidable at the election of the Government, or were valid and beyond any right of challenge of the Government, or any one else, a case was not presented for the interference of a court of equity. *Deweese* v. *Reinhard*, 386.

See BANK, 3, 4; INFANT, 3; EQUITABLE LIEN; PUBLIC LAND, 1, 9; TRUST.

EVIDENCE.

Notwithstanding the provisions of the acts of July 2, 1864, cc. 210, 222 (reënacted in Rev. Stat. § 858, and Rev. Stat. D. C. §§ 876, 877), a widow is incompetent to testify, in a suit which she is neither a party to, nor interested in, to a private conversation between her husband and herself in his lifetime; and a conversation between them in their own home, in the presence of no one but a young daughter, who does not appear to have taken any part in it, is a private conversation, within the rule. *Hopkins* v. *Grimshaw*, 342.

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TAX AND TAXATION.

1. In enforcing the collection of taxes one rule may be adopted in respect of the admitted use of one kind of property, and another rule in respect of the admitted use of another, in order that all may be compelled to contribute their proper share to the burdens of government. *Western Union Telegraph Co.* v. *Indiana*, 304.
2. The amount of penalty to be enforced for non-payment of taxes is a matter within legislative discretion. *Ib.*

See Constitutional Law, 14 to 18, 23, 25.

TERRITORY.

1. The act of April 4, 1874, c. 80, legislating for all the Territories, secures to their inhabitants all the rights of trial by jury, as they existed at