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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1896

J. C. BANCROFT DAVIS

REPORTER

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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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.

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JUDSON HARMON, Attorney General.
JOSEPH McKENNA, Attorney General.[1]
HOLMES CONRAD, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Harmon having resigned, Mr. McKenna was appointed in his place. His commission was dated March 5, 1897.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES,

AT

# OCTOBER TERM, 1896.



## THE THREE FRIENDS.[1]

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

No. 701. Argued February 15, 1897. — Decided March 1, 1897.

When a libel in admiralty is ordered to stand dismissed if not amended within a time named, the prosecution of an appeal within that time is a waiver of the right to amend, and the decree of dismissal takes effect immediately.

In admiralty cases, although the decree of the Circuit Court of Appeals is made final in that court, this court may require any such case to be certified for its review and determination, with the same power and authority as if it had been brought here, directly, from the District or Circuit Court; and although this power is not ordinarily to be exercised, the circumstances justified the allowance of the writ in this instance.

The forfeiture of a vessel proceeded against under Rev. Stat. § 5283, does not depend upon the conviction of the person or persons charged with doing the acts therein forbidden.

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward

[1] The docket title of this case is The United States, Petitioner, *v.* The Steamer Three Friends, her engines, etc., Napoleon B. Broward and Montcalm Broward, claimants.

both parties: but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency; and, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

The word "people," as used in Rev. Stat. § 5283, forbidding the fitting out or arming of vessels with intent that they shall be employed in the service of any foreign people, or to cruise or commit hostilities against the subjects, citizens or property of any foreign people with whom the United States are at peace, covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized.

Although the political department of the government has not recognized the existence of a *de facto* belligerent power, engaged in hostility with Spain, it has recognized the existence of insurrectionary warfare, prevailing before, at the time, and since the forfeiture sought to be enforced in this case was incurred; and the case sharply illustrates the distinction between recognition of belligerency, and recognition of a condition of political revolt; between recognition of the existence of war in a material sense, and of war in a legal sense.

The courts of the United States having been informed by the political department of the existence of an actual conflict of arms, in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents has not taken place, the statute is applicable to the case.

The order for the release of the vessel was improvidently made, as it should not have been released.

The steamer Three Friends was seized November 7, 1896, by the collector of customs for the district of St. John's, Florida, as forfeited to the United States under section 5283 of the Revised Statutes, and, thereupon, November 12, was libelled on behalf of the United States in the District Court for the Southern District of Florida.

The first two paragraphs of the libel alleged the seizure and detention of the vessel, and the libel then continued:

"Third. That the said steamboat or steam vessel, the 'Three Friends,' was on, to wit, on the twenty-third day of May, A.D. 1896, furnished, fitted out and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba, to cruise

and commit hostilities against the subjects, citizens and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace.

"Fourth. That the said steamboat or steam vessel, 'Three Friends,' on, to wit, on the twenty-third day of May, A.D. 1896, whereof one Napoleon B. Broward was then and there master, and within the said southern district of Florida, was then and there fitted out, furnished and armed, with intent that said vessel, the said 'Three Friends,' should be employed in the service of a certain people, to wit, the insurgents in the island of Cuba, otherwise called the Cuban revolutionists, to cruise and commit hostilities against the subjects, property and people of the King of Spain, in the said island of Cuba, with whom the United States are and were then at peace.

"Fifth. That the said steamboat or steam vessel, 'Three Friends,' on, to wit, on the twenty-third day of May, A.D. 1896, and whereof one N. B. Broward was then and there master, within the navigable waters of the United States, and within the southern district of Florida and the jurisdiction of this court, was then and there, by certain persons to the attorneys of the said United States unknown, furnished, fitted out and armed, being loaded with supplies and arms and munitions of war, and it, the said steam vessel 'Three Friends,' being then and there furnished, fitted out and armed with one certain gun or guns, the exact number to the said attorneys of the United States unknown, and with munitions of war thereof, with the intent, then and there, to be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain in the island of Cuba, and with the intent to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the said island of Cuba, and who, on the said date and day last aforesaid, and being so furnished, fitted out, and armed as aforesaid, then and there aforesaid, from the navigable waters of the United States, to wit, from the St. John's River, within the southern district of Florida, and within the jurisdiction of this court aforesaid, proceeded upon a voyage to the island of Cuba aforesaid, with the in-

tent aforesaid, contrary to the form of the statute in such case made and provided. And that by force and virtue of the acts of Congress in such case made and provided, the said steamboat or steam vessel, her tackle, engines, machinery, apparel and furniture became and are forfeited to the use of the said United States.

"Sixth. And the said attorneys say that by reason of all and singular the premises aforesaid, and that by force of the statute in such case made and provided, the aforesaid and described steamboat or steam vessel 'Three Friends,' her tackle, machinery, apparel and furniture, became and are forfeited to the use of the said United States."

And concluded with a prayer for process and monition and the condemnation of the vessel as forfeited. Attachment and monition having issued as prayed, Napoleon B. Broward and Montcalm Broward, master and owners, intervened as claimants; applied for an appraisement of the vessel and her release on stipulation; and filed the following exceptions to the libel:

"1. Sec. 5283, for an alleged violation of which the said vessel is sought to be forfeited, makes such forfeiture dependent upon the conviction of a person for doing the act or acts denounced in the first sentence of said section, and as a consequence of conviction of such person; whereas the allegations in said libel do not show what persons had been guilty of the acts therein denounced as unlawful.

"2. The said libel does not show the 'Three Friends' was fitted out and armed, attempted to be fitted out and armed, or procured to be fitted out and armed in violation of said section.

"3. The said libel does not show the said vessel was so fitted out and armed, or so attempted to be fitted out and armed, or so procured to be fitted out and armed or furnished, with the intent that said vessel should be employed in the service of a foreign prince, or state, or of a colony, district or people with whom the United States are at peace.

"4. The said libel does not show by whom said vessel was so fitted out.

"5. Said libel does not show in the service of what foreign

prince, or state, or colony, or district, or body politic the said vessel was so fitted out.

"6. The said libel does not show that said vessel was so armed or fitted out or furnished with the intent that such vessel should be employed in the service of any body politic recognized by or known to the United States as a body politic."

The vessel was appraised at $4000 and a bond on stipulation given for $10,000, upon which she was directed to be released. The cause came on to be heard upon the exceptions to the libel, and on January 18 the following decree was entered:

"This cause coming on to be heard upon exceptions to the libel and having been fully heard and considered, it is ordered that said second, third, fifth and sixth exceptions be sustained and that the libellant have permission to amend said libel, and in event said libel is not so amended within ten days the same stand dismissed and the bond herein filed be cancelled."

From this decree the United States, on January 23, prayed an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, which was allowed and duly prosecuted.

The following errors were assigned:

"First. For that the court over the objection of the libellants allowed the said steam vessel 'Three Friends' to be released from custody upon the giving of bond.

"Second. For that the court erred in sustaining the 2d, 3d, 5th and 6th exceptions of the claimants to the libel of information of the libellants.

"Third. For that the court erred in entering a decree dismissing the libel of information herein."

On February 1 application was made to this court for a writ of certiorari to bring up the cause from said Circuit Court of Appeals, and, having been granted and sent down, the record was returned accordingly.

*Mr. Assistant Attorney General Whitney* for the United States.

The following propositions seem to be clearly established:

(1) That a recognition of belligerency is not always accom-

plished by a recognition of the fact that actual hostilities are in progress.

(2) That the existence of a civil war, in the ordinary sense of that term, may be made known by what is sometimes called a recognition of insurgency.

(3) That to justify a recognition of belligerency there must be something more than the mere existence of a civil war — the nation which gives the recognition must be impelled to do so for the protection of its own rights or those of its citizens.

(4) That the recognition of an insurgent body as a belligerent, in the technical sense of the phrase, makes that insurgent body a state for all purposes of the war. Lawrence, Principles of International Law, §§ 162, 163; Dana's Wheaton on International Law, § 23, note; Hall's International Law, 4th ed. pp. 32, 35–37.

The consequences of a recognition of the belligerency of an insurgent body — while neither increasing nor diminishing the duty of non-interference — are very serious. The neutral nation must abandon further claims for reparation on account of damages suffered by its citizens through the hostilities. Its merchantmen must submit to the rights of blockade, visitation, search and seizure of contraband articles on the high seas.

Hence a recognition of belligerency should never be given except when it becomes necessary on the grounds above stated, or in the rare instances when armed intervention is justifiable.

Such a recognition can often be forced by either party to the warfare by establishing an effective blockade.

It is forced by an insurgent body when it enters into maritime operations and maintains the right to search neutral vessels for contraband of war. The neutral is thus forced either to recognize the vessels of the insurgents as belligerents or to pursue them as pirates, for if they molest third parties they must be one or the other, whatever the true definition of piracy may be. See *The Malek Adhel*, 2 How. 210; *The Ambrose Light*, 25 Fed. Rep. 408, and auth. cit.; Dr. Wharton's criticism thereon in 33 Alb. L. J. 125, and auth. cit.;

Lawrence, International Law, § 122; Dana's Wheaton, § 124, note; 1 Op. Attys. Gen. 249, 252.

When insurgents have no maritime force, and the war is not in contiguous territory, a recognition of belligerency harms them as well as the neutral; for it gives to their enemy rights of search on the high seas which they themselves are unable to utilize. Thus if we should be forced to recognize the present hostilities in Cuba as a civil war, technically speaking, the shipment of arms, ammunition and other contraband goods to the insurgents would become much more difficult.

Hence recognitions of belligerency by a neutral nation are comparatively rare. Recognitions of the fact that hostilities are in progress are, however, quite common. To such recognitions Dr. Wharton has applied the convenient phrase "recognition of insurgency." 3 Whart. Int. Law Dig. 2d ed. 351; Criticism of Ambrose Light Case, 33 Alb. L. J. 125.

The existence of a recognized state of belligerency is not an express requirement of this statute. There could be no object in discriminating between recognized and unrecognized belligerents. The words "colony," "district" and "people" are not apt if parties recognized as belligerent are the only ones intended to be referred to. A belligerent is not recognized as a colony, as a district, or as a people, but as a prince or as a state. It is true that "a people" is a phrase often used as equivalent to a state. This cannot be its use in the present statute, because it was introduced as an amendment to a law which already contained the word "state." The new word is not to be interpreted as mere surplusage, but is to be given some separate force if possible. *Market Co.* v. *Hoffman*, 101 U. S. 112, 115, 116; Opinion of Justices, 22 Pick. 571, 573. This principle was applied to the British Foreign Enlistment Act in *Attorney General* v. *Sillem*, 2 Hurlst. & Coltm. 431, 572, quoting Lord Coke in 8 Rep. 117. Assuming, then, that the word is not used as the equivalent of a state or a nation, it must be used in the alternative sense of a body of men less than a nation who are bound together by ties of blood, neighborship, common enterprise or otherwise.

*Situation of the Latin-American world at the time of the neutrality act of 1817.*

The contesting bodies may be divided into classes, as follows:

(*a*) *The leading Spanish-American colonies, whose position as belligerents was in doubt.* — Whether or not the belligerency of the South American revolutionists had been recognized in Madison's administration depends upon the question — how much formality is necessary in a recognition of belligerency? Is it only recognized by the President or Secretary of State in a formal document declaring the fact to the world or communicating it to Congress? Or is it recognized also whenever the President or one of the Cabinet officers, in an ordinary official letter of instruction, or in transmitting information to a Congressional committee, uses the term "belligerent" or "civil war"? This cannot be. Were it so, then on the same principle President Monroe would have been held to acknowledge the *independence* of the South American governments as early as January, 1819. 4 Wheat. App'x, p. 41.

The former method was held necessary in *The Conserva*, 38 Fed. Rep. 431, 437. On this principle Henry Clay considered that neutrality had not been recognized at the time of the act (Annals of Congress, March 18, 1818, p. 1415), and Mr. Wheaton seems to have agreed with him (4 Wheat. App'x, p. 23); but President Monroe took the opposite view (Annual Message of December 2, 1817). President Madison had used very guarded language in his message of December 26, 1816. Monroe's view was probably based on his own language as Secretary of State in his letter of January 19, 1816, to the Spanish minister, Onis, and his letter of January 10, 1817, to the Chairman of the Foreign Affairs Committee of the House of Representatives, John Forsyth, and on the circular of Mr. Rush, Secretary of the Treasury, to all collectors of customs, dated July 3, 1815, directing the admission to our ports of all insurgent flags. This circular, however, named no particular flag, and imposed no condition as to executive recognition.

The states whose belligerency was recognized by Monroe in 1817 were doubtless those whose independence was recognized in 1822, namely, New Granada and Venezuela (after-

wards united as Colombia), Buenos Ayres (officially known as the United Provinces of South America), and Chile — the successful revolts of Peru and Mexico having been later than 1817. That the recognition of belligerency did not apply to all the minor insurgencies has been expressly ruled by this court in *The Nueva Anna and Liebre*, 6 Wheat. 193.

(*b*) *Certain Spanish or Portuguese districts whose belligerency had not then been and never was recognized.* — One of these — Paraguay — has been already referred to. This may have attracted no attention, as our people did not come into contact with it, though probably informed of its existence. 4 American State Papers, Foreign Relations, pp. 219, 222, 225, 250, 265, 278, 339.

Second only to Buenos Ayres, however, if not first of all the powers of Latin America in capacity to make trouble, was the now forgotten but then world-famous General Artigas, who held sway with various ebbs and flows of fortune on the east bank of the La Plata River in the old Spanish intendency of Banda Oriental, called by him the Oriental Republic, and now known as the independent Republic of Uruguay. Any recognition of his claims would have given offence, not only to Spain, but to Portugal, and even to Buenos Ayres, for all three laid claim to his territory, and with all three he was at war. His main city, Montevideo, was generally in Portuguese control. Yet cruisers under the "Artigan flag," and claiming to be commissioned by Artigas, were on all the seas. They did the main injury complained of by the Portuguese government. H. R. Ex. Doc. No. 53, 32d Cong. 1st sess. pp. 193–200; see also *The Gran Para*, 7 Wheat. 471. Notices of his proceedings are to be found in 4 American State Papers, Foreign Relations, at pp. 173, 174, 218, 219, 221, 225, 250, 268, 274, 288, 289, and in argument of counsel, 7 Wheat. pp. 476–481. His country had been claimed by both Spain and Portugal. Portugal had surrendered it in 1778, but renewed the claim when the South American revolutions broke out. It was the Portuguese who finally conquered Artigas, and the country was then for a time annexed to Brazil. In 1817 and 1818 the Artigas revolt

seems generally to have been regarded as directed against Portugal rather than against Spain, but Monroe's recognition of belligerency in December, 1817, applied only to "the contest between Spain and the colonies," as was pointed out by Attorney General Wirt. 1 Op. Attys. Gen. 249.

(*c*) *Hayti.* — This unfortunate island had long been free from the sovereignty of France, but its independence had not been recognized by us, and was not so recognized prior to 1862, because it was under negro domination. At that time it was divided between two negro chieftains who were engaged in a bloody contest, but whose belligerency had not been recognized. As stated by Attorney General Wirt (*ut sup.*), "our Government had never acknowledged those sovereignties, not even by the recognition of a civil war between themselves or their mother countries." Henry Clay said that "we had not recognized the war as a civil war, etc., or in any manner so regarded it as that a case arising under it in our courts could be viewed in the same light as a case occurring in the existing conflict in South America." Annals of Congress, March 18, 1818, p. 1425.

(*d*) *Amelia Island and Galveston.* — These places were the rendezvous of privateers, Aury (their best-known leader) claiming the right to fly the Venezuelan, Artigan, and other revolutionary flags. 1 Whart. Int. Law Dig. § 50*a*. They were practically pirates, as stated by Monroe in his message of 1817.

Counsel further argued that the insertion of the words "district or people" in the act of 1817, which was by amendment adopted without debate on January 28, was probably due to Attorney General Rush, who was then preparing for argument the case of *Gelston* v. *Hoyt*, 13 Johns. 141, 561, 590; 3 Wheat. 246, 278. But that case related to the contest between the Haytian chieftains aforesaid, neither of whom was recognized as a belligerent.

It may be added that John Forsyth, who had had charge in the House of Representatives of the acts of 1817 and 1818, was Secretary of State at the time of the revolution in Texas. He evidently then regarded the operation of these acts as in nowise dependent upon a recognition of belligerency. He

directed the district attorneys beforehand to enforce these laws "should the contest begin." H. R. 24th Cong. 1st sess. Doc. No. 256, p. 36, and directed prosecutions for enlistment in the insurgent cause before the independence of Texas was declared. Id., p. 37; see p. 3.

In 1837 an insurrection broke out in Canada. Belligerency of the insurgents was never recognized. Van Buren, in his annual message of 1838, shows clearly that he regarded them in the same light in which the present Cuban insurrectionists have been regarded. A neutrality act was passed, however; and the words "colony, district or people" were regarded as sufficient for the case. Act of March 10, 1838, c. 31, §§ 1, 2, 5. The act expired in two years by its own limitation, § 9.

If any executive recognition is necessary to put the statute in operation, that recognition had been given when the libel was filed, by the messages and proclamations of President Cleveland.

When a vessel belonging to citizens of the United States commits hostilities upon the high seas against a friendly power, her act is *prima facie* piratical. She is forfeit, and her owners, officers and crew are liable to be hanged. See *The Ambrose Light*, 25 Fed. Rep. 408, and auth. cit.; Lawrence, International Law, § 122; Dana's Wheaton, § 124, note. If the act is done in the interests of a colony, district or people struggling for independence, then it is freed from this imputation, and the punishment is under a different and milder law. How is the existence of such a contest to be established? It is matter of judicial notice, not proof. It is not in its nature susceptible of proof by witnesses, and, besides, from motives of policy the judiciary looks to the Executive for information.

As the present insurrection is for independence it is not necessary to inquire whether the pursuit of this object is a prerequisite to the operation of the statute. This does not appear to be required, and the statute seems equally applicable to revolts for the control of an already established state, like the recent Chilean war, or for civil rights, like our Revolution

before July 4, 1776, the Buenos Ayres revolution before 1816, and the recent proposed revolt in Johannesburg.

The bond or stipulation for the release of the vessel pending suit is not authorized by law; and, if authorized, should have been denied in the case of so serious a charge, in the absence of a defence upon the merits and of an affidavit of merits.

*Mr. William Hallett Phillips* for appellees.

From the variety of ways in which it is attempted in the libel to state what constitutes "a people," it is evident that the government experienced much difficulty in making the law agree with the facts. In some places it is alleged that the people referred to were certain persons, insurgents, revolutionists, engaged in armed resistance to the government of Spain. There is throughout the libel an endeavor on the part of the Attorney General to show a status of "a people," so that it should appear he does not refer to a people meaning simply persons. But the endeavor to escape from this meaning of individuals has not been successful, because, take as you will these various statements of "a people," arrange the designations as you may, the matter comes to this, that the reference after all is only to unorganized individuals — persons; and that is the signification which the court must draw from the use of the words "a people" in the libel. The Attorney General has attached too much significance to the question of belligerency. He seems to regard this question as the controlling one in the case. But the decree does not rest upon this point. Belligerency is only important as showing that to constitute "a people," within the meaning of the act, there must be either an actual independent state, or a power *de facto*, and that power *de facto* may or may not be recognized as belligerent. The real question is this: Can there be any proceeding under section 5283 against parties charged with fitting out a ship for the purpose of being employed by a state or "a people," unless it is shown that there exists a state in every sense of the word; a state among the family of nations, or else a *de facto*

government recognized in the form of a political or other organization; "a people" claiming to be a government or actually exercising sovereignty. That there must exist "a people" in the sense I am contending for, is shown conclusively by the mention in the section of the words "subjects, citizens, or property of a people."

Thus section 4, act of 1817, 3 Stat. 370, now § 5285, Rev. Stat., which applies to the augmentation of force of any ship of war or armed vessel within the United States "in the service of any foreign prince or state or of any colony, district or people, or belonging to the subjects or citizens of any such prince, state, colony, district or people."

How can there be subjects of "a people," unless that people constitutes a government *de jure* or *de facto?* The Attorney General assumes a position which narrows the controversy. In the court below, when the libel was filed, the idea prevailed that "a people," within the meaning of the act, meant any people, persons, individuals, and it was so stated. But now the Attorney General is driven to the position that "a people" must denote a body, must mean a community, an organization which actually exercises sovereignty or claims to exercise sovereignty over a country. The inquiry therefore is reduced to this: Is there shown in the record, either in the libel or otherwise, that there exists "a people" as is now contended by the United States; to wit, "a people" exercising or claiming sovereignty over Cuba either *de jure* or *de facto?* The Attorney General mentions certain persons as "a body." He refers to them as insurrectionists, revolutionists; reference is made to the President's proclamations and messages as establishing a status of "a people." The brief says: "This case brings up a question which has been recently much discussed; namely, whether the words, 'any colony, district or people,' include insurrectionary bodies, like the present 'Republic of Cuba,' whose belligerency, technically speaking, has not yet been recognized by the executive department of our Government." I do not understand what is meant by this expression, "technically speaking." I suppose it means legally speaking. What is this "body" to which reference is made

as the present Republic of Cuba? Is there any such question in the present case? I submit that there is not. The Attorney General asks the court to contemplate the Republic of Cuba for one purpose only, for that of punishment. When he has succeeded in punishing persons for aiding the Republic of Cuba, he says to the court: "There is no such republic, there is no such people." They are the People of the Mist. They were here for a moment, they have now disappeared! As a matter of fact, can the court take notice of any Republic of Cuba or anybody called the Republic of Cuba? I should be very glad if the court could do so, but I think they are inhibited by the circumstances of this case and the statements in this record. Neither in the proclamations of the President, nor in his messages, nor in the libel, is there any mention of such a body as the Republic of Cuba or of any other body. We submit that the Government has not succeeded in creating for the purposes of this case an organized political body, or a community, or a government, or what is the same thing, a power, "a people." The reference in the libel is to insurgents, to revolutionists, to certain persons engaged in armed resistance to the government of Spain in the island of Cuba. Spain has never conceded that Cuba as a colony or "a people" is in insurrection against her, nor has the President stated it. It is true that there are insurgents there, or revolutionists, if you choose so to call them, or persons engaged in armed resistance to Spain. You may designate them as the Spanish government does and call them brigands, banditti, outlaws. You may bestow upon them the character they possess in the eyes of Americans, of patriots. What legal definition or distinction can be drawn from any one of these designations? For legal purposes you might just as well use one of these terms as another; they all fail to define "a people." The appellant's case is not strengthened by reference to executive documents. You will look in vain in any of these to find any recognition of a government or of "a people," of a sovereignty or of a power, having actually arisen against Spain. The President in his proclamations refers to "civil disturbances existing in the island of Cuba." He is very

careful in the use of language. He was not so willing as the Attorney General now is to acknowledge a republic existing or claiming sovereignty over Cuba. Such a concession would have involved many problems he was desirous of avoiding. The Attorney General further insists that the President's messages contained a description of this "body" or sovereignty in whose service it is alleged the vessel was to be employed. But these communications are as cautious as the proclamations not to commit this country to a concession that there exists in Cuba a sovereignty or government opposed to that of Spain. On the contrary it is definitely asserted that the only sovereignty on that island is the sovereignty of Spain.

The Secretary of State in his report for 1896, communicated to Congress by the President, says:

"So far as our information shows, there is not only no effective local government by the insurgents in the territories they overrun, but there is not even a tangible pretence to establish administration anywhere. Their organization, confined to the shifting exigencies of the military operations of the hour, is nomadic, without definite centres, and lacking the most elementary features of municipal government. There nowhere appears the nucleus of statehood. The machinery for exercising the legitimate rights and powers of sovereignty, and responding to the obligations which *de facto* sovereignty entails in the face of equal rights of other states, is conspicuously lacking. It is not possible to discern a homogeneous political entity, possessing and exercising the functions of administration, and capable, if left to itself, of maintaining orderly government in its own territory and sustaining normal relations with the external family of governments."

The President, in his message for 1896, says:

"As the contest has gone on, the pretence that civil government exists on the island, except so far as Spain is able to maintain it, has been practically abandoned. Spain does keep on foot such a government, more or less imperfectly in the large towns and their immediate suburbs. But, that exception being made, the entire country is either given over to anarchy

or is subject to the military occupation of one or the other party. It is reported indeed on reliable authority that, at the demand of the commander-in-chief of the insurgent army, the putative Cuban government has now given up all attempt to exercise its functions, leaving that government, confessedly, (but there is the best reason for supposing it always to have been in fact) a government merely on paper. . . . But imperfect and restricted as the Spanish government of the island may be, no other exists there — unless the will of the military officer in temporary command of a particular district can be dignified as a species of government."

The President denies not only the existence of any actual government on the part of those in insurrection, but even the claim of government; he says that there are scattered bands, wandering nomads, opposing the authority of the government of Spain. Such is his description of those whom the Attorney General now designates as "a people" or Republic of Cuba!

This prosecution is a novel one. The "civil disturbances" on the island of Cuba have existed for two years, and this is the first proceeding of the kind yet instituted under section 5283. Section 5286, as to military enterprises, covers all phases of hostile undertakings set on foot in this country by the fitting out of ships, by military expeditions, by enlistments, or by commissions. This section 5286 is applicable in time of peace as well as in time of war, in time of recognized war as well as in time of unrecognized war, and it must be admitted embraces the whole field of hostile operations. It makes it a crime against the laws of the United States to begin on our soil such hostile operations or to carry them on from hence. It is a domestic criminal statute and a domestic statute wholly. How different is section 5283! The explanation is that all along it has been generally supposed that the section treating of fitting out of cruisers of war only applied where there was open public war, where there were belligerents, where there was neutrality in the legal sense of that term.

The real reason why this proceeding is at this late day resorted to, is to obtain a condemnation of the vessel for

doing what this court in the *Wiborg case* declared lawful; that is, the transportation of war supplies to those engaged in insurrection. It is proposed, by resorting to proceedings for a forfeiture of the vessel in a court of admiralty, to take away from the citizen the right of a trial by jury on the allegation of a crime for which the government seeks to exact a forfeiture. But if the proceeding was under section 5283, prohibiting military enterprises, not only would a jury trial be necessary, but in addition the government could not exact a forfeiture. No doubt could have existed in the minds of the jurists who framed the amendment to the act of 1794, as contained in the act of 1817, regarding the meaning of the expression "a people." That term has already been defined in the law regarding maritime insurance. *Nesbitt* v. *Lushington*, 4 T. R. 783, was decided by the Kings Bench in 1792, two years before the act of 1794. It was an adjudication of great importance, and the argument was by some of the most considerable members of the English bar. A ship approaching the Irish coast was set upon by an organized force for the purpose of seizing the ship, and holding her until the captain should agree to sell them the corn, with which she was loaded, at a price they stipulated. This they proceeded to do. The question arose, whether this was a restraint or detainment by "a people," and it was held in the negative. The court said, that the use of the word "people," in that connection, meant a power, "a people," a government. Lord Kenyon said, the word "people" referred to the ruling power of the country. Mr. Justice Buller observed, that it denoted the supreme power of the country, whatever that might be; that the word "people" did not apply to individuals but to nations in their collective capacity.

No question of jurisprudence was better settled than that appertaining to losses under such policies, by detention "of all kings, princes and people, of what nation, condition or quality soever." 2 Dane Abr. 113. In the authoritative work, Marshall on Insurance (1810), the author says that under these words, which are nearly the same in the policies of all the maritime countries, the insurers are liable for all losses occa-

sioned by arrests or detention of the ship or goods insured by the authority of any prince "or public body claiming to exercise sovereign power under what pretence soever." B. 1, ch. 12, sec. 5. In the same section the author observes that the word "people" in the policy means a people or nation, not a mob. "By the word 'people' in the policy is not to be understood any promiscuous or lawless rabble that may be guilty of attacking or detaining the ship; it means a people — that is, a nation in its collective and political capacity."

In Park Mar. Ins. (2 Am. ed. 1799), 78, it is said: "What the word 'people' in this clause of a policy of insurance means has lately been judicially settled."

In *Mauran* v. *Insurance Company*, 6 Wall. 1, this court confirms such construction, and discusses its bearing upon our neutrality acts.

Chancellor Kent was quoted to the effect that the stipulation of indemnity against takings at sea, arrests, restraints and detainment of all kings, princes and people, refers only to the acts of government for government purposes, whether right or wrong. 3 Com. 302, note D, 6th edition.

Other illustrations were made of governments *de facto*, which, for certain purposes, are recognized as if they were *de jure* and regularly constructed nationalities: "The court, in the case of *Nesbitt* v. *Lushington*, 4 T. R. 763, fitly described the character of the government contemplated in the clause respecting the restraints, etc., of kings, princes or people, viz., 'the ruling power of the country,' 'the supreme power,' 'the power of the country, whatever it might be' — not necessarily a lawful power or government, or one that had been adopted into the family of nations."

The court concluded that the so-called Confederate government, being in the possession of the supreme power of the district of country over which its jurisdiction extended, was a government *de facto*, which could make a capture within the meaning of the policy. *Mauran* v. *Insurance Co.*, 6 Wall. 1, 13.

No reason exists why the word "people" should have one sense when used in a maritime policy, but a different sense as

used in the statute. The one assures protection against the acts of such a "people," while the other prohibits acts. Let us suppose that in view of this settled definition accepted by this court in the case of *Mauran* v. *Insurance Company*, 6 Wall. 1, the owners of the Three Friends, being about to take a voyage to Cuba, obtained a maritime insurance upon the vessel, containing the clause as to restraints of kings, princes and people. The vessel, while on her voyage, is arrested by persons engaged "in a civil disturbance in Cuba." An action is brought against the insurers in the United States District Court for the Southern District of Florida. The question arises as to whether the restraint was by "a people" within the meaning of the instrument. The District Court decides in view of the accepted meaning of that term, that the restraint was not by "a people," and dismisses the proceeding. At the same time the Attorney General of the United States files a libel of condemnation in the same court, against the same vessel, on the ground that she had been fitted out in this country to be used in the service of the same people described in the other suit. The District Judge can only decide that he has already passed upon the meaning of the expression. He could not admit a different meaning of the same word when used in the act of Congress. In both instances the word referred to a power, or community, or government, whether right or wrong. On the one hand, there was a provision in the maritime law enabling a party to insure himself against certain maritime losses. On the other hand, there was a provision in an act of Congress which subjected a party to punishment and loss on account of certain maritime operations. The court could not give a different meaning to the term "a people," unless compelled by the association of the word with other words in the act. The question therefore is, whether the legislature meant something different in the use of the word from what was indicated by every other word associated with it. In effect, the Government contends that the rule *noscitur a sociis* is not applicable; that while the words "any prince, state, district, colony," are all words of government, are all words of sovereignty, all refer to powers, yet the signification of the words

"any people," is different. That it does not necessarily apply to any sovereignty, or body claiming sovereignty, but may denote persons unorganized as a political entity.

This expression, "any people," cannot be disassociated from the terms which precede it — any foreign prince or state, or any colony or district.

In the language of Lord Kenyon in *Nesbitt* v. *Lushington*, *supra*, "the meaning of the word 'people' may be discovered here by the accompanying words, *noscitur a sociis*. It means, the 'ruling power of the country.'"

It would be strange, in the light of history, if all the other terms refer to the people in their collective and political capacity, a body politic or assuming to be a body politic, while this expression, "a people," may be construed to refer in another sense to persons in their individual capacity.

What, in 1817, was "the actual situation of the world," to use the language of Chief Justice Marshall? It was the situation of America, and especially of South America, which, by provinces, countries, districts, peoples, was in a state of recognized public war against Spain. The act of 1794 applied only to princes or states, and did not contemplate these new belligerent powers, and therefore, in 1817, it was found necessary to adapt the law to the actual situation of the world. I only dwell upon belligerency for the purpose of signifying a designated sovereignty or asserted government not yet recognized as independent or admitted as such into the family of nations. It is stated by the Attorney General that before this act of 1817 the word "state" referred to such powers as those of South America, and that it could not have been intended that Congress inserted the words "a people," unless they had meant something else than a state, unless they referred to a collection of persons. The Attorney General says something in addition to that was intended by the use of the word "people," and claims that the act of 1794 covered belligerents. I submit that this was not the interpretation of the act of 1794. Chief Justice Marshall, on the circuit, disclaimed that the words "prince or state" covered the case of one of the recognized South American belligerents. I refer to

the case of *The Santissima Trinidad.* Chief Justice Marshall remarked as follows :

"However serious may be the doubt, whether a section of a nation struggling for its independence may come within the prohibitions of the act [1794], there can be no doubt that such a people come within the more ample provisions of the law of nations. Whether Buenos Ayres be a state or not, if she is in a condition to make war and to claim the character and rights of a belligerent, she is bound to respect the laws of war; and the government which concedes her those rights is bound to maintain its own neutrality, unless it means to become a party to the war, as entirely as if she were an acknowledged state. She has no more right to recruit her navy within the United States than Spain would have, and this government is as much bound to restrain her from using our strength in the war as to restrain her enemy." 1 Brock. 488; 7 Wheat. 283. The libel in this case was filed in 1817.

The meaning of the words "foreign prince or state" was announced in *Gelston* v. *Hoyt.* 3 Wheat. 323.

In that case the evidence was that the ship was fitted out and armed with intent that she should be employed in the service of that part of the island of San Domingo which was then under the government of Pétion, to commit hostilities upon the subjects of that part of the island of San Domingo which was then under the government of Christophe.

The court held that neither of these allegations could be supported, inasmuch as the government of the United States had never recognized either of these governments as "a foreign prince or state."

They had not been recognized either as belligerents or as independent communities. On the contrary, our Government had acknowledged they were parts of the French possessions, and had regulated, as requested by France, our trade therewith.

In *United States* v. *Palmer*, the Circuit Court of the United States for the First Circuit, consisting of Judges Story and Davis, divided in opinion upon certain questions, which they certified here. Some of these were as follows :

"5th. Whether any revolted colony, district or people, which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States as a sovereign independent nation or power, have authority to issue commissions to make captures on the high seas of the persons, property and vessels of the subjects of the mother country who retain their allegiance. . . .

"6th. Whether an act which would be deemed a robbery on the high seas, if done without a lawful commission, is protected from being considered as a robbery on the high seas when the same act is done under a commission or the color of a commission from any foreign colony, district or people which have revolted from their native allegiance, and have declared themselves independent and sovereign, and have assumed to exercise the powers and authorities of an independent and sovereign government, but have never been acknowledged or recognized as an independent or sovereign government or nation by the United States or by any other foreign state, prince or sovereignty."

"10th. Whether any colony, district or people, who have revolted from their native allegiance and have assumed upon themselves the exercise of independent and sovereign power, can be deemed in any court in the United States an independent or sovereign nation or government until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved in a court of the United States otherwise than by some act or statute or resolution of the Congress of the United States, or by some public proclamation or other public act of the executive authority of the United States directly containing or announcing such acknowledgment, or by publicly receiving and acknowledging an ambassador or other public minister from such colony, district or people; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, when no public acknowledgment has ever been made, and whether the courts of the United States are bound judicially to take notice of the existing relations of the

United States as to foreign states and sovereignties, their colonies and dependencies.

"11th. Whether, in case of a civil war between a mother country and its colony, the subjects of the different parties are to be deemed, in respect to neutral nations, as enemies to each other, entitled to the rights of war." . . .

Chief Justice Marshall, March 14, 1818, 3 Wheat. 610, 626, delivering the opinion of the court, observed:

"The first four questions relate to the construction of the 8th section of the 'act for the punishment of certain crimes against the United States.' The remaining seven questions respect the rights of a colony or other portion of an established empire which has proclaimed itself an independent nation, and is asserting and maintaining its claim to independence by arms."

Both in this observation and in the question certified the word "people" is construed in the sense for which we are contending, and no better definition of it can be made than that given by the Chief Justice. It applies to a foreign power or "the rights of part of a foreign empire which asserts and is contending for its independence."

The Chief Justice observes further that "the rights of a part of a foreign empire, which asserts and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. . . . They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as, to their own judgment, shall appear wise; to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other; may observe absolute neutrality; may recognize the new state absolutely, or may make a limited recognition of it. It may be said generally, that if the government remains neutral and recognizes the existence of a civil

war, its courts cannot consider as criminal those acts of hostility which war authorizes and which the new government may direct against its enemy. To decide otherwise would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arraign the nation to which the court belongs against the party."

He concluded that persons or vessels employed in the service of "a self-declared government," acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state.

"Any colony, district or people" are thus made to refer to a self-declared government or unrecognized state or portion of an established empire asserting its claim to independence by arms. *United States* v. *Palmer*, 3 Wheat. 610.

The Chief Justice also declared "that the title of an act cannot control, but may furnish some aid in showing what was in the mind of the legislature."

That the provision we have been considering only applies to recognized public war and the duty of neutrality as towards foreign powers and belligerents, clearly appears when we examine the history of this legislation, executive and legislative.

On December 26, 1816, the South American wars then raging, President Madison communicated to Congress the following message:

"It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace *towards belligerent parties*, and other unlawful acts on the high seas, by armed vessels equipped within the waters of the United States.

"With a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped or in a course of equipment with a warlike force

within the jurisdiction of the United States; or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments, with the exceptions in such provisions proper for the cases of merchant vessels furnished with the defensive armaments usual on distant and dangerous expeditions, and of a private commerce in military stores permitted by our laws and which the law of nations does not require the United States to prohibit." Annals of Cong. 14th Cong. 2d sess. 1079, 1080.

On January 1, 1817, Mr. Forsyth, the chairman of the Committee on Foreign Relations, afterwards Secretary of State, addressed a letter to Mr. Monroe, then Secretary of State, as follows:

"I am instructed by the Committee on Foreign Relations to inquire what information has been given to the Department of State of violations or intended violations of the *neutral obligations* of the United States to *foreign Powers* by the arming and equipment of vessels of war in our ports; what prosecutions have been commenced under the existing laws to prevent the commission of such offences; what persons prosecuted have been discharged, in consequence of the defects of the laws now in force, and the particular provisions that have been found insufficient or for the want of which persons deserving punishment have escaped." Annals of Cong. 14th Cong. 2d sess., 1080.

This letter was written in order to obtain the information requisite for the framing of the proper amendments to existing law, in pursuance of the President's message, which had been referred to the committee.

From the passages underscored it is seen that the mind of Congress and of the Executive was solely directed to prevent violation of the obligations of the United States as a neutral towards "belligerent parties," as mentioned in the message of the President, or "foreign powers," as mentioned in the letter of Mr. Forsyth.

The Secretary of State on January 10, 1817, communicated documents bearing on the inquiry of the Committee on For-

eign Relations. Among these was a communication from the district attorney of Louisiana giving "an enumeration of the cases in which individuals have been prosecuted for infringing or attempting to infringe our neutrality in aid of the governments of New Spain, and in which vessels have been seized and libelled under the act of the 5th of June, 1794" (*Ib.* p. 1082).

On January 14, 1817, Mr. Forsyth, from the Committee on Foreign Relations, reported a bill defining our neutral obligations as to fitting out of cruisers more fully than had been done in the previous act of 1794, but which still retained the words "prince or state." Annals of Cong. 14th Cong. 2d sess., 477.

The debate in the House on the bill for enforcing neutrality was extensive, and exhibits the clear understanding of Congress that the amendments were for the purpose of preventing aid to the South American provinces, then recognized belligerents, and that the provision as to fitting out of vessels was intended solely to prevent such aid in this country to foreign powers at war as would violate our neutral obligations.

It was developed that strong pressure had been brought to bear upon our Government to strengthen the neutrality law in order to prevent the South American colonies from obtaining necessary aid here, and preventive measures were suggested by the Spanish minister.

The only objections to the bill were founded on the allegation that it went too far in the enforcement of our neutral obligations towards belligerents. It was, indeed, contended by Mr. Randolph that the doctrine of neutrality had no application to the case, because one party was not recognized by this Government as independent.

He was answered by Mr. Clay, who said:

"Whenever a war exists, whether between two independent states or between parts of a common empire, he knew of but two relations in which other powers could stand towards the belligerents. The one was that of neutrality and the other that of a belligerent. He hoped the gentleman from Virginia did not mean to contend (what would seem to be a conse-

quence of his opinion) that we were a party to the war and an ally of Old Spain against her colonies.

"Being then in a state of neutrality respecting the contest and bound to maintain it, the question was whether the provisions of the bill were necessary to the performance of that duty.

* * * * *

"Gentlemen have contended that this bill ought to be considered as intended merely to enforce our own laws — as a municipal regulation having no relation to the war now existing. It was impossible to deceive ourselves as to the true character of the measure. Bestow on it what denomination you please, disguise it as you may, it is a law, and will be understood by the whole world as a law to discountenance any aid being given to the South American colonies in a state of revolution against the parent country." Annals of Cong. 14th Cong. 2d sess., 741, 742.

In answer to Mr. Clay, Mr. Calhoun expressed in common with other gentlemen his good wishes for the cause of the South American colonies against the mother country, but that such wishes would never influence him to permit a violation of our neutral obligations.

He alluded to the nature of the contest existing in the Spanish provinces, acknowledged that its analogy to our own situation in 1776 enlisted our sympathies, but all that could be expected of us by the patriots was that we, being neutral, should do nothing to weaken their efforts or injure their cause.

On a later occasion he remarked that the law of 1794 had contemplated a war between two independent powers, not one between a mother country and its colonies; and if the defect of that law could not preserve our neutral character in the war now existing in the South he was willing to adopt the remedy. *Ib.* 747, 752.

Mr. Lowndes said:

"The law of 1794, applying only to the case of war between two independent states, it ought, no doubt, to be extended to comprehend the contest referred to between Spain and her

colonies, and not, when prosecutions are carried up to court for breaches of the law, deny that redress we profess to give. It appeared to him, by some inadvertence, however, the committee had not gone far enough in amending the act of 1794, if it be amended so as to apply to governments not acknowledged to be independent," etc. *Ib.* 755.

The bill, as it passed the House, contained the words "colony, district or people," in addition to the words "prince or state." *Ib.* 768.

In this form it was adopted by the Senate and became a law, with an amendment not here material. *Ib.* 205.

The court will notice that the act of March 3, 1817, 3 Stat. 370, is entitled "An act more effectually to preserve the neutral relations of the United States." This act deals entirely with the fitting out or employment of armed cruisers of war.

Those amendments were urged upon our Government by Spain as necessary, in order to include the South American wars, "for the purpose of putting a stop to the armaments making in different parts of the Union, in violation of the law of nations and of the treaty existing between his Catholic Majesty and this Republic." Chevalier de Onis, Spanish minister, to the Secretary of State, February 28, 1817.

Soon after the bill became the law of 1817, as early as March 15, 1817, the Secretary of State wrote to the Spanish minister, and by direction of the President enclosed a copy of the act "by which the President trusts that the Spanish government will perceive a new proof on the part of the United States of a desire to cultivate friendly dispositions towards Spain." Amer. State Papers, 4 Foreign Relations, 188, 189; 3 Whart. Int. Dig. 560, § 396.

The declarations of the Executive show that from the beginning of the South American revolutions they had been recognized as belligerents by this country.

President Monroe, in 1817, sent a message to Congress in which he said:

"*Through every stage of the conflict* the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships or munitions of war.

They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal having as to neutral powers equal rights."

In 1836 Mr. Gorostiza, the Mexican minister, complained to our government that the Texans were being treated as belligerents, although he said the Texan movement "had not yet arrived at the point which those of the Spanish Americans had attained when the United States allowed them the same right."

He cites the principles announced by Mr. Monroe, in his message of March 8, 1822, in which he says:

"The United States have acknowledged the rights to which they (the Spanish provinces) were entitled by the law of nations, and as belligerents, so soon as their movement had assumed such a steady and consistent form as to render their ultimate success probable, and from that period they had been permitted to enter with their vessels of war into the ports of these United States," etc.

From this the minister inferred that until such movement had acquired such a steady and consistent form as to render probable the ultimate success of the said provinces in their struggle against Spain, the United States neither acknowledged their possession of any rights as belligerents nor admitted their vessels in the American ports.

He concludes there was a great interval between the commencement of the movement and the period at which it could have acquired the steadiness and consistency deemed requisite. Message of the President, H. R. Doc. 105, 24th Cong. 2d sess. p. 136.

In answer to this communication Mr. Forsyth the Secretary of State declined, in the name of the President, to allow the seizure of the Texan vessel or otherwise molest her. He said that such course "was in accordance with the principles in practice which have been invariably observed by this Government from the first breaking out of the revolution among the Spanish provinces on this continent to the present time."

It is obvious, he says, "that the exclusion of the vessels of the one party from the ports of the United States and the

admission of those of the other would be inconsistent with an impartial neutrality, and yet the President, in the same message from which Mr. Gorostiza has quoted, states that 'through the whole of this contest the United States have remained neutral, and have fulfilled with the utmost impartiality all the obligations incident to that character.' In a previous message of December 7, 1819, he observes, 'In the civil war existing between Spain and the Spanish provinces in this hemisphere the greatest care has been taken to enforce the laws intended to preserve an impartial neutrality. Our ports have continued to be equally open to both parties and on the same conditions.' This language plainly refers to the whole of the contest, and the President is not to be understood in his subsequent message, to which Mr. Gorostiza has referred, as intending to say that the vessels of either party were only permitted to enter the ports of the United States from the period when the success of such party appeared to be probable. The construction which Mr. Gorostiza has given to the particular passage he has cited is not only contradicted by other passages from the messages of the same executive officer, but still more strongly, if possible, by the uniform acts of this government in that and similar cases. It is a well-known fact that the vessels of the South American provinces were admitted into the ports of the United States under their own or other flags from the commencement of the revolution, and it is equally true that throughout the various civil contests that have taken place at different periods among the states that sprung from that revolution the vessels of each of the contending parties have been alike permitted to enter the ports of this country. It has never been held necessary, as a preliminary to the extension of the rights of hospitality to either, that the chances of the war should be balanced, and the probability of eventual success determined. For this purpose it has been deemed sufficient that the party had declared its independence and at the time was actually maintaining it. . . . The exclusion of the vessels of Texas while those of Mexico are admitted is not deemed compatible with the strict neutrality which it is the desire and the determination of this government to observe

in respect to the present contest between those countries." H. R. Doc. 105, 24th Cong. 2d sess. 141, September 30, 1836; 1 Int. Law Dig. sec. 69, p. 509.

The declarations of the department charged with our foreign relations state the historical facts upon which the legislation now under review is largely dependent, and which were the inspiration for its enactment.

Such was the actual condition of the foreign relations of this country when the neutrality act was amended, in 1817, as to armed cruisers, by inserting words which would cover every form of recognized war then being waged by colonies or dependencies for independence. Every such contest was covered and described, either by the words a prince, a state, a colony, a district or a people, each of these expressions being used to designate some *de facto* power or belligerent.

Between such contestants, our government declared it would enforce neutrality, and would allow neither to fit out war vessels in our ports.

It is not strange that Congress should not have contemplated an enforcement of a neutrality provision except in a case where there were belligerents. It could not suppose that ships of war would be fitted out in our ports when there was no recognized war, or that our Government would support a fiction by refusing to recognize a state of war and yet enforce measures only applicable to such a state.

It was natural to assume that if a civil war should ever break out on the American continent the United States would recognize it as such and place both parties on an equal level as regards the enforcement of neutrality.

In *The Santissima Trinidad*, 7 Wheat. 337, the policy of the United States is thus declared:

"The government of the United States has recognized the existence of a civil war between Spain and her colonies and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war."

The enforcement of neutrality, in so far as we have been considering it, has been in accordance with these views.

In the case of Texas, its belligerency was recognized from the time the declaration of independence was announced, which was contemporaneous with the outbreak of the revolution.

That the provision regarding arming and fitting out cruisers in our ports, as originally enacted in 1794, had in view only restrictions of neutrality and applied to belligerent powers alone cannot be doubted.

This provision was directed principally against the practices of Genest, acting on behalf of the French government, during the wars then raging in Europe.

Its origin is clearly traced:

"The practice of commissioning, equipping and manning vessels in our ports to cruise on any of the belligerent parties is equally and entirely disapproved, and the Government will take effectual measures to prevent a repetition of it." 3 Jeff. Works, 105; 4 do. 34.

The keynote to this legislation is found in President Washington's message, December 3, 1793, in which he says:

"The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military services, offensive or defensive, is deemed unlawful."

Mr. Wharton treats the provision under the head of "Issuing of belligerent cruisers," and the proposition which he announces as the result of the legislation is that the United States is "bound to restrain fitting out and sailing of armed cruisers of belligerents." 3 Wharton's Int. Law Dig. 551, § 396.

In an opinion delivered in 1841, Mr. Legaré declares "the object of the act of 1818 (same in act of 1817) was to prevent all equipping of vessels of war in our ports for a foreign power actually engaged in hostilities with a nation with which the United States are at peace, knowing the purpose for which they are to be employed." 3 Op. Att'y Gen. 738.

But reliance is placed, as we understand, upon the proclamations of the President during the present disturbances in Cuba as making the "insurrection sufficiently notorious and

extensive to have received the attention of the Government of this country for nearly two years past, although the insurgents have not received any recognition of belligerency."

These proclamations do not lend countenance to the present position of the Government, for they do not recognize a public war existing in Cuba, much less a government or new power asserting its sovereignty.

"Civil disturbances," which may proceed from factions, can hardly be deemed the equivalent of a public war, or to constitute those participating in them "a people," in view of the construction placed upon this expression in the judicial and political declarations of this country.

If the argument of appellant is correct, there results a condition opposed to the very conception of neutrality, for the courts would be obliged to say that those causing civil disturbance constitute "a people" for the purpose of punishment under the act, and yet would be obliged to deny to them their standing as such under the neutrality laws, because the political departments of the Government have not recognized their belligerency or political existence.

Spain would obtain all the advantages of neutrality without incurring any of its obligations; it would be the enforcement of a simulated neutrality, a neutrality in name only, as it would be entirely in her favor.

It would enable Spain to proceed against those opposing her in Cuba as engaged in civil commotion only, while calling upon this nation to assist her by enforcing a neutrality provision applying to public war waged by a belligerent.

The court can hardly treat the expressions in the President's messages as a political declaration of the existence of a colony, a district or a people at war with Spain, and how can the insurgents be declared by the court to constitute "a people" without some such declaration?

If the proclamations can be resorted to by courts as evidence of a status possessed by the insurgents, for one purpose, they must be equally available as establishing such status for all purposes of neutrality. It would not be fair to hold that these documents contain a sufficient declaration of the exist-

ence of "a people" for the purpose of punishing those who act here in their service, but not sufficient to constitute "a people" entitled to the rights of neutrality under our laws. The court will not close its eyes and open them again to suit the pleasure of the Government for the time being.

The Government places much reliance upon the opinion of Attorney General Hoar as to the construction of the neutrality clause in question.

This opinion is thus stated by Mr. Wharton:

"The neutrality act of 1818 is not restricted in its operation to cases of war between two nations or where both parties to a contest have been recognized as belligerents — that is, as having a sufficiently organized political existence to enable them to carry on war. It would extend to the fitting out and arming of vessels for a revolted colony whose belligerency had not been recognized, but it should not be applied to the fitting out, etc., of vessels for the parent state for use against a revolted colony whose independence had not in any manner been recognized by our government." 3 Whart. Int. Law Dig. 628, § 402.

The question before the Attorney General was different from the one now presented to the court.

The point submitted was whether proceedings could be taken under the act against Spanish vessels fitted out in this country, on the ground that they were procured to be fitted out and armed with intent that they should be employed in the service of Spain, a foreign state, with intent to cruise or commit hostilities against the subjects, citizens or property of a "colony, district or people" with whom the United States were at peace, namely, a "colony, district or people" claiming to be the Republic of Cuba. It was held that in the absence of any political recognition of such a state the courts must conform to the action of the Government.

It was further held that Spain could not be said to commit hostilities against any party by procuring armed vessels for the purpose of enforcing its own recognized authority within its own dominions.

Here is an admission that the hostilities were not against "a people."

The attention of the Attorney General was called to the fact that libels had been filed to procure the condemnation of vessels on the ground that they were being fitted out and armed with intent to be employed in the service of a "colony, district or people," viz., the "colony, district or people of Cuba," and it was argued that as the Government in those libels had asserted that Cuba was a "colony, district or people" capable of committing hostilities against Spain, the law equally applied to an armament procured or fitted out by Spain for the purpose of hostilities against Cuba.

This proposition the Attorney General denied.

We do not feel called upon to enter into the question of the soundness of the opinion.

In the present case there is no allegation that Cuba as a "colony, district or people" has arisen against Spain.

The case before the Attorney General involved the assertion of a pretended government, claiming to be the Republic of Cuba, and therefore might well be said to come within the act as a "colony, district or people."

The argument of inconvenience is made.

It is said that if under the present condition of affairs proceedings cannot be had against vessels under section 5283, there is no penalty provided by law. This argument, as remarked in the court below, was as applicable under the original act of 1794 as it is now, under the act of 1818, reënacted in section 5283, Revised Statutes.

Under the first act it was held, as we have seen, that the words "foreign prince or state" did not embrace sections of an empire not recognized by the United States.

In order to cover such cases, Congress resorted to additional legislation.

It was not supposed that the courts by any argument *ab inconvenienti* could so stretch the act as to cover such cases.

The result was the act of 1817, which added words to cover sections of an empire which had separated, or were endeavoring to separate, from the mother country.

There are ample provisions of municipal law to punish those who set on foot enterprises for the purpose of committing hostilities against a power with which we are at peace.

Section 6 of the act of 1818 (3 Stat. 448), reënacted in section 5286, Revised Statutes, prohibits military enterprises to be carried on from "thence against the territory or dominions of any foreign prince or state, or of any colony, district or people with whom the United States are at peace."

This section, as we have seen, provides fully for offences against the peace of a foreign state, including enlistments.

It applies as well in times of peace as in times of war. There is no requirement that the expedition or enterprise should be in the service of any government or "people."

It is only necessary that it should be directed against the territory or dominions of a "people."

This use of the words "any people" conclusively shows that in the sense of Congress it meant a power exercising or asserting dominion, and is therefore of great significance in the argument.

Under this clause no forfeiture is provided.

For any offences committed at sea amounting to piracy under our laws, those laws provide ample penalties.

But if at any time Spain should think it necessary for this country to enforce its law regarding the fitting out of belligerent cruisers, the remedy is in her own hands; she has but to recognize a state of war.

This has always been determined by our Government.

Neither the United States nor Spain admits there exists a state of belligerency, and in its absence there cannot exist any obligations of neutrality.

In preparing the Foreign Enlistment Act of 1819, taken from our act, Parliament added to the language of our statute, "or part of any province or people or of any person exercising or assuming to exercise any powers of government in or over any foreign state, colony, province or parts of any province or people." 59 George III, c. 69, 7.

This additional language was undoubtedly inserted in view of the pronounced object of the language of the amendatory

acts of 1817, 1818, as applying only to an empire or sections of an empire, and in view, also, of the construction of the word "people" by our decisions and in the light of the English case of *Nesbitt* v. *Lushington*, *supra*, defining the meaning of the same expression.

In the case of *The Itata*, in some respects similar to the present controversy, the District Court of the United States for the district of California, in an opinion, said as follows:

"Prior to the passage of the act of April 20, 1818, the Supreme Court of the United States, in the case of *Gelston* v. *Hoyt*, 3 Wheat. 245, speaking through Mr. Justice Story, held that section 3 of the act of 1794, prohibiting the fitting out of any ship, etc., for the service of 'any foreign prince or state,' to cruise against the subjects, etc., of any foreign prince or state with which the United States were at peace, did not apply to any new government unless it had been recognized by the United States or by the government of the country to which such new country belonged, and that a plea which set up a forfeiture under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

"Congress, in passing the subsequent act of April 20, 1818, by which the provision referred to of the act of 1794 was, in substance, reënacted, must be presumed to have known the construction that had been theretofore put by the Supreme Court upon the words 'prince or state' in the act of 1794, and with that knowledge in passing the act of 1818 inserted in the same clause the words 'colony, district or people.' This was done, according to Dana's Wheaton, sec. 439, note 215, and 1 Whart. Int. Dig. p. 561, upon the suggestion of the Spanish minister that the South American provinces then in revolt and not recognized as independent might not be included in the word 'state.' But in every one of those instances the United States had acknowledged the existence of a state of war and, as a consequence, the belligerent rights of the provinces." 49 Fed. Rep. 646. Affirmed on Appeal, 56 Fed. Rep. 505.

No attempt was made by the Government to obtain a review of either of these decisions.

President Harrison was of opinion that the matter was a proper one to call to the attention of the legislature. In his message, December 9, 1891, he said:

"A trial in the District Court of the United States for the Southern District of California has recently resulted in a decision holding, among other things, that, inasmuch as the party offending had not been recognized as a belligerent, the acts done in its interest could not be a violation of our neutrality laws. From this judgment the United States has appealed, not that the condemnation of the vessel is a matter of importance, but that we may know what the present state of our law is, for, if this construction of the statute is correct, there is obvious necessity for revision and amendment."

There have been several cases decided in the District Courts involving the condemnation of vessels where the question as to the application of the statute was not raised or discussed by the court. *United States* v. *Mary M. Hogan;* Brown, Justice, 18 Fed. Rep. 529; *United States* v. *214 Boxes*, etc., 20 Fed. Rep. 50; *The City of Mexico*, 28 Fed. Rep. 148.

The same judge who decided the first case also decided that of *The Carondelet*, 37 Fed. Rep. 799.

There the question was much discussed, and although the libel was dismissed on a different ground, the judge leaves no doubt as to his views. The question was whether a vessel entering the service of the faction under Hippolyte, in Hayti, which had not been recognized, could be said "to enter the service of a foreign prince or state, or of a colony, district or people, unless our Government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done."

The judge remarked that the statute was a highly criminal and penal one; that it was not to be enlarged by construction beyond the fair import of its terms.

In *United States* v. *Hart*, the same judge said:

"Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with whom we are at peace." 74 Fed. Rep. 724.

Mr. Phillips' Argument for Appellees.

In the case of *The Conserva*, 38 Fed. Rep. 431, Judge Benedict held that the language of section 5283, Revised Statutes, as to the commission of hostilities against the subjects, citizens or property of a foreign prince or people, did not include factions engaged in insurrection who were not recognized by the United States as belligerents.

The question was whether the section applied, as neither Hippolyte nor Légitime, who were struggling for supremacy in Hayti, had been recognized by our Government as belligerent powers.

"In the absence of proof of that fact, the fitting out of a vessel with intent to enter the service of one to commit hostilities against the other is not brought within the scope of the statute."

It is said that the history of the act tends to show "that it was intended to cover every revolutionary body, recognized or unrecognized, which made *bona fide* claims to rights of sovereignty."

But where is it shown in this record that there exists "a revolutionary body claiming the rights of sovereignty"?

A good deal has been said about a "recognition of insurgency" as distinguished from a recognition of belligerency. I think this is the first time in any court of justice that such a distinction has been made. The expression, "recognition of insurgency," is not found in the works of any of the accepted writers on international law, nor is it a part of our jurisprudence. It has been used by Dr. Wharton in a paper which he contributed to a law magazine. The only meaning he attaches to the expression, is that the Government when it sees that certain persons are insurgents, may refuse to treat them as pirates. The court is now asked to enforce a provision regarding the fitting out of belligerent cruisers, a strictly neutrality provision, where there is no neutrality, no recognized war. Our Government is going further than Spain has ever admitted and further than she is willing to go. Our Government here insists that there is a war, that there is a hostile sovereignty in Cuba, and that the people of Cuba as "a people" are in revolt against Spain. The Government, in

effect, says to Spain: We will enforce neutrality in your favor, but not in favor of the other party which we now assert to be "a people." This argument admits our obligations to Spain are just the same under the present conditions, when that Government does not admit there is a war, as if there was belligerency. This is a great responsibility for the Government to take, and a great responsibility for this court to declare.

*Mr. A. W. Cockrell* for appellees.

The act of arming, etc., a vessel is punishable only when that act of arming, etc., done as therein provided, is accompanied by the intent, imputed to the person or persons therein specified, of doing the thing therein provided against. Is it not idle to say that the vessel may be forfeited, under this statute, for the acts or doings, therein specified, dissociated from the intent therein imputed to the persons therein specified? If it be that the acts and doings therein specified must be accompanied with the intent therein specified before persons can be punished thereunder, it follows the vessel cannot be condemned to forfeiture otherwise than upon allegations and proof showing those acts and doings, and allegations and proof showing the intent, therein denounced, with which they were committed.

Under any other construction, a vessel may be condemned to forfeiture, upon allegations and proof, short of those required to punish the offending persons. Whereas, the plain, imperative, unambiguous language of the statute, is "And every such vessel," etc.; that is, a vessel in respect of which these acts and doings have been committed; a vessel, in respect of the arming of which, this intent existed; and, equally and alike, a vessel in respect of which, the intent of the offending persons therein denounced has been ascertained by their conviction thereof.

Condemnation to forfeiture is not, by the law-making power, predicated of any other vessel, than such vessel. Forfeiture is denounced against a vessel so fitted out and armed, with the

intent therein specified, by the offending persons so fitting her out; and of which acts and doings with such intent, the offending persons have been convicted; and forfeiture is denounced against no other than "such" vessel.

In seeking, under this libel, to make a case of forfeiture, independently of and without reference to the ascertained guilt of the offending persons, the Government insists that the vessel identified by the statute as such vessel, means the vessel so fitted out and armed with the intent denounced, but not a vessel in respect of whose fitting out and arming offending persons have been convicted; because, speaking through the learned District Attorney, it said, and was logically forced to say, the vessel may be liable to condemnation, under this statute, and the offending persons acquitted.

Under the statute, upon which this libel is based, no wrong doing in which the vessel is made the guilty instrument, is required to consummate the forfeiture. The guilty intent of the offending person is attached by the mandate of the statute to the vessel, and forfeiture is denounced because of this guilty intent. The original act, § 3, c. 50, act of June 5, 1794, lends strong support to the contention of claimants. In the structure of the section as originally passed, the language condemning the vessel to forfeiture, following upon the ascertained guilt of the offending person, was not separated from such ascertainment by the intervention of a semi-colon.

In the case of *Gelston* v. *Hoyt*, 3 Wheat. 246, it was argued, in this court, in March, 1817, by Mr. Hoffman and Mr. D. B. Ogden, for defendant in error, that "By every just rule of construction the proceeding by indictment against the offender and his conviction must precede the suit *in rem* and the forfeiture of the vessel. The phraseology of the act is different from all other statutes. By those statutes, the revenue officers have power to seize and proceed *in rem* against the thing seized as forfeited, independent of any criminal proceedings against the offending individuals. By this act the forfeiture of the thing is made to depend upon the conviction of the person, and the President alone has power to seize, and that only as a precautionary measure, to prevent an intended violation

of the laws." The case stood over for reargument, and was reargued February 23d, and decided February 27th, 1818. The act in its present form was enacted April 20th, thereafter, and although the argument of these gentlemen prevailed on other propositions hereinafter discussed, and the court was not required to pass upon this special contention, it could not have escaped the attention of the Congress when in April, 1818, this statute was subjected to revision. If, in this revision, Congress had purposed to authorize a seizure and forfeiture of the thing, independent of any criminal proceedings against offending individuals, it was its duty to have recast the phraseology of the statute and put it in harmony with other statutes empowering revenue officers to seize and proceed *in rem* against the thing seized for forfeiture.

The libel excepted to, not only fails to allege that the necessary criminal intent of the offending persons has been in anywise ascertained; it does not even show who the offending persons are.

The language of the statute clearly shows that the act of arming must be accompanied with the specific intent therein denounced, to consummate the offence. It follows the specific intent must be laid in the identical persons, and none other, so fitting out the vessel.

The word "people," as used in this statute, was defined in *United States* v. *Quincy*, 6 Pet. 445, to be merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power.

It follows that the word, "colony," and the word, "district," each is, also, descriptive of the power in whose service the vessel is to be employed; each is, also, one of the denominations applied by the act of Congress to a foreign power. It is equally clear that the added words, "colony, district or people," do not mean a part of a colony, a part of a district, or a part of a people or many people. They mean a colony, district or people, constituting a body politic, that is charged with recognized political power, a foreign power.

That it had been attempted to import into section 5283,

the effect given to sec. 7 of the Foreign Enlistment Act, 59 George III, in the numerous cases, and the discussions thereof, arising thereunder, could not, it is presumed, have escaped the attention of the Supreme Court; the *Itata case* had been before it on application for a writ of *certiorari;* nor was this court unaware of the recommendations of President Harrison to Congress based on the decision of the *Itata case;* nor was it unaware that the Congress had failed to respond to those recommendations, when in May, 1896, in the *Wiborg case*, 163 U. S. 632, it analyzed the sections grouped under the title Neutrality Laws.

It is apparent that this court in the *Wiborg case* brought in opposition and contrast the eleven sections from 5281 to 5291, for the purpose of defining and ascribing to each its appropriate functions in the statutory system thereby enacted, and declared that "section 5283 deals with fitting out and arming vessels in this country in favor of one foreign power against another foreign power with which we are at peace."

The court, after this analysis of the sections commented on, proceeds to set forth in terms section 5286, under which Wiborg was indicted. And in the analysis of this section, the court makes it apparent, from its terms as contrasted with section 5283, theretofore quoted also at length, that section 5286, while its general purpose "was undoubtedly designed to secure neutrality in wars between two other nations, or between two contending parties recognized as belligerents, its operation is not necessarily dependent on the existence of such state of belligerency."

That this language applies to section 5286, and not to section 5283, is obvious not only from the context, but also because section 5286 was the only section under consideration. Its meaning and application of the facts under consideration were to be ascertained by reference to the statutory system as a whole; and the court demonstrated, that though this section was placed under Title LXVII, headed neutrality, and though it did tend to secure neutrality in wars between foreign powers or recognized belligerencies, its operation was not necessarily dependent on such a recognized state or status of

belligerency. And the court enforces this reasoning by reference to its language following as it does the recommendations of President Washington.

*Mr. Attorney General* for the United States.

In view of the hour [it was then past the usual time for adjournment], I will not make an extended argument. A few remarks upon the illustrations made by Mr. Phillips will serve to bring out the difference between my position, as I understand it, and my position as put by him.

Before doing this, however, I call your Honor's attention to the exact form of the entry of the judgment below: that if the libel be not amended within ten days the same stand dismissed.

The counsel on the other side contend that the United States Attorney had to wait ten days before deciding whether he wanted to amend or not. We say that he could immediately state to the court that he did not wish to amend, and that by appealing he did so state, and that the libel thereby was dismissed.

It is also contended that the libel should have been dismissed because it was brought before the successful prosecution of the persons who had fitted out and armed the vessel. It seems to be plain upon the very reading of the statute that two penalties are to follow from a certain act; first, that every person who shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any such ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state or of any colony, district or people, to cruise or commit hostilities, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned: and, secondly, every such ship or vessel shall be forfeited — not upon the conviction of the offending person, but upon the doing or procuring to be done the acts.

The counsel who first addressed the court on the other side,

in speaking of the old insurance case of *Nesbitt* v. *Lushington*, 4 T. R. 783, supposed the case of a ship which was insured under a policy containing a provision for insurance against "restraints and detainments of all kings, princes and people." A moment's attention to this case will illustrate the exact point here under discussion.

I am not willing to admit, in view of the amendment made to the act of 1794, by adding to the words "prince and state," which covered every form of organized government, the words "colony, district or people," and in view of the historical facts attending that amendment, that the language of our statutes is to be governed by the rules of construction applicable to such policies of insurance.

But, assuming for the purpose of what I have to say, that the question of what are "a people" would be the same under our statute as it would be under a policy of insurance such as was involved in that case, here are the facts involved in *Nesbitt* v. *Lushington*. It appeared in evidence that a ship was forced, by stress of weather, into Elly Harbor, in Ireland. There happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, and took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she stranded; and they would not leave her until they had compelled the captain to sell all the corn except about ten tons, at a certain rate, which was about three fourths of the invoice price.

Now, what picture does that present? It presents no picture of an attempt to set up a government, or even of an attempt to overthrow an existing government, save in so far as the act which they did was lawless, and therefore in temporary defiance of the laws of the government which had jurisdiction there.

But suppose the same ship landed upon a point on the coast of Cuba, where General Gomez or any other Cuban leader was in control, and the vessel had been seized and her cargo confiscated for the support of the insurgent forces. Would that present the same case as the case in the 4th Term

Reports? No. What is the difference? The Irish case had no political significance. The people wanted something to eat. The uprising was a temporary one, which would be terminated when hunger was appeased. What is the other? The President of the United States, in language which has already been read to your Honors, describes them thus, in his annual message of 1895: "Whatever may be the sympathy of our countrymen, as individuals, with a people who seem to be struggling for larger autonomy and greater freedom." That is what this people in Cuba are doing. There lies the distinction between that case and this, and there lies the application of the rule "*noscitur a sociis.*" The old statute declared that any one who equips, or causes to be equipped, a vessel to commit hostilities against the subjects or property of a "prince or state" with whom or which the United States are at peace, should be punished. I admit that Congress, when it adds other words, is proceeding in the same line — that when it says "colony, district or people," it refers to other political associations — not to hungry mobs. It is not associations of individuals, wandering at large over an island; it is not a mob, without political purpose; but an organization which, successfully or unsuccessfully, rightfully or wrongfully, is attempting, with the knowledge of the whole world, to set up a government.

The words, "subjects, citizens or property of a people," indicate the objects of the hostilities. Any political organization which has, partly or wholly, authority over any part of the land, however narrow or however temporary, comes within the description of this law, because its objects are political. They are in less degree as to permanency of organization, as to extent of dominion, or as to permanent control, the same as a "prince" or "state."

The libel charges that the vessel was fitted out to be employed in the service of a people then engaged in armed resistance to the government of the King of Spain in the Island of Cuba, to cruise and commit hostilities against the subjects, citizens and property of the King in that island. This distinguishes this case from the corn seizure on the coast of Ireland.

When men resist the regular authority of the country in which they dwell, they do it for one of two purposes: for the purpose of robbery, rapine or lawlessness, or in order to set up another government. If they do it for the former purpose, they are robbers on the land and pirates on the sea. If they do it for the latter purpose, they are "a district," if you speak of them with reference to the territory they occupy; "a colony," if you speak of them with reference to their origin; and "a people," whether many or few, if you speak of them with reference to their mere character.

I do not claim that there is no middle ground between a political organization and a band of robbers or pirates. I say that is the distinction by land and sea. No one has a right to use force against persons, property or vessels of any nation, without some sort of political authority to do so. It may be an old, established authority. It may be merely a recognized belligerent authority. It may be the authority of the sacred right of revolution which some have undertaken to exercise, without getting far enough along with it in its success or its permanency, or its points of contact with other nations, to secure formal recognition. The world recognizes and the courts recognize, that in the one case the men are blindly striking out for what they believe to be their right of governing themselves; in the other case it is recognized that the lawlessness is without warrant.

The definition that to be a pirate one must be an enemy of all mankind is a very strange one. The conclusion from it would be that if men want to start out to be pirates and confine themselves entirely to robbing British ships, they never can be punished as pirates. A pirate would not want anything better than that.

The question is whether there is some kind of a body of people, whether you describe them as "a district" from their place of abode; or as "a colony," having reference to where they come from; or as "a people"; or whether they have got together hurriedly, or been long together with ties of blood between them. If they are united by a common purpose to pull down one government and put up another,

they are "a people." It seems to be clear that the intention of Congress in adding these words to the statute was to prevent our citizens from taking part in any sort of political enterprise against a friendly power, or its subjects, citizens or property.

This libel charges that this vessel was fitted out with intent to enter the service of a people, to wit: the Cuban insurgents or revolutionists. Who are they?

The proclamation of the President tells you who they are. They are a body of people down there who are struggling to govern themselves, with or without just reasons for complaint against the government of Spain. The fact, however, is plain. We know it not only as matter of general history, but through the Executive Department. The reasons which determine whether this Government will give them formal recognition have been discussed by my associate. Right or wrong, the Executive has considered that the reasons existing do not justify formal recognition of their belligerency or independence.

But the actual state of fact, the existence of hostilities which has caused the King of Spain to send two hundred thousand troops to the island of Cuba, the destruction of the property of American citizens which is almost daily called to the attention of the Government, constitutes a condition which confronts us, and, confronted with this condition, the Government is met by these troubles, now centred largely in the District of Florida which, having formerly belonged to Spain, naturally feels inclined to one side of the contest more than the other.

We have found, for the first time, a ship which we could prove was fitted out for warlike purposes. We are twitted with the fact that this is the first time that this proceeding has been taken. But this is the first time a ship has set a gun on her deck, so arranged that it could be used from that deck for the purpose of firing upon a vessel of a friendly power. We come into court and ask for the enforcement of this statute. We are met by the claim that these insurgents are not "a people," because they have not been formally recognized as belligerents or insurgents. We say that they are a

political organization, which makes them "a people," and that they are engaged in a political enterprise, which alone gives character to the action of the owners of this vessel, and prevents them from being pirates.

*Mr. Calderon Carlisle*, by leave of court, filed a brief as *Amicus Curiæ*.

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

It is objected that the decree was not final, but, inasmuch as the libel was ordered to stand dismissed if not amended within ten days, the prosecution of the appeal, within that time, was an election to waive the right to amend and the decree of dismissal took effect immediately.

In admiralty cases, among others enumerated, the decree of the Circuit Court of Appeals is made final in that court by the terms of section six of the Judiciary Act of March 3, 1891, but this court may require any such case, by certiorari or otherwise, to be certified "for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court," that is, as if it had been brought directly from the District or the Circuit Court. 26 Stat. 826, 828, c. 517, § 6.

Accordingly the writ of certiorari may be issued in such cases to the Circuit Court of Appeals, pending action by that court, and, although this is a power not ordinarily to be exercised, *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 385, we were of opinion that the circumstances justified the allowance of the writ in this instance, and the case is properly before us.

We agree with the District Judge that the contention that forfeiture under section 5283 depends upon the conviction of a person or persons for doing the acts denounced is untenable. The suit is a civil suit *in rem* for the condemnation of the vessel only, and is not a criminal prosecution. The two proceedings are wholly independent and pursued in different

courts, and the result in each might be different. Indeed, forfeiture might be decreed if the proof showed the prohibited acts were committed though lacking as to the identity of the particular person by whom they were committed. *The Palmyra*, 12 Wheat. 1, 14; *The Ambrose Light*, 25 Fed. Rep. 408; *The Meteor*, 17 Fed. Cas. 178.

*The Palmyra* was a case of a libel of information against the vessel to forfeit her for a piratical aggression, under certain acts of Congress which made no provision for the personal punishment of the offenders, but it was held that, even if such provision had been made, conviction would not have been necessary to the enforcement of forfeiture. And Mr. Justice Story, delivering the opinion, said: "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the Crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se.* The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam.* Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been

and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." And see *The Malek Adhel*, 2 How. 210; *United States* v. *The Little Charles*, 1 Brock. 347.

The libel alleged that the vessel was "furnished, fitted out and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace."

The learned District Judge held that this was insufficient under section 5283, because it was not alleged "that said vessel had been fitted out with intent that she be employed in the service of a foreign prince or state, or of any colony, district or people recognized as such by the political power of the United States."

In *Wiborg* v. *United States*, 163 U. S. 632, which was an indictment under section 5286, we referred to the eleven sections from 5281 to 5291, inclusive, which constitute Title LXVII of the Revised Statutes, and said: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency," and the consideration of the present case arising under section 5283 confirms us in the view thus expressed.

It is true that in giving a *résumé* of the sections, we referred to section 5283 as dealing "with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace," but that was matter of general description, and the entire scope of the section was not required to be indicated.

The title is headed "Neutrality," and usually called by way of convenience the "Neutrality Act," as the term "Foreign Enlistment Act" is applied to the analogous British statute, but this does not operate as a restriction.

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

Hence, as Mr. Attorney General Hoar pointed out, 13 Opinions, 177, 178, though the principal object of the act was "to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect of foreign powers," the act is nevertheless an act "to punish certain offences against the United States by fines, imprisonment and forfeitures, and the act itself defines the precise nature of those offences."

These sections were brought forward from the act of April 20, 1818, 3 Stat. 447, c. 88, entitled "An act in addition to the 'Act for the punishment of certain crimes against the United States,' and to repeal the acts therein mentioned," which was derived from the act of June 5, 1794, 1 Stat. 381, c. 50, entitled "An act in addition to the 'Act for the punishment of certain crimes against the United States,'" and the act of March 3, 1817, 3 Stat. 370, c. 58, entitled "An act more effectually to preserve the neutral relations of the United States."

The piracy act of March 3, 1819, 3 Stat. 510, c. 77, Rev. Stat. §§ 4293, 4294, 4295, 4296, 5368, supplemented the acts of 1817 and 1818.

The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of International Law, was recommended to Congress by President Washington in his annual address on December 3, 1793; was drawn by Hamilton; and passed the Senate by the

casting vote of Vice President Adams. Ann. 3d Cong. 11, 67. Its enactment grew out of the proceedings of the then French minister, which called forth President Washington's proclamation of neutrality in the spring of 1793. And though the law of nations had been declared by Chief Justice Jay, in his charge to the grand jury at Richmond, May 22, 1793 (Wharton's State Trials, 49, 56), and by Mr. Justice Wilson, Mr. Justice Iredell and Judge Peters, on the trial of Henfield in July of that year (Id. 66, 84), to be capable of being enforced in the courts of the United States criminally, as well as civilly, without further legislation, yet it was deemed advisable to pass the act in view of controversy over that position, and, moreover, in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers.

Section 5283 of the Revised Statutes is as follows:

"Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."

By referring to section three of the act of June 5, 1794, section one of the act of 1817, and section three of the act of

1818, which are given in the margin,[1] it will be seen that the words "or of any colony, district or people" were inserted in the original law by the act of 1817, carried forward by the act of 1818, and so into section 5283.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that that Government was at war with the "self-styled Government of Buenos Ayres," and soliciting "the proposition to Congress of such provisions of law as will prevent such attempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the inefficacy of existing laws "to pre-

[1] Act of June 5, 1794: "SEC. 3. That if any person shall within any of the ports, harbors, bays, rivers or other waters of the United States, fit out and arm or attempt to fit out and arm or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars and the term of imprisonment shall not exceed three years, and every such ship or vessel with her tackle, apparel and furniture together with all materials, arms, ammunition and stores which may have been procured for the building and equipment thereof shall be forfeited, one half to the use of any person who shall give information of the offence, and the other half to the use of the United States."

Act of March 3, 1817, c. 58, 3 Stat. 370: "That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming, of any such ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people to cruise or commit hostilities, or to aid or coöperate in any warlike measure whatever, against the subjects, citizens or property, of any prince or state, or of any colony, district or people with whom the United States are at peace,

vent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative provisions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. *Geneva Arbitration, Case of the United States*, 138. In Mr. Dana's elaborate note to § 439 of his edition of Wheaton, it is said that the words "colony, district or people" were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in

every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than ten thousand dollars, and the term of imprisonment shall not exceed ten years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of any person who shall give information, and the other half to the use of the United States."

Act of April 20, 1818, 3 Stat. 447: "SEC. 3. That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming, of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."

the word "state." Under the circumstances this act was entitled as "to preserve the neutral relations of the United States," while the title of the act of 1794 described it as "in addition" to the Crimes Act of April 30, 1790, 1 Stat. 112, c. 9, and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words "colony, district or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words "district or people" should be attributed to the intention to include such bodies, as for instance, the so-called Oriental Republic of Artigas, and the Governments of Pétion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in *Gelston* v. *Hoyt*, 13 Johns. 141, 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in saying, in *The Gran Para*, 7 Wheat. 471, 489, that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no limitation on the words "colony, district or people," by requiring political recognition.

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words "colony, district or people," instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve

independence, although recognition of belligerency has not been accorded.

And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the Government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a Government are not in aid of a state in the sense of the statute.

Contemporaneous decisions are not to the contrary, though they throw no special light upon the precise question.

*Gelston* v. *Hoyt*, 3 Wheat. 246, decided at February term, 1818 (and below January and February, 1816), was an action of trespass against the collector and surveyor of the port of New York for seizing the ship American Eagle, her tackle, apparel, etc. The seizure was made July 10, 1810, by order of President Madison under section three of the act of 1794, corresponding to section 5283. The ship was intended for the service of Pétion against Christophe, who had divided the island of Hayti between them and were engaged in a bloody contest, but whose belligerency had not been recognized. It was held that the service of "any foreign prince or state" imported a prince or state which had been recognized by the Government, and as there was no recognition in any manner, the question whether the recognition of the belligerency of a *de facto* sovereignty would bring it within those words, did not arise.

The case of *The Estrella*, 4 Wheat. 298, involved the capture of a Venezuelan privateer on April 24, 1817. There was a recapture by an American vessel, and the prize thus came before the court at New Orleans for adjudication. The privateer was found to have a regular commission from Bolivar, issued as early as 1816, but it had violated section two of the act of 1794, which is the same as section two of the act of 1818, omitting the words "colony, district or people" (and is now section 5282 of the Revised Statutes), by enlisting men at New Orleans, provided Venezuela was

a state within the meaning of that act. The decision proceeded on the ground that Venezuela was to be so regarded on the theory that recognition of belligerency made the belligerent to that intent a state.

In *The Nueva Anna and Liebre*, 6 Wheat. 193, the record of a prize court at "Galveztown," constituted under the authority of the "Mexican Republic," was offered in proof, and this court refused to recognize the belligerent right claimed, because our Government had not acknowledged "the existence of any Mexican Republic or state at war with Spain"; and in *The Gran Para*, 7 Wheat. 471, Chief Justice Marshall referred to Buenos Ayres as a state within the meaning of the act of 1794.

Even if the word "state" as previously employed admitted of a less liberal signification, why should the meaning of the words "colony, district or people" be confined only to parties recognized as belligerent? Neither of these words is used as equivalent to the word "state," for they were added to enlarge the scope of a statute which already contained that word. The statute does not say *foreign* colony, district or people, nor was it necessary, for the reference is to that which is part of the dominion of a foreign prince or state, though acting in hostility to such prince or state. Nor are the words apt if confined to a belligerent. As argued by counsel for the Government, an insurgent colony under the act is the same before as after the recognition of belligerency, as shown by the instance of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized but not of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized power *de facto*, since such a power would represent not the territory actually held but the territory covered by the claim of sovereignty. And the word "people," when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body.

In *United States* v. *Quincy*, 6 Pet. 445, 467, an indictment under the third section of the act of 1818, the court disposed

of the following, among other points, thus: "The last instruction or opinion asked on the part of the defendant was: That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, a government acknowledged by the United States, and thus was a 'state' and not a 'people' within the meaning of the act of Congress under which the defendant is indicted; the word 'people' in that act being intended to describe communities under an existing government not recognized by the United States; and that the indictment therefore cannot be supported on this evidence.

"The indictment charges that the defendant was concerned in fitting out the Bolivar with intent that she should be employed in the service of a foreign 'people;' that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the Executive Department of the Government of the United States, before the year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are, 'in the service of any foreign prince or state, or of any colony, district or people.' The application of the word 'people' is rendered sufficiently certain by what follows under the videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word 'people' is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the videlicet, only serves to explain what is doubtful and obscure in the word 'people.'"

All that was decided was that any obscurity in the word "people" as applied to a recognized government was cured by the videlicet.

*Nesbitt* v. *Lushington*, 4 T. R. 783, was an action on a policy of insurance in the usual form, and among the perils insured against were "pirates, rovers, thieves," and "arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever." The vessel with a cargo of corn was driven into a port and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim *noscitur a sociis* was applied by Lord Kenyon and Mr. Justice Buller. Mr. Justice Buller said: "'People' means 'the supreme power'; 'the power of the country,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, thieves'; then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes and *people* of what nation, condition or quality soever.' Those words therefore must apply to 'nations' in their collective capacity."

As remarked in the brief of Messrs. Richard H. Dana, Jr., and Horace Gray, Jr., filed by Mr. Cushing in *Mauran* v. *Insurance Co.*, 6 Wall. 1, the words were "doubtless originally inserted with the view of enumerating all possible forms of government, monarchical, aristocratical, and democratic."

The British Foreign Enlistment Act, 59 Geo. III, c. 69, was bottomed on the act of 1818, and the seventh section, the opening portion of which is given below,[1] corresponded to the

[1] "That if any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and license of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out or arm, or attempt or endeavor to equip, furnish, fit out or arm, or procure to be equipped, furnished, fitted out or armed, or shall knowingly aid, assist or be concerned in the equipping, furnishing, fitting out or arming of any Ship or Vessel with intent or in order that such Ship or Vessel shall be employed in the service of any Foreign Prince, State or Potentate, or of any Foreign Colony, Province or part of any Province or People, or of any Person or Persons exercising or assuming to exercise any powers of Government in or over any Foreign State, Colony,

third section of that act. Its terms were, however, considerably broader and left less to construction. But we think the words "colony, district or people" must be treated as equally comprehensive in their bearing here.

In the case of *The Salvador*, L. R. 3 P. C. 218, the Salvador had been seized under warrant of the governor of the Bahama Islands and proceeded against in the Vice Admiralty Court there for breach of that section, and was, upon the hearing of the cause, ordered to be restored, the court not being satisfied that the vessel was engaged, within the meaning of the section, in aiding parties in insurrection against a foreign government, as such parties did not assume to exercise the powers of government over any portion of the territory of such government. This decision was overruled on appeal by the Judicial Committee of the Privy Council, and Lord Cairns, delivering the opinion, said: "It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a Foreign Prince, State, or Potentate, or Foreign State, Colony, Province or part of any Province or People; that is to say, if you find any consolidated body in the Foreign State, whether it be the Potentate, who has the absolute dominion, or the Government, or a part of the Province or of the People, or the whole of the Province or the People acting for themselves, that is sufficient. But by way of alternative it is suggested that there may be a case where, although you cannot say that the Province, or the People, or a part of the Province or People are employing the ship, there yet may be some person or persons who may

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Province or part of any Province or People, as a transport or store ship, or with intent to cruise or commit hostilities against any Prince, State or Potentate, or against the subjects or citizens of any Prince, State or Potentate, or against the persons exercising or assuming to exercise the powers of Government in any Colony, Province or part of any Province or Country, or against the inhabitants of any Foreign Colony, Province or part of any Province or Country, with whom His Majesty shall not then be at war; or shall, within the United Kingdom, or any of His Majesty's dominions, or in any Settlement, Colony, Territory, Island or place belonging or subject to His Majesty, issue or deliver any Commission for any Ship or Vessel, to the intent that such Ship or Vessel shall be employed as aforesaid," etc.

be exercising, or assuming to exercise, powers of Government in the Foreign Colony or State, drawing the whole of the material aid for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of 'any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province or part of any Province or people'; but that alternative need not be resorted to, if you find the ship is fitted out and armed for the purpose of being 'employed in the service of any Foreign State or People, or part of any Province or People.' . . .

"It may be (it is not necessary to decide whether it is or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of Government in Cuba, in opposition to the Spanish authorities. That may be so: their Lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section; but their Lordships are clearly of opinion, that there is no difficulty in bringing the case under the first alternative of the section, because their Lordships find these propositions established beyond all doubt, —there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the Province or People of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

We regard these observations as entirely apposite, and while the word "people" may mean the entire body of the inhabitants of a state; or the state or nation collectively in its political capacity; or the ruling power of the country; its meaning in this branch of the section, taken in connection with the words "colony" and "district," covers in our judgment any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although

its belligerency has not been recognized. Nor is this view otherwise than confirmed by the use made of the same words in the succeeding part of the sentence, for they are there employed in another connection, that is, in relation to the cruising, or the commission of hostilities, "against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace"; and, as thus used, are affected by obviously different considerations. If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the Government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. *The Ambrose Light*, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, § 381; and authorities cited.

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recog-

nition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity"; declaring that "the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government"; and admonishing all such citizens and other persons to abstain from any violation of these laws.

In his annual message of December 2, 1895, the President said: "Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this

Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their Government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfil every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken

place; and it cannot be doubted that, this being so, the act in question is applicable.

We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed.

This conclusion brings us to consider whether the vessel ought to have been released on bond and stipulation.

It is provided by section 938 of the Revised Statutes that —

"Upon the prayer of any claimant to the court, that any vessel, goods, wares or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing, of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed, etc. . . . If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States, etc., . . . the court shall, by rule, order such vessel, goods, wares or merchandise to be delivered to such claimant. . . ."

Section 939 provides for the sale of vessels "condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bond shall not have been given by the claimant. . . ."

Section 940 authorizes the judges to do in vacation everything that they could do in term time in regard to bonding and sales, and to "exercise every other incidental power necessary to the complete execution of the authority herein granted."

Section 941 provides:

"When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except the cases of seizure for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on re-

ceiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge, etc. . . ."

By section 917 this court may prescribe rules of practice in admiralty "in any manner not inconsistent with any law of the United States."

Rule 10, as thus prescribed, provides for the sale of perishable articles or their delivery upon security to "abide by and pay the money awarded by the final decree."

Rule 11 is as follows:

"In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned."

In *The Mary N. Hogan*, 17 Fed. Rep. 813, Judge Brown, of the Southern District of New York, refused to deliver the vessel on stipulation, and referring to Rule 11, said that it was not in form imperative in all cases, but left to the court a discretion which might be rightly exercised under peculiar circumstances; and that the rule clearly should not be applied where the object of the suit was "not the enforcement of any money demand, nor to secure any payment of damages, but to take possession of and forfeit the vessel herself in order to prevent her departure upon an unlawful expedition in violation of the neutrality laws of the United States." And he added: "It is clearly not the intention of section 5283, in imposing a forfeiture, to accept the value of the vessel as the price of a hostile expedition against a friendly power, which might entail a hundredfold greater liabilities on the part of the Government. No unnecessary interpretation of the rules should be adopted which would permit that result; and yet

such might be the result, and even the expected result, of a release of the vessel on bond. The plain intent of section 5283 is effectually to prevent any such expedition altogether, through the seizure and forfeiture of the vessel herself. The Government is, therefore, entitled to retain her in custody, and Rule 11 cannot be properly applied to such a case."

In *The Alligator*, 1 Gall. 145 (decided in 1812), Mr. Justice Story referred to an invariable practice in all proper cases of seizure, to take bonds for the property whenever application was made by the claimant for the purpose, but that was a case where the claimant had been allowed to give bond without objection and was attempting to avoid payment by alleging its irregularity; and in *The Struggle*, 1 Gall. 476 (1813), the same eminent judge, in making a similar ruling, said: "That where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the validity of the security."

But in section 941 of the Revised Statutes the exception was introduced of "cases of seizure for forfeiture under any law of the United States." And it seems obvious that the release on bond of a vessel charged with liability to forfeiture under section 5283, before answer or hearing, and against the objection of the United States, could not have been contemplated. However, as this application was not based upon absolute right, but addressed to the sound discretion of the court, it is enough to hold that, under the circumstances of this case, the vessel should not have been released as it was, and should be recalled on the ground that the order of release was improvidently made. *United States* v. *Ames*, 99 U. S. 35, 39, 41, 43. If the vessel is held without probable cause her owners can recover demurrage, and, moreover, vessels so situated are frequently allowed to pursue their ordinary avocations while in custody pending suit, under proper supervision, and in order to prevent hardship.

*The decree must be reversed, and the cause remanded to the District Court with directions to resume custody of the vessel and proceed with the case in conformity with this opinion.*

*Ordered accordingly.*

Dissenting Opinion: Harlan, J.

Mr. Justice Harlan dissenting.

I am unable to concur in the views expressed by the court in the opinion just delivered. In my judgment a very strained construction has been put on the statute [1] under which this case arises — one not justified by its words, or by any facts disclosed by the record, or by any facts of a public character of which we may take judicial cognizance. It seems to me that the better construction is that given by the learned judge of the District Court. I concur in the general views expressed in his able and satisfactory opinion, which is given below. That opinion so clearly and forcibly states the reasons in support of the conclusion reached by me that I am relieved of the labor of preparing one, which I would be glad to do, if the pressure in respect of other business in the court did not render that course impracticable.

The present case has been made to depend largely upon the language of public documents issued by the Executive branch of the government. If the defects in the libel can be supplied in that way, reference should be made to the last annual message and accompanying documents sent by President Cleveland to the Congress of the United States. In that message the President said that the so-called Cuban government had given up all attempt to exercise its functions, and that it was "confessedly (what there is the best reason for

[1] "§ 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer and the other half to the use of the United States."

supposing it always to have been in fact) a government merely on paper." And in his report to the President, under date of December 7, 1896, the Secretary of State said: "So far as our information shows, there is not only no effective local government by the insurgents in the territories they overrun, but there is not even a tangible pretence to establish administration anywhere. Their organization, confined to the shifting exigencies of the military operations of the hour, is nomadic, without definite centres, and lacking the most elementary features of municipal government. There nowhere appears the nucleus of statehood. The machinery for exercising the legitimate rights and powers of sovereignty and responding to the obligations which *de facto* sovereignty entails in the face of equal rights of other States is conspicuously lacking. It is not possible to discern a homogeneous political entity, possessing and exercising the functions of administration and capable, if left to itself, of maintaining orderly government in its own territory and sustaining normal relations with the external family of governments."

It does not seem to me that the persons thus described as having no government except one on paper, with no power of administration, and entirely nomadic, constitute a colony, district or "people" within the meaning of the statute. In my opinion, the words "of any colony, district or people" should be interpreted as applying only to a colony, district or people that have "subjects, citizens or property." I cannot agree that the persons described by the President and Secretary of State can be properly regarded as constituting a colony, district or people, having subjects, citizens or property. It cannot be that the words "any colony, district or people," where they first appear in section 5283, have any different meaning from the same words in a subsequent clause, "the subjects, citizens or property . . . of any colony, district or people, with whom the United States are at peace." The United States cannot properly be said to be "at peace," or not "at peace," with insurgents, who have no government, except "on paper," no power of administration, and are merely nomads.

Dissenting Opinion: Harlan, J.

The opinion of Locke, District Judge, adopted by Mr. Justice Harlan, is as follows:

"This vessel has been libelled for forfeiture under the provisions of section 5283 of the Revised Statutes of the United States.

"The libel alleges that said steam vessel was on the 23d day of May, A.D. 1896, furnished, fitted out and armed 'with intent that she should be employed by certain insurgents or persons in the island of Cuba to cruise or commit hostilities against the subjects, citizens or property of the said island of Cuba and against the King of Spain, and the subjects, citizens and property of the said King of Spain in the island of Cuba, with whom the United States are and were at that date at peace.'

"To this there have been exceptions filed upon two grounds:

"1st. That forfeiture under this section depends upon the conviction of a person or persons for doing the acts denounced; and

"2d. That the libel does not show that the vessel was armed or fitted out with the intention that she should be employed in the service of a foreign prince or state, or of any colony, district or people recognized or known to the United States as a body politic.

"The first objection raised by these exceptions is easily disposed of by the language of the Supreme Court in the case of *The Palmyra*, 12 Wheat. 1, where, after elaborate argument, it is said:

"'Many cases exist, when the forfeiture for acts done attaches solely *in rem* and there is no accompanying penalty *in personam;* many cases exist where there is both a forfeiture *in rem* and a personal penalty; but in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent and wholly unaffected by any criminal proceeding *in personam*.' . . . 'In the judgment of this court no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature.'

"The other question raised by the exceptions is more difficult and requires a construction of the clause of the section 5283, 'with intent that such vessel should be employed in the service of any foreign prince or state, or of any colony, district or people,' and more particularly the significance of the words 'colony, district or people,' and a determination whether the requirements of the law are satisfied by the allegations of the libel that the vessel was intended to be employed 'in the service of certain insurgents or persons in the island of Cuba,' and whether the statute admits a construction which would make a vessel liable to forfeiture when fitted out for the intended employment of any one or more persons not recognized as a political power by the Executive of our nation.

"The section under which this libel has been filed was originally the third section of the act of June 5, 1794, 1 Stat. 281, c. 50, and the language at that time only contained the provision that the vessel should be fitted out with intent that said vessel should be employed in the service of any foreign prince or state to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state with whom the United States might be at peace.

"While that was the language of the act, the question came before the Supreme Court in the case of *Gelston* v. *Hoyt*, 3 Wheat. 246, 328, and, in speaking of a plea considered necessary for a defence to a suit for damages for a seizure under this statute, it was held that such plea was bad, 'because it does not aver that the Governments of Pétion and Christophe are foreign states which have been duly recognized as such by the Government of the United States.'

"In this case there was no distinction made between the party in whose service the vessel was to be employed and the one against whom hostilities were intended, and the language of the court would fully justify the conclusion they should both have been recognized, either as princes or states.

"Subsequently, as is stated by Mr. Wharton in his work on International Law, upon the outbreak of war between the South American colonies and Spain, upon a special message

of the President to Congress upon the subject, the words 'or of any colony, district or people' were added to the description of both parties contemplated — both that one into whose employment the vessel was to enter, and that one against whom the hostilities were contemplated.

"Has the addition of these words changed the character of the party intending to employ such vessel from that of a political power duly recognized as such, as is declared by the court in *Gelston* v. *Hoyt*, to that of a collection of individuals without any recognized political position? This question has been before the courts frequently, and several times been examined and commented upon, but in no case which I have been able to find has it been so presented, unconnected with questions of fact, that there has been a ruling upon it so that it can be considered as final and conclusive.

"Beyond question the courts are bound by the actions of the political branch of the Government in the recognition of the political character and relations of foreign nations, and of the conditions of peace or war.

"The act of 1794, as well as its modification, that act of 1818, used the same language in describing the power or party in whose behalf or into whose service the vessel was intended to enter as was used in describing the political power against which it is intended that hostilities should be committed; and as far as the language itself goes it is impossible to say that in using the words in one clause of the sentence the political character and power was intended, while in another clause of the same sentence words used in exactly the same connection and with apparently the same force and meaning were intended to represent not the political power but the individuals of a certain colony, district or people.

"It is contended that although the original act of 1794 required the construction given it in *Gelston* v. *Hoyt*, that each party should be one duly recognized by the United States, yet the modification of 1818 so changed it that it should be held to apply to any persons, regardless of their political character, for whose service a vessel might be intended.

"It is understood that this modification was brought about

by the special message of President Madison of December 26, 1816. The question presented by this message is clearly set forth in the language used. He says: 'It is found that the existing laws have not the efficacy necessary to prevent violations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States.'

"In further explanation of the condition of affairs which called for this modification of this statute may be considered the letter of Mr. Monroe, Secretary of State, to Mr. Forsyth, January 10, 1817, in which he speaks of vessels going out as merchant vessels and hoisting the flag of some of the belligerents and cruised under it, of other vessels armed and equipped in our ports hoisting such flags after getting out to sea, and of vessels having taken on board citizens of the United States, who, upon the arrival at neutral points, have assumed the character of officers and soldiers in the service of some of the parties in the contest then prevailing. All of this correspondence shows that the effort at that time was to enforce neutrality between recognized and belligerent parties. That the parties then in contest were recognized as belligerents and a neutrality was sought to be preserved is clearly shown by the first annual message of President Monroe in 1817. He says: 'Through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships or munitions of war. They have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been opened to both, and any articles . . . that either was permitted to take have been equally free to the other.'

"It is considered that this shows what was in contemplation at the time of the enactment of the law of 1818, and that what was intended was to prevent the fitting out of vessels to be employed in the service of a colony, district or people, which had been recognized as belligerents, but which had not been recognized as an independent state, or which was not represented in the political world by a prince.

"There appears to be nothing in the remedy demanded at that time, or in the language used, to show that the words so added were intended to represent or be construed as referring to the individual people of any colony, district or people, or any number of them however designated, except as in their collective representative political capacity, any more than there is to show that the term 'state' in the original was intended to refer to the individual people of the state.

"The language of the foreign enlistment act of Great Britain, 59 Geo. III, c. 69, § 7, leaves no question as to the intention of Parliament in that legislation, as it added to the words of our statute the words, 'or part of any province or people or of any person exercising or assuming to exercise any powers of government in or over any foreign state, colony, province or parts of any province or people.'

"In order to give the statute under which this libel is brought the force contended for by the libellant, it is necessary to eliminate from the provision that makes it necessary to declare how the vessel is to be employed the entire clause 'in the service of any foreign prince or state, or of any colony, district or people,' or to read into it the language found in the act of Great Britain, or its equivalent. That it was the general understanding at the time of the passage of the original act that it was considered to apply only to duly recognized nations is shown by the fact that, in the case of the *United States* v. *Guinet*, 2 Dall. 321, under this same section — the first case brought under it — the indictment alleged fully in terms that both the state of the Republic of France, in whose service the vessel was to be employed, and the King of Great Britain were a state and a prince with whom the United States were at peace.

"In the case of the *United States* v. *Quincy*, 6 Pet. 445, the Supreme Court says that the word 'people' was used in this statute as simply descriptive of the power in whose service the vessel was intended to be employed, and is one of the denominations applied by the acts of Congress to a foreign power.

"In the case of *The Meteor*, 17 Fed. Cas. 178; 26 Fed. Cas. 1241, where the original libel alleged that the vessel was fitted

out with the intent that she should be employed in the service of certain persons to commit hostilities against the Government of Spain, it was considered necessary to amend it by alleging that she was intended to be employed by the Government of Chili; and in that case there was presented a certificate of the Secretary of State, under seal, of the fact of the war existing between Spain and Chili, and that they were both nations with whom the United States were at peace.

"In addition to the declaration of the Supreme Court in the cases of *Gelston* v. *Hoyt* and the *United States* v. *Quincy*, this question has been incidentally under examination in several cases in the lower courts. In the case of *The Carondelet*, 37 Fed. Rep. 799, Judge Brown says: 'Section 5283 is designed in general to secure our neutrality between foreign belligerent powers. But there can be no obligation of neutrality except towards some recognized state or power, *de jure* or *de facto*. Neutrality presupposes two belligerents, at least, and as respects any recognition of belligerency — *i.e.*, of belligerent rights — the judiciary must follow the executive. To fall within the statute, the vessel must be intended to be employed in the service of one foreign prince, state, colony, district or people to cruise or commit hostilities against the subjects, citizens or property of another with which the United States are at peace. The United States can hardly be said to be at peace, in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising or committing of hostilities against such a mere faction well be said to be committing hostilities against the subjects, citizens or property of a district or people within the meaning of the statute. So, on the other hand, a vessel in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign prince or state, or of a colony, district or people, unless our Government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done.'

"In the case of *The Conserva*, 38 Fed. Rep. 431, a case in which it was alleged the vessel was to be used in a contest between Légitime and Hippolyte, Judge Benedict says: 'The

libel in this case charges certain facts to have been done in connection with the vessel with the intention that the vessel be employed in the service of certain rebels in a state of insurrection against the organized and recognized Government of Hayti, to cruise and commit hostilities against the subjects, citizens or property of the Republic of Hayti, with whom the United States are at peace. A violation of the neutrality which the United States is obliged to maintain between the rebels mentioned and the Government of the Republic of Hayti is the gravamen of the charge. But the evidence fails to show a state of facts from which the court concluded that the United States was ever under any obligation of neutrality to the rebels mentioned, or is now under any obligation of neutrality to the Government of the Republic of Hayti.'

"In the case of *United States* v. *Trumbull*, 48 Fed. Rep. 99, Judge Ross carefully reviews the different authorities, examines the question and clearly indicates how he would have decided the question had it been necessary for the purposes of deciding the case before him. He says: 'Does section 5283 of the Revised Statutes apply to any people whom it is optional with the United States to treat as pirates? That section is found in the chapter headed "Neutrality," and it was carried into the Revised Statutes, and was originally enacted in furtherance of the obligations of the nations as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; and it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other.'

"In speaking of the case of *United States* v. *Quincy*, in which it was said that the word 'people' 'was one of the denominations applied by the act of Congress to a foreign power,' he says: 'This can hardly mean an association of people in no way recognized by the United States or by the government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates.'

"In the case of *United States* v. *The Itata*, 56 Fed. Rep. 505, on appeal before the Circuit Court of Appeals, the ques-

tion was fully and carefully considered in an elaborate opinion, and although not found necessary to decide the question in this case, as the case was disposed of upon other grounds, it is considered to be apparent how the question would have been decided had it been necessary. The force of the word 'people,' as used in this statute, is carefully examined, as well as all other questions, and it is considered that the force of the conclusion which must necessarily result from such investigations cannot be avoided.

"In the case of *United States* v. *Hart et al.*, Judge Brown expresses his view of this section by saying: 'Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another foreign power with whom we are at peace.'

"The same language is used by the court in the case of the *United States* v. *Wiborg*, 163 U. S. 632, but it is contended in behalf of the libellant that this language was modified by the subsequent declaration made in the same case, that the operation of this statute is not necessarily dependent on the existence of such state of belligerency. In using the latter language it would seem that the court had the entire statute under contemplation, and more particularly § 5286, Rev. Stat., the sixth section of the original act, which plainly does not depend upon a state of belligerency or neutrality. This was the section then under consideration, as the immediate context and following sentence show, and was the section upon which the suit was based; and it cannot be considered that this language was intended to apply to another section, the consideration of which was in no way called in question.

"With this understanding of the language in this case, in that case, every judicial decision, remark or ruling, where the question has been under consideration or examination, appears to be in favor of the position taken by the claimants in the exceptions.

"In the case of *The Mary N. Hogan*, 18 Fed. Rep. 529, and in the cases of the intended charge of that vessel, boxes of arms and ammunition (20 Fed. Rep. 50), it does not appear that this question was raised by the claimant or considered by

the learned judge; and his language in the subsequent case of *The Carondelet*, where it was raised and discussed, may be accepted as presumptive proof of what his decision would have been, had it been so considered.

"The same is true of the case of *The City of Mexico*, 28 Fed. Rep. 148, decided by me in this court. In that case the defence was upon entirely different grounds, and the force of the portion of the statute contended for, the necessity that there should be an intent not only that the vessel should intend to commit hostilities, but that for such purposes she should be employed in the service of some political power, was entirely lost sight of and eliminated from the consideration of the case.

"The only expression authoritatively given which I have been able to find opposed to the view of the claimant in his exceptions is that of a portion of the letter of the honorable Attorney General to the Secretary of State, of December 16, 1869, 13 Op. Att'y Gen. 177, and cited in the case of *United States* v. *Wiborg*. I do not consider that I should be doing myself justice to pass that by unnoticed, as it has raised more questions in my mind and called for and compelled more thought and consideration than anything else connected with the case; but I feel compelled to reach a different conclusion than is there expressed.

"The general purpose and intent of that letter was to declare that the insurrection in Cuba was not a fitting opportunity to enforce the provisions of this law, inasmuch as we owed no duty to such insurgents to protect them from hostilities, or rather that any contest between Spain and such insurgents could not be considered as hostilities, but incidentally it was stated that a condition of belligerency was not necessary for the operation of this statute.

"It could not be considered that we owed such insurgents no such duty, not because we were not at peace with them, but because we had never recognized them as a colony, district or people.

"The force and effect of the letter was that the Cuban insurgents had not been recognized as a colony, district or

people, and, therefore, this section did not apply. If they had not been then so recognized or were not entitled to be so recognized, how can they now be so recognized or described as to come within terms of the statute in question?

"It is considered that the argument used in such letter to show that the statute should be held applicable to cases where there was no condition of belligerency and but one political power recognized, would have been fully as applicable under the old law, when the case of *Gelston* v. *Hoyt* decided to the contrary.

"The fact that a vessel was fitted out to be employed in the service of a prince would not necessarily imply that such prince was a political power recognized by the United States any more than would the terms a 'colony, district or people' under the act of 1818. But the Supreme Court clearly held in that case that it must be alleged that such prince or state has been recognized as such by the United States. The same argument used therein would call for the application of this statute for the forfeiting of any vessel fitted out to be employed by any person, individual, corporation or firm, for the purpose of committing hostilities against a state at peace, which would plainly not come within the provisions of the statute, however much it might be considered international policy or proper national conduct.

"It is impossible in my view of the construction required by the language used to properly apply the term 'a people,' used in the connection in which it is found, to any persons few in number and occupying a small territory with no recognized political organization, although they might procure the fitting out and arming of a vessel. I fail to find any ground for giving this statute, a criminal one as it is, any but its ordinary application. The question presented is clear and distinct, are 'certain insurgents or persons in the island of Cuba' properly described by either of the terms a 'colony,' a 'district' or a 'people,' and if so, which? The inconveniences which might arise from the political branch of our government recognizing such insurgents as a colony, district or people having political existence and as belligerents cannot be considered in determining whether they are entitled to such description.

Dissenting Opinion: Harlan, J.

"This statute is a criminal and penal one, and is not to be enlarged beyond what the language clearly expresses as being intended. It is not the privilege of courts to construe such statutes according to the emergency of the occasion, or according to temporary questions of policy, but according to the principles considered to have been established by a line of judicial decisions.

"It is contended that if the principles embodied in the exceptions are declared to be the law, there can be no law for the prevention of the fitting out of armed and hostile vessels to stir up insurrections and commit hostilities against nations with which we are at peace, and that such conclusion would make the parties engaged in any such expedition liable to prosecution as pirates.

"To the first of these points it is considered that section 5286 is, as has been constantly held, intended to prevent any such expeditions, regardless of the character of the parties in whose behalf they were organized, the only distinction being that in that case it is necessary to bring a criminal suit and prove overt acts, while under this portion of this section the intent is the gravamen of the charge and the prosecution is against the vessel, regardless of the persons engaged in the fitting out or the ignorance or innocence of the owners.

"This is not a case that can be or should be determined upon questions of public policy, and whether any parties subject themselves to prosecution for piracy or not should have no weight in its consideration. If they should be so subject they would have the benefit of the necessity of proving piratical acts rather than intentions.

"It is certainly considered to be true that any such parties would be considered as pirates by Spain, and would be treated as such if found in any acts of hostility, regardless of any recognition this nation might give them by considering them as having any political character as a people.

"Without attempting further argument, but regretting that the pressing duties of a very busy term of jury trials have prevented a fuller and more complete expression of my views, it is my conclusion that the line of judicial decisions demands

that a construction should be put upon the section in question which would hold that it was the intention of Congress in such enactment to prevent recognized political powers from having vessels prepared for their service in the United States, but that it was not the intention to extend such prohibition to vessels fitted out to be employed by individuals or private parties, however they might be designated, for piratical or other hostilities where no protection could be obtained by a commission from a recognized government. In such case they would be held liable under the section which provides for the fitting out of a military expedition, or if they were guilty of any piratical acts upon the high seas they would become liable under the laws for the punishment of such acts. It is considered that at the time of the amendment of 1818 this construction had been declared, and the language of the amendment was in no way intended to change such construction, but was only intended to apply to the new designation of political powers, the existence of which had been recognized as belligerents if not as independents, and who were entitled to the right of neutrals; that the libel herein does not state such a case as is contemplated by the statute, in that it does not allege that said vessel had been fitted out with intent that she be employed in the service of any foreign prince or state, or of any colony, district or people recognized as such by the political power of the United States, and unless it can be so amended should be dismissed, and it is so ordered.

* * * * *

"Since writing the foregoing, the libel herein has been amended by inserting in place of 'by certain insurgents or persons in the island of Cuba,' the words 'in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain in the island of Cuba,' but it is considered that the objection to the libel in sustaining the exceptions has not been overcome, but that although the language has been somewhat changed, the substance has not been amended in the material part, inasmuch as it appears clearly that the word 'people' is used in an individual and personal sense, and not as an organized and

recognized political power in any way corresponding to a state, prince, colony or district, and can in no way change my conclusion heretofore expressed, and the libel must be dismissed."

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## BARBER *v.* PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY.

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

No. 431. Submitted May 7, 1896. — Decided March 1, 1897.

A single verdict and judgment in ejectment, when not conclusive under the laws and in the courts of a State, is no bar to a second action of ejectment in the courts of the United States.

When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the courts of the United States in determining the title to land within the State, whether between the same or between other parties.

A single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights.

In Pennsylvania, under a will executed and taking effect before the passage of the statute of 1833, by which "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate," and beginning with the statement that the testator was desirous of making a distribution of his property in the event of his decease, a devise of a parcel of land, without words of inheritance, gave an estate in fee, unless qualified by other provisions of the will.

A devise over in the event of a married woman "dying without offspring by her husband" is equivalent to a devise in the event of her "dying without issue."

In Pennsylvania, in a will executed and taking effect before the statute of 1855, enlarging estates tail into estates in fee, a devise of certain lots of land to A in fee, and "in the event of A dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold,

Statement of the Case.

and the proceeds to be divided equally among the heirs of B," looked to an indefinite failure of issue of A, and gave A an estate tail.

A power to sell land upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities.

In a will devising certain land to A, and, if A die without issue, "then to be sold and the proceeds divided equally among the heirs of B," and directing the residue of the testator's estate to be sold and the proceeds divided into sixteen shares, of which two are given to B and two others to "the heirs of B," both B and his children being alive at the time of the testator's death, the word "heirs" in the specific devise applies either to children or to more remote descendants of B, whichever may be his heirs if he be dead, or his heirs apparent if he be living, when the devise takes effect.

Oral testimony to a testator's state of health at the time of publishing his will, or to his length of life afterwards, is incompetent to control the construction or effect of devises therein.

THIS was a certificate from the Circuit Court of Appeals for the Third Circuit of questions on which it desired the instruction of this court, and, as originally made, was (omitting the words printed in brackets below) as follows:

"This was an action of ejectment, and comes before this court on a writ of error to the United States Circuit Court for the Western District of Pennsylvania, which entered judgment for the defendants.

"First. The parties to the action both claimed title to the land in controversy under the will of James S. Stevenson, deceased, dated March 11, 1831, which is in the words following, to wit:

"'I, James S. Stevenson, of the city of Pittsburgh, in the State of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March in the year of our Lord one thousand eight hundred and thirty-one.

"'I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69 and 70, in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny river and by lot 71. Said Amanda Stephens

is now five years old (born April 7, 1826). ——— Stephens and ———, his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Pennsylvania.

"'In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber, of Columbia, Pennsylvania.

"'I give and bequeath to John Barber, of Columbia, and to his heirs, the lots in the city of Pittsburgh, numbered 71 and 72, bounded by Penn street, by lot 70, by the Allegheny river and by lot 73.

"'I give and bequeath to Mary Livingston's children the lot 74 in the city of Pittsburgh. And to her unmarried sister, Eliza Stevenson, I give and bequeath the lot 73 in the city of Pittsburgh, and in the event of her death the lot to go to her sister's children. Mary Livingston and Eliza Stevenson are daughters of the late Colonel S. Stevenson, son of Robert Stevenson, of York county, Pennsylvania.

"'I give and bequeath to the sons of James Stevenson, formerly of York county, but who died in Lycoming county in 1810 or 1811, the brick and other buildings, with the ground on which they are erected, situated at the corner of Wood and Fifth streets, Pittsburgh. These sons are Stephen, Manning, Reuben, Samuel and I. Stevenson.

"'All the remainder of my property to be sold, and, after paying my debts, to be divided into sixteen shares, and to be disposed of as follows: To Amanda Stephens, one share; to Mary Livingston, one share; to Eliza Stevenson, one share; to Stephen Stevenson, within named, one share; to James Wright, of Columbia, or his heirs, two shares; to John Barber, of Columbia, two shares; to Ann Elliott, formerly Ann West, now wife of Rev. Mr. Elliott, of Washington county, one share; to Jane E. Thecker, niece of the late Rev. Mr. Kerr, one sixteenth (or one share); to the heirs of John Barber, of Columbia, two shares; to the heirs of James Wright, of Columbia, two shares; to Charles Avery, J. M. Snowden and John Thaw, to be divided equally, two shares.

"'I hereby constitute and appoint the said Charles Avery,

J. M. Snowden and John Thaw, and John Barber, the executors of this my will.

"'Signed at Pittsburgh this 11th day of March, 1831.

"'JAS. S. STEVENSON.

"'Witness:

"'GEO. OGDEN,

"'J. S. CRAFT.'"

"Second. That on October 16, 1831, when confined to his room by sickness, [and after a dangerous illness for two weeks preceding his death,] the testator [though he had theretofore signed his will] first published [the same] *his will* in the presence of witnesses, whom he called to attest it, and a few hours thereafter died; and this will, on October 18, 1831, was duly probated; [which facts as to the time and circumstances of publication were not found by the special verdict, on which judgment was entered in the ejectment suit in the state courts of Pennsylvania].

"Third. That the said Amanda Stephens, then a child of five years of age, survived the testator, and in 1847 intermarried with Samuel Haight; that in 1848 she and her husband executed a deed, intended to bar a supposed estate tail in the land covered by the devise, which, upon the assumption that she had taken an estate tail, would have been sufficient for that purpose; that she had children by her said husband, who, as well as her husband, died in her lifetime, and that she died [never having married again,] on September 21, 1891. [But she and her husband in their lifetime, and after said steps to bar the entail, conveyed in fee simple to the defendants and others the property here in dispute.]

"Fourth. That, at the date of the death of the testator, John Barber was alive, married and had children, some of whom are plaintiffs in this action.

"Fifth. That on March 20, 1893, S. Duffield Mitchell, administrator *de bonis non cum testamento annexo* of James S. Stevenson, deceased, brought an action of ejectment against these defendants in the court of common pleas in and for Allegheny county, Pennsylvania, to recover the land here in controversy,

in which action a verdict was rendered under the direction of the court for the defendants, on which judgment was entered accordingly; that on writ of error to the Supreme Court of the State this judgment was affirmed.

"Sixth. That on February 2, 1895, a second action of ejectment for the same land was brought by the plaintiffs in this suit in the Circuit Court of the United States for the Western District of Pennsylvania, in which a verdict under the direction of the court was rendered for the defendants, on which judgment was entered accordingly; to which judgment a writ of error was sued out from the Circuit Court of Appeals of the Third Circuit, being the writ of error upon which the questions now to be submitted have arisen.

"The said Court of Appeals, desiring the instruction of the Supreme Court of the United States for its proper decision of the following questions or propositions of law, respectfully certifies the same:

"First. Is the decision of the Supreme Court of Pennsylvania, before referred to, conclusive? If not, then,

"Second. What estate did Amanda Stephens take under the devise?"

At the suggestion of both parties, and by order of the Circuit Court of Appeals, the certificate was afterwards amended by inserting the words above printed in brackets in the second and third paragraphs thereof; by striking out those in italics in the second paragraph; by adding to the fifth paragraph copies of the opinions delivered, in the action therein described, by Judge Ewing in the court of common pleas of Allegheny county, not reported, and therefore (omitting the preliminary statement of facts) printed in the margin,[1] and by the Supreme Court of Pennsylvania, as reported

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[1] "The testator evidently intended to dispose of all his property. The devise to Amanda Stephens, followed by the limitations over, or without them, created a fee, whether in tail or contingent. The circumstances, the age of the devisee, and the will leave us in no doubt that the contingency of Amanda's death did not mean her death before the testator.

"What is the true and legal meaning of the words 'dying without offspring by her husband'? Legally, if not defined by other parts of the will,

Counsel for Parties.

in 165 Penn. St. 645; and by adding to the sixth paragraph a copy of the opinion of the Circuit Court of the United States in the present case, as reported in 69 Fed. Rep. 501.

*Mr. William T. Barber*, *Mr. John S. Ferguson* and *Mr. S. Duffield Mitchell* for plaintiffs in error.

*Mr. Johns McCleave* and *Mr. D. T. Watson* for Pittsburgh, Fort Wayne & Chicago Railway Company, defendants in error, and *Mr. William Scott* and *Mr. George B. Gordon* for the Pennsylvania Company, defendants in error, filed a joint brief, contending:

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we take offspring to mean descendants, however remote. *Thompson* v. *Beasley*, 3 Drewry, 7; *Young* v. *Davies*, 2 Dr. & Sm. 167; *Allen* v. *Markell*, 36 Penn. St. 117. Webster defines it 'That which is produced, especially a child or children; descendants, however remote from the stock.' The Century Dictionary says, 'Progeny; descendants, however remote from the stock; issue; a collective term applied to several or all descendants.' True, it may be confined to children, as in *Lister* v. *Tidd*, 29 Beavan, 618, in a division of money at death of widow. In the present case, we interpret the phrase 'dying without offspring by her husband' to have the same legal effect and force as the words 'dying without legitimate issue' or 'heirs of her body.' They are words of limitation, not of purchase.

"Does the will of James S. Stevenson refer to a definite or an indefinite failure of issue or offspring of Amanda Stephens?

"To undertake to cite, and still more to reconcile, the numerous decisions on this general question would not only be confusing and interminable, but to any clear-headed lawyer it is impossible. The decisions are irreconcilable.

"But there are general rules, well established, which govern this case. That the words 'dying without issue,' or 'without legitimate issue,' standing alone and uncontrolled by other parts of the will, 'import an indefinite failure of issue is well established, and in all the departures from fundamental rules' it has not been shaken in this State; *Eichelberger* v. *Barnitz*, 9 Watts, 447, being the leading case, affirmed in *Middleswarth* v. *Blackmore*, 74 Penn. St. 414, and in all subsequent cases when the question has been raised. *Prima facie*, then, on the settled rule of interpretation, this phrase in the will imports an indefinite failure of issue.

"Another canon of interpretation is properly invoked by the plaintiff, to wit, that the intention of the testator must govern; and if, from reading the whole will, it is apparent that the testator meant, and has potentially said, that the devise over is to take effect in case the first taker dies leaving no issue living at the time of her death, it is a definite failure of issue.

Argument for Defendants in Error.

I. The decision of the Supreme Court of Pennsylvania, holding that under the long-settled rule of property in Pennsylvania, the heirs of John Barber had no title to the property in dispute, is conclusive in the Federal courts.

The proper construction of this will, under the law of Pennsylvania, has been decided by the highest court of the State in the case of *Mitchell* v. *Pittsburgh, Fort Wayne & Chicago Railway*, 165 Penn. St. 645.

That court held that, under the first clause of the will above quoted, Amanda took an absolute estate, and that the limitation over in the second clause of the devise was substitutionary in character, to take effect only upon Amanda dying in

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"*Middleswarth* v. *Blackmore*, 74 Penn. St. 414, was a case of this kind, where each of several provisions of the will pointed distinctly to a distribution at the death of Jonathan without issue living at his death, and all these provisions taken together showed clearly and conclusively that that was the intention of the testator.

"Is this such a will? Counsel for plaintiffs have made a very ingenious argument in the affirmative, and, while the case is not free from doubt, they have failed to convince us that the intention of the testator was different from the ordinary legal import of the terms used in the devise.

"The arguments mainly are that it must be presumed that he intended the event to occur, if at all, in the lifetime of his executors named, who would then sell the property and divide the proceeds; also that testator in the devise uses the words 'in the event of' Amanda dying, &c., and that he uses these words in the preamble of his will, 'in the event of my dying,' and in the second [sixth] paragraph of the will, 'in the event of her (Eliza Stevenson's) death' — in these two other cases referring to what is to be done immediately upon the death — that he, in declaring what was to be done in the contingency of Amanda's death, must have intended at and immediately after her death. It may be he did so intend; but we start with the presumption, the legal rule of interpretation, against it, and in our opinion it is not overcome by the other clauses.

"The legatees of the proceeds of the property, if sold, were not necessarily in being, or known to testator; it is to 'the heirs of John Barber'; the same words he uses in another part of the will, 'John Barber and his heirs,' evidently in the latter not meaning children.

"If an indefinite failure of issue was intended, the fact as to Amanda having had offspring, or her having survived them, is immaterial.

"We are of the opinion that the will of James S. Stephenson devised an estate tail in the property in question to Amanda Stephens, which, having been duly barred and the title conveyed to the defendants, they have a good title to the property, and the plaintiff has no title thereto."

the lifetime of the testator. And, inasmuch as she survived the testator, any operation of the substitutionary clause forever became impossible.

The Circuit Court below held that because a single verdict and judgment in ejectment in Pennsylvania is not conclusive upon the parties, this decision of the Supreme Court of the State construing the will is not conclusive in a second action in the Federal courts, though, as a precedent, it is entitled to peculiar regard. While it is true that a single verdict and judgment in ejectment is not conclusive upon the parties in Pennsylvania, yet this decision of the Supreme Court of the State, declaring the law of this will, we respectfully submit is conclusive. In a second ejectment brought in the lower courts of the State this decision of the Supreme Court would be absolutely binding upon the proper legal interpretation of the will. It is true, that upon a second appeal to the Supreme Court, that court might overrule its previous decision, as it might overrule any former decision, but, yet, so long as the decision remained, it would give the law of the State, absolutely binding upon the parties, and upon all subordinate tribunals in the State and upon the judges of the Supreme Court. Undoubtedly, it was the law of the State, the law of this particular will, at the time this case was presented to the Circuit Court below, and must so remain the law until overruled by the Supreme Court of the State.

That the construction of a will, given by the highest court of the State, will be accepted by the Federal courts, was held by this court in *Henderson* v. *Griffin*, 5 Pet. 151.

In *Suydam* v. *Williamson*, 24 How. 427, the defendant in ejectment claimed title under a purchaser at a sale of the property had under decree of foreclosure of a mortgage by the Court of Chancery in New York. The plaintiff claimed under a devise in the will of an ancestor in the title, by which devise a certain trust had been created. The title depended upon the validity of the foreclosure proceedings as against the terms of the trust created by the will. The Court of Appeals of New York had decided in favor of the title under the foreclosure in *Cochran* v. *Van Surlay*, 20 Wend.

265. Subsequent to this decision of the state court several suits involving the same question were brought to this court: *Williamson* v. *Berry*, 8 How. 495; *Williams* v. *Irish Presbyterian Church*, 8 How. 565; and *Williamson* v. *Ball*, 8 How. 566. In each of these cases this court decided contrary to the said decision, and supported the title under the trust in the will as against the title claimed under the foreclosure. Subsequent to the decisions of this court in 8 Howard, the Court of Appeals in New York rendered a decision upon the same title, adhering to its previous decision in *Cochran* v. *Van Surlay*, 20 Wend. 365, holding that, as between the judgments of their own courts and those of the courts of the United States, their own are binding where there is a conflict except in cases arising under the Constitution and laws of the United States, when the judgments of the Supreme Court of the United States are controlling authorities. The question presented to this court in the case cited in 24 Howard, was whether they should adhere to their own opinion as expressed in the cases in 8 Howard, or acknowledge the authority of the courts of New York to decide the validity of the title. Upon this question this court yielded to the courts of the State, abandoning their previous determination.

See also *Beauregard* v. *New Orleans*, 18 How. 497; *Miles* v. *Caldwell*, 2 Wall. 35, 43; *Daly* v. *James*, 8 Wheat. 495; *Jackson* v. *Chew*, 12 Wheat. 153; *Lane* v. *Vick*, 3 How. 464.

In *Swift* v. *Tyson*, 16 Pet. 1, 18, it was said by Mr. Justice Story: "In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local; that is to say the positive statutes of the State and the construction thereof adopted by the local tribunals, *and to rights and titles to things having a permanent locality, such as the rights and titles to real estate*, and other matters immovable and intraterritorial in their nature and character."

In this case we have the decision of the highest court of Pennsylvania directly upon the question as to the right and title of the respective litigants herein to the real estate situ-

ated in the State of Pennsylvania, and wholly subject to its jurisdiction. We respectfully submit that, where the highest court of a State has settled the title of the respective parties to land within the State, its decision should be respected.

It is a settled rule of property in Pennsylvania construing wills that the happening of the event on a limitation over as in Mr. Stevenson's will is restricted to the lifetime of the testator. Admittedly the event on which John Barber's heirs would take did not happen in Mr. Stevenson's lifetime.

The decision of the Supreme Court of the State, confirming the title of the defendant under this will, was made in application of the Pennsylvania rule of property, which in *Stevenson* v. *Fox*, 125 Penn. St. 568, was stated and approved by the Supreme Court of the State in the following language: "In a devise to A in fee, followed by a proviso that if A should die without leaving issue surviving him, then to B, the testator means the death of A within the period of the testator's own life, with the result that A, surviving the testator, takes a fee without any other condition or limitation, and that B takes nothing." The rule was announced in the jurisprudence of Pennsylvania in the case of *Caldwell* v. *Skilton*, 13 Penn. St. 152.

So we have a clear ruling that the clause of the will: "Or if said child shall die without issue born alive," must be held to mean, dying without issue born alive during the lifetime of the testator.

The rule as thus announced for the construction of such provisions remains to this day the law of Pennsylvania, and is thoroughly imbedded in our jurisprudence as a rule of property upon which hundreds of titles depend. Applying this rule to our will, undoubtedly, the testator when he uses the words: "In the event of Amanda dying . . . without offspring by her husband," intended such death as happening before his own; the gift is immediate; there is no precedent particular interest created. The gift over is made to depend upon an actual contingency, and there is nothing in the will to show the contingency of dying without offspring by her husband was meant to operate without limit during the life of the first

taker, and such being the case, in the language of the court, it is, as in the other instance (death uncoupled with any circumstances making it really contingent), restricted to death of testator.

This rule has been followed ever since, both as to devises of real estate and bequests of personal property, there being no distinction in Pennsylvania between realty and personalty in this respect. *Estate of Mary Biddle*, 28 Penn. St. 59; *Schoonmaker* v. *Stockton*, 37 Penn. St. 461; *Shutt* v. *Rambo*, 57 Penn. St. 149; *Karker's Appeal*, 60 Penn. St. 141; *Fahrney* v. *Holsinger*, 65 Penn. St. 388; *Mickley's Appeal*, 92 Penn. St. 514; *Fitzwater's Appeal*, 94 Penn. St. 141; *Stevenson* v. *Fox*, 125 Penn. St. 568; *McCormick* v. *McElligott*, 127 Penn. St. 230; *King* v. *Frick*, 135 Penn. St. 575; *Morrison* v. *Truby*, 145 Penn. St. 540; *Coles* v. *Ayres*, 156 Penn. St. 197.

These decisions unite in defining the settled rule of property in Pennsylvania to be that, where the devise and the limitation over are, as in Mr. Stevenson's will, the happening of the condition is restricted to the lifetime of the testator, and John Barber's heirs took no title because the condition subject to which Amanda took did not happen in testator's lifetime.

For the Federal courts to reverse that rule, and adopt another rule of property for Pennsylvania, would be to depart from their settled policy of following the rules of property in each State, and would establish two rules for the same title — one good only in the state courts, and one good only in the Federal courts. The title would, in the end, depend on where the citizen lived who held it.

II. If the question as to the nature and extent of the title which Amanda Stephens took under the will of Mr. Stevenson is open in the Federal courts for original investigation, then we assert that she took a fee simple absolute.

If the devise be construed a fee tail, it was barred and became a fee simple.

If the devise be construed a fee with limitation over, the fee became absolute, because (*a*) the event upon which the

limitation must happen was under the rule of property in Pennsylvania restricted in time to the lifetime of the testator, and admittedly it did not so happen. (*b*) The conditions, upon the non-performance of which the estate was to go over, were performed by Amanda. She did not die unmarried — she married and had offspring by her husband — and therefore the estate did not go to John Barber's heirs.

(1) The word "offspring" used in this clause of the will has the same legal significance as the word "issue" used in similar clauses. *Young* v. *Davies*, 2 Drew. & Sm. 167; *Thompson* v. *Veasley*, 3 Drew. 7; *Allen* v. *Markle*, 36 Penn. St. 117; *Denn* v. *Puckey*, 5 T. R. 299, 306; *Vaughn* v. *Dickes*, 20 Penn. St. 509.

So in our case, as Amanda could not have lawful issue without marriage, we may disencumber the sentence of the marriage condition as was done in *Vaughn* v. *Dickes;* and, so reading the will, we have the ordinary case of limitation over after an indefinite failure of issue, void as an executory devise; good, as a vested remainder, subject to be barred by fine, or common recovery, and now, under our statutes, by deed executed and acknowledged in accordance therewith, which the verdict in this case has found to have been done. This has been the unmolested construction of such clauses in Pennsylvania, certainly ever since the case of *Eichelberger* v. *Barnitz*, 9 Watts, 447. See also *Hackney* v. *Tracy*, 137 Penn. St. 53; *Taylor* v. *Taylor*, 63 Penn. St. 481.

(2) The second matter found by the plaintiff's counsel to rebut the established meaning which the law has placed upon such clauses is the direction, "to divide the proceeds of such sale among living persons." Here again the language of the will is unfortunate for their contention. The direction is: "Then these lots are to be sold and the proceeds to be divided equally amongst the heirs of John Barber."

At the time the will took effect John Barber was living, and had certain children living. The testator, however, in the clause does not direct the division amongst the children of John Barber, but amongst his heirs, and, as there can be no heir of a living person, the legal meaning of the phrase cer-

tainly contemplated a division only after John Barber's death, and then among his heirs whosoever they might be. That he used the word "heirs" in its proper meaning is manifest from the next succeeding clause of the will, wherein he devised an estate in fee to John Barber as follows: "I give and bequeath to John Barber, of Columbia, and his heirs, the lots," etc. Clearly in this clause he did not mean "children" by the word "heirs," but intended to give, as he did give, by appropriate language, an estate in fee simple. The word "heirs" in the one clause has precisely the same meaning as in the other. There is no direction, therefore, in our will to divide the proceeds among living persons, but the direction is to divide them among "heirs" of a living person, thereby clearly manifesting that he only contemplated such division as a remote possibility, or, at least, after the death of John Barber, and not during his lifetime.

A limitation over to persons named and in being at the time of the testator's death, or of the making of the will, is a common feature in many of the cases where the estate created has been adjudged a fee tail in the first taker.

In *Eichelberger* v. *Barnitz*, 9 Watts, 447, the leading case in Pennsylvania, the limitation over was to other children of the testator by name, all living at the death of the devisor.

In *Hackney* v. *Tracy*, 137 Penn. St. 53, the limitation over was to a named sister of the testator living at the time of his death; and it was expressly said by the court that this circumstance was not sufficient to show that the testator intended a definite failure of issue. So in *Lapsley* v. *Lapsley*, 9 Penn. St. 130; *Allen* v. *Henderson*, 49 Penn. St. 333; *Cochran* v. *Cochran*, 127 Penn. St. 486.

The absolute answer to these suggestions of the plaintiffs in error is found in the decision in *Criley* v. *Chamberlain*, 30 Penn. St. 161.

(3) The third matter found by the plaintiffs by which to rebut the definition of the law, is in combining the contingency of death, unmarried, with death without offspring, if married.

The cases in Pennsylvania, however, have settled this con-

tention against the plaintiffs. *Vaughn* v. *Dickes*, 20 Penn. St. 509. *Mattlach* v. *Roberts*, 54 Penn. St. 148; *McCullough* v. *Fenton*, 65 Penn. St. 418.

(4) The fourth cause for finding that the testator has used language to rebut the definition of the law is supposed to lie in the use by the testator of the expression "in the event of," and the word "then"; and it is supposed that these expressions mark the death of Amanda as the time at which the failure of issue shall be fixed.

The expression "in the event of Amanda dying unmarried, or if married, dying without offspring," etc., certainly means, and can only mean, that if Amanda should die unmarried, or if married, should die without issue; or, upon Amanda dying unmarried, or if married, dying without issue, etc.

The words "in the event of" were clearly used to express the contingency referred to. There can be no doubt or ambiguity as to the meaning of this expression. Nor can the use of the word "then" have the effect contended for and it has never been given such effect in any of the cases cited. *Eichelberger* v. *Barnitz*, *ub. sup.*; *Robinson's Estate*, 119 Penn. St. 418; *Lawrence* v. *Lawrence*, 105 Penn. St. 335; *Reinoehl* v. *Shirk*, 119 Penn. St. 108.

The rule in *Eichelberger* v. *Barnitz* has been applied in a multitude of cases in Pennsylvania in the construction of devises similar to the one now before us. *Hoff's Estate*, 147 Penn. St. 636; *Ray* v. *Alexander*, 146 Penn. St. 242; *Hackney* v. *Tracy*, 137 Penn. St. 53; *Cochran* v. *Cochran*, 127 Penn. St. 486; *Reinoehl* v. *Shirk*, 119 Penn. St. 108; *Bassett* v. *Hawk*, 118 Penn. St. 94; *Carroll* v. *Burns*, 108 Penn. St. 386; *Lawrence* v. *Lawrence*, 105 Penn. St. 335; *Ogden's Appeal*, 70 Penn. St. 501; *Gast* v. *Baer*, 62 Penn. St. 35; *Matlack* v. *Roberts*, 54 Penn. St. 148; *Criley* v. *Chamberlain*, 30 Penn. St. 161; *Vaughn* v. *Dickes*, 20 Penn. St. 509; *Lapsley* v. *Lapsley*, 9 Penn. St. 130.

Many more cases might be added to those cited, but reference to these will be sufficient to illustrate the application of the rule of *Eichelberger* v. *Barnitz* in the construction of clauses, in many of them, of the identical force and effect of the clause

in controversy here. By the rule of property established by these decisions, we contend there can be no doubt that if Amanda Stephens did not take a fee absolute, she at least took a fee tail, under the will of James Stevenson, which has been properly barred under the statutes.

Under the will Amanda took on testator's death an absolute estate in fee simple.

The Supreme Court of Pennsylvania, in a well-reasoned opinion, held that Amanda took an absolute estate; that this absolute estate was not limited, but a clause substitutionary in character was inserted, which, in the event of "Amanda dying unmarried, or, if married, dying without offspring by her husband, then those lots are to be sold and the proceeds to be divided equally among the heirs of John Barber."

That the dying without issue (which is what the clause means) the testator intended should take place in his lifetime, and as it did not the estate became absolute in Amanda on testator's death.

That this will admits of this construction that opinion proves. It is so well written and reasoned that no words of ours will add to it, and even if this court should hold that it is not conclusive, it is, at least, entitled to peculiar weight. *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 584.

As was said in *Burgess* v. *Seligman*, 107 U. S. 34, "for the sake of harmony, and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt." See also *Jackson* v. *Chew*, 12 Wheat. 153.

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

The real question between the parties, upon which the decision of this case must turn, is what estate Amanda Stephens took under the will of James S. Stevenson, by which he devised to her certain lots of land in Pittsburgh, and further provided as follows: "In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then

these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber."

The testator duly published his will on October 16, 1831, and died on the same day, being fifty years old. At that date, John Barber was alive and married, and had children, some of whom are plaintiffs in this action of ejectment. Amanda Stephens, then a child of five years of age, and so described in the will, survived the testator, and afterwards married. She and her husband executed a deed of the land, intended and sufficient to bar an estate tail therein; and afterwards conveyed the land in fee simple to the defendants and others.

The testator died, and his will took effect, before the passage of the statute of Pennsylvania of April 8, 1833, c. 128, § 9, providing that "all devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate"; and long before the statute of April 27, 1855, c. 387, § 1, providing that "whenever hereafter, by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this State, it shall be taken and construed to be an estate in fee simple, and as such shall be inheritable and freely alienable." Penn. Laws of 1832-33, p. 249; Laws of 1855, p. 368; Purdon's Digest, (12th ed.) 2103, § 11; 810, § 8.

A former action of ejectment was brought by the administrator with the will annexed of the testator against these defendants in the court of common pleas of Allegheny county, in the State of Pennsylvania, which directed a verdict and rendered judgment for the defendants, on the ground that Amanda Stephens took an estate tail, which had been duly barred, and the title conveyed to the defendants.

Upon a writ of error, that judgment was affirmed by the Supreme Court of Pennsylvania, on the ground that the devise over to the heirs of John Barber was an alternative and substitutionary devise, dependent upon the contingency of Amanda's dying without offspring in the lifetime of the

testator, and this contingency not having happened, that she took an absolute estate in fee simple. 165 Penn. St. 645.

This second action of ejectment was afterwards brought in the Circuit Court of the United States, which directed a verdict and rendered judgment for the defendants, on the ground that Amanda, if she did not take a fee, took at least an estate tail. 69 Fed. Rep. 501.

To reverse this judgment, the plaintiffs sued out a writ of error from the Circuit Court of Appeals, which has certified to this court these two questions:

"First. Is the decision of the Supreme Court of Pennsylvania, before referred to, conclusive? If not, then,

"Second. What estate did Amanda Stephens take under the devise?"

The first question, in the terms in which it is expressed, and taken by itself, is somewhat difficult to answer.

The decision of the Supreme Court of Pennsylvania, in the former action of ejectment, is certainly not conclusive as an adjudication of the rights of the parties, inasmuch as a single verdict and judgment in ejectment, not being conclusive under the laws and in the courts of the State, is not conclusive in the courts of the United States, and is no bar to a second action of ejectment. *Equator Co.* v. *Hall*, 106 U. S. 86; *Britton* v. *Thornton*, 112 U. S. 526; *Gibson* v. *Lyon*, 115 U. S. 439; *Smale* v. *Mitchell*, 143 U. S. 99.

The question, whether the opinion of the Supreme Court of the State in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise.

When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the courts of the United States in determining the title to land within the State, whether between the same or between other parties. *Jackson* v. *Chew*, 12 Wheat. 153, 167; *Henderson* v. *Griffin*,

5 Pet. 151; *Suydam* v. *Williamson*, 24 How. 427; *Burgess* v. *Seligman*, 107 U. S. 20, 33.

But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights. *Lane* v. *Vick*, 3 How. 464, and *Vick* v. *Vicksburg*, 1 How. (Miss.) 379; *Homer* v. *Brown*, 16 How. 354, and *Brown* v. *Lawrence*, 3 Cush. 390; *Gibson* v. *Lyon*, 115 U. S. 439, 446.

It becomes important, therefore, that the opinion of the Supreme Court of Pennsylvania in the former action of ejectment should be carefully examined and compared with the previous judgments of that court.

In that opinion, delivered by Chief Justice Sterrett, the principal grounds of the decision were stated as follows:

"Although the devise to Amanda Stephens was made before the act of 1833, and without words of inheritance, yet, when read in connection with the introductory clause of James S. Stevenson's will, there is a plain intent manifested in the first instance, to give her an absolute estate. In *McCullough* v. *Gilmore*, 11 Penn. St. 370, where substantially the same expression was used, this court said: 'These words, and the like of them, are generally carried down into the corpus of the will, to show that the testator meant to dispose of his whole interest in a particular devise, unless words are used which plainly indicate an intent to limit it.' Numerous cases to the same effect are cited in *Schriver* v. *Meyer*, 19 Penn. St. 87. The first taker is always the favorite object of testator's bounty, and as such entitled to the benefit of every implication.

"There are no words used in the second paragraph of the will, containing the devise to Amanda, which indicate any intent to limit her estate. Had the will stopped there, the devise would unquestionably have been absolute. The following paragraph was not intended to operate by way of limita-

tion, but was manifestly substitutionary in its character. The thought would very naturally occur to testator to make an alternative devise for the contingency of Amanda's dying without issue; *Biddle's Appeal*, 28 Penn. St. 59; and this was in effect what was done. 'In the event,' said testator, 'of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber.' The word 'offspring' here used is but a synonym for 'issue'; and 'issue' cannot be lawful without marriage. The devise is, then, in the first instance, to Amanda; and, in the event of her dying without issue, over to alternate beneficiaries. Dying without issue was thus made the contingency upon which the substituted beneficiaries could take. *Coles* v. *Ayres*, 156 Penn. St. 197. But death when? Where, as here, there is nothing to indicate an adverse intent, additional limitations dependent on no other contingency than is implied from the language 'if any of them die,' or 'in case of death,' or the like, cannot be referred to the event whenever it may happen — for that would be to give a forced construction to the words — but must be construed as referring to death in association with some additional circumstance which makes it actually contingent. That circumstance is said to be naturally in regard to the time of happening, and that time, where, as here, the gift is immediate, is necessarily the death of the testator, there being no other period to which the death can refer. *Caldwell* v. *Skilton*, 13 Penn. St. 152." 165 Penn. St. 649, 650.

The first statement, that by the devise in the second paragraph of the will, read in connection with the introductory clause, there was a plain intent manifested, in the first instance, to give Amanda an absolute estate, was in accord with the settled law of Pennsylvania. *Schriver* v. *Meyer*, (1852) 19 Penn. St. 87, 90, 91, and cases there cited. And the statement that the word "offspring," in the next paragraph, was used as a synonym for "issue," was in accord with a judgment of that court delivered in 1859 by Mr. Justice Strong (afterwards of this court), as well as with the English

decisions. *Allen* v. *Markle*, 36 Penn. St. 117; *Thompson* v. *Beasley*, 3 Drewry, 7; *Young* v. *Davies*, 2 Dr. & Sm. 167.

Whether the conclusion, that the devise over to John Barber's heirs was substitutionary, and could take effect only at the time of testator's death, and not afterwards, was in accord with the law of Pennsylvania as declared in previous decisions, is a question requiring more consideration.

Chief Justice Sterrett's propositions as to the meaning of the words "in case of death," or the like, are taken, almost *verbatim*, from the opinion of Mr. Justice Bell, in *Caldwell* v. *Skilton*, (1850) 13 Penn. St. 152, to which he refers. In that case, the testator devised real estate to his wife during her life or widowhood, and, at her decease or marriage, to his children in equal shares in fee, and, in case of the death of any child, his share to go to his issue, or if he should "die without issue born alive," to the testator's surviving children; the decision was that the devise over to the children, upon the death or marriage of the widow, must take effect upon her death, or upon the testator's death if he survived her, and, therefore, the devise over of the share of each child must take effect at the same time; and in the opinion, immediately after the propositions above referred to, Mr. Justice Bell added: "But as a testator is not supposed to anticipate himself surviving the object of his bounty, this construction is only made from necessity, and gives way when the contingency of the death of the first beneficiaries may be referred to some other time." 13 Penn. St. 156.

There is, indeed, a line of cases in that court, in which a devise over, after a devise in fee, has been held to be substitutionary, when expressed by such words as if the first taker die "without children"; *Biddle's Estate*, (1857) 28 Penn. St. 59; *McCormick* v. *McElligott*, (1889) 127 Penn. St. 230; or "without leaving issue living at the time of his death," *Mickley's Appeal*, (1880) 92 Penn. St. 514; *Stevenson* v. *Fox*, (1889) 125 Penn. St. 568; *King* v. *Frick*, (1890) 135 Penn. St. 575; *Morrison* v. *Truby*, (1891) 145 Penn. St. 540; or "intestate and without issue," *Karker's Appeal*, (1869) 60 Penn. St. 141; *Coles* v. *Ayres*, (1893) 156 Penn. St. 197. In none of

these cases, however, was the devise so expressed that it could be construed as creating an estate tail.

Two other cases were cited at the bar, as favoring the substitutionary rule, in one of which "die unmarried or without issue"; *Schoonmaker* v. *Stockton*, (1860) 37 Penn. St. 461; and in the other "die without heirs"; *Shutt* v. *Rambo*, (1868) 57 Penn. St. 149; were held to mean "die in the lifetime of the testator." But in each of them, not only the first device was to a child of the testator in fee, and the limitation over was to the testator's other children, but the whole scope of the will was thought to show that he could not have meant an indefinite failure of the issue. And in the second case, Chief Justice Thompson said: "But giving the words of the clause all that could possibly be claimed for them, to wit, an implication of a limitation to issue by the words 'die without heirs,' equivalent to 'dying without issue,' as in *Eichelberger* v. *Barnitz*, 9 Watts, 447, and kindred cases, the devise to Emma Rambo, the plaintiff below, would be a fee tail, which by the act of April 27, 1855, would be turned into a fee simple, the will bearing date May 27, 1857. That the word 'heirs' meant 'issue' must be inferred, in the presence of the fact that her brothers and sisters were living and would be her heirs. It must, therefore, have been 'issue,' that was meant by the words. In either view of the case, the plaintiff below was vested with the fee simple of the property in question." 57 Penn. St. 151.

Where a testator specifically devised lands to his daughter in fee, and provided that should she "die in her minority, and without lawful issue then living, the lands hereby devised shall revert to and become part of the residue of my estate," the substitutionary rule was not applied, either by the Supreme Court of Pennsylvania, or by this court; but both courts held that the daughter, having survived the testator, took an estate in fee, subject to be divested by her afterwards dying under age and without issue. *Britton* v. *Thornton*, (1878) 25 Pittsburgh Law Journal, 158, and (1884) 112 U. S. 526.

A careful examination of the adjudged cases in Pennsylvania irresistibly compels us to the conclusion that there is

no settled rule of property in that State, by which the words of the devise to Amanda Stephens, "and in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," should be construed as restricted to her death in the testator's lifetime, making the devise over substitutionary, and to take effect only upon her death within that time.

The result is, that the decision of the Supreme Court of Pennsylvania upon the construction of the will of James S. Stevenson is not conclusive; and that the first question certified to this court by the Circuit Court of Appeals must be answered in the negative.

This brings us to the second question, which is, "What estate did Amanda Stephens take under the devise?"

In *Eichelberger* v. *Barnitz*, above cited, decided in 1840, the court, speaking by Mr. Justice Serjeant, said: "The principle has now become a settled rule of property, in relation to lands, that if a devise be made to one in fee, and if he die without issue, or on failure of issue, or for want of issue, or without leaving issue, then over to another in fee, the estate of the first taker is a fee tail, which, if he have issue, passes to them *ad infinitum* by descent as tenants in tail." And this rule was applied to a devise in which the contingency was expressed in the words "my will is, because my son Henry is not yet married, that if he should die without leaving any lawful issue, that then his full share shall fall or go in equal share to my other three children." 9 Watts, 450, 451.

In *Middleswarth* v. *Blackmore*, (1873) 74 Penn. St. 414, 419, the court, speaking by Mr. Justice Mercur, and referring to *Eichelberger* v. *Barnitz*, above cited, and other cases, recognized and affirmed that "as a general rule, and standing alone, the language, 'die without leaving any legitimate issue,' must be understood to mean issue indefinitely; that the estate created would, in such case, have been one in tail"; and denied such effect to those words, only because of the general scope of the particular will, and of the land being thereby charged with the payment of certain sums to persons living, and required, in case of the happening of the contingency

named, to be sold by the testator's executors, and the proceeds, after paying those sums, to be distributed among his grandchildren.

Again, in *Lawrence* v. *Lawrence*, (1884) 105 Penn. St. 335, a devise of land to the testator's two nephews, "and their heirs, as tenants in common," but if one of them "should die without leaving lawful issue," his share to go to the other, "his heirs and assigns forever," was held to create an estate tail in the nephews; and Mr. Justice Trunkey, in delivering judgment, said that it had not been doubted, since the decision in *Eichelberger* v. *Barnitz*, above cited, that the rule in Pennsylvania is that "the established interpretation of words of limitation on failure of issue, whether the terms be 'if he die without issue,' 'if he die without having issue,' 'if he have no issue,' or 'if he die before he has any issue,' in absence of all words making a different intent apparent, is, that they import a general indefinite failure of issue, and not a failure at the first taker's death," 105 Penn. St. 339.

In *Reinoehl* v. *Shirk*, (1888) 119 Penn. St. 108, the testator devised real estate to two children of his deceased son in fee, and if either should "die without leaving lawful issue," his share to go to the survivor, and "if both of the said children should die without leaving lawful issue," the real estate devised to them to go to the testator's other children; and directed that under no circumstances should his son's divorced wife have any part of the testator's estate. The court, speaking by Mr. Justice Sterrett, held that the children of the son took an estate tail; and said that since *Eichelberger* v. *Barnitz*, above cited, it had undoubtedly been the rule in Pennsylvania, that, standing alone, the words "die without leaving issue," or other expressions of the same import, mean a general indefinite failure of issue, and not a failure at the death of the first taker.

In *Hackney* v. *Tracy*, (1890) 137 Penn. St. 53, a testator, who made his will in 1854 and died in 1864, devised real estate to his daughter Elizabeth, "but in case my daughter Elizabeth should die without issue, then in that case all her interest that she might or could have in the same to descend to my daugh-

ter Mary"; and it was held, in an opinion delivered by Mr. Justice Green, reviewing the previous cases, that the devise over was upon an indefinite failure of issue of Elizabeth, and that she took an estate tail, enlarged by the act of 1855 into a fee simple.

Like decisions were made in 1892 in two cases, in one of which the devise was to a daughter in fee simple, "provided, nevertheless, that in case she shall die without leaving lawful issue, then it is my will that the property above devised to her shall be equally divided amongst the children of my brother"; *Ray* v. *Alexander*, 146 Penn. St. 242; and in the other the testator, after devising to his wife an estate for life, provided that "in case either of my daughters shall die without issue, either before or after the decease of my wife, then the amount of their share or shares in the residue of the estate shall revert back to the remainder of my children, share and share alike"; and "the share or shares that such of my daughters as may be without issue before or after the death of my wife may be entitled to" should be invested, and the income paid to them; "and after her death the residue of the estate is to be divided, share and share alike, amongst those of my heirs that are then alive." *Hoff's Estate*, 147 Penn. St. 636.

In view of this series of adjudications of the highest court of the State, extending over more than half a century, we cannot but accede to the opinion expressed by Judge Acheson, with the concurrence of Judge Buffington, in the Circuit Court of the United States, in the case at bar, that "it is firmly established by an unbroken line of authorities, that a devise over to named living persons, upon the failure of the issue of the first taker, does not import a definite failure of issue"; and that "to hold at this late day that such a devise over imports a definite failure of issue would shake a multitude of titles." 69 Fed. Rep. 504, 505.

It has also long been regarded as established law in Pennsylvania, that such words as "in case of his death unmarried or without issue," in this connection, are equivalent to simply "dying without issue," unless there is something else in the case to warrant and require a different construction of the

will. *Vaughan* v. *Dickes*, (1853) 20 Penn. St. 509, 513; *Matlack* v. *Roberts*, (1867) 54 Penn. St. 148, 150; *McCullough* v. *Fenton*, (1870) 65 Penn. St. 418, 426.

The result of the foregoing considerations is that, by a settled rule of property in Pennsylvania, the devise to Amanda Stephens, with a devise over "in the event of Amanda dying unmarried, or, if married, without offspring by her husband," gave her an estate tail, unless this conclusion is controlled by other words in the will, or by the facts stated in the certificate of the Circuit Court of Appeals.

Indeed, the reasoning of Chief Justice Sterrett upon the construction of the clause "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," would seem to point to the same conclusion. That reasoning, in his own words, above quoted, is that "the word 'offspring' here used is but a synonym for 'issue'"; that "'issue' cannot be lawful without marriage"; that "the devise is, then, in the event of her dying without issue, over to" the heirs of John Barber; and that "dying without issue was thus made the contingency upon which" those heirs could take. 165 Penn. St. 649. Assuming the correctness of that inference, namely, that the contingency described was simply "dying without issue," these words would import an indefinite failure of issue, according to the long line of authorities above cited, beginning with the judgment delivered by Mr. Justice Serjeant in *Eichelberger* v. *Barnitz*, and including the judgment delivered by Mr. Justice Sterrett in *Reinoehl* v. *Shirk;* and would be inconsistent with the conclusion of the court that the devise over to the heirs of John Barber must take effect, if at all, upon the death of the testator.

The Supreme Court of Pennsylvania considered that conclusion to be strengthened by two special considerations: First. "That, in the absence of a fixed period, the power of sale was intended to be exercised at a near rather than a remote period after the testator's death," because, as said in *Wilkinson* v. *Buist*, 124 Penn. St. 253, 261, "a power of sale without limit would doubtless be bad, under the rule against perpetuities." Second. "That testator had in view living

persons as substituted beneficiaries — the gift over is to the 'heirs,' and therefore the children, of John Barber, who was living — and the natural inference is he intended them to take as such." 165 Penn. St. 650, 651.

But there does not appear to this court to be anything in the will indicating that the time, either of executing the power of sale of this land, or of ascertaining the persons who are to take the proceeds of its sale, must be upon or soon after the death of the testator.

The words "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband," which, as has been seen, import of themselves an indefinite failure of issue, and therefore an estate tail in Amanda, are followed by the words "then these lots are to be sold, and the proceeds to be divided equally among the heirs of John Barber."

There is no direction that the sale of these lots shall be made by the executors; the sale is to be made upon the expiration of the estate tail; and a power to sell upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities. *Cresson* v. *Ferree*, 70 Penn. St. 446, 449; *Heasman* v. *Pearse*, L. R. 7 Ch. 275; Gray on Perpetuities, §§ 447, 490.

The persons who are to take under the limitation over are described as "the heirs of John Barber." Although, strictly speaking, no one is the heir of a living person, yet a devise to the "heirs" of a person named (who is a living person, and is so recognized in the will) describes with sufficient certainty the persons intended, and shows that the word is not used in the strict sense, but as meaning the heirs apparent of that person, or the persons who would be his heirs were he dead when the devise takes effect. *Darbison* v. *Beaumont*, 1 P. Wms. 229; *S. C.*, Fortescue, 18; *Goodright* v. *White*, 2 W. Bl. 1010; *Heard* v. *Horton*, 1 Denio, 165. That this testator used the word in this meaning is confirmed by the clause in which he directs the residue of his estate to be sold and divided into sixteen shares, of which he gives two shares "to John Barber," and two other shares "to the heirs of John

Barber." But the word "heirs" is not limited, in its own meaning, or by anything in this will, to children; and applies either to John Barber's children, or to his more remote descendants, whichever may be his heirs if he be dead, or his heirs apparent if he be living, when the devise in question takes effect.

The facts added, by way of amendment, to the second paragraph of the certificate of the Circuit Court of Appeals, are wholly immaterial. Evidence of extrinsic circumstances, such as the testator's relation to persons, or the amount and condition of his estate, may be admitted to explain ambiguities of description in the will, but never to control the construction or extent of devises therein contained. As said by this court, speaking by Mr. Justice Grier: "A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised." *King* v. *Ackerman*, 2 Black, 408, 418. See also *Allen* v. *Allen*, 18 How. 385. To allow the legal construction of the terms of a will, executed and attested as required by law, to be affected by testimony to the testator's state of health at the time of publishing his will, or to his length of life afterwards, would be open in the highest degree to the confusion and uncertainty resulting from permitting the meaning of written instruments to be altered by parol evidence.

For the reasons above stated, this court is of opinion that the answer to the second question certified by the Circuit Court of Appeals must be that Amanda Stephens took an estate tail under the devise to her.

*Ordered accordingly.*

Syllabus.

# THE CONQUEROR.

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

No. 98. Argued January 6, 7, 1897. — Decided March 8, 1897.

So long as the transcript of the record in the Circuit Court is in the Circuit Court of Appeals, the fact that a mandate from it has gone down to the Circuit Court, affirming its decree, does not affect the right of this court to issue a writ of certiorari to the Court of Appeals, to bring the record here.

An application for a writ of certiorari to bring here for review a record and judgment entered after the final adjournment of this court, made at the next term and within a year after the original decree, is made within time.

A foreign built vessel, purchased by a citizen of the United States, and brought into the waters thereof, is not taxable under the tariff laws of the United States.

Rev. Stat. § 970, which provides that "when, in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *provided*, That the vessel, goods, wares or merchandise be, after judgment, forthwith returned to such claimant or his agent," only affords the collector immunity against a judgment for damages in cases where proceedings against the vessel were instituted upon information filed by the United States, for a fine or forfeiture incurred by the vessel itself.

A collector of customs who seizes a foreign built vessel purchased by a citizen of the United States and brought by him into their waters, and holds the same on the claim that it is taxable for duties under the tariff laws, is not protected against a judgment for damages, by a certificate of probable cause.

Demurrage is a proper element of damages, but it can only be allowed when profits have either actually been lost, or may be reasonably supposed to have been lost, and their amount is proven with reasonable certainty.

The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market; but

Statement of the Case.

in the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention.

Testimony as to value may be properly received from witnesses who are duly qualified as experts, but the jury, even if such testimony be uncontradicted, may exercise their independent judgment; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses.

The testimony in this case falls far short of establishing such a case of loss of profits as entitles the claimant to recover the large sum awarded to him for the detention of his yacht.

Whether the other charges were proper or not, was a matter for the courts below to determine, in the exercise of their best judgment; and, as the commissioner found that they were proper, and as both the District Court and the Court of Appeals affirmed his action in that regard, this court is not disposed to disturb their finding, although the amount seems large.

This was a libel by Frederick W. Vanderbilt to recover possession of the steam yacht Conqueror, of which he was the owner, and which was alleged to be illegally detained by J. Sloat Fassett, then collector of customs for the District of New York.

The material facts of the case are as follows: In May, 1891, Vanderbilt, who is a native-born American citizen, purchased of one Bailey, of Kingston-upon-Hull, England, the yacht Conqueror, a foreign built vessel, for the sum of £15,500, or about $75,000. The bill of sale was certified by the United States consul at Liverpool, and the yacht was delivered to Vanderbilt at Hull. The vessel was designed for pleasure only, and has never been put to any other use. After a cruise to Norway, Mr. Vanderbilt returned with her to England, and in June was elected a member of the "Royal Mersey Yacht Club" of Liverpool, thereby, it seems, obtaining the right to fly the blue ensign of Her Majesty's fleet. He never did, however, fly a British flag, but always carried the ensign of the New York Yacht Club, and her enrolment in the Liverpool Yacht Club seems to have been with the intent of claiming a special privilege of exemption from tonnage tax under Rev.

Stat. § 4216, accorded to yachts belonging to foreign yacht clubs.

Shortly after this, the yacht crossed the ocean, and arrived at New York about July 6, 1891, where she was duly entered as a vessel with the collector of the port, and paid the light money levied upon her by the collector as a vessel, pursuant to Rev. Stat. § 4225. She also received from the deputy collector a certificate to her bill of sale, describing her, stating that she had been sold by Bailey to Vanderbilt, and that the latter was a citizen of the United States. This entitled her to protection as an American vessel, but did not authorize her to engage in commerce. After cruising for some time about the coast, on August 27, 1891, in obedience to instructions from the Treasury Department, founded upon an opinion of the Solicitor of the Treasury, that the yacht should be regarded as a dutiable importation, the collector took forcible possession of her, and held her until dispossessed by the marshal under authority of the District Court. On October 1, Mr. Fassett went out of office, and was succeeded by Francis Hendricks, to whom the possession passed.

Meanwhile, on September 1, Mr. Vanderbilt filed his present libel for possession of the yacht, alleging his citizenship; the fact that the vessel was designed, intended and constructed as a pleasure yacht only; its purchase by the libellant, as well as other facts hereinbefore set forth, and prayed for process against the vessel, and for a decree awarding him possession and condemning Fassett in damages and costs. Process having been issued against the yacht, the execution thereof by the marshal was restricted by the customs officials, and it was not until an *alias* and *pluries* process had been issued that the marshal succeeded in obtaining exclusive and undisputed control of her. Fassett then applied to this court for a writ of prohibition, which was denied. *In re Fassett*, 142 U. S. 479.

Answers having been filed by Mr. Fassett, as late collector and personally, and by Mr. Hendricks, as collector, praying for the dismissal of the libel and for a decree of restitution of the yacht to the collector, the cause came on for a hearing in

the District Court, and resulted in a decree of restitution, 47 Fed. Rep. 99, a reference to a commissioner for an assessment of damages, and a subsequent decree for damages in the sum of $15,000 as demurrage for detention of the yacht from August 27 to February 3, and for other items sufficient to make up a total decree of $21,742.34.

Upon appeal to the Circuit Court of Appeals this decree was affirmed without an opinion, whereupon appellant applied for and was granted the present writ of certiorari.

*Mr. Assistant Attorney General Whitney* for appellants.

*Mr. Elihu Root* for appellee. *Mr. S. B. Clarke* and *Mr. Bronson Winthrop* were on his brief.

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

Two questions are involved in the merits of this case: *First*, whether this vessel was taxable under the tariff laws; *second*, whether the award of damages was justified by the law and the testimony.

1. A preliminary objection is made, however, by the appellee that the case is not properly before the court, because the mandate is not here, and because the case was in the District Court and was brought here by a writ addressed to a court which had lost jurisdiction of it before the writ had issued.

The fact that the mandate of the Circuit Court of Appeals to the District Court, affirming the decree of that court, had gone down, is immaterial. The transcript of the record is still in the Court of Appeals, and if a writ of certiorari can be issued at all after a final disposition of the case in that court, it could not be defeated by the issue of a mandate to the court below. That certiorari can issue, and, indeed, is ordinarily only issued, after a final decree in the Court of Appeals, was settled by this court in the *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway*, 148 U. S. 372, 384, although it may be issued before, if this

court be of opinion that the facts of the case require an earlier interposition. *The Three Friends*, *ante*, 1.

The only question worthy of consideration in this connection is whether the writ of certiorari should not have been applied for more promptly. The decree sought to be reviewed was entered June 6, 1893; the petition for certiorari was not filed until April 16, 1894. The act does not fix the time within which application for a certiorari must be made. As the decree was entered June 6, immediately after this court had adjourned for the term, and as the application must be made to the court while in session, no fault is imputable to the Government in not making the application before the opening of the next term in October; and while we think such application should be made with reasonable promptness, as it was made during the term and within a year after the original decree, we think it was within the time. We do not think the party complaining is limited to the six months allowed by section eleven of the Court of Appeals act for suing out a writ of error from the Court of Appeals to review the judgment of the District or Circuit Court; and it would seem that he is, by analogy, entitled to the year within which, by section six, an appeal shall be taken or writ of error sued out from this court to review judgments or decrees of the Court of Appeals in cases where the losing party is entitled to such review.

2. Was The Conqueror dutiable under the tariff act of October 1, 1890? 26 Stat. 567. This act requires duties to be levied upon all "articles" imported from foreign countries and mentioned in schedules therein contained, none of which schedules mention ships or vessels *eo nomine*. An abstract furnished us of the corresponding clauses in all the principal tariff acts from 1789 to the present date shows that duties are laid either upon "articles," as in the present act, or upon "goods, wares and merchandise" — words which have a similar meaning. Indeed, the words "articles" and "goods, wares and merchandise" seem to be used indiscriminately, and without any apparent purpose of distinguishing between them. While a vessel is an article of personal property, and may be

termed "goods, wares and merchandise," as distinguished from real estate, it is not within either class, as the words are ordinarily used. In all this class of cases, the meaning of the words, as used in the particular statute, must be gathered from the context and from the evident purpose of the act. Thus, in *Palmer's Ship Building and Iron Co.* v. *Claytor*, L. R. 4 Q. B. 209, it was held that a ship was not an "article" within the meaning of an act forbidding the employment of children to labor in the manufacture of articles, or parts of articles; but that an iron plate was an article of metal, even though used in shipbuilding, and the shaping of the plate was part of the manufacture.

Vessels certainly have not been treated as dutiable articles, but rather as the vehicles of such articles, and though foreign built and foreign owned, are never charged with duties when entering our ports, though every article upon them, that is not a part of the vessel or of its equipment or provisions, is subject to duty, unless expressly exempted by law. If this yacht had been brought here by a foreigner, it is not insisted that she would have been subject to duty. Indeed, she might be navigated between our ports for an unlimited time, provided only that she did not carry passengers or goods for hire. If she be dutiable at all, it must then be because she was bought by an American citizen. But why should this make her dutiable? She is not imported or taken into the country in the ordinary sense in which that term is used with reference to other articles, does not become commingled with the general mass of property, and is employed precisely as she might be legally employed by her foreign owners, or by an American citizen leasing her from such owner. Other articles are dutiable, not because they have been purchased, but because they are actually imported and become the subject of sale and commerce within the country. But if a yacht be dutiable when purchased, and only when purchased by an American citizen, we apply a test of dutiability that we apply to no other article, namely, the test of ownership.

Not only is there no mention of vessels, *eo nomine*, in the tariff acts, but there is no general description under which they

could be included except as manufactures of iron or wood. But it is only by straining the word far beyond its ordinary import, that we are able to apply the word "manufacture" to a seagoing, schooner-rigged, screw steamship, 182½ feet long, nearly 25 feet wide, and of 372 tons burden. The term "manufacture" is as inapplicable to such a vessel as it would be to a block of brick or stone, erected in the heart of a great city. A ship is doubtless constructed of manufactured articles which, if imported separately, would be the subject of duty, but which put together in the form of a ship are taken out of the class of "manufactures," and become a vehicle for the importation of other articles. Considering the hundreds of foreign vessels which enter the ports of the United States every day, it is incredible that, if Congress had intended to include them in the tariff acts, it would not have made mention of them in terms more definite than that of "manufactures."

While there has been no direct adjudication upon the question of the taxability of foreign vessels under the tariff laws, it was held in *United States* v. *A Chain Cable*, 2 Sumn. 362, that a chain cable was not taxable, which was purchased at Liverpool by the master of the ship Marathon to supply the place of a hempen cable which had become unseaworthy before the arrival of the ship at Liverpool, if the cable were purchased *bona fide* with the intention of using it for that ship, and not to sell as merchandise. It was said by Mr. Justice Story that the words "goods, wares and merchandise," used in the tariff act, included only such as were designed for sale, or to be applied to some use or object distinct from their *bona fide* appropriation to the use of the ship in which they are imported. And in *The Gertrude*, 2 Ware, 181; *S. C.* 3 Story, 68, it was held that the tackle, apparel and furniture of a foreign vessel, wrecked upon our coast, and landed and sold separately from the hull, were not goods, wares and merchandise imported into the United States within the meaning of the revenue laws. The opinion was delivered by Judge Ware, briefly affirmed on appeal to the Circuit Court by Mr. Justice Story, and the case put upon the ground that the rigging and apparel of the ship are a part of the ship, and therefore not

merchandise in any other sense of the word than that in which the ship herself is. "If," said he, "we look through the whole of the numerous acts of Congress laying duties on merchandise imported, as well as those regulating the collection of the same, we shall find they uniformly contemplate the cargo; they refer to articles having the quality of merchandise in the ordinary and most popular sense of the word. They refer also to goods intended to be introduced into the country for sale and consumption, or for the general purposes of commerce."

While neither of these cases is directly in point, each of them would probably have been differently decided, if the court had been of opinion that a foreign vessel arriving in this country and sold here, was the subject of duty.

The fact that, in a particular case, such as that of The Geneva, 20 Stat. 473, Congress may have seen fit to impose duties as a condition to the granting of an American registry to a foreign built steamboat, is fully met by a very large number of similar cases, in which no such requirement is made. In the following, taken from a single volume, 28 Stat., it appears that foreign built vessels were admitted to registry or nationalized without any such requirement: The Oneida, p. 43; The Goldsworthy, p. 216; The Astoria, p. 217; The Oceano, p. 219; The S. Oteri, p. 277; The Skudesnaes, p. 508; The Claribel and Athos, p. 625; The Empress, p. 626; The Linda and The Archer, p. 626; The James H. Hamlen, p. 643. Doubtless an examination would reveal an equally large number in other volumes. In fact the case of The Geneva seems to have been wholly exceptional. As bearing upon this, by the act of December 23, 1852, c. 4, 10 Stat. 149, reproduced in Rev. Stat. § 4136, the Secretary of the Treasury is authorized to "issue a register or enrolment for any vessel built in a foreign country, whenever such vessel shall be wrecked in the United States, and shall be purchased and repaired by a citizen of the United States, if it shall be proved to the satisfaction of the Secretary that the repairs put upon such vessel are equal to three fourths of the cost of the vessel when so repaired."

We do not undertake to say that the same rule applies to canoes, small boats, launches and other undocumented vessels,

which are not used, or are not capable of being used, as a means of transportation on water, as the word "vessel" is defined in Rev. Stat. § 3. While these vessels have a limited capacity for transportation, they are ordinarily used for purposes of pleasure, and are not considered of sufficient importance to require them to be entered at the custom house, or to be entitled to the special protection of the flag. They are treated like other similar vehicles used upon land, and there are reasons for saying that these boats, which do not ordinarily come of themselves into the country, but are imported or brought upon the decks of other vessels, are mere manufactures or other "articles," and are within the description of the tariff acts.

But the decisive objection to the taxability of vessels as imports is found in the fact that, from the foundation of the Government, vessels have been treated as *sui generis*, and subject to an entirely different set of laws and regulations from those applied to imported articles. By the very first act passed by Congress in 1789, subsequent to an act for administering oaths to its own members, a duty was laid upon "goods, wares and merchandise," imported into the United States, in which no mention whatever is made of ships or vessels; but by the next act, entitled "An act imposing duties on tonnage," a duty was imposed "on all ships or vessels entered in the United States" at the rate of six cents per ton upon all such as were built within the United States, and belonged to American citizens; of thirty cents per ton upon all such as should thereafter be built within the United States, belonging to subjects of foreign powers, and of fifty cents per ton upon all other ships or vessels, with a proviso that no American ship or vessel employed in the coasting trade or fisheries should pay tonnage more than once in any year. This distinction between "goods, wares and merchandise," and "ships or vessels," has been maintained ever since, although the amount of such duties has been repeatedly and sometimes radically changed. At the time of the arrival of The Conqueror, tonnage duties were imposed under the act of June 26, 1884, as amended by section eleven of the act of June 19, 1886, with a proviso that the

President of the United States might suspend the collection of them in certain specified cases. In addition thereto there was, by Rev. Stat. § 4225, a duty of fifty cents per ton, denominated "light money," levied and collected on all vessels not of the United States which might enter the ports of the United States; although, by § 4226, there was a provision that this tax should not be imposed upon any unregistered vessel "owned by citizens of the United States, and carrying a sea letter, or other regular document, issued from a custom house of the United States, proving the vessel to be American property." It would seem that, under this section and in virtue of the collector's certificate to her bill of sale, stating that her owner was an American citizen, The Conqueror would not thereafter be subject to the payment of light money. *The Miranda*, 1 U. S. App. 228.

There is no provision of law preventing foreign built vessels from being purchased, owned and navigated by citizens of the United States, although they are not entitled to registry, or to enrolment and license as American vessels, because not built in the United States. §§ 4132, 4311, 4312.

The privilege, however, of owning foreign vessels is usually of comparatively little value, since in order to carry on a foreign trade, the coasting trade or the fisheries, they must be entitled either to registry, or to enrolment and license, a privilege, as above stated, not granted to foreign built vessels though owned by American citizens. Rev. Stat. §§ 2497, 4131, 4311; *The Merritt*, 17 Wall. 582.

The privilege, then, of owning foreign built vessels, and of navigating them under the protection of the American flag, is practically confined to vessels used for the purposes of pleasure, which is probably the reason why the question presented in this case has never arisen before, since the only way in which foreign built vessels can be made available as American vessels, for purposes of trade and commerce, is by a special act of Congress permitting them to be registered or enrolled as American vessels.

A special provision is made for yachts by Rev. Stat. § 4214, as amended by the act of March 3, 1883, c. 133, 22 Stat. 566,

under which "the Secretary of the Treasury may cause yachts used and employed exclusively as pleasure vessels or designed as models of naval architecture, . . . to be licensed on terms which will authorize them to proceed from port to port of the United States, and by sea to foreign ports, without entering or clearing at the custom house." By § 4216, "yachts, belonging to a regularly organized yacht club of any foreign nation which shall extend like privileges to the yachts of the United States, shall have the privilege of entering or leaving any port of the United States without entering or clearing at the custom house thereof, or paying tonnage tax." It was probably under this section, and for the purpose of exempting her from payment of a tonnage tax, that Mr. Vanderbilt had The Conqueror enrolled as a member of the Royal Mersey Yacht Club, although it may be open to question whether this section was not intended as a mere reciprocity of courtesy, or has any application to foreign built yachts belonging to American citizens. Certainly no such question can arise since the passage of the act of January 25, 1897 — not yet officially published — by the first section of which Rev. Stat. § 4216 is reënacted, with a proviso "that the privileges of this section shall not extend to any yacht built outside of the United States, and owned, chartered or used by a citizen of the United States, unless such ownership or charter was acquired prior to the passage of this act." By the second section of the same act it is further provided that the previous act of June 19, 1886, exempting yachts from tonnage taxes, is repealed, "so far as the same exempts any yacht built outside of the United States, and owned, chartered or used by a citizen of the United States."

It is worthy of notice in this connection that this act, which was evidently passed with reference to this case or this class of cases, and for the express purpose of subjecting foreign built yachts hereafter purchased or chartered by American citizens to tonnage fees, makes no mention whatever of duties. It is scarcely possible that, if Congress had chosen to impose duties upon such yachts, or had supposed them subject to duty as imported articles, it would have also discriminated against them by requiring them to pay tonnage fees. In this, the

latest expression of the legislative will, Congress seems to have recognized the theory, which we have already gathered from the prior course of legislation, that vessels should be treated as a class by themselves, and not within the general scope of the tariff acts.

In view of the elaborate opinion of the District Judge upon this branch of the case it is unnecessary to extend this discussion farther. We think that the liability of ships and vessels to tonnage dues and to light money, except where a certain class of vessels is specially exempted, shows that it was not the intention of Congress to treat them as dutiable articles. So far as the court below awarded restitution of the vessel to the libellant, its decree was right and will be affirmed.

3. The question of damages remains to be considered. Upon the rendition of the decree, the court granted the usual certificate that the collector acted "therein under direction of the Secretary of the Treasury, and there was probable cause for said acts done by him." The certificate was made upon application of the collector, and was not opposed by the libellant who, however, reserved the right to move to vacate the same in case the judgment was not paid out of the Treasury within a reasonable time. This certificate was granted pursuant to Rev. Stat. § 970, which provides that "when, in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, That the vessel, goods, wares or merchandise be, after judgment, forthwith returned to such claimant or his agent."

This section is claimed by the Government to afford the collector complete immunity against any judgment for damages. Its language, broadly construed, might justify this position, although the fact that the certificate is only author-

ized when judgment is rendered for the *claimant* would indicate that it was properly applicable only in cases where proceedings against the vessel were instituted, upon information filed by the United States, for a fine or forfeiture incurred by the vessel itself. This construction is also supported by the final words of the section, declaring that neither the person who made the seizure, nor the prosecutor, shall be liable to suit or judgment on account of such suit or prosecution, and that the vessel shall be forthwith returned to the *claimant*. The word "claimant" in all admiralty proceedings *in rem* is used to denote the person who makes claim to the property seized as the owner thereof, and by virtue of such ownership, or other interest therein, is admitted to defend the suit. Gen. Adm. Rule 26. In a broader sense, however, it might be used to designate the owner of property, whether prosecuting or defending his right to such property, though this does not agree with the ordinary legal meaning of the word "claimant."

But if it were conceded that the statute be somewhat ambiguous, we are authorized to refer to the original statutes, from which the section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply. *United States* v. *Bowen*, 100 U. S. 508; *Myer* v. *Car Company*, 102 U. S. 1, 11; *United States* v. *Lacher*, 134 U. S. 624. The protection of the collector by a certificate of probable cause appears first in the act of July 31, 1789, c. 5, § 36, 1 Stat. 29, 47, to regulate the collection of duties upon the tonnage of ships, and upon goods, wares and merchandise imported. The act is not a tariff act imposing duties and tonnage, but is one for the administration of the tariff laws, and the collection of duties. By this act the country was divided into collection districts, ports of entry and delivery established, the duties of the collector and other customs officers defined, the obligation of vessels arriving with cargoes laid down, and the method of collecting such duties prescribed with certain penalties for the non-performance of its provisions. By section 36 "all penalties accruing by any breach of this act shall be sued for and recovered with costs

of suit, in the name of the United States, . . . by the collector of the district, . . . and such collector shall be, and hereby is authorized and directed to sue for and prosecute the same to effect." The section then provides for the manner of prosecuting for a forfeiture; how *claim* shall be made for the property seized, and under what circumstances it shall be delivered to the *claimant.* The section terminates with a provision for a certificate of probable cause, if judgment shall be given for the *claimant or claimants.* Through this entire section the word "claimant" is obviously used in its technical sense, to stand for the owner of the property seized for a penalty or forfeiture, under previous sections of the act. Indeed, the act is so clear in this particular, that scarcely any room is left for any other construction. This act was repealed by the act of August 4, 1790, c. 35, 1 Stat. 145, to provide more effectually for the collection of the duties on goods imported and upon tonnage. The later act is practically a reënactment of the former, with many amendments and enlargements of its scope, and in section 67, section 36 of the prior act is repeated, with the same provision for a certificate of probable cause. The act of 1790, however, was repealed March 2, 1799, c. 22, 1 Stat. 627, by a further act "to regulate the collection of duties on imports and tonnage," wherein the whole subject was again reconsidered, and a new act, still further amending and enlarging the prior ones, adopted. Section 89 of this act again repeated the provision for a certificate of probable cause. These acts limited the granting of such certificates to seizures made for fines or forfeitures under the provisions of the particular act. Subsequently, however, other acts were passed authorizing seizures of vessels and goods for other offences; but in none of these acts was protection given to the officer making the seizure with probable cause. Act of December 31, 1792, § 4, 1 Stat. 287, 289; Act of September 1, 1789, c. 11, § 29, 1 Stat. 55, 63; Act of June 5, 1794, c. 50, 1 Stat. 381; Act of April 18, 1806, c. 29, 2 Stat. 379. To extend to the collector the protection of a certificate of probable cause, where forfeitures were incurred under these acts, a short act was passed on February 24, 1807,

2 Stat. 422, c. 19, permitting the court to grant such certificate, wherever a seizure was made by any collector, or other officer, under *any* act of Congress authorizing such seizure. This act was substantially reënacted in Rev. Stat. § 970.

We think this legislation, however, was intended to be confined to cases where the collector makes a seizure, followed by a suit or prosecution in the name of the United States for a penalty or forfeiture arising from an illegal act of the persons in charge of the vessel, and was not intended to be applied where a vessel is simply detained under § 2964 for a non-payment of duties. As was observed in *In re Fassett*, 142 U. S. 485: "Section 2964 provides that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, the merchandise shall be taken possession of by the collector and deposited in the public stores, there to be kept, subject at all times to the order of the importer, on payment of the proper duties and expenses. Section 2973 provides that, if the merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, it is then to be appraised and sold by the collector at public auction, and the proceeds, after deducting for storage and other charges and expenses, including duties, are to be paid over to the importer." Of course, the yacht Conqueror was not such an article as could have been deposited in public stores within the language of the section, but if it had been subject to duty at all, the collector could not be considered in default for having detained her in the manner he did for its payment. His seizure, however, is not such a one as is contemplated by the above statutes concerning certificates of probable cause.

The case, instead of being covered by Rev. Stat. § 970, seems more properly to fall within the provisions of section 989, by which "when a recovery is had in any suit or proceeding against a collector . . . for any act done by him, . . . in the performance of his official duty, and the court certifies that there was probable cause, . . . or that he acted under the directions of the Secretary of the Treasury, . . . no execution shall issue against such col-

lector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." Upon the whole, we are of opinion that the collector was not protected by the certificate of probable cause from a judgment for damages.

4. The main question in this case turns upon the proper measure of damages. In the amount of $21,742.24, awarded by the final decree of the District Court, was included the sum of $15,000, "for loss of use of boat while detained by the respondent, from August 27, 1891, to February 3, 1892, at $100 per day." This is the principal item of damage to which objection is made in this court.

That the loss of profits or of the use of a vessel pending repairs or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty. In one of the earliest English cases upon this subject, *The Clarence*, 3 W. Rob. 283, it was said by Dr. Lushington that "in order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary — actual loss, and reasonable proof of the amount. . . . It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed." To same effect are *The Black Prince*, Lush. 568; *The City of Peking*, 15 App. Cas. 438; *The Argentino*, 14 App. Cas. 519.

The first case in which demurrage was allowed by this court for the detention of a ship under a libel for tortious seizure was that of *The Apollon*, 9 Wheat. 362, which was a suit brought by the master of a French ship against the

collector of St. Mary's for damages occasioned by an illegal seizure of the ship and cargo while lying within the territories of the King of Spain. In this case demurrage was allowed at the rate of $40 per day, although the court had expressed its opinion that the probable profits of a voyage, either upon the ship or cargo, could not furnish any just basis for the compensation of damages, the court observing that "every other method of adjusting compensation," than that of demurrage, "would be merely speculative, and liable to the greatest uncertainties."

*Smith* v. *Condry*, 1 How. 28, was a common law case, wherein a vessel, laden with a cargo of salt, received injury by a collision in the port of Liverpool. Upon the trial, plaintiffs offered to prove that if the ship had been able to sail upon her voyage upon the day named, she would in due course have arrived in Georgetown in time for the sale of her cargo in the fishing season of the Potomac River, when there was a great demand for salt; but, owing to the delay, she did not arrive until the season was over, and thereby lost ten cents per bushel upon the value of the salt. The court, acting upon the analogy of insurance cases, held that this testimony was properly refused admission. It is quite obvious, however, that this was not a case where damages were claimed for the use of the vessel pending her repairs, but for the loss of anticipated profits pending the sale of her cargo, and therefore falling within the rule stated in *The Apollon*, that profits upon the sale of the cargo are excluded. There is no conflict between this case and that of *Williamson* v. *Barrett*, 13 How. 101, wherein the court held upon the authority of *The Gazelle*, 2 W. Rob. 279, that the plaintiffs were entitled to recover for the use of their boat, by which "we understand what she would have produced to the plaintiffs by the hiring or chartering of her to run upon the river in the business in which she had been usually engaged"; in other words, the market price of the hire of the vessel. This ruling has been repeatedly affirmed in this court, *The Potomac*, 105 U. S. 630; in England, *The Betsey Caines*, 2 Haggard, 28; *The Inflexible*, Swabey, 200; *The Star of India*, 1

P. D. 466; *The City of Buenos Ayres*, 1 Asp. Mar. L. C. 169; and in France, *Sibille*, De l'Abordage, sec. 411; *De Fresquet*, Des Abordages, pp. 48, 49; *Caumont*, Dict. Mar. Title Abordage, sec. 224.

The difficulty is in determining when the vessel has lost profits and the amount thereof. The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, as it is only in the larger ports that there can be said to be a market price for the use of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.

In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention. *The Mayflower*, Brown's Adm. 376; *The Transit*, 4 Ben. 138; *The Emilie*, 4 Ben. 235.

The mere opinion of witnesses, unfortified by any data, as to what the earnings would probably have been, is usually regarded as too uncertain and conjectural to form a proper basis for estimation, though in a few cases they seem to have been received. The damages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs. Thus, if a vessel employed upon the lakes should receive damages by collision, occurring just before the close of navigation, and she were repaired during the winter, no demurrage could be allowed, since no vessel upon the lakes can earn freight during the winter. *The Thomas Kiley*, 3 Ben. 228.

In *The R. L. Maybey*, 4 Blatchford, 439, 440, it was said by Mr. Justice Nelson upon the subject of damages that "a good deal of the testimony was general, and turned upon mere opinion as to the probability of employment in the towing business and the amount of the earnings, if employed. This

kind of proof is too speculative and contingent to be the foundation of any rule of damages. It is at best but conjecture." On appeal to this court the decree was affirmed, *Sturgis* v. *Clough*, 1 Wall. 269, Mr. Justice Grier observing that "the charge for demurrage allowed by him" (the commissioner) "was not justified by the evidence, although there was testimony to support it, such as can always be obtained when friendly experts are called to give opinions. Besides, the libellant withheld the best evidence of the profits made by his boat, which would be found in his own books, showing his receipts and expenditures before the collision." The testimony is not set forth in the report of the case, but on referring to the original record we find that it was much stronger in favor of an allowance of demurrage than the testimony in this case. Five witnesses were sworn by the libellant, who testified that there was a demand in the port of New York for the services of steam tug boats, such as the injured vessel was, and that the value of such a boat was about $100 per day. Four witnesses testifying for the claimant did not deny that there was a demand for such vessels, but put the value of her services at a much lower sum. So in the case of *The Isaac Newton*, 4 Blatchford, 21, Mr. Justice Nelson rejected the allowance for demurrage founded simply upon the evidence of the master and the mate, as a matter of opinion, treating the allowance as conjectural and speculative.

In *The Cayuga*, 2 Ben. 125, a ferry boat, injured by a collision, was withdrawn for repairs, her place being supplied by a boat taken from another ferry belonging to the libellants, whose place was in turn supplied by a spare boat. It was not shown that the injured boat could have been chartered for any sum for the time she was laid up, but proof was given as to the value of her use, based upon her receipts while running on the ferry. It was held that a judgment as to her charter value, given by men having experience upon the ferries, founded upon their knowledge of the business, was a proper basis for the allowance of demurrage. This case was affirmed by the Circuit Court, 7 Blatchford, 385, and also

upon further appeal by this court. 14 Wall. 270. Of same purport is *The Favorita*, 18 Wall. 598.

There are two cases reported in which demurrage was allowed for the detention of a yacht. In one of these, *The Walter W. Pharo*, 1 Lowell, 437, the total allowance was but $80; and in the other, *The Lagonda*, 44 Fed. Rep. 367, the yacht had been detained eight days while undergoing repairs, and was allowed by the commissioner $48 as interest upon $36,000, the cost of the yacht. Upon exceptions by the libellant, the court held that the testimony seemed to justify the conclusion that the yacht could have been chartered by her owner for a season of three months for the sum of $6000; that under such a charter the vessel would have earned for her owner in eight days the sum of $552, and gave a decree for that sum.

Upon the other hand, however, in the recent case of *The Emerald*, 1896, P. D. 192, decided by the English Court of Appeals, the question was whether demurrage could be allowed for detention pending the repairs of a vessel (the Greta Holme) used by a body of public trustees for the purpose of dredging and raising wrecks in Liverpool harbor. The court held unanimously that demurrage could not be allowed to the board of trustees, because the vessel was not a source of profit to them. In delivering the opinion Lord Esher observed: (p. 204) "It has peen pointed out, and I think quite fairly, that you cannot recover by way of damages on account of something which you call profit, but of which profit there is no evidence. . . . Then they talk of letting her go to Preston, and that the Preston people would have given £100 a week probably. It is all imagination. . . . The dredger is not kept for the purpose of being let to any one else. . . . To say that at some indefinite and future time they could have let her if they had not wanted her is too remote for anybody to act upon in giving them compensation for the loss of the dredger by way of damages. It seems to me that the damages were too shadowy and too remote to be the proper subject-matter of damages in the collision." Lord Justice A. L. Smith said: (p. 206) "It is to be remarked that during all the

time that the dredger was sunk and under repairs the harbor board have not, in fact, lost one penny. . . . I agree with the report of the registrar and merchants upon this point. They say that 'the harbor or conservancy board are clearly not in the position of a trading company which is entitled to claim for loss of profit, and although their dredging operations were no doubt delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss.'" Lord Justice Rigby said: (p. 208) "The board attempted to show that in some circumstances they might let this dredger; but the evidence failed to fix any definite time when the board would no longer require to use her. It seems to me that the suggested damage which might be occasioned to the Mersey docks and harbor board was mere speculation."

In the case under consideration, the only evidence of loss of profits was that of three witnesses, one of whom, Samuel Holmes, a steamboat broker, swore that the reasonable value of the use of the yacht was $3000 per month. He gave the only instance of such a charter within his knowledge — the charter of a boat of this size about three or four years before, for about $9000 for a winter trip to the West Indies. "The circumstances were a little different than this though." What those circumstances were, what was the character of the yacht, and how long the duration of the charter, were not stated, and the illustration is of trifling value. The next witness, Hughes, a yacht-broker, stated simply that The Conqueror was worth $100 per day, fortifying his testimony by no fact whatever. The last witness, Thomas Manning, also a yacht-broker, stated the value of The Conqueror from August 27 to February 3 to be about $20,000 for the boat itself without the crew; stating that there was more or less demand for those large boats, but a great difficulty in getting them. Whether the demand at that time was more or less than the average was not stated; nor are any facts given in support of his testimony. The expression is wholly indefinite and unsatisfactory.

Perhaps if this testimony were taken literally, without reading between the lines, considering other facts appearing in the

record, or bringing to bear upon it other considerations which are matters of common knowledge, it might justify the construction placed upon it by the court below, that the libellant had been deprived of the services of a vessel which might possibly have been leased at $100 per day. But this is not the proper view to be taken of this testimony. While there are doubtless authorities holding that a jury (and in this class of cases the court acts as a jury) has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts, and that a wilful disregard of such testimony will be ground for a new trial, no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate. Indeed, the courts of New Hampshire at one time, and until the rule was changed by the legislature, went so far as to exclude the opinions of witnesses upon questions of value altogether, and irrespective of any question as to their qualifications. *Rochester* v. *Chester*, 3 N. H. 349; *Peterborough* v. *Jaffrey*, 6 N. H. 462; *Beard* v. *Kirk*, 11 N. H. 397; *Robertson* v. *Stark*, 15 N. H. 109; *Low* v. *Connecticut & Passumpsic Railroad*, 45 N. H. 370.

The better opinion, however, is that testimony as to value may be properly received from the mouths of witnesses, who are duly qualified to testify in relation to the subject of inquiry, although the jury, even if such testimony be uncontradicted, may exercise their independent judgment. In *Forsyth* v. *Doolittle*, 120 U. S. 73, which was an action to recover compensation for services rendered by plaintiffs in effecting the sale of certain lands in Indiana, and in various legal proceedings concerning the title, the following instruction to the jury was held to be correct: "You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you, as part of the proof bearing upon the question of value, as the testimony of men experienced in such matters, and whose judgment may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case, and to award to

the plaintiffs such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof, you find plaintiff rendered, after deducting the amount the plaintiffs have already received for such services."

The proper rule upon the subject is nowhere better stated than by Mr. Justice Field in delivering the opinion of the court in *Head* v. *Hargrave*, 105 U. S. 45, which was also an action for professional services as attorneys: "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may — and to act intelligently they must — judge of the weight of the force of that evidence by their own general knowledge of the subject of inquiry. . . . Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable."

Opinion of the Court.

In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses. Rogers on Expert Testimony, § 207; *St. Louis* v. *Ranken*, 95 Missouri, 189; *Kansas* v. *Butterfield*, 89 Missouri, 648; *Atchison, Topeka &c. Railroad* v. *Thul*, 32 Kansas, 255; *Brehm* v. *Great Western Railroad*, 34 Barb. 256, 272; *Williams* v. *State*, 50 Arkansas, 511, 520; *Humphries* v. *Johnson*, 20 Indiana, 190; *Goodwin* v. *State*, 96 Indiana, 550; *United States* v. *McGlue*, 1 Curtis, 1, 19; *United States* v. *Molloy*, 31 Fed. Rep. 19.

Without imputing to the witnesses, who were sworn in this case upon the subject of damages, any design to mislead the court, we are bound to say that their testimony falls far short of establishing such a case of loss of profits as entitles the libellant to recover this large sum for the detention of his yacht. It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least, a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure, or, as was said by Doctor Lushington in *The Clarence*, 3 W. Rob. 286: "There must be actual loss and reasonable proof of the amount." In other words, there must be a loss of profits in its commercial sense. In all the cases in which we have allowed demurrage the vessel has been engaged, or was capable of being engaged, in a profitable commerce, and the amount allowed was determined either by the charter value of such vessel, or by her actual earnings at about the time of the collision. The Conqueror, however, did not belong to the class of vessels which are engaged in commercial pursuits, or are ordinarily let to hire. There is doubtless a class of pleasure boats that are let for excursions, and become a source of pecuniary profit to their owners; but The Conqueror did not belong to that class. She was purchased by her owner for his personal pleasure, and there is not an atom of testimony tending to show that he

bought her for hire, or would have leased her if he had been able to do so, even for the large sum of $100 per day fixed as her value.

Again; the court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the first of November, and, as The Conqueror was seized on August 27, during more than one half the time for which demurrage was allowed she probably would have been laid up at her wharf. It is true there was a possibility that her owner might have desired her for use in a winter's cruise to tropical waters; but there was not the slightest evidence of that, and the contingency of her being so used was too remote to justify an allowance upon that basis.

The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was made, is putting a strain upon our credulity which we find ourselves quite unable to bear. The truth is, that estimates of value made by friendly witnesses, with no practical illustrations to support them, are, as observed by the various courts through which the case of *Sturgis* v. *Clough* passed, too unsafe, as a rule, to be made the basis of a judicial award, unless it be shown with much greater certainty than it is in this case, either that the vessel was earning profits, or that she belonged to a class of vessels for which there was a steady demand in the market. We think the testimony upon the subject of demurrage in this case should have been held to be insufficient.

5. The other items of damage, going to make up the aggregate amount awarded, included about $4500 for the wages and provisions of the crew, and also for wharfage, towage, night watchmen and extra expenses in heating the vessel; all of which are claimed to be unauthorized, in view of the

fact that by Rev. Stat. § 829, the marshal is allowed, "for the necessary expenses of keeping boats, vessels or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents a day." While it is entirely true that the marshal is thus limited, it does not follow that the libellant may not incur a larger expense if, in his opinion, it is necessary for the proper protection of the vessel, subject to the contingency of paying for it himself, if he be unsuccessful. It is easy to understand that an expensive yacht, like this, would require a much larger outlay than $2.50 per day to provide her with safe accommodations and to maintain her in good condition and repair. The finding of the commissioner in this connection was "that the collector took possession of the yacht on the 27th of August, 1891, by placing only one person on board of her; that from this time till the end of September, the collector, through this one representative, remained on board, claiming possession of the yacht; that during all this time she lay in the stream off Stapleton, where it was necessary to have a crew on board to keep her safely, 'as no ship could be secure in any stream,' under such circumstances, without such protection; that he considered that 'while the vessel was in that position' that it was necessary to keep the crew to 'take care of' her, and that at no time did he employ any more men than was necessary for that purpose." "That on the 29th of September the collector, at the request of the libellant, ordered the vessel placed in the Erie Basin, and the marshal took partial possession, the collector having resisted and his representative still remaining on board. The vessel having been thus removed from the stream where she had been at anchor, the captain testifies that he took steps immediately to get rid of the crew, and that they were discharged as fast as he could do so consistently while preparing the vessel for being laid up. There is nothing to contradict this testimony, and it seems to me that the captain pursued a reasonable, as well as judicious, course, one consistent with his duty to take proper care of the vessel. As soon as the marshal, under further process of the court, got exclusive possession of the yacht, on the 8th of October, he put only one man

aboard of her to represent him, and employed the captain and four men to take care of the vessel, besides a night watchman. The marshal's possession being a legal possession, he had the right to take this course, and I do not find anything in the testimony, or in the circumstances of the case, to warrant the conclusion that the expenses of keeping such a vessel while in the collector's or the marshal's possession were extravagant."

Whether these charges were proper or not, was a matter for the courts below to determine in the exercise of their best judgment, and, as the commissioner found that they were, and both the District Court and the Court of Appeals affirmed his action in that regard, we are not disposed to disturb their finding, although the amount seems large.

*The decree of the Court of Appeals must be reversed, and the case remanded to the District Court for further proceedings in conformity to this opinion.*

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## *In re* ALIX, Petitioner.

ORIGINAL.

No. 15. Original. Argued March 1, 1897. — Decided March 15, 1897.

Applying to the facts as stated in the opinion of the court the settled rules in reference to writs of prohibition laid down in *In re Rice*, 155 U. S. 396, 402, it is *held* that a proper case is not made for awarding such a writ.

The case is stated in the opinion.

*Mr. Horace L. Cheney* (with whom was *Mr. John F. Lewis* on the brief) for petitioner.

*Mr. Curtis Tilton* opposing.

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

John L. Mills filed his libel in the District Court of the United States for the District of New Jersey on the fourteenth day of September, A.D. 1896, against the steamer Allegheny and her cargo to recover salvage, and such proceedings were thereafter had thereon as resulted in a decree in favor of the libellant, December 2, 1896. An order for the sale of the steamer and cargo was entered December 15; a motion to vacate this order was made on behalf of Gustave Alix, master of the Belgian steamer Caucase, which was denied December 21; the sale took place December 22, and was confirmed December 30, 1896.

On December 26, 1896, Alix filed a petition of intervention in said cause, alleging that he had filed a libel in admiralty against the Allegheny, October 22, 1894, in the District Court of the United States for the District of Delaware; that the steamer had been attached by the marshal of that district in December of that year; and that the District Court for the District of New Jersey had no jurisdiction.

All the material allegations of the petition of intervention were denied by the answer thereto, and issues of fact were raised on which the question of jurisdiction depended.

Thereupon, on January 11, 1897, a petition or suggestion was filed by Alix in this court, seeking the issue of a writ of prohibition to the judge of the District Court for the District of New Jersey to restrain him from enforcing any of the orders or decrees by him theretofore made in the suit of said Mills, or proceeding further therein. A rule to show cause was granted, to which return has been duly made.

The settled rules in reference to the writ of prohibition were thus laid down in *In re Rice, Petitioner*, 155 U. S. 396, 402: "Where it appears that the court whose action is sought to be prohibited had clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made

matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney*, 116 U. S. 167, 173; *In re Cooper*, 143 U. S. 472, 495."

Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition.

*Writ denied.*

## ALLEN *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 641. Submitted January 19, 1897. — Decided March 15, 1897.

After a person had been convicted in a state court of murder, he sued out a writ of error from the Supreme Court of the State. On the day assigned for its hearing it appeared from affidavits that the accused had escaped from jail, and was at that time a fugitive from justice. The court thereupon ordered the writ of error dismissed, unless he should within sixty days surrender himself or be recaptured, and when that time passed without either happening, the writ was dismissed. He was afterwards recaptured, and resentenced to death, whereupon he sued out this writ of error, assigning as error that the dismissal of his writ of error by the Supreme Court was a denial of due process of law. *Held*, that the dismissal of the writ of error by the Supreme Court of the State was justified by the abandonment of his case by the plaintiff in the writ.

This was a writ of error to review an order of the Supreme Court of the State of Georgia dismissing a writ of error from that court which had been sued out to reverse the conviction of the plaintiff in error for the murder of one Charles Carr.

After defendant had been convicted and sentenced to death by the Superior Court of Bibb County, he made a motion for a new trial which was overruled, whereupon he sued out a writ of error from the Supreme Court of the State, which was assigned for hearing upon the 4th day of March, 1895. The case having been called upon that day, it was made to appear to the court by affidavits that Allen, after his conviction and

sentence, had escaped from jail, and was at that time a fugitive from justice. Upon this showing, the court ordered that the writ of error be dismissed, unless he should within sixty days surrender himself to custody, or should be recaptured within that time, so as to be subject to the jurisdiction of the court, and should furnish evidence thereof by filing the same in the clerk's office.

On May 6 — which was more than sixty days thereafter — the court made a further order, in which, after stating that the plaintiff in error had not surrendered himself to custody, and furnished evidence thereof as required, and that he had not been rearrested since his escape from jail, it was ordered that the writ of error be finally dismissed.

This judgment was, on July 13, 1895, made the judgment of the Superior Court of Bibb County. Afterwards Allen, having been recaptured, was, on the 25th of April, 1896, resentenced to death by the Superior Court, and thereupon made application to one of the justices of this court for a writ of error, which was duly granted — plaintiff assigning as error that the dismissing of his writ of error by the Supreme Court of the State of Georgia was a denial of due process of law.

*Mr. W. C. Glenn* and *Mr. Daniel W. Rountree* for plaintiff in error.

*Mr. J. M. Terrell* and *Mr. John R. Cooper* for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

The plaintiff in error claims that the order of the Supreme Court of the State of Georgia, dismissing his writ of error to the Superior Court of Bibb County, because he had escaped from jail and was a fugitive from justice, was a denial of due process of law within the meaning of the Federal Constitution.

It appeared from the record that, after the writ of error had been finally dismissed on May 6, 1895, Allen was subsequently recaptured and, upon April 25, 1896, was resentenced to death by the court in which he had been convicted. While the

precise question here involved has never before been presented to this court, we have repeatedly held that we would not hear and determine moot cases, or cases in which there was not at the time a *bona fide* controversy pending. In a similar case from the Supreme Court of Nebraska, *Bonahan* v. *Nebraska*, 125 U. S. 692, wherein it appeared that, pending the writ of error from this court, the plaintiff in error had escaped, and was no longer within the control of the court below, it was ordered that the submission of the cause be set aside, and unless the plaintiff were brought within the jurisdiction of the court below on or before the last day of the term, the cause should be thereafter left off the docket until directions to the contrary. A like order under similar circumstances was made in *Smith* v. *United States*, 94 U. S. 97.

In civil cases it has been the universal practice to dismiss the case whenever it became apparent that there was no real dispute remaining between the plaintiff and the defendant, or that the case had been settled or otherwise disposed of by agreement of the parties, and there was no actual controversy pending. *Lord* v. *Veazie*, 8 How. 251; *Gaines* v. *Hennen*, 24 How. 553, 628; *Cleveland* v. *Chamberlain*, 1 Black, 419; *Wood-Paper Co.* v. *Heft*, 8 Wall. 333; *Dakota County* v. *Glidden*, 113 U. S. 222; *Little* v. *Bowers*, 134 U. S. 547; *California* v. *San Pablo &c. Railroad*, 149 U. S. 308.

We know at present of no reason why the same course may not be taken in criminal cases if the laws of the State or the practice of its courts authorize it. To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been

deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.

We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offence; and it seems but a light punishment for such offence to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction. Otherwise he is put in a position of saying to the court: "Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the State, or forever remain in hiding." We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.

The course pursued in this case is approved by the ruling of many courts in different States, and notably in the case of *Commonwealth* v. *Andrews*, 97 Mass. 543, where the defendant escaped during the pendency of his case in the Supreme Court. It was held that, not being present in person, he could not be heard by attorney; that if a new trial were ordered, he was not there to answer further, and that if the exceptions were overruled, a sentence could not be pronounced or executed upon him, p. 544. "So far as the defendant had any right to be heard under the constitution, he must be deemed to have waived it by escaping from custody, and the failing to appear and prosecute his exceptions in person, according to the order of court under which he was committed." In *Sherman* v. *Commonwealth*, 14 Gratt. 677, upon a similar state of facts, the court ordered that the writ of error be dismissed, unless the defendant should appear before a certain day. This judgment was afterwards approved in

*Leftwich* v. *Commonwealth*, 20 Gratt. 716. In the case of *Genet*, 59 N. Y. 80, the defendant escaped, pending the settlement of a bill of exceptions, and the court declining to proceed with the settlement of the proposed bill, the case was carried before the Court of Appeals, and the action of the Court of Oyer and Terminer affirmed. See also *People* v. *Redinger*, 55 California, 290; *Wilson* v. *Commonwealth*, 10 Bush, 526; *Gresham* v. *State*, 1 Texas App. 458; *McGowan* v. *People*, 104 Illinois, 100; *Warwick* v. *State*, 73 Alabama, 486; *State* v. *Conners*, 20 W. Va. 1; *State* v. *Wright*, 32 La. Ann. 1017; *Woodson* v. *State*, 19 Florida, 549; *Sargent* v. *State*, 96 Indiana, 63; *Moore* v. *State*, 44 Texas, 595; *State* v. *Craighead*, 44 La. Ann. 968; *Zardenta* v. *State*, 23 S. W. Rep. 684; *Gatliff* v. *State*, 28 S. W. Rep. 466.

The course pursued in this case has also received the approval of the Supreme Court of the State of Georgia in several prior cases. *Madden* v. *The State*, 70 Georgia, 383; *Osborn* v. *The State*, 70 Georgia, 731; *Gentry* v. *The State*, 91 Georgia, 669.

The constitution of the State of Georgia, Art. 6, Sec. 2, Par. 6, requires the Supreme Court to dispose of every case at the first term, unless prevented by providential causes; and, by section 4271 of the Code, this enactment is repeated, with a further provision that no continuance shall be allowed except for providential cause. Indeed, it is admitted that it would be useless to ask the Supreme Court of the State of Georgia to reinstate this case, or to grant to the plaintiff in error any relief whatever, because under the rules and decisions of that court, and under the statutes of the State of Georgia, as construed by that court, such relief would be denied. Whether the court should give the plaintiff sixty days, or until the last day of the term, to appear and surrender himself to custody, was a matter for the court to determine, and even if there were error in that particular, it would not constitute a denial of due process of law.

The order of the Supreme Court dismissing the writ of error must, therefore, be

*Affirmed.*

# GRAND LODGE F. AND A. MASONS OF LOUISIANA *v.* NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 111. Argued January 19, 1897. — Decided March 15, 1897.

Act No. 225 of the legislature of Louisiana of March 15, 1855, exempting the hall of the Grand Lodge from state and parish taxation, "so long as it is occupied as a Grand Lodge of the F. & A. Masons," did not constitute a contract between the State and the complainant, but was a mere continuing gratuity which the legislature was at liberty to terminate or withdraw at any time.

If such a law be a mere offer of bounty it may be withdrawn at any time, although the recipients may have incurred expense on the faith of the offer.

This was a petition originally filed in the Civil District Court for the parish of Orleans by the Grand Lodge of the F. & A. Masons of the State of Louisiana, to enjoin the city of New Orleans from proceeding to sell, for the taxes of 1888, 1889 and 1890, certain property owned by the petitioner, and claimed to be exempt from taxation.

The petition set forth that the Grand Lodge was incorporated by a perpetual charter, granted by the legislature in 1816; that petitioner was the owner of a lot of ground, with buildings and improvements thereon, at the corner of St. Charles and Perdido streets, known as the hall of the Grand Lodge, etc., which property it had purchased in 1853 by a notarial act, in which was incorporated a resolution of the Grand Lodge, which, in substance, devoted the entire net revenues of such property "to the relief of worthy distressed members of the order, their wives, children and families, and as a permanent charitable fund"; that such resolution was in strict accord with the objects of the institution, of which the Grand Lodge is the superintending body or organization, "the principles of which are charity and universal benevolence," and "to the end thereof, that charitable insti-

tutions may be promoted," the act of incorporation was enacted; that further to promote this object the legislature, by an act (No. 255), approved March 15, 1855, acts of 1855, p. 270, exempted said hall from city and parish taxation, so long as it was occupied by the Grand Lodge of F. & A. Masons, which exemption was claimed to have become a contract between the State and the Grand Lodge so long as the property was owned and occupied by it. The petitioner alleged that the principles and objects of Free Masonry are still unchanged, and that the net revenues arising from the property have not been diverted; that the city now claims that the property is subject to taxation, and threatens to enforce the collection of the taxes.

The answer of the city was simply a general denial.

Upon the trial it appeared that the Grand Lodge was incorporated by act of March 18, 1816, with full power and authority to take, hold and enjoy real and personal property, etc.; that the hall was erected in the year 1845 for a commercial exchange, and was purchased by the Grand Lodge for a hall in 1853; that on March 15, 1855, the general assembly enacted that the building, whose location and name were given in the act, should be exempt from state and parish taxation so long as it was occupied as the Grand Lodge of the F. & A. Masons. It further appeared that the objects proposed by the institution were charity and universal benevolence; that contributions were exacted from each member of the order for the ordinary expenses of the lodge and as a fund for the purposes of charity, to be distributed as occasion required, and that from 1853 to the present time the whole of the revenue, except that used for insurance, repairs and current expenses, has been exclusively devoted to charitable purposes as stated in the charter and act of sale. These revenues averaged over $3000 per year.

It further appeared that in 1879 a new constitution was adopted by the State, of which article 207 was as follows: "The following property shall be exempt from taxation and no other, viz.: All public property, places of religious worship or burial, all charitable institutions; . . . provided, the

property so exempted be not used or leased for purposes of private or corporate profit or income."

Upon the hearing in the District Court, the property was held to be exempt from taxation, and an injunction granted. The city appealed to the Supreme Court, which reversed the decree of the District Court and dissolved the injunction. Upon a rehearing, the decree was amended by recognizing the exemption of that part of the property occupied by the grand and subordinate lodges of Masons, and in other respects the demand was rejected, and the case remanded to the court below with directions to hear evidence and ascertain what property was thus occupied, and what property was rented or used for private or corporate profit or income, and to pass upon and decide the relative values of that part of the property thus occupied by said Masons to that leased or used as aforesaid, that is, "from the assessed value of the property, viz., $60,000, must be deducted the value of the property exempted aforesaid."

The case having been remanded and reheard in the District Court, a new judgment was rendered in favor of the city for the city taxes of 1888, on an assessment of $20,000; of the year 1889, on an assessment of $10,000, and for the year 1890, on an assessment of $6200. The case was then appealed and reheard in the Supreme Court, and the judgment of the District Court affirmed. Whereupon petitioner sued out this writ of error.

*Mr. Charles F. Buck* for plaintiff in error. *Mr. J. Q. A. Fellows* was on his brief.

*Mr. Samuel L. Gilmore* for defendant in error. *Mr. W. R. Sommerville* was on his brief.

*Mr. M. J. Cunningham*, Attorney General of the State of Louisiana, *Mr. F. C. Zacharie* and *Mr. Alexander Porter Morse* filed a brief on behalf of the State.

Mr. Justice Brown delivered the opinion of the court.

The only question in this case is whether the act of 1855, exempting the hall of the Grand Lodge from state and parish taxation, "so long as it is occupied as a Grand Lodge of the F. & A. Masons," constitutes a contract between the State and the complainant, or was a mere continuing gratuity which the legislature was at liberty to terminate or withdraw at any time, and which the State did subsequently withdraw by the adoption of a constitution, which secured the exemption of the property of "all charitable institutions, . . . provided, the property so exempted be not used or leased for the purposes of private or corporate profit or income." It appeared in this case that, during the years in which the assessments complained of were made, a part of the ground floor of the exempted property was rented for stores; that some of the rooms were rented for other like purposes, and that from these sources a large amount of corporate income had been realized, although that income was devoted to charitable purposes.

If the act of 1855 be regarded as a contract within the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, then it is clear that the exemption from taxation was valid, and beyond the power of the legislature to abrogate. *State Bank* v. *Knoop*, 16 How. 369; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Dodge* v. *Woolsey*, 18 How. 331; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *McGee* v. *Mathis*, 4 Wall. 143; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Humphrey* v. *Pegues*, 16 Wall. 244; *Farrington* v. *Tennessee*, 95 U. S. 679; *New Jersey* v. *Yard*, 95 U. S. 104.

To make such a contract, however, there is the same necessity for a consideration that there would be if it were a contract between private parties. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer. Thus, the legislature of the State of Michigan, desiring to encourage the manufacture of salt, which had been recently discovered in the Saginaw Valley, in 1859, offered exemption from taxation and a bounty of ten cents per bushel to all individuals, companies or corporations formed

for the purpose of boring for and manufacturing salt. It was held in the *Salt Company* v. *East Saginaw*, 13 Wall. 373, that, if the salt company plaintiff had been incorporated by a special charter, containing the provision that its property should be exempt from taxation, and that charter had been accepted and acted upon, it would have constituted a contract; but that this was a bounty offered to *all* corporations and individuals who should manufacture salt, and there was no pledge that it should not be repealed at any time; that as long as it remained a law, every individual or corporation was at liberty to avail himself or itself of its advantages, by complying with its terms, and doing the things which it promised to reward; but was also at liberty at any time to abandon such a course; that it was a matter purely voluntary upon both sides — giving to one party the power to abandon the manufacture of salt, and to the other to repeal the exemption from taxation and the bounty of ten cents per bushel. The consequence of a different decision in this case might easily have become disastrous, since the arguments which were urged upon this court at that time would have been equally forceful at any time thereafter, and the State might have found itself bound by a perpetual pledge to pay ten cents upon every bushel of salt thereafter manufactured by the companies, which had embarked in the enterprise under the encouragement of the bounty. A like ruling was made in *Welch* v. *Cook*, 97 U. S. 541, in which an act of the legislature of the District of Columbia, exempting from general taxation for ten years such real and personal property as might be employed within the District for manufacturing purposes, did not create an irrepealable contract with the owners of such property, but merely conferred a bounty, liable at any time to be withdrawn.

Complainant, while admitting the soundness of this proposition, claims that the requisite consideration existed in the deed by which the property was acquired, wherein the Grand Lodge solemnly declared and proclaimed said purchase to be made for the purpose and object of creating a fund for charitable purposes, in the relief of worthy distressed members of

the order, their wives, children and families; and solemnly pledged itself that as soon as the said property should be paid for, the whole of the revenue which might be derived from it, after deducting necessary and unavoidable expenses on its account, should be devoted to those objects.

This consideration, however, was not one upon the faith of which the legislature granted the exemption, since the deed had already been in existence for two years, and the property had been purchased under the resolution of the lodge, adopted January 27, 1853, to the same effect as the above recital in the deed. While subscriptions for the purchase of the property may have been obtained upon the faith of this resolution, it cannot be said to have constituted a consideration for the exemption. The alleged contract for exemption was not contained in the charter — as in other cases where such exemption has been sustained — since the lodge had already pledged its revenues to charitable purposes; and when the act was passed it gave no additional pledge, and promised nothing which it had not already promised, and was bound in honor to perform. If additional subscriptions were obtained upon the faith of the act, the subscribers were bound to take notice of the fact that the legislature was at liberty to repeal the act at any time, or, that the people might, in the exercise of their sovereign power, nullify it by an amendment to the constitution.

In the *Home of the Friendless* v. *Rouse*, 8 Wall. 430, relied upon by the plaintiff in error, the exemption was contained in the original charter of the Home of the Friendless, which purported in its preamble to be granted for the purpose of encouraging the undertaking, and enabling the parties engaged therein more fully and effectually to accomplish their laudable purpose. The exemption was offered not in view of a consideration which had already passed, but for the purpose of inducing the incorporators to accept the charter and to carry out the enterprise.

So in *Asylum* v. *New Orleans*, 105 U. S. 362, the institution was incorporated under an act of the general assembly, which declared that all the property belonging to the institution

should be exempted from all taxation. The question turned upon the exemption of certain property which was devised to it twenty years after it was incorporated, the revenues of which were applied to enable it to carry on its work; but it was held that the contract applied not only to property in existence when the charter was granted, nor only to that which was in existence when the constitution of 1868 was adopted, but to all which might afterwards be acquired in the due fulfilment of the purposes of the institution.

We are of opinion that the act in question in this case was one which the legislature might properly enact as a matter of public policy, and in aid of a beneficent purpose; but that it was a mere gratuity or bounty which it was competent at any time to terminate, and that this was done by Art. 207 of the Constitution of 1879. The case is practically upon all fours with that of *The Rector of Christ Church* v. *Philadelphia*, 24 How. 300, in which the legislature of Pennsylvania enacted that "the real property, including ground rents, *now belonging and payable* to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." Eighteen years thereafter, the legislature enacted that all property belonging to any association, then exempt from taxation, other than that in actual use and occupation of such association, should thereafter be subject to taxation. It was held that this last law was not in violation of the Constitution of the United States; that the former act of 1833 was a mere privilege existing *bene placitum*, and might be revoked at the pleasure of the sovereign. It would seem from this case that the hospital had been incorporated long before the act containing the exemption was passed, as that act recited that the hospital "had for many years afforded an asylum for numerous poor and distressed widows," and that the exemption was granted on account of its means being curtailed by decay of the buildings, and the increased burden of taxation. So in *Tucker* v. *Ferguson*, 22 Wall. 527, and in *West Wisconsin Railway* v. *Board of Supervisors*, 93 U. S. 595, it was held that an act of the legislature exempting property of all railroads

from taxation was not a contract to exempt, unless there were a consideration for the act; that the promise of a gratuity, spontaneously made, may be kept, changed or recalled at pleasure, and that this rule applied to the agreements of States, made without consideration, as well as to those of persons. See also *Newton* v. *Commissioners*, 100 U. S. 548, 561, and *People* v. *Roper*, 35 N. Y. 629, wherein a law, providing that persons who had served seven years in the militia and had been honorably discharged, were entitled to perpetual immunity from taxation to the extent of $500 each, was held to be repealable at any time by the legislature.

The act of 1855, now in question, clearly falls within the latter class of gratuities or bounties, which are subject to the will of the legislature, and may be withdrawn at any time.

The decree of the court below was, therefore, right, and will be

*Affirmed.*

## HENDERSON BRIDGE COMPANY *v.* KENTUCKY.

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

No. 462. Argued December 11, 14, 1896. — Decided March 15, 1897.

The Henderson Bridge Company was a corporation created by the Commonwealth of Kentucky for the purpose of erecting and operating a railroad bridge, with its approaches, over the Ohio River between the city of Henderson, in Kentucky, and the Indiana shore. It owned 9.46 miles of railroad and .65 of a mile of siding, making its railroad connections in Indiana, which property was assessed for taxation in that State, at $627,660. The length of the bridge in the two States, measured by feet, was one third in Indiana and two thirds in Kentucky. The tangible property of the company was assessed in Henderson County, Kentucky, at $649,735.54. From the evidence before them, the Board of Valuation and Assessment placed the value of the company's entire property at $2,900,000, and deducted therefrom $627,660 for the tangible property assessed in Indiana, which left $2,272,340, of which two thirds, or $1,514,893, was held to be the entire value of the property in Kentucky. From this, $649,735.54, the value of the tangible property in Henderson

Counsel for Parties.

County, was deducted, and the remainder, $865,157.46, was fixed by the Board as the value of the company's franchise. From the total value, $1,385,107 was deducted for the tangible and intangible property in Indiana, and the taxes in Kentucky were levied on $1,514,893 of tangible and intangible property in that State. The company paid the tax on the tangible property ($2762.08), and refused to pay the tax on the intangible property ($3675.91). This action was brought to recover it. The Court of Appeals held that the Commonwealth was entitled to recover it. *Held*,

(1) That the company was chartered by the State of Kentucky to build and operate a bridge and the State could properly include the franchises it had granted in the valuation of the company's property for taxation;

(2) That the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business; that business being carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge;

(3) That the fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, was too remote and incidental to make it a tax on the business transacted;

(4) That the acts of Congress conferred no right or franchise on the company to erect the bridge or collect tolls for its use; that they merely regulated the height of bridges over that river and the width of their spans, in order that they might not interfere with its navigation; and that the declaration that such bridges should be regarded as post roads did not interfere with the right of the State to impose taxes;

(5) That the tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals, as consistent with the provisions of the constitution of Kentucky in reference to taxation; and that for the reasons given, and on the authorities cited in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, this court is unable to conclude that the method of taxation prescribed by the statute of Kentucky and followed in making this assessment is in violation of the Constitution of the United States.

THE case is stated in the opinion.

*Mr. James P. Helm* for plaintiff in error. *Mr. Helm Bruce* was on his brief.

*Mr. William J. Hendrick* for defendant in error.

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

This was an action brought by the Commonwealth of Kentucky against the Henderson Bridge Company to recover the sum of $3675.91, taxes levied against that company on an assessment made of its intangible property by the Kentucky Board of Valuation and Assessment for the year 1893.

The Henderson Bridge Company is a corporation created by the Commonwealth of Kentucky for the purpose of erecting and operating a railroad bridge, with its approaches, over the Ohio River between the city of Henderson, in Kentucky, and the Indiana shore.

The record does not show that it was also incorporated under any law of Indiana, but the company alleged that, being incorporated by the laws of Kentucky, it was granted certain powers and privileges under the laws of Indiana; though it was not denied that the company actually constructed and now owned and operated the bridge and approaches under its Kentucky charter. It was, moreover, averred that the company built its bridge under and in accordance with the act of Congress of December 17, 1872, c. 4, 17 Stat. 398, entitled "An act to authorize the construction of bridges across the Ohio River, and to prescribe the dimensions of the same," which provided that any such bridge should be recognized as a post route; and the act supplementary to that act approved February 14, 1883, c. 44, 22 Stat. 414.

It appeared that the bridge company owned 9.46 miles of railroad and .65 of a mile of siding, making its railroad connections in Indiana, which property was assessed for taxation in that State, at $627,660; that the length of the bridge in the two States, measured by feet, was one third in Indiana and two thirds in Kentucky; that the tangible property of the company was assessed in Henderson County, Kentucky, at $649,735.54; that the capital stock of the company was $1,000,000, and that it had issued bonds to the amount of $2,000,000.

From the evidence before them, the Board of Valuation

and Assessment placed the value of the company's entire property at $2,900,000, and deducted therefrom $627,660 for the tangible property assessed in Indiana, which left $2,272,340, of which two thirds, or $1,514,893, was held to be the entire value of the property in Kentucky. From this, $649,735.54, the value of the tangible property in Henderson County, was deducted, and the remainder, $865,157.46, was fixed by the Board as the value of the company's franchise.

The company's stock was worth not less than $90 per share on the market, and the bonds took precedence of the stock. The evidence showed a large amount of assets and the receipt of a large income. From the total value, $1,385,107 was deducted for the tangible and intangible property in Indiana, and the taxes in Kentucky were levied on $1,514,893 of tangible and intangible property in that State.

The tax on the tangible property amounted to $2762.08, and this, as we understand it, was paid by the company. The tax on the intangible property was $3675.91, which the company refused to pay, whereupon this action was brought for its recovery.

The state Circuit Court rendered judgment in favor of the Commonwealth for $595, which was reversed by the Court of Appeals, which held the Commonwealth entitled to recover the full amount. 31 S. W. Rep. 486. The cause having been remanded, and judgment entered accordingly, by the Circuit Court, and affirmed by the Court of Appeals, this writ of error was sued out.

The company was chartered by the State of Kentucky to build and operate a bridge, and the State could properly include the franchises it had granted in the valuation of the company's property for taxation. *Central Pacific Railroad* v. *California*, 162 U. S. 91. The regulation of tolls for transportation over the bridge considered in *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, presented an entirely different question.

Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried

on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431, 439, where it was said: "It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance." The only franchises treated here as the subject of taxation were those granted by the State of Kentucky. So far as the State of Indiana could be said to have conferred any franchise upon the company, it was a franchise that inhered in that portion of the structure that was within the State of Indiana, the value of which was not included in the tax complained of.

The acts of Congress conferred no right or franchise on the company to erect the bridge or collect tolls for its use. They merely regulated the height of bridges over that river and the width of their spans, in order that they might not interfere with its navigation. The declaration that such bridges should be regarded as post roads did not interfere with the right of the State to impose taxes, as was decided in *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S. 692, 700. The contrary view would withdraw from the taxing power of the States nearly all the railroads and stage routes throughout the country.

The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals, as consistent with the provisions of the constitution of Kentucky in reference to taxation.

And for the reasons given, and on the authorities cited in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, we are

unable to conclude that the method of taxation prescribed by the statute of Kentucky and followed in making this assessment is in violation of the Constitution of the United States.

*Judgment affirmed.*

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE HARLAN and MR. JUSTICE BROWN, dissenting.

A fuller statement of the facts than is given in the opinion of the court seems to me necessary in order to make clear the reasons for my dissent.

The plaintiff in error, the Henderson Bridge Company, owns and operates a bridge across the Ohio River from Henderson, Kentucky, to the Indiana shore. This bridge is largely occupied by railroad tracks, used, necessarily, solely for interstate commerce. On the Kentucky side there is an approach, and one also on the Indiana side, consisting of an embankment and a siding about nine miles in length. The corporation was chartered by the State of Kentucky. The general laws of the State of Indiana provide for the recognition of any corporation "created by the laws of another State for constructing a bridge across any river or stream forming in whole or in part the boundary between such other State and this State." It directs also the filing of a copy of the charter in Indiana, and subjects the charter of the corporation to the exercise by the State of Indiana of the power to repeal, alter or amend. The bridge in question was also authorized by act of Congress and was established as a post route. 17 Stat. 398, as amended by 22 Stat. 414. Whether the operation of the Indiana legislation was to make the bridge company an Indiana corporation, need not be considered. It is certain, however, from the facts just stated, that the bridge company possessed, first, a franchise to exist as a corporation from the State of Kentucky, and under this franchise to build and operate the bridge to the Indiana line —that is, two thirds of its length; second, that it also possessed a franchise or right from the State of Indiana, whether

a corporation under the Indiana laws or not, to build and operate the bridge and its approaches in so far as these structures were to be located in that State; third, a franchise or right derived from the United States to operate the bridge for purposes of interstate commerce and as a post route. None of these franchises were incompatible, the one with the other, and all were of such a nature as to be of value to the corporation.

The laws of the State of Kentucky under which the tax in question was levied are set out *in extenso* in the opinion of the court in *Adams Express Co.* v. *Kentucky*, this day decided, *post*, 171, and I therefore content myself with a brief statement thereof. The sections referred to are as numbered and contained in Barbour & Carroll's compilation of the Kentucky statutes in force in 1894.

Section 4019 fixes the rate of taxation and the various purposes for which taxes may be imposed. Section 4020 defines the general subjects of taxation, that is to say, the objects upon which the rate of taxation provided in the previous section are to be levied. This latter section provides that "all real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt," etc.

It is manifest that this section clearly designates the objects of taxation to be as follows: (*a*) all real and personal estate within this State; (*b*) all personal estate of persons residing within the State; (*c*) all the property of corporations organized under the laws of the State, whether such property be in or out of the State, including the intangible property of such corporations, which property, that is, the intangible property, whether situated in or out of the State, shall be considered and estimated in fixing the value of the corporate franchises.

The statutes of Kentucky provide, as a general rule, for the assessment by the local or county officials of all real and per-

sonal property of individuals or corporations in the county where the property is situated or the corporation established. The franchise tax embraced in the last of the foregoing enumerations is not assessed by the local authorities, but by a board of valuation and assessment, composed of the state auditor, treasurer and secretary of State; for it is said in section 4077: "The auditor, treasurer and secretary of State are hereby constituted a board of valuation and assessment, for fixing the value of said *franchises*," and a subsequent sentence makes the state auditor the chairman of the board. Section 4078 compels a return to this board showing the amount of capital stock, preferred and common; the number of shares; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within the next twelve months before the day on which the statement is required to be made; the amount of surplus and undivided profit, the value of all assets, the total amount of principal indebtedness, the amount of gross or net earnings or income, including interest on investments and income from all sources for twelve months; the amount and kind of tangible property in the State, and where situated, "assessed or liable to assessment in the State," and the fair cash value thereof estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require. Section 4079 provides, if the corporation have a line or lines extending beyond the limits of the State, the statement must also show the length of the entire line owned, leased or controlled in the State, and the entire line of the same company elsewhere. If the corporation be organized under the laws of any other State, or under the laws of Kentucky, but conduct its business in Kentucky as well as in other States, the statement is required to show the gross or net income or earnings received in the State and out of the State on business done in the State and the entire gross receipts of the company in the State and elsewhere during twelve months.

From the data thus obliged to be furnished to the board, the act (§ 4079) commands that the assessment of the franchises of the corporation created by the State of Kentucky

shall be made as follows (I quote): "Provided, that said board, from said statement and from such other evidence, as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. *The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.*" The following section (4080) fixes the rule for the ascertainment of the value of the capital stock by which the amount of the tax on franchises is to be arrived at, by making it the duty of the board to "*take the proportion which the gross receipts in this State within twelve months . . . bears to the entire gross receipts of the company*," and declaring that "*the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation . . . for taxation in this State.*"

The bridge company was assessed by the local county officials on the bridge and other tangible property the sum of six hundred and forty-nine thousand seven hundred and thirty-five dollars and fifty-four cents ($649,735.54). The board of valuation assessed the company for the franchise tax, under the laws above stated, in the sum of eight hundred and sixty-five thousand one hundred and fifty-seven dollars and forty-six cents ($865,157.46). The constitutionality of this latter assessment and the tax levied thereupon is the issue involved.

The first question which arises is, Was the tax levied on the franchise of the corporation? In solving this question it will serve only to confuse and delude the reason if the method which has been pursued in argument is now followed, that is, of calling the levy a franchise tax in one breath and then in the next dropping that designation, and not only denominating the tax, but treating it as solely a tax on intangible property.

If the words "intangible property" be synonymous with franchise, there is no reason for shifting the name by which the object taxed is designated. If, on the contrary, intangible property and franchise are two different objects, then to call the tax first by one and then by the other name gives rise not only to inaccuracy, but to misapprehension.

That the tax is on the franchise is to me so obvious, so clear, that I fail to see how there can be doubt or question on the subject. The law under which the tax is levied, in language which nothing can obscure, designates it as a franchise tax and only a franchise tax. Can this be denied? Let the query be answered by briefly considering the law, section by section. Section 4020 says "shall be considered and estimated in fixing the value of the corporate franchises as hereinafter provided." Section 4077, the one which creates the board of valuation, declares "are hereby constituted a board of valuation and assessment, for fixing the value of said franchises." Section 4078 says "in order to determine the value of the franchises mentioned"; section 4079, that the information required of the taxpayer is for "determining the value of the franchises to be taxed." Section 4080 is no less explicit: "Shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State."

But clear as is the statute in its every line, the pleadings of the State, by which this suit was commenced, are, if possible, more so. The declaration, after reciting the levy of the assessment by the board and stating the total amount, adds that it is the sum "which said board of valuation and assessment fixed *as the value of the franchise of said defendant company.*" The language of the statute and the averment of the petition are, moreover, supported by the opinion of the highest court of the State of Kentucky, from which this case comes to this court, wherein it is announced that the tax is on the franchise. I shall quote from the opinion hereafter.

The tax being, then, a tax on franchises, the question is —

First, *Is it exclusively on the franchise to exist as a corporation granted by the laws of Kentucky?* or, second, *Is it also*

*a tax on the franchise enjoyed by the corporation from the United States, and likewise on the one accorded to the corporation by the State of Indiana, and in addition is the tax a burden laid directly by the State upon the interstate commerce business carried on by the corporation?* If it is solely on the first of these objects of taxation, of course it was within the power of the State to assess and levy it. *Central Pacific Railroad* v. *California*, 162 U. S. 91. On the other hand, if the tax is levied on all or either of the subject-matters of taxation embraced in the second enumeration, it violates the Constitution. *California* v. *Pacific Railroad*, 127 U. S. 1, and authorities cited and referred to in the dissenting opinion in *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 229.

The difference between the levy exclusively on the franchise to exist as a corporation granted by a State, and the attempt by such State to tax franchises granted by the United States or another State, or to lay a burden on interstate commerce, is well illustrated in *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. There a tax had been laid by the State of Pennsylvania upon the gross receipts of a domestic corporation of the State under authority of a statute which embraced certain classes of corporations, both foreign and domestic. Answering the argument that the vessels and franchises of the corporation were two kinds of personal property, and that the tax was really upon the franchises of the company, and that each kind of property was taxed without regard to the fact that it was involved in and devoted to the pursuit of interstate and foreign commerce, the court, speaking through Mr. Justice Bradley, said (p. 342):

"The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business — which, in this case, is the business of transportation in carry-

ing on interstate and foreign commerce — it would clearly be unconstitutional."

The issue, then, is: was this franchise tax levied solely upon the franchise granted by the State of Kentucky to exist as a corporation, or was it upon all the franchises of the company and upon all its interstate commerce business? It cannot be that the Kentucky law contemplated that the assessment which it ordained, should be only on the franchise to exist as a corporation derived from that State, since the statute commands that the tax shall be laid upon all corporations doing business in the State, whether or not they hold a franchise to be a corporation from the State of Kentucky. This is shown to be the fact on the very face of the statutes, and this test was made decisive by this court as shown in the foregoing citation from the opinion in *Philadelphia Steamship Co.* v. *Pennsylvania.*

Let me turn to the particular provisions of the statute and ascertain upon what it commands the tax to be levied. Section 4020, in enumerating the objects of taxation which shall be assessed as part of the franchise, provides for all intangible property to be thus included in the franchise, *whether the property be in or out of the State.* Can it be said when the law in mandatory terms directs the inclusion in the franchise to be assessed of property, whether in or out of the State, that it means that only the franchise granted by the State to a corporation to exist as such shall be assessed? Examine the other sections of the law, 4077, 4078, 4079, 4080, and it is apparent that they also provide that the board *shall* consider the entire value of the corporate property, everything that it owns, in ascertaining the value of the franchise, which is the thing to be taxed. Now, when the law says that in taxing the franchise the board shall include therein all the intangible property of the corporation, whether within or without the State, and, moreover, in subsequent provisions imposes on the board the duty not simply of considering all the property in and out of the State, but imperatively says that the assessment of the franchise shall contain all this property, it seems to me that it is impossible with reason to

say that the assessment which the law required was one only on the franchise to exist as a corporation granted by the State, and was not levied on the value of the franchise made up by assessing every right which the corporation possessed, whether in or out of the State, or whether conferred by the United States or the State of Indiana.

That the board by which the assessment was made considered it to be its duty to include every thing in and out of the State and every right possessed by the corporation, is made also clear by the testimony of the state auditor, who was president of the board of valuation. The corporation had a capital stock, the par value of which was one million (1,000,000) dollars; it had besides outstanding bonds to the amount of two million (2,000,000) dollars. The president of the board stated — and his testimony is all there is on the subject in the record — that the total value was fixed, as follows:

| | |
|---|---|
| One million (1,000,000) dollars of capital stock, which was valued at ninety (90) dollars per share | $900,000 00 |
| Two million (2,000,000) dollars of bonds, valued at par | 2,000,000 00 |
| Total | $2,900,000 00 |

As by the statute the value of the taxable franchise was to be ascertained by taking the sum determined to be the worth of the capital stock, as that term was employed in the statute, less the amount of property otherwise taxed, which was to be deducted, it follows that the franchise was embraced in the amount of this total. As the franchise was included in the total, it also results, as the part is contained in the whole, that the elements which entered into and formed a part of the total were, therefore, elements of value entering into and forming part of the taxable franchise.

Now, by what process of calculation does the president of the board declare that the sum of two million nine hundred thousand (2,900,000) dollars was reached? I quote the

| | | |
|---|---|---|
| "They say their gross earnings or income amounted to | | $209,072 21 |
| Income from all other sources | | 8,000 00 |
| "Total | | $217,072 21 |
| Less interest on bonds | $120,000 00 | |
| Less sinking fund | 21,000 00 | |
| | | 141,000 00 |
| "Balance | | $76,072 21 |

"So that you see here the corporation paying $120,000 interest on two millions of bonds, putting $21,000 into a sinking fund, and with a net profit upon the operation of the bridge of $76,071.21, which was over seven per cent on one million of stock."

Thus the president of the board declares that the total sum out of which the taxable value of the franchise was to be ascertained was fixed at nearly two millions of dollars above the par value of the stock of the company, because the gross (not the net) earnings of the company derived from its entire interstate commerce business — its business done in Indiana as well as in Kentucky — were all treated as one. The further result of the testimony is that, because by so considering these gross earnings they established that the company realized a sum which would pay six per cent upon its bonds and seven per cent upon the par of its capital stock, therefore the gross amount, in which the franchise was included, was fixed at two million nine hundred thousand (2,900,000) dollars.

In passing it is worthy of remark that the record contains no explanation of how it could have been found that the gross earnings could have produced the result stated, in view of the fact that none of the operating expenses of the corporation were taken into consideration, and that no allowance was even made for the payment of the sum of the tax which the board proceeded to assess. Can it be said in face of the fact that the assessing officer declares that although in making up the total amount every right possessed by the corporation and all the results of its interstate business were made the basis of

the valuation, yet that the sum so made up embraced only the mere right of the corporation to exist as such, granted by Kentucky, and did not include the rights enjoyed by the corporation under the law of the United States and the law of Indiana, and also all its gross interstate commerce earnings?

But the testimony of the president of the board as to the method of calculation by which the ultimate taxable value of the franchise was fixed at eight hundred and sixty-five thousand one hundred and fifty-seven dollars and forty-six cents ($865,157.46) is an additional demonstration that the sum of all the gross earnings from interstate commerce, and indeed everything that the corporation earned, was included in this amount. How was this taxable value of the franchise fixed?

| | | |
|---|---|---|
| The total valuation was | | $2,900,000 00 |
| There was deducted the following assessment on the nine miles of railroad in Indiana | $627,660 00 | |
| Actual value of bridge estimated in Kentucky | 649,735 54 | |
| Actual value of bridge estimated in Indiana | 757,447 00 | |
| Total | | 2,034,842 54 |
| Balance | | $865,157 46 |

That is to say, the president of the board testifies that after having used the whole gross earnings of the company, from interstate commerce, from business done in Indiana under the franchise held by that State, and also under that held by the United States, in order thereby to swell the original amount, yet when the deductions came to be made nothing was subtracted in consequence of having included in the original amount the results of the United States franchise, those of the Indiana franchise, and those arising from the entire interstate commerce business of the corporation. As it is, in my opinion, a demonstration that these things were included in the gross amount, and as it is also a demonstration that none

of them were deducted, it follows that the taxable value of the franchise was almost wholly made up of these items. It cannot, I submit, be said that where a thing is included to make up an amount and is not subsequently deducted therefrom, it does not continue to be a part of the amount into which it originally entered. The statement of the president of the assessing board is the only testimony on the subject contained in the record. In view of the fact that he unquestionably establishes that the assessment was really on the gross receipts, I submit it leaves no room whatever for conjecture or presumption that the assessment must have been levied upon some other object of taxation.

This court has held repeatedly that a State cannot tax the gross earnings of a corporation, even though created by it, derived from interstate commerce, as the levy of such tax would be a burden on that commerce, and therefore an interference with the exclusive power of Congress over that subject. It being beyond dispute, therefore, that the sum of taxation in this case was fixed almost exclusively by the gross earnings from interstate commerce, who, may I ask, can point out the distinction between taxing the gross earnings derived from interstate commerce and taxing a valuation based on such earnings? The elementary principle so often applied by the court, that a tax which may not be imposed directly cannot be levied indirectly, is decisive. Indeed, even the application of that familiar rule is unnecessary, since the method pursued in this case is an exact and literal equivalent of a tax levied directly upon the gross earnings from interstate commerce itself.

The language of the Court of Appeals of Kentucky, whose judgment is now here for review, leaves no doubt as to how it understood the case and what it interpreted the tax to be. The opinion, in referring to the use of the words "capital stock" as a measure or instrument for the purposes of the valuation of the franchise, says (31 S. W. Rep. 491): "By this term 'capital stock' the legislature meant to include the entire property, real and personal, tangible and intangible, assets on hand, and its franchises as well; and that, when so embraced

and construed and valued as an entirety," the net balance obtained by deducting the tangible property already assessed would constitute the "value of the franchise to be taxed under section 4077." And, again, in another portion of the opinion, after reviewing the figures showing the value of the "property and the franchises of the company" (mark the use of the plural), the court said (p. 491): "So that the large earning capacity of this property, based on its tangible value only, authorizes us to assume that it lies in its franchise, which is the right to charge tolls on every locomotive, freight and passenger car, ton of freight, and passenger that passes over its road." Also (on p. 492), the court quotes from section 929 of Morawetz on Corporations, among other remarks of the author, the following: "On the other hand, franchises clearly have a value if the word 'value' is used to signify the advantage derived from their possession; or, in other words, their utility. The value of a franchise, using the word 'value' in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession." The Kentucky court adds: "Thus, the value of the franchise in this case aptly illustrates the meaning of the author."

When the opinion of the court of last resort of the State, as announced in this very case, asserts that the tax is, beyond doubt, a levy upon all the property of the company in and out of the State, *that it is a tax upon the value of the exercise of the privilege of using the bridge, of charging for the running of locomotives across the bridge, and of doing the business of interstate commerce in any form*, I cannot bring my mind to the conclusion that the tax is only levied on the mere franchise to exist as a corporation conferred by the State of Kentucky.

It was doubtless the construction given by the Kentucky court to the statute which has caused the opinion of this court now announced to maintain the proposition that the traffic over the bridge which crosses the river between Kentucky and Indiana, and over which, in the nature of things, there can be, I think, nothing but interstate commerce, is not such commerce. Serious as I conceive to be the violation of the

Constitution which results from recognizing the right of a State to tax gross earnings derived from interstate commerce, the premise upon which the court thus rests its opinion, to my mind, is a yet more evident violation of the Constitution, and is more pregnant with dangerous results to our institutions.

I consider it a new and startling doctrine to say that a bridge which is situated in two States, with the sanction of the laws of both, which has been made a post route by act of Congress, is not an instrument of interstate commerce, and that the traffic which goes over such bridge is not such commerce, and that the receipts derived from or charges resulting from such business are not receipts derived from interstate commerce business. Pushed to its legitimate conclusion, this premise deprives the interstate commerce clause of the Constitution of its entire efficacy, and is, I think, in direct conflict with the Constitution as interpreted by this court from the foundation of the government. I need go no further to demonstrate this than to refer to the recent decision of this court in *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, where the validity of an act of the legislature of Kentucky regulating the rate of tolls to be charged for traffic over a bridge between Covington, Kentucky, and Cincinnati, Ohio, was considered. In the course of the opinion this court, speaking through Mr. Justice Brown, said (p. 217):

"This case involves the right of one State to fix charges for the transportation of persons and property over a bridge connecting it with another State, without the assent of Congress or such other State, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce."

Both these questions were answered in the affirmative on the authority of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, and *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557. These cases were held to be directly in point. The first denied the right of the State to impose a tax upon the franchise of a ferry company operating between the States of Pennsylvania and New Jersey, while the second

denied to the State of Illinois the power of regulating the rates of railway charges between Illinois and New York. Where, may I ask, can the line of distinction be drawn between the *Covington Bridge case* and this? The bridge in the former case was one between Kentucky and Ohio over the Ohio River, the bridge here is over the same river between Kentucky and Indiana. Certainly, it cannot be said that there is something peculiar to the State of Indiana which causes the bridge between that State and Kentucky not to be an instrument of interstate commerce, and the traffic over it not to be interstate commerce, when the contrary is the case as to a bridge between Kentucky and Ohio.

The contention that although the traffic over the bridge may be interstate commerce and the receipts from said traffic be interstate commerce receipts, yet the tolls paid to the bridge company are not receipts from interstate commerce business transacted by the bridge company, is a mere distinction without a difference. What, may I again ask, is the toll paid to the company for the use of the bridge but the result of a contract entered into for the purpose of carrying on interstate commerce? In the *Covington Bridge case* the sole question was as to the right of the State of Kentucky to regulate the amount of tolls to be received by the bridge company. The right of the State was denied on the ground that the tolls were a matter of interstate commerce, that is, that the business of operating the bridge and charging for the use thereof was interstate commerce and not subject to state control. In that case then, the tolls were adjudged to be receipts from interstate commerce; in the case at bar, they are declared not so to be. The far-reaching consequence of this asserted distinction is well calculated to arouse solicitude for the future. A large portion of the interstate commerce business of the country is carried on by freight lines. These lines arrange with the railways for transportation, pay them a charge or toll, and upon this basis afford the public increased business facilities. Under the supposed distinction all this interstate commerce traffic ceases to be such, and the whole of the gross receipts become taxable in every State through which the

business passes. The freight lines do not transport the merchandise; the railways do; therefore the receipts of the freight lines as to such lines are not interstate commerce receipts. This illustration is but one of the many which at once suggest themselves. All the express business, the sleeping car business, the tank lines, and manifold other forms of interstate commerce, will be stricken down if the rule now applied to the tolls of an interstate bridge be enforced as to other means of interstate commerce.

Where, also, I submit, does a distinction exist between this case and the case of the ferry between Pennsylvania and New Jersey, considered in the *Gloucester Ferry case*, or the attempt of the State of Illinois to regulate freight charges between that State and New York, embraced in the *Wabash case*, *supra?* Manifestly, there is an irreconcilable conflict between the decision in this case and the rulings of the court in the cases just cited. It follows that in order to maintain the tax in the case at bar the decisions referred to must be and are, as I conceive, substantially overruled by the opinion now announced.

Nor can I see the slightest relevancy to the issues in this cause of the decision in *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431. In that case, the court considered a statute of Pennsylvania which authorized the imposition of a tax upon the gross receipts of companies for tolls and transportation derived from railroads, etc., *situated within the State.* The Erie company held and operated several branch lines *lying wholly within the State of Pennsylvania*, and permitted other railroad companies to use such branch lines or portions thereof, and the taxes there in question were laid upon the tolls so received by the Erie company from its lessees. Such receipts, of course, were merely the income derived from property lying wholly within the State of Pennsylvania.

Obviously, the mere fact that corporations who practically rented property wholly in Pennsylvania and paid rent charges thereon, did business outside of the State, could not exempt the landlord (the Erie company) from paying taxes on the rentals so received from its tenants for property wholly in

Pennsylvania. Is there any ground for contending here that the Henderson bridge is wholly in Kentucky, when the fact is that it is both in Kentucky and Indiana, and that no business can be done over it which is not necessarily business done in both States and between both States? That there was no intention in the *Erie case* to question the settled doctrine as to the want of power in a State to tax interstate commerce, or the gross receipts derived therefrom, is conclusively shown by the express language of the opinion, where it was declared (p. 437) that it was needless to review the previous decisions of this court, holding that a tax laid upon gross receipts derived from interstate commerce put a burden upon commerce among the States and was void, because the proposition the decisions were quoted to sustain was regarded as thoroughly established. So, likewise, at page 438, an extract was made from the decision in *Postal Telegraph Company* v. *Charleston*, 153 U. S. 692, 695, and the doctrine there declared was approved, to wit, that a tax, by whatever name imposed, was valid where the amount of the tax was made dependent in fact on the value of the property of the taxpayer situated within the jurisdiction of the State imposing the tax.

How can it in reason be said that a case which proceeded solely upon the ground that the rentals which were taxed were the fruits of property which lay wholly within the State of Pennsylvania is authority supporting the proposition now maintained that the State of Kentucky has the right to tax the gross receipts derived from business not done wholly within the State, but consisting of tolls and charges derived from the operation of a bridge situated between that State and the State of Indiana, and which tolls and charges this court has recently declared in the *Covington Bridge case*, *supra*, constitute receipts from interstate commerce business?

I am authorized to state that Mr. Justice Field, Mr. Justice Harlan and Mr. Justice Brown concur in this dissent.

Syllabus.

# ADAMS EXPRESS COMPANY *v.* KENTUCKY.[1]

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

No. 586. Argued December 11, 14, 1896. — Decided March 15, 1897.

Section 4077 of the compilation of the Kentucky statutes of 1894 provides that each of the enumerated companies or corporations; "every other like company, corporation or association"; and also "every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised"; and in the succeeding sections the words "franchise," "franchises" and "corporate franchise" are used. *Held* that, taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080 and 4081, it was evident that the word "franchise" was not employed in a technical sense, and that the legislative intention was plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the State, that their intangible property should be assessed on the basis of the mileage of their lines within and without the State; but that from the valuation on the mileage basis the value of all tangible property should be deducted before the taxation was applied.

So far as the commerce clause and the Fourteenth Amendment of the Federal Constitution are concerned, this scheme of taxation is not in contravention thereof, as already determined in *Adams Express Company* v. *Ohio State Auditor*, 165 U. S. 194, and cases cited.

Considered as a property tax, it is in harmony with the provisions of the constitution of the Commonwealth of Kentucky.

Section 174 of the constitution of Kentucky does not prevent intangible property from being taxed, and the tax mentioned in section 4077 is not an additional tax upon the same property, but upon intangible property which has not been taxed as tangible property.

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[1] The docket title of this case is Levi C. Weir, President of the Adams Express Company, Appellant *v.* L. C. Norman, Auditor of Public Accounts for the Commonwealth of Kentucky.

Statement of the Case.

Neither section 172 of the Kentucky constitution, nor any other section, confines the levy of an *ad valorem* tax to tangible property.

The statute, as construed by the Court of Appeals of the State of Kentucky, cannot be overthrown for failure to conform to the requirements of sections 171, 172 and 174 of the state constitution.

This was a bill filed in the Circuit Court of the United States for the District of Kentucky on behalf of the Adams Express Company to enjoin the collection and certification of taxes against it for the year 1895 under an act of Kentucky of November 11, 1892, entitled "An act relating to revenue and taxation," carried forward as chapter 108 of the compilation of the Kentucky statutes of 1894, page 1291. The case comes to this court on appeal from a decree of the Circuit Court sustaining a demurrer and dismissing the bill as amended. The decree proceeded on the grounds stated by Judge Barr in the opinion of the court in *Western Union Telegraph Co.* v. *Norman*, 77 Fed. Rep. 13.

The bill charged the statute of Kentucky, under which the tax complained of was levied, to be in contravention of the Constitution of the United States, and also of sections 171, 172 and 174 of the constitution of Kentucky. Similar averments to those considered in *Adams Express Company* v. *Ohio State Auditor*, 165 U. S. 194, appear in this bill, and need not be repeated at length. It is stated that the Adams Express Company had no property in the State of Kentucky in the year 1895, except certain horses, wagons, harness, trucks, safes, office fixtures and other appliances, located at different points in the State, and that all of said property, including the moneys and credits of the company within the State, were duly returned and assessed for state, county, municipal and other purposes; that the said cash value of the same was $36,614.53, and that the taxes thereon were duly paid; and that the tax complained of is an assessment for state, county, municipal and other purposes on the further sum of $1,463,040.

Sections 171, 172, 174 and 181 of the constitution are as follows:

"§ 171. The general assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to

Statement of the Case.

defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"§ 172. All property, not exempted from taxation by this constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

"§ 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises."

"§ 181. The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities, and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

Sections 190 to 208 refer to corporations, the latter section reading: "The word 'corporation' as used in this constitution shall embrace joint stock companies and associations."

Chapter 108 of the compilation of 1894 is divided into articles as well as sections, and may be referred to by way of con-

venience. There are some slight differences from the act of 1892 not material to be noted. The first article contains the general provisions relating to the assessment and collection of taxes "upon all property."

Sections 4019 and 4020 are as follows:

"§ 4019. An annual tax of forty-two and one half cents upon each one hundred dollars of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes: Fifteen (15) cents for the ordinary expenses of the government; five (5) cents for the use of the Sinking Fund; twenty-two (22) cents for the support of the common schools, and one half of one cent for the Agricultural and Mechanical College, as now provided by law, by an act entitled 'An act for the benefit of the Agricultural and Mechanical College,' approved April twenty-ninth, one thousand eight hundred and eighty, including the necessary travelling expenses of all pupils of the State entitled to free tuition in said college, and who continue students for the period of ten months, unless unavoidably prevented.

"§ 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Article two relates to the assessment of property by the assessors, to whom every person in the Commonwealth must give in a list of all his property under oath.

Section 4058 provides for schedules with interrogatories to be propounded to each person, "with affidavit thereto attached, to be signed and sworn to by the person whose property is assessed." The schedules contain a long list of

items, including all forms of tangible and intangible, real, personal and mixed property; the enumeration being exceedingly minute. The first eleven items relate to bonds; notes secured by mortgage; other notes; accounts; cash on hand; cash on deposit in bank; cash on deposit with other corporations; cash on deposit with individuals; all other credits or money at interest; stock in joint stock companies or associations; stock in foreign corporations.

The third article covers the assessment of corporations; corporations generally; banks and trust companies; building and loan associations; turnpikes.

Sections 4077, 4078, 4079, 4080, 4081, 4082 and 4091 are as follows:

"§ 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchises may be exercised. The auditor, treasurer and secretary of State are hereby constituted a board of valuation and assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section four thousand and ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed

on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require.

"§ 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually, between the fifteenth day of September and the first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.: the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

"§ 4079. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in

each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence, as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

"§ 4080. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the

tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

"§ 4081. If the corporation organized under the laws of this State or of some other State or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through, or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town or taxing district.

"§ 4082. Whenever any person or association of persons not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation."

"§ 4091. All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the auditor; and every such corporation, company

or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction."

The fourth article relates to the assessment and payment of taxes by railroads; the fifth to distilled spirits; the sixth, seventh, eighth and ninth articles to the board of supervisors and the collection of taxes and the revenue.

Articles 10 to 12 relate to license taxes, special taxes, privilege taxes and the like; and articles 13, 14 and 15 prescribe certain duties for designated officers touching the collection of the revenue. Article 15 provides for a state board of equalization to equalize the assessments returned to them from each county.

*Mr. Lawrence Maxwell, Jr.*, for appellant. *Mr. Clarence A. Seward*, *Mr. James C. Carter* and *Mr. Frank H. Platt* were on the brief.

*Mr. William J. Hendrick* for appellee.

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

Section 4077 of the compilation of the Kentucky statutes of 1894 provides that each of the enumerated companies or corporations; "every other like company, corporation or association"; and also "every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its fran-

chise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised"; and in the succeeding sections the words "franchise," "franchises" and "corporate franchise" are used. But taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080 and 4081, we agree with the Circuit Court that it is evident that the word "franchise" was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the State, that their intangible property should be assessed on the basis of the mileage of their lines within and without the State.

But from the valuation on the mileage basis the value of all tangible property is deducted before the taxation is applied.

So far as the commerce clause and the Fourteenth Amendment of the Federal Constitution are concerned, this scheme of taxation is not in contravention thereof, as already determined in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, and cases cited.

And considered as a property tax, as in our opinion the prescribed exaction must be held to be, we regard it as in harmony with the provisions of the constitution of the Commonwealth of Kentucky. The property, tangible and intangible, owned by corporations is subjected to like taxation, and so is the tangible and intangible property of individuals associated together in companies, and while the provisions of sections 4077 and 4078 do not apply to all individual taxpayers, yet reference to section 4020 and the schedule which must be returned by each taxpayer, as required by section 4058, demonstrates that individual taxpayers are also subjected to taxation on all their intangible property, whatever that may be, as well as on all their tangible property. As pointed out by

the Circuit Court, the mode of the assessment of the intangible property of companies, corporations and associations mentioned in section 4077 and that of individual taxpayers is different, and the intangible property of such corporations, companies and associations may in some respects differ from the intangible property belonging to individual taxpayers, but there is nothing in the statute which exempts any intangible property owned by any corporation, company or individual taxpayer from taxation, or discriminates between them.

Section 174 of the constitution of Kentucky provides that "all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises."

But this does not prevent intangible property from being taxed, and the tax mentioned in section 4077 is not an additional tax upon the same property, but on intangible property which has not been taxed as tangible property.

We concur with the views of the Circuit Court that neither section 172 of the constitution nor any other section confines "the levy of an *ad valorem* tax to tangible property; but, as decided by the Kentucky Court of Appeals in *Levi* v. *Louisville*, 30 S. W. Rep. 973, it does require the levy of an *ad valorem* tax upon personal property as well as upon real estate, and this case decides that a license tax which is not a property tax cannot be substituted for an *ad valorem* tax upon personal property engaged in certain commercial pursuits in the city of Louisville. It does not decide that section 171 of the constitution, which declares that taxation shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, applies to taxation based upon income, license or franchise. If there is any intimation upon the subject in this case, it is that taxation which is based upon income, license or franchise may be classified by the legislature; and as to licenses, they may be levied upon some

employments and occupations and not upon others. If, however, we are correct in our construction of the Kentucky statutes, there is no ground for contending that there is a want of uniformity in the levy of the taxes against the defendant, even though section 171, requiring uniformity of taxation upon all property subject to taxation, applies to taxation based upon income, license or franchise, and is given its broadest possible construction."

The act received consideration in *Henderson Bridge Co.* v. *Commonwealth*, 31 S. W. Rep. 486, and the Court of Appeals of Kentucky, speaking through Grace, J., said:

"Thus we see what a varied meaning this term 'capital stock' may have. So that it becomes necessary to examine and see what was the object and meaning of the legislature when using this term in the clause before quoted from section 4079 of our statutes. In this examination it becomes important to notice those clauses of the constitution in reference to revenue and taxation, and see what was contemplated and enjoined by that instrument in reference to taxation. Section 172 provides: 'That all property not exempt from taxation, by this constitution, shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.' . . . Section 174 provides: 'That all property, whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation, based on income, licenses or franchises.'

"Thus it is manifest that what the constitution intended to be taxed was property, — all property; and, as to corporations, not only all tangible property, but that it intended to leave the legislature of the State free to tax the franchises of corporations if it so desired; that the property of a corporation should be taxed as the property of an individual. It will be observed that in these several sections quoted, 'capital stock,' 'stock' and 'shares of stock' are not mentioned as being appropriate terms to designate the subjects of taxation, but

it says 'property,' 'all property,' etc., so that there might be no confusion as to what that instrument intended. Neither is there any reason to suspect that the legislature did not understand the language and meaning of the constitution when it came to frame the revenue laws of the State under it now under consideration. Neither is there reason to suspect that it did not intend and endeavor in good faith to carry into effect the intent and meaning of the constitution. So that we may safely interpret all words and phrases (of doubtful and uncertain meaning) in accordance with and so as to effectuate and carry out that intent."

The statute thus construed cannot be overthrown for failure to conform to the requirements of sections 171, 172 and 174 of the state constitution.

*Decree affirmed.*

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE HARLAN and MR. JUSTICE BROWN, dissenting.

In its ultimate analysis the legal principles by which this case should, in our opinion, be controlled are those which were by us deemed decisive in *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 229. It follows that the reasons for our dissent stated in that case are pertinent to this, and we reiterate them as expressing the grounds for our dissent from the conclusions reached by the court in this case. The facts here, however, so pointedly exemplify the force of the reasons for our dissent in that case that we briefly state them. The actual value of all the tangible property owned by the express company in Kentucky was $36,614.53. This property was assessed by the local authorities for that amount and the taxes duly paid. In addition, the value of the franchise was assessed at $1,463,040, a disproportion enormously in excess of the amount imposed by the State of Ohio, great as was that disproportion. The operation of the tax is additionally illustrated by a further fact. The tax imposed in Ohio and held to be valid in *Adams Express Co.* v. *Ohio*, considered with reference to the routes

travelled by the agents of the express company, was at the rate of $250 per mile, whilst in this case the tax levied is at the rate of $764 per mile.

Although the fundamental legal principles which, in our opinion, should have controlled *Adams Express Co.* v. *Ohio* are the same in this case, there are yet material differences between the Kentucky and the Ohio statutes, which we think should take this case out of the ruling in the former case, even conceding that case to have been correctly decided. The tax here levied is a franchise tax. This is fully demonstrated by the dissenting opinion in *Henderson Bridge Co.* v. *Kentucky*, this day decided, *ante*, 155. The levy here sought to be sustained, then, is a franchise tax, assessed on a joint stock company which has no franchise, for the bill alleges that the express company is a partnership and the demurrer concedes it. Under this state of law and fact, therefore, the effect of holding the tax now in question valid, is to decide that a franchise can be taxed, when there is no franchise on which to levy the tax. This can only be escaped by contending that the right of the express company to do interstate commerce business in Kentucky, resulted from the assent of the State, and therefore the doing of such business was equivalent to accepting a franchise from the State. But to announce this proposition would overthrow the settled rule so necessary for the perpetuity of our institutions and the free intercourse between the States, that the right to transact interstate commerce business by a person or corporation is protected by the Constitution of the United States, and does not depend upon the mere grace of one of the States of the Union.

In addition to the clear distinctions, already noted, between *Adams Express Co.* v. *Ohio* and this case, there are others resulting from the difference between the Ohio and the Kentucky statutes. The Ohio statute considered in *Adams Express Co.* v. *Ohio* purported only to tax the tangible property within the State, but empowered the assessing board to consider its value as augmented by the use to which such property might be put. In other words, the Ohio law, as construed by the Supreme Court of the State, taxed only tangible property

within the State enhanced in value by intangible elements outside the State. We considered, in dissenting in the Ohio case, that this was a mere disguise, a distinction without a difference, but the court held otherwise. In this case, by the law in question, the mask is thrown off, and what we conceive to be logically the thin disguise under which the courts of Ohio supported its statute is not asserted to exist, but the Kentucky statute, in unambiguous and unmistakable language, imposes the imperative duty upon the assessing board to assess property both in and out of the State. That is to say, it leaves nothing to implication or to evasion, but declares in plain English that property in and out of the State shall be assessed.

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## ADAMS EXPRESS COMPANY *v.* OHIO STATE AUDITOR.

PETITION FOR REHEARING OF NO. 337 REPORTED 165 U. S. 194; AND NOS. 469, 470 AND 471, REPORTED 165 U. S. 255.

Received March 1, 1897. — Decided March 15, 1897.

The members of the court who concurred in the above named judgments, add a few observations to what has been already said.

It is well settled that no State can interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce; and also that such restriction upon the power of a State does not in the least degree abridge its right to tax at their full value all the instrumentalities used for such commerce.

The state statutes imposing taxes upon express companies which form the subject of these suits grant no privilege of doing an express business, and contemplate only the assessment and levy of taxes upon the properties of the respective companies situated within the respective States.

In the complex civilization of to-day a large portion of the wealth of a community consists of intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing such intangible property at its real value.

Whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not unfrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property.

Petition for Rehearing.

Whatever property is worth for the purposes of income and sale, it is worth for the purposes of taxation; and if the State comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value, and taxable.

The capital stock of a corporation and the shares in a joint stock company represent not only its tangible property, but also its intangible property, including therein all corporate franchises and all contracts, privileges and good will of the concern; and when, as in the case of the express company, the tangible property of the corporation is scattered through different States by means of which its business is transacted in each, the situs of this intangible property is not simply where its home office is, but is distributed wherever its tangible property is located and its work is done.

No fine spun theories about situs should interfere to enable these large corporations, whose business is of necessity carried on through many States, from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires.

This was an application for leave to file a petition for a rehearing of the several cases decided February 1, 1897, under the title of *Adams Express Company* v. *Ohio State Auditor*, and reported 165 U. S. 194; and of *American Express Company* v. *Indiana*, *Adams Express Company* v. *Indiana*, and *United States Express Company* v. *Indiana*, decided February 1, 1897, and reported 165 U. S. 255. The petition was as follows:

To the Supreme Court of the United States:

Your petitioners, the appellants in the above entitled causes, respectfully pray for an order directing a reargument of the said causes upon the following grounds:

*First.* — The total insufficiency of the argument offered by the counsel for the appellants, due to a failure on their part to anticipate the grounds which have really led to the decision of the court.

*Second.* — The extreme importance and far reaching effect of the decision which has been announced, as bearing upon some of the most fundamental principles of constitutional law.

*Third.* — Its momentous practical importance as affecting existing interests, making it wholly impossible for the appellants to continue the express business of the country under the system of taxation sanctioned by the decision, in view of

the natural tendencies of the different States to compel contributions from that business; tendencies against which the law affords the most meagre, if any, protection.

*Fourth.* — The entire novelty of the questions discussed and of the points necessarily determined by the judgment.

*Fifth.* — The fact that under the circumstances such failure on the part of counsel is not without reasonable excuse.

*Sixth.* — That the appellants believe and are so advised by their counsel, that a further consideration of the cases and a consideration of reasons which have not heretofore, in consequence of the failure aforesaid, been stated, will lead this honorable court to a decision in favor of the appellants.

*Seventh.* — We beg finally to suggest that upon the question whether the Nichols law denies the appellants the equal protection of the laws, this court has erroneously assumed that the taxing laws of Ohio classify property of different sorts for purposes of valuation.

And your petitioners respectfully ask for an attentive consideration of the paper annexed hereto, in which an attempt is made to more fully state and to support the grounds above mentioned, with such brevity, however, as the nature of this petition and the rule of the court requires, and they further pray that the above entitled cases be set down for reargument before the court upon some day by it to be appointed.

And as in duty bound will ever pray.

JAMES C. CARTER,
LAWRENCE MAXWELL, JR.,
Counsel for Appellants.

We certify that, in our opinion, the foregoing petition for rehearing is well founded.

JAMES C. CARTER,
LAWRENCE MAXWELL, JR.,
Counsel for Appellants.

GROUNDS UPON WHICH THE REARGUMENT IS ASKED.

*First.* The total insufficiency of the argument heretofore offered by counsel for the appellants due to a failure on their

part to anticipate, in any adequate degree, the grounds which have really led to the decision of the court.

It is important in the first place that the precise substance and effect of the decision should be stated.

A review of the decisions of this court prior to the argument of the present cases and referred to in the opinion of the court just pronounced as being, in point of authority, the foundation of the decision is appended hereto in an appendix.

From this review it is believed that the following is a fair and just statement of the propositions actually determined by those decisions.

1. They rightly assume two principles as incontrovertible; first, that, so far as concerns the taxation of *property*, a State cannot tax, as against non-residents, any property except such as has an *actual situs* within its limits; second, that no State can tax or burden in any form the business of interstate commerce.

2. That where a State *assumes* only to tax property *actually situated within its limits*, it does not violate either of the above principles if, in ascertaining the value, it adopts *the ordinary method* of assessment; or, where the ordinary method is not practicable, some other fair and reasonable method.

3. That in the case of railroad and telegraph companies, the ordinary method is not applicable, and the method of taking into view the value of the *whole*, in order to ascertain the value of the part, is fair and reasonable, at least so far as to justify an apportionment of value according to *mileage*.

The step now taken by the present decision is to evolve a new general proposition, not declared or distinctly discussed in any of the prior cases, that where there is what is called a *unity of use* between several pieces of property not united together by any physical tie, some of the pieces situated within and some without the State, the value of the parts within may be determined by the value of the whole, even though the part within is *physically separable, and is, as separated, an ordinary thing, having an ordinary market value based upon its capability of similar uses in a multitude of different businesses*, differing in nothing, so far as the

ascertainment of value is concerned, from the thousand other classes of chattels which form the usual subjects of taxation.

No precise explanation is given of just what this *unity of use*, which involves such momentous consequences, may be; but it is held that the property of express companies is of that character.

This doctrine of the effect upon taxation of a *unity of use* was not discussed in the prior cases, and was not touched by appellants' counsel in the argument of these cases. The excuse for this omission will hereafter be given. But the argument which they thought abundantly sufficient to defeat the assessments consisted in pointing out that the property taxed was, both physically, and in respect of ownership, *capable of separation without altering its identity, or any of its properties, or its value, as ordinarily understood*, and would remain, after separation, an ordinary subject of taxation, and that to tax it as it was taxed under the Ohio law, was *in effect* to tax property outside of the State, and also the business of interstate commerce. This argument, which seems not to be disputed, must be regarded as rendering the validity of the taxation, at least, doubtful. The weighty dissent fairly entitles it to be so considered.

The additional arguments and illustrations which they might have adduced, but did not, are as follows:

1. The *unity* which makes the property so taxable is said in the opinion of the court to be dependent, not upon *physical connection*, or unity of ownership, but to be sufficiently constituted by unity of *use*.

But suppose the Adams Express Company should, in Ohio, *hire* all its horses, wagons, etc., as it easily might without materially affecting its business, and for the ordinary rates. The same *unity of use* would continue. Would the *owner* (the horses, wagons, etc., being worth $42,065) be properly assessed for taxation at $533,095.80, although he had no interest in the express business? If not, is there really any *unity of use* which justifies these assessments?

2. Again let it be supposed that the company *reduces* the amount of its horses, wagons, etc., to one half, not by hiring

from others, but by *substituting human carriers*, which it easily might do without substantially affecting its receipts. This would not alter the proportions of mileage, or gross receipts, and therefore, although the amount of the property *purporting to be valued* were reduced one half, the *valuation would be the same.* And, supposing it hired all its horses, wagons, etc., *except one horse and wagon*, owning no other personal property than that, the valuation would still be unaffected.

3. If, however, it should hire *all* and own no personal property whatever, it would then be wholly relieved, for the assessors would be left without a subject for assessment: That is to say we have a scheme of assessing the value of the personal property owned by express companies in Ohio wholly unaffected by the amount which is owned.

4. Perhaps it may be suggested that the assessment would, in the case of hiring by the express companies, stand as an assessment not of the *property* but of its *use.* But under this law, certainly, nothing can be assessed except the value of the *property*, and that against its *owner.* Let it be supposed, however, that this were otherwise, or that the law were changed so as to tax the *use.* Would the *owners* of the horses and wagons still be justly taxable on them, and on what amount? Or, would this property be exempt from further taxation? There would seem to be no just reason for not taxing it against the real owner, and on the full value; and in that case we would have a horse assessed at its true value, $150 to the *owner*, and at about $4000 to the *user.*

5. And yet, in the case last mentioned, consistent reasoning requires that the owner should be exempt, for if the plant really be united it is *inseparable*, and if it remains *in* the unity for purposes of taxation, it cannot at the same time be out of it for the same purpose.

It may, indeed, be suggested that the case would be one, after all, only of double taxation, and that this, however flagitious, is not a subject of criticism in a Federal court. But we beg to refer to the opinion of Mr. Justice Brewer, in *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439, repeatedly approved, and so recently as in the case of *Western*

*Union Tel. Co.* v. *Taggart*, 163 U. S. 1, that it is only *fair, reasonable, ordinary, necessary* taxation which is, in such cases, a defence against the charge of violating both the fundamental principles above referred to, which principles are committed to the care of the Supreme Court.

6. But what shall be said of the pretence by Ohio that the different parts of the plant are an *inseparable unity* when she herself asserts that they are *not*, and, *in this same law*, actually separates them for the purpose of taxation? If all the property of the company composes, as is said, this united inseparable plant, then, certainly, the real estate in Ohio is part of it and an inseparable part; but that State finds no difficulty in separating it, and imposes on the company an entirely separate assessment of $58,000 and upwards, on this account.

The real estate of the companies in Ohio is there assessed like that of other owners. The law requires *this assessed value* to be included in the return made by the companies to the board of assessors, and *adopts* it and taxes it accordingly and separately. It thus assumes and declares that the value of *this* property, although as much a part of the unity as any other, does *not* depend for its value, as it plainly does not, upon the use to which it is put, but upon the same elements which determine the value of all other lands and buildings in the State.

7. The principal idea which underlies the opinion of the court and is made to defend these extraordinary assessments is that the value of property is dependent upon the *use* to which it is put. We earnestly request the court to reconsider this proposition. It is an expression which has several times been employed to support the doctrine declared in the railroad and telegraph cases, and in the sense there intended is entirely just. In cases where the ordinary and nearly universal methods of ascertaining value cannot be employed, where the thing to be valued has no market value, where it cannot be *indefinitely produced*, where there is no *supply and demand*, there is a necessity of resorting to other considerations, and the *productiveness* of the property, in other words, the value of the *use* of it, is a *natural, ordinary* and *proper*

inquiry; for if the thing were to be sold just as it is, that would be the inquiry of the intending purchaser. But this method is the creature of necessity, and should be carefully limited to that necessity. Can it be thought for a moment that this proposition should be made general and the value of property generally be held to be determined by the *use* to which it is put, and not at all by the fact that it is a common subject of sale in the market, and has a distinct and certain market value? What would be said of a system of taxation of ordinary property wholly within a State, which should direct or permit an assessing board to displace the ordinary tests of value, namely, what the things are bought and sold for, and inquire, in each instance, into the profits which the owners made who use them, and then impute those profits to the particular thing, making houses and lands, horses and cattle, and all other chattels bear every variety of value? Such a system would be in violation of fundamental notions of right, and would make fairness and equality in taxation impossible. It would not be taxation, but arbitrary exaction. And yet this would be justified if the proposition under notice were sound.

If this is not sound as a *general* proposition, is it sound in any cases, and why is it sound in them? It is sound in cases *where there is no better method*, and sound because necessary.

We have referred to the opinion of the court in *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439, drawn up by Mr. Justice Brewer, as laying down the true reason (necessity) for the assessment of part of a railroad lying within a State, by a reference to the value of the whole. In that opinion there are, indeed, expressions to the effect that the value of all property is determined by its use, as if this were true as a broad and general proposition (p. 445); but did Mr. Justice Brewer really mean this? Did he mean that this was the ordinary test? Did he mean that where the common judgment of men, based upon all the elements of value, the *uses* to which the property may be put, *supply and demand*, etc., had established a value (for this is what is *ordinarily* meant by value) that judgment could be *disregarded*, and an assessing

board be permitted to establish another value based on *use* alone, or did he mean that in those cases where common judgment had never had occasion to fix a value, and never had done it, and where, consequently, a value so fixed was not available, an assessing board was *obliged* to have recourse to the original elements of value and make up, as best it could, a judgment? We have only to recur to the other parts of the opinion to see that the latter meaning was all that he intended.

8. What then is the precise error, as we humbly conceive it to be, in the decision? It finds that in the railroad and telegraph cases there was declared to be property actually situated within the State and therefore taxable there. The problem, as declared by the court, was to ascertain its *cash* value. There was no market value. The subject of taxation was not one capable of indefinite production, and not subject to the operation of supply and demand. To separate it from the use to which it was put would be to destroy it, and it would have no value, except as a ruin, for its materials. But yet it *had* a cash value which a purchaser would give for it, and this *in the purchaser's mind* would depend on the *use* to which it was put. Now in *those cases* the use to which the thing was put was in inseparable unison with other things, together constituting a whole, as much as a dwelling house which happened to rest on both sides of a state line, and the value of the whole was the material thing to be determined.

What the prior decisions establish is that where the value of a thing proper to be taxed cannot be ascertained by ordinary methods, its *use* may be referred to, and where its use *is* in inseparable combination with a whole of which it forms a part, the value of the whole may be referred to. What the court now apparently construes that decision to be, is that wherever the *use* of a thing in one State is in combination with other things outside of the State as a whole, its value for taxation may be determined by a reference to the value of the whole, *notwithstanding* that there is no difficulty in physical separation or in separation of ownership, and notwithstanding that the part within the State has the same full and perfect value *after* separation which it possessed before

combination. As to railroads and telegraphs, the parts within one State cannot be sold, delivered and taken away by a purchaser without destroying the value. Let it be imagined that this could be done, and that the price were easily ascertainable, can it be thought that the method of assessment adopted in respect to them would have been sanctioned? It was the impossibility of this which was the ground and the sole ground of the decisions.

9. There is manifest from the face of the opinion an impression on the part of the court that there is equity and justice in the methods sanctioned, and that the express companies are seeking to avoid just contributions. This is most unfortunate. It should not be assumed where the question is alone as to the constitutionality of methods, for the records cannot contain the facts upon which such an assumption can either be justified or repelled. The opinion contains this statement: "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 produce $275,446 in a single year; or $28,438 worth $350,519? The answer is obvious." It is not intended, we assume, by this language to impute to the appellants an assertion of the fact implied by those interrogatories. They mean that in the opinion of the court the horses, wagons, etc., sought to be taxed, are the real sources from which the large sums mentioned are derived; or that they may be justly so regarded for the purpose of taxation. But ought not this to be reconsidered and retracted? *Some* agency in producing these sums (for they are *gross* receipts) will, of course, be allowed to the physical labor of a large number of people, mere laborers, who must be paid out of the receipts; something more to the skill and superior talents of principals and subordinates who could earn, in various callings, large salaries, and some of them very large, and who must also be paid out of the receipts; something more to an accumulated fund derived from past profits which furnishes the public with an assurance of responsibility; something more to those habits of patronage, commonly called good will; and a great deal to the

services performed by the railroad companies, for it is a matter of common knowledge that the express companies are required to pay nearly one half of their gross receipts to the railroad companies for transportation. If fair and just minded men should deliberately estimate in the best possible manner the proportion to be awarded to each of these sources, would the amount properly to be ascribed to these horses, wagons, etc., be one particle more than is represented by their actual value as set forth in the returns? Certainly there is nothing perceived in these records which enables the court to say that there is, and the appellants assert most confidently that there is not.

There is evidently an impression that the contracts which express companies have with the railroads are sources of large profits. If this were the fact it is not perceived how it would affect the value of horses and wagons used by the companies; but the impression is erroneous. Railroad companies are as exacting as other persons in the compensation they demand for their facilities, and just as exacting towards express companies as towards others.

But why is it that all these receipts are imputed to the horses and other personal property? If one piece of property can be *selected*, and the entire receipts be imputed to that, why cannot another piece be as well taken? Why cannot the real estate in Ohio be taken and the personal property be dropped, just as well as to take the personal and leave out of view the real estate? The real estate in the case of both the Adams and the American Company is of more than twice the value of its personalty, and yet that is not supposed, in the opinion, to contribute anything to the receipts.

10. It is said in the opinion that the appellants' returns of their property "did not take into account contracts for transportation and accompanying facilities." We are not advised whether the court means to suggest that such contracts constitute property which is subject to taxation by the States in which the railroads are situated.

(*a*) We submit in the first place that the statutes do not undertake to assess the railroad contracts of express companies

as property. They do not require the express companies to return such contracts to the assessing board or direct the board to estimate their value. The Supreme Court of Indiana has so construed the statute of that State (Indiana Record, 59), and its construction is binding upon this court.

There is nothing in the opinion of the Supreme Court of Ohio to indicate that it regards the railroad contracts of the express companies as *property* to be taxed under the Nichols law. On the contrary in *Adams Express Co.* v. *State*, 44 N. E. Rep. 506, 508, they say:

"What is known as the 'Nichols law,' held constitutional in *State* v. *Jones*, 51 Ohio St. 492, imposes a tax upon *property only*, and does not impose any tax for the privilege of exercising a franchise in this State."

(*b*) We submit that the express companies' railroad contracts are not *property*. They do not create in the express companies any interest or estate in the railroads. They simply reduce to writing, for the purposes of convenience and certainty, the details of the service to be rendered by the railroads and the compensation to be paid therefor. The only property involved is the railroad, which belongs not to the express companies but to the railroad company, and which is taxed as such against the railroad company, and that too upon the basis of its value as affected by its earnings from express companies and other patrons.

The railroad facilities are no doubt valuable to the express companies; indeed, they are as essential to the conduct of the express business as they are to the conduct of business generally. But that does not make them *property*.

In *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1, the Supreme Court of Ohio held that the franchise of a bank was not *property* subject to taxation under the constitution of Ohio. The court, speaking by Bartley, C. J., said:

"Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function of making and circulating paper money, is valuable — indeed, a thing of great value.

But value is not the distinguishing attribute of property. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; a license to keep a tavern, as formerly granted in this State, or a license to carry on any special business, which is prohibited without a special grant of authority from the Government, may be valuable; and a right to either of these things may be asserted and maintained in a court of justice, yet neither of them possess the essential qualities which constitute property. Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the Government, may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject-matter of private property, are such as the owner may exercise exclusive dominion over, in the use, enjoyment and disposal of them, without any control or diminution, save only by the laws of the land. 1 Wend. Bla. 138. It is a fundamental principle, that 'property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them.' Rutherford's Institutes; 20 Puffendorf, chap. 9, b. 7.

"It is said that capability of alienation or disposal, either by sale, devise or abandonment, is an essential incident to property." 2 Kent Com. 317, 3 Ohio St. 7, 8.

In *Ex parte Gilchrist*, 17 Q. B. D. 521, it was held that a power of appointment under a deed or will is not the "property" of the donee. Fry, L. J., said:

"No two ideas can well be more distinct the one from the other than those of 'property' and 'power.' This is a 'power' and nothing but a 'power.' A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is

immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property,' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognizes are they 'property.' In one sense, no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of the word as used in law. Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition."

(*c*) It has been said several times in opinions delivered in this court that it is not within the power of a State to levy a tax against a person engaged in interstate commerce for the privilege of constructing or using an instrumentality of interstate commerce. *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439, 445, 446. In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 696, Mr. Chief Justice Fuller said:

"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."

The express companies must use the railroads. For convenience they must reduce to writing the terms under which the railroads perform services for them. But the States can hardly be permitted to tax express companies for the privilege of employing railroads to render service in interstate commerce; or tax as property contracts which create in the express companies no interest or estate in property. But it is not necessary to enlarge upon this point, for the reason that, according to the decision itself, the contract can only be reached as being an inseparable part of the *whole plant* of the company, of which the horses, wagons, etc., are another

inseparable part. If the notion of a *unity* falls, there can of course be no ground upon which the contracts can be made to add anything to the value of the property assessed in Ohio. Account might just as well be taken of any other part of the property of the company as of the contracts referred to. If the notion of unity is not maintainable, it follows necessarily, that any attempt to add to the valuation of the horses and wagons by a reference to anything except the intrinsic value of those articles themselves, must fail.

11. It must certainly be admitted that a *part* of an assumed unity cannot be valued by a reference to the value of the whole as determined by its productive use, unless the *whole* could be properly so assessed. It must therefore follow that a State in taxing properties wholly within its limits may properly tax things *united in use* as a whole, by reference to the supposed productiveness of the whole. Would it be endurable to tax *farms*, *cattle*, *hay*, *tools* and all as a *unit*, by a reference to productiveness, instead of by the ordinary method? And is an express company more of a unit than ordinary farms?

12. Mr. Justice Brewer declared, in the opinion so often referred to by us, that if a taxable thing were situated within the limits of a State and *had a cash value*, the fact that such value was in part derived from the circumstance that it was an instrumentality of interstate commerce was immaterial; and he might with equal truth have added that if its value were, in part, derived from its use in inseparable connection with other property actually situated outside of the State, that circumstance would be immaterial. In both instances it is the value only of property actually situated within the State which is taxed.

But let it be supposed that there are multitudes of the *same things*, situated in the *same State*, all equally *capable* of being used as the *same instrumentalities*, and all having an *ascertained ordinary value*, can an assessing board disregard *this* value and recur to the original elements which are supposed to make value, or to *one* of them, namely, *use*, and declare *another* value, twenty, or a hundred times greater? If it can,

we are out of the domain of law, and without a defence against injustice and oppression.

The main defence against unlimited oppression in the name of taxation lies wholly in the *rule* which limits assessors to *ordinary* value. Even with that rule much oppression is possible, for in many instances just men do not agree as to the value when the ordinary rule is applied. But when the rule is discarded there is scarcely a limit to the possible abuse. It must be laid aside in *some* instances; but necessity alone should be held sufficient to justify it.

13. True, indeed, *use* is one of the elements which give property its value; for, unless a thing is *useful*, it has no value; but it is not the *actual use*, but the *capabilities of use* which constitute the effectual element. The value of horses in Ohio, aside from the effect of supply and demand, comes from the fact that they are capable of use for many different purposes. If they were capable of use for but one purpose, the demand would be infinitely smaller and the value less. The value of horses in Ohio is affected, therefore, by their capability of use in the express business, and every horse in Ohio is equally capable of this use, and their market value is based, in part, on that fact. Are the horses actually employed in this use any more *capable* of it than others?

The part situated in Ohio of a long line of railroad is *capable of no other use*, and there are no other *like* pieces of property situated in that State and capable of being applied to a multitude of other uses, which can be substituted in place of the piece actually used. If the case were otherwise such pieces of railroad would have a market value in Ohio. In that case could such market value be set aside and the roundabout and complicated method of ascertaining the value of the whole line, involving, in effect, taxation of property situated outside of the State, and burdening interstate commerce, be substituted in order to reach another and an artificial value?

*If the only use of horses, wagons, etc., in Ohio was in the express business, and they had no other value except that dependent upon such use, then the authority of the railroad cases*

*might more justly be invoked, and the rules there sanctioned applied.*

14. If we were to put the doctrine of the Ohio scheme in its scientific form, it would be as follows:

"It is true that the Ohio law authorizes the assessment only of the horses, wagons, etc., of the express companies; yet it *identifies* these by an *intellectual fiction* with an indivisible part of what is imagined by another intellectual fiction as the 'profit-producing plant' of the express companies; and, therefore, the value of that indivisible part is properly ascertained by reference to the value of the whole."

But we beg the attention of the court to the maxim that *intellectual fictions* are to be resorted to only for the purposes of *justice*, *convenience*, *certainty* and *order* in the law. Here they are resorted to (we must not say for the *intentional* purpose), but, certainly, with the necessary effect of bringing about the very opposite results, which is substantially the same thing.

And we beg further to say that if the State of Ohio is authorized, for the purposes of taxation, to *identify* by an intellectual conception the horses, wagons, etc., with an indivisible part of an *imagined thing*, it must be for the reason that such indivisible part of an imagined thing might *itself* have been *directly* subjected to taxation. Can this be possible?

But in the case of railroads and telegraphs no intellectual fictions are employed. The parts in one State are *real* indivisible parts of *real* wholes.

15. The rules approved in the railroad and telegraph cases are based upon *necessity*. The decision in these cases takes a rule founded on necessity and follows it and extends it, as a new point of departure, just as if it were founded on *principle*, and applies it where no necessity exists.

We respectfully ask the court to consider the certain error which results from such a method. A rule adopted from necessity is, *confessedly*, susceptible of no other defence, and therefore *wrong*. If it were defensible upon other grounds, it would be put upon such grounds, and necessity would not be resorted to. Hence, rules founded on necessity are *never to*

*be extended.* If other cases of necessity arise, that necessity will dictate its own rules.

Let us illustrate: The electric power works, in which many millions have been invested at Niagara Falls, may largely furnish their power by wires through Canada and Pennsylvania. Those States will have the right to tax the property situated in their respective limits. There will be no *market* or *ordinary* value to it. Consequently, the value must be ascertained by reference to other things. The rule of *mileage* will plainly not be applicable, nor that of gross receipts. Necessity will force the adoption of the best practicable method.

16. The sleeping car case stands upon necessity, but of a very different sort from that of the railroad and telegraph cases. The difficulty was occasioned by the circumstance that the cars were constantly moving from State to State; they had a physical *situs* in one as much as in another; but the whole could not be said to have a situs in any one. Some method of ascertaining the number and value of the cars in Pennsylvania was necessary. The method adopted was assailed on the ground that capital stock was not taxable. This objection was not good, for capital stock was held not to be taxed, but the cars only. If the method had been attacked on the true grounds it would have been perceived that there was a better way. The method adopted was thought to be effectual to determine the average number and value of cars used in Pennsylvania, and this seems not to have been contested by the Pullman Company. The better way would have been that suggested by Mr. Justice Matthews in *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 123, cited and approved by the court in the *Pullman cases*, to wit, to ascertain and appraise the average number of cars habitually used in the State.

If the horses, wagons, etc., of the express companies, were constantly on the move from one State to another, the decision in the *Pullman case* would have defended, not indeed the methods actually adopted in the express cases, but some method which would answer the necessities thus presented.

17. Taxation is administrative business, and the system must be workable; but the method sanctioned by the decision is wholly unworkable. It is wholly repugnant to all other parts of our systems of taxation, and would compel a revolution in them; and the oppression and injustice which would follow would be unendurable.

(*a*) What is to be the effect on the ordinary methods of assessment in the various States? If various pieces of property used in connection in different States are to be taxed as part of a unity in some of the States, it must be in all, and the separate value of the parts be disregarded, and real and personal be alike included in the unity. The practice now universal of taxing persons and corporations in the State of domicil for all personal and real estate except such as is physically situated elsewhere must be abandoned in the case of things *united in use.*

(*b*) Each State is the judge of the size of the part over which it has jurisdiction, and when the separate parts are ascertained they may (they certainly will) amount to twice, or thrice the whole, and, very probably, even more.

(*c*) Against this injustice and oppression the law affords no defence. There is no common tribunal which can determine the value of the whole and of the separate parts.

If an appeal be taken to this court, the answer will be "We cannot review determinations of fact," and yet the whole mischief lies in determinations of fact.

In one State the proportion will be reached by a comparison of *mileage;* in another by a comparison of *gross receipts.* Upon what principle can this court declare that one is wrong and the other right?

(*d*) An avalanche of litigation impossible to be dealt with will be the result. The victims will of course resort to this court before submitting to absolute ruin. The exactions they will show will shock the sense, and yet no fraud can be proved, and no rule invoked by which the exactions can be reduced to just sums. And the necessities for relief will, as they always do, subject just and established rules to a strain under which they will break down.

(*e*) It is taxation without representation, with all its evils. The citizens of Ohio can compel each other to establish justice and equality as between themselves. But what means have the citizens of New York to resort to, to compel justice at the hands of the citizens of Ohio?

*Second.* The extreme importance and far-reaching effect of the decision which has been announced as a determination upon some of the most fundamental principles of constitutional law.

1. The Ohio method of taxation, once sustained by this court, will be followed in every State in which the express companies carry on their operations, even in the State of domicil, and as to such companies, at least, two practices, one or the other of which have heretofore been universally adopted, can no longer be followed, at least without the inevitable consequence of double taxation. These practices are (1) that of taxing corporations in the State of their domicil upon the value of their capital stock, excepting therefrom the value of tangible property actually situated in another jurisdiction; (2) that of taxing corporations in the State of their domicil, upon the value of their property in that State without reference to capital stock, and assuming that all intangible property has its situs for the purpose of taxation within such State. We say that these practices must be abandoned or double taxation will be the result. This is an understatement. Treble or quadruple taxation will be the more probable consequence. And there will be no way of preventing this, for the assessments in the several States (and there may be forty) will be entirely independent of each other, with no common supervising authority to correct their errors or reconcile their inconsistencies, and there will be an irresistible temptation in each State to compel the citizens of other States to pay as large a share as possible of their own expenditures.

2. It seems also to follow that States favorably situated in respect to interstate commerce, like New Jersey, Pennsylvania, Ohio and Indiana, will be easily enabled by an application of this method to compel enormous contributions from the citizens of other States for the natural facilities which passage

through their territories affords; contributions, to which, in an international point of view, no objection can be made, but a surrender of which it was one of the prime objects of the Constitution to compel in consideration of other advantages afforded by union, and which power those States certainly did surrender upon coming into the Union.

3. These consequences cannot be limited to the case of the express companies, but must be applied in all instances where companies, or even individuals, carry on business operations in different States, and whose property can be justly said to be blended together by what is called in the decision "a unity of use."

4. The framers of the Constitution intended to create what would be, in substance, one country; at the same time they could not dispense with the existence of sovereign States. And as a substitute for the ordinary remedies, as between sovereign States, of war and retaliation (resorts no longer admissible) they provided the following safeguards: (1) First and foremost, the fundamental principle that the property of the citizen of one State could not be taxed by another unless it had an actual situs within the latter. (2) By making it impossible that any State impose any burden, by way of taxation or otherwise, upon any of the instrumentalities of interstate commerce. (3) By declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." These provisions, however, would be of comparatively little value if their interpretation and enforcement were allowed to rest with the States themselves; and therefore, another provision was added, namely: (4) a power to transfer, in certain cases, judicial proceedings in the States to the courts of the United States, and in other cases to subject the decisions of the former to review by the latter. These latter safeguards, quite efficient in many cases, would be substantially powerless in relation to the matter of taxation. Proceedings to assess property cannot be transferred, and indirect review is effective only when distinct principles of law are violated, whereas, in the determination of the value of property, opinion and discretion are the effective elements and

the exercise of these by the state officers, cannot be effectually supervised, checked or restrained. If an attempt is made to tax the property of a non-resident not having an actual situs in the State, the safeguard is entirely effectual. If the ordinary rules limiting assessment to value, as value is ordinarily understood, are applied, a protection is secured equal to that which a citizen has in cases of the assessment of his property in his own State. If these rules of valuation are allowed to be disregarded or superseded by another as to which there is no safeguard, a citizen of one State has no defence against the exactions which may be imposed upon him by another. These United States will cease, in many of the most important respects, to be *one country*, but will become *independent nations*. And this, too, without the protection which independent nations have against each other in the mutual dread of retaliation of war.

*Third.* The immediate practical importance of the decision in its direct effect upon the express companies.

In the deliberate judgment of those companies the stroke is a crushing one. They are left at the mercy of the mere caprice of assessing boards all over the country; for this system of taxation establishes no standard or criterion by which the amount of the assessment can be tested or restrained. It may be a half million, as in Ohio, or a million and a half, as in Kentucky. This year it is a half a million in Ohio, but she is not likely to be content with less than Kentucky, and next year Ohio may make it two millions, and the courts will be powerless to afford relief.

The express companies concede that it is not unjust, in view of the small amount of property which they use in their business, as compared with the police protection which they receive, to lay a tax upon them, in addition to a property tax. Many States, including Ohio, levy such additional tax. Where it is laid by a reasonably definite rule, such as percentage upon gross receipts from state business, the companies have the protection of law; but the evils of a system, such as the Nichols law, which sets up no standard that can be tested by any rule, are intolerable.

Petition for Rehearing.

1. That every State will resort to this new device, now that it has been pronounced legal, must of course be regarded as certain. A proper view of their own interests would require them to do so. The complaints of the citizens in each State at the burdens of taxation imposed upon them, growing louder and louder every year as that burden increases, will compel all assessing officers to impose as much of the burden as possible upon those whose complaints they can afford to disregard. What limit, indeed, can be placed upon the extent to which the people of a State will compel foreigners to bear the burden of their expenditures, if they have neither war nor judicial interference to apprehend?

The device of Ohio was immediately imitated by Indiana and Kentucky even before its validity was tested. That other States did not follow it is imputable only to the circumstance that they believed this court would promptly condemn it. But immediately upon announcement of this decision the legislative machinery has been started; and while these words are being written intelligence has come that bills for similar schemes have been introduced into the legislatures of more than one State.

*Fourth.* The novelty of the questions discussed, and of the points necessarily determined by the judgment.

Upon this point no observations are needed. It is believed that no one will say that such a method of taxation has ever heretofore been practised in any civilized country, in respect to property having a market value and distinctly separable without affecting that value from the business with which it is connected.

*Fifth.* The fact that under the circumstances such failure on the part of counsel is not without reasonable excuse.

The insufficiency of the argument of the appellants was twofold: first, in not embracing a review of authorities which it now appears by the opinion of the court are deemed decisive of the question; second, in not subjecting the theory of a *unity of use* to a thorough scrutiny, showing the grave objections to it.

The excuse for the omission of a review of the prior

decisions is this: The cases of railroad and telegraph companies are, it will be agreed, to say the least, very different from that of express companies. They are assimilated to it in the opinion of the court on the ground that the property of the latter constitutes a united profit-producing plant, an idea which, it will be admitted, has never before been entertained by this court. The extreme differences between the case of express companies and the class of companies above mentioned would alone have justified a hesitancy on the part of counsel in bringing into the discussion the decisions in the latter class of cases as being too remote. But, more than this, this court had in substance declared them inapplicable. It had said, in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 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"; that express companies were "entirely dissimilar in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like owning a large amount of tangible and other property subject to taxation under other and different laws and upon other and different principles," and that "in the nature of things, and irrespective of the definitive legislation in question, they belong to different classes."

The opinion of the court disposes of *Pacific Express Co.* v. *Seibert* by saying that Mr. Justice Lamar's reference was "to the legislation of the State of Missouri, and the scheme of taxation under consideration here was not involved in any manner." But the objection there made to that legislation (which imposed a tax on the gross receipts of the express company) was that the statute violated the Fourteenth Amendment in denying to express companies the equal protection of the laws, because it did not impose a similar tax upon other persons, such as railroad companies, engaged in similar occupations. The answer of this court to that contention was, in the "language of Mr. Justice Lamar, that express companies were *entirely dissimilar* as regards the purposes and policy

of taxation from railroad companies," and that "in the *nature of things*, and irrespective of the *definitive legislation of Missouri*, they belonged to *different* classes"; and because they belonged to different classes, the court held that the statute of Missouri, which imposed a tax upon them, that was not laid on railroads, was not in contravention of the provision of the Federal Constitution, which vouchsafes the equal protection of the laws.

It is now, however, declared by the court that the prior decisions of the court in the railroad, telegraph and sleeping car company cases do decide, in principle at least, the very point raised in the present cases, and this opinion is reached without the benefit to the appellants in the present case of a close review of those decisions for the purpose of showing that such is not the fact.

As to the omission to scrutinize the foundation of the theory of a *unity of use* as a basis of taxation, the reason is the same. It had never been stated, in terms, by this court. In the *Gloucester Ferry case* it had been urged by the attorney general of Pennsylvania under the plea of a "homogeneous unit," 114 U. S. 196, 201, and repudiated by the court. The railroad, telegraph and sleeping car decisions had made no allusion to it. These were put on other grounds stated in the review hereto annexed. The notion is the invention of the Supreme Court of Ohio. How could counsel think it necessary to discuss such a theory when it had been so plainly intimated by this court that express companies, at least, could not be dealt with in such a way?

*Sixth.* The denial of the equal protection of the laws.

If property generally in the State of Ohio were assessed for taxation on the basis of the Nichols law, the express companies would have no substantial ground of complaint, because, in that event, the property of all other owners would be valued for taxation on the same basis as that of express companies, and while the amount of all assessments would be tremendously increased, the rate would be proportionately reduced, and the proportion of taxes paid by the express companies would not be increased. The practical injustice of the Nichols

law lies in the fact that the property of express companies is valued for taxation according to the principles of that law, while all other property in the State is valued without reference to the earnings of the owner or the profitableness of the use to which he puts his property. Merchants, manufacturers, banks, brokers, newspapers, gas companies, street railway companies, indeed all persons and corporations engaged in business in the State, except the companies covered by the Nichols law, are taxed without the slightest reference to the profits of their business. The market value of the shares of a bank, for instance, may be greatly in excess of the value of the bank's assets, owing to good will and a large deposit account, but its shares are assessed upon the simple basis of the cash value of the assets of the bank, after deducting its liabilities. The market value of the shares of a newspaper company may, on account of heavy circulation, largely exceed the value of the assets of the company, but it is taxed only upon the ordinary cash value of its printing presses and other appliances. In assessing a merchant or manufacturer for taxation, no inquiry is made as to the profitableness of his business, or if the business is conducted by a corporation, as to the par or market value of its shares. The assessment is laid upon the ordinary cash value of the tangible assets of the business.

All owners are not assessed by the same assessing officer or board, but the *basis of valuation* is the same, and absolutely without exception, except under the Nichols law. It was for the purpose of pointing out this unjust discrimination of the Nichols law that we printed in our Exhibit Book all of the statutes of Ohio governing the taxation of personal property.

We respectfully submit that the court has mistaken those statutes in assuming in the language of the opinion that "the policy pursued in Ohio is to classify property for taxation," and that "property of different sorts is classified under various statutory provisions for the purpose of assessment and taxation." There is not and never has been, in the State of Ohio, any classification affecting the *method* or *basis valuation* of

property for taxation except that introduced by the Nichols law.

The case of *Wagoner* v. *Loomis*, 37 Ohio St. 571, cited by the court in support of its statement, involved the taxation of shares of a national bank; but it will be seen by referring to the opinion in that case, or to the statute providing for the assessment of such shares, that they are estimated for purposes of taxation, not at their par or market price, but by taking the ordinary cash value of the bank's assets and dividing the sum by the number of shares.

We have never meant to dispute the rule so often announced, and reaffirmed in the opinion, that the Fourteenth Amendment does not prevent a just classification of property for taxation. What we complain of is the adoption of a method of *valuation* which applies to those covered by the Nichols law and to no other owners, with the effect of increasing the assessments against express companies twenty-fold.

A motion for a reargument does not require, and the pressure under which it is made does not permit elaboration. The above suggestions are but a part of those which may properly be urged; but they are the principal ones. Are they not enough to justify the indulgence of a further full opportunity to complete them by weaving them into a connected argument such as the court has not yet heard, designed to show that the scheme of taxation framed under these recent laws is not consistent with the Constitution of the United States?

Respectfully submitted,

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REVIEW OF SOME OF THE AUTHORITIES RELIED UPON IN THE OPINION OF THE COURT.

*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18.

In this case the taxes challenged were levied under statutes of Pennsylvania, imposing, in form, taxes on the capital stock of corporations incorporated by the laws of Pennsylvania or

of any other State and doing business in Pennsylvania, to be computed on a certain percentage of dividends made and declared. It was *treated* as being not a tax on capital stock, but on property. The tax was made to depend partly upon the value of the capital stock, and partly on the amount of dividends, and the tax would, therefore, be dependent in part upon the value of the capital stock as ascertained in the manner provided by the act. So far as appears from the case the only questions to be determined were those stated by Mr. Justice Gray at the opening of his opinion, which was that of the court. "Upon this writ of error whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business." We understand by this that the plaintiff in error took two grounds: First, that the taxation of such railroad cars at all, when in actual use, was a burden upon interstate commerce, and therefore void. Second, that if such cars were subject to taxation at all they could be taxed only where the corporation had its domicil, which was in Illinois.

The point involved in our express cases is, whether in assessing the value of the personal property of an express company, which has confessedly an ascertainable market value, such market value can be totally disregarded and superseded by reference to another criterion which has no relation whatever to value, as that term is commonly understood, and especially by reference to the value of a right to prosecute interstate commerce.

How these points can be supposed to have been determined by the discussion and determination of the questions above stated, as arising in the case of the Pullman Car Company against Pennsylvania, is not easy to see. Upon perusing the opinion in that case, it will be perceived that it begins by an

emphatic statement and maintenance of the rule that property is not subject to taxation by a State unless it has an actual situs therein. It was manifest that the sleeping cars had an actual situs outside of the place of domicil of the company owning them, and therefore that they were justly taxable outside of that State. The puzzle was that they had this actual situs as much in one of several other States as another. Each might put in a claim that a situs was within its own territory exclusively. Such exceptional cases of course justify a resort to exceptional methods. The real problem was to ascertain how much of this sleeping car property was fairly to be treated as having a situs in Pennsylvania. The actual method which was sanctioned was not subjected to discussion. What was insisted upon by the company was that *no* method was allowable. If the horses, wagons, etc., used by the express companies in Ohio had been, in point of fact, used in a similar manner in half a dozen different States, the decision in the sleeping car case would have justified the adoption of some equitable method of ascertaining to how many of them a situs in Ohio should be assigned. Upon the other point, as to whether taxing these sleeping cars was imposing a burden upon interstate commerce, there is nothing certainly opposed to our contention. We have never asserted, in the remotest degree, that the horses, wagons, harness, etc., of the express companies in Ohio are in any way relieved from taxation because employed in interstate commerce.

If the sleeping cars, the taxation of which was the subject of dispute in this case, had been entirely confined in their operation and use to the State of Pennsylvania, and had been proved to be of the value of $10,000, and had, by a reference to the capital stock of the Pullman Car Company and the proportion of its lines within the State to that outside of it, been assessed at the value of $200,000 each, and the question had arisen as to the validity of such an assessment, a decision sustaining the assessment would have been authority in this case. The appellants' counsel cannot help thinking that if such had been the question, the taxation sustained in that case would have met a different fate.

There is indeed, in the opinion of the court, the following statement: "The tax on the capital of the corporation, on account of its property within the State, is in substance and effect, a tax on that property," but this statement cannot be regarded as any part of the decision, because no issue was joined on it, nor was it subjected to any discussion whatever, as will be seen by the observation which immediately follows, namely: "This is not only admitted, but insisted on, by the plaintiff in error," that is to say, the opinion deals with the case of the plaintiff in error upon its own avowed assumptions.

It may be asked, however, if we admit the correctness of the proposition thus stated by the court. We do admit it fully in the sense in which it is declared in one of the two cases cited which affirm it. Nothing is more common than attempts by a State, where they are precluded by constitutional principles from taxing directly a particular item of property, to reach the object indirectly by imposing a tax upon some other thing which includes it or is dependent upon it. Wherever such an attempt is made it ought to be denounced and defeated. The first case referred to by Mr. Justice Gray, *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, was one of that character. The State of Pennsylvania wanted to tax a ferry boat belonging to a New Jersey corporation, which was employed on a ferry across the Delaware River, and which was, of course, from time to time, within the territory of Pennsylvania. It could not, it was admitted, do that directly. It sought to do it indirectly by attempting to impose a tax upon the capital stock of the New Jersey Company. This court promptly declared, as it ought to have done, that that was in substance and effect the same thing. What better authority could be found than this to support the contention of the appellants? The State of Ohio had, in every way which ingenuity could suggest, taxed everything which it had a right to tax against these express companies. It wanted to tax the capital stock. It knew that this could not be done directly. It sought to accomplish the same thing indirectly by imputing an utterly fictitious value to personal property owned by that company in the State and subject to

taxation. What ought to be said in this case (a proposition laid down by Mr. Justice Gray in the case of *Pullman's Car Company* v. *Pennsylvania*, abundantly sustained by the *Gloucester Ferry Co.* v. *Pennsylvania*, and by many other cases) is, that the State of Ohio, not having the right to tax the capital stock of these express companies directly, must not do it by the device which it has sought to employ.

It should hardly be necessary to say, however, that when a court stigmatizes an attempt by a State to tax specific property within it which it has no right to tax, by saying that an indirect effort to accomplish the same thing by an attempt to tax capital stock cannot be permitted, it does not mean, by any means, that the taxing of specific property and the taxing of capital stock are so far identical that one may properly be resorted to wherever the other can be employed. Specific property belonging to a corporate body may have an actual situs within a State, and therefore be the subject of taxation, but it by no means follows from this that the capital stock or some portion of it, of such corporation, has such actual situs.

The case of *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, was, as the court declares in the beginning of its opinion, "*an excise tax* upon the defendant corporation for *the privilege of exercising its franchises* within the State of Maine." The subject-matter of the tax was confessedly one within the taxing power of the State. There must necessarily, therefore, be some allowable mode for ascertaining the value of that privilege. The mode adopted was by a reference *to comparative gross receipts*. What error can be suggested in such a method, especially when, as in Maine, it was the one adopted as to domestic corporations of the same character? How can such a case, which was not that of a tax upon specific property, nor one in which the method was by a reference to the value of capital stock, nor one in which the amount of the tax was dependent upon the supposed value of the subject taxed, nor one in which, if it were so dependent, the subject taxed had a fixed value, be regarded as an authority upon the questions in these express company cases?

In the case of *Pittsburgh, Cincinnati &c. Railway* v. *Backus*,

154 U. S. 421, the tax assailed was one upon that part of the railroad property situated within the State of Indiana. The law under which the tax was imposed did not lay down any rule, as in these express company cases, for the *guidance* of the assessing board in determining value, but required it to assess it at its "actual cash value." It did, however, require statements which indicated that the board might and should look to the value of the whole road in determining the value of the part.

This mode of assessing property of a railroad company, undoubtedly within the State, was put in this case, as in a prior case cited in the opinion, upon its true ground *necessity*. Are these cases authority for another in which the whole basis of the decision is wanting?

The next case cited in the opinion of the court is that of the *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439. The special attention of the court is respectfully called to the opinion. It was a case of taxation of railroad property under the same law as in the case last above mentioned, but the validity of the method was more emphatically assailed in argument, and was considered by Mr. Justice Brewer with great candor and deliberation. He was evidently not insensible to the abuses possible in the case of the imposition by one State of taxes upon the property of citizens of another State; but he properly recognizes the fact that it was right and indeed necessary that such taxes should be imposed. He upheld this method of assessment upon the obvious ground that it was the *true and natural method* which the individuals would employ, and was indeed the only practicable method; and that either such method *must* be adopted or the property be suffered to go exempt of taxation. He insisted that in the case of *such* property "there is no pecuniary value outside of that which results from such use"; and that it was impossible to disintegrate the value of that portion of the road within Indiana. He affirmed the rule that no State must put any burden in any way upon interstate commerce, but declared that "the taxation of property *according to the ordinary rule of property taxation*" did not violate that rule.

Opinion of the Court.

We respectfully invite the attention of the court to the whole of this opinion, and especially to so much of it as is on pages 443–447. Is it possible to think that if in that case it had appeared that there was "outside of the use to which the property was put" a distinct and clearly ascertainable pecuniary value, that the property could be separated from the use to which it was put, and bear the same value which it possessed before it was put to that use, that such property was *ordinarily* taxed in a wholly different way, and that the whole field of invasion of these rules which forbid the taxation of interstate commerce or of property outside of the jurisdiction, would be thrown open if the ordinary method should be displaced, the decision would not have been the other way?

The last case cited by the court is that of the *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1. The decision was to the effect that the value of the easements, poles, wires, etc., of a *telegraph company* within a State was subject to the same rules of taxation as are applicable to the case of a railroad company. Nothing is perceived in this doctrine which has any direct bearing. It is relevant however in one respect, namely, that for the true defence of the principle of taxation as applied to the cases of railroads, it quotes very largely from the opinion of the court read by Mr. Justice Brewer, in the case of *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439, above referred to, and adopts the reasoning laid down in that opinion.

Mr. Justice Brewer delivered the opinion of the court.

We have had before us at the present term several cases involving the taxation of the property of express companies, some coming from Ohio, some from Indiana, and one from Kentucky; also a case from the latter State involving the taxation of the property of the Henderson Bridge Company. The Ohio and Indiana cases were decided on the 1st of February. (165 U. S. 194.) Petitions for rehearing of those cases have been presented and are now before us for consideration.

The importance of the questions involved, the close division

in this court upon them, and the earnestness of counsel for the express companies in their original arguments, as well as in their briefs on this application, lead those of us who concurred in the judgments to add a few observations to what has hitherto been said.

Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a State to interfere with interstate commerce does not in the least degree abridge the right of a State to tax at their full value all the instrumentalities used for such commerce.

Now the taxes imposed upon express companies by the statutes of the three States of Ohio, Indiana and Kentucky are certainly not in terms "privilege taxes." They purport to be upon the property of the companies. They are, therefore, not, in form at least, subject to any of the denunciations against privilege taxes which have so often come from this court. The statutes grant no privilege of doing an express business, charge nothing for doing such a business and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective States. And the only really substantial question is whether, properly understood and administered, they subject to the taxing power of the State property not within its territorial limits. The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from tax-

ing at its real value such intangible property. Take the simplest illustration: B, a solvent man, purchases from A certain property, and gives to A his promise to pay, say, $100,000 therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B may or may not be of the value of $100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B to pay to A $100,000. That promise is a part of A's property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists — whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which though intangible exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property?

The first question to be considered therefore is whether there is belonging to these express companies intangible property — property differing from the tangible property — a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is

something of no value, is to insult the common intelligence of every man. Take the Henderson Bridge Company's property, the validity of the taxation of which is before us in another case. The facts disclosed in that record show that the bridge company owns a bridge over the Ohio, between the city of Henderson in Kentucky and the Indiana shore, and also ten miles of railroad in Indiana; that that tangible property — that is, the bridge and railroad track — was assessed in the States of Indiana and Kentucky at $1,277,695.54, such, therefore, being the adjudged value of the tangible property. Thus the physical property could presumably be reproduced by an expenditure of that sum, and if placed elsewhere on the Ohio River, and without its connections or the business passing over it or the franchises connected with it, might not of itself be worth any more. As mere bridge and tracks, that was its value. If the State's power of taxation is limited to the tangible property, the company should only be taxed in the two States for that sum, but it also appears that it, as a corporation, had issued bonds to the amount of $2,000,000, upon which it was paying interest; that it had a capital stock of $1,000,000, and that the shares of that stock were worth not less than $90 per share in the market. The owners, therefore, of that stock had property which for purposes of income and purposes of sale was worth $2,900,000. What gives this excess of value? Obviously the franchises, the privileges the company possesses — its intangible property.

Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a State, and it appeared that the bridge itself cost only $1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or other connections, so used by the travelling public, that it was worth to the holders of it in the matter of income $2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of $2,900,000, can there be any doubt of the State's power to assess it at that sum,

and to collect taxes from it upon that basis of value? Substance of right demands that whatever be the real value of any property, that value may be accepted by the State for purpose of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a State, and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that State, so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the State of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.

A distinction must be noticed between the construction of a state law and the power of a State. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the State comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern.

Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single State. Take, for instance, the Adams Express Company. According to the return filed by it with the audi-

tor of the State of Ohio, as shown in the records of these cases, its number of shares was $120,000, the market value of each $140 to $150. Taking the smaller sum, gives the value of the company's property taken as an entirety as $16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only $25,170; of real estate owned outside of Ohio $3,005,157.52; or a total of $3,030,327.52; the value of its personal property in Ohio $42,065; of personal property outside of Ohio $1,117,426.05; or a total of $1,159,491.05, making a total valuation of its tangible property $4,189,818.57, and upon that basis it insists that taxes shall be levied. But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale $16,800,000, to be adjudged liable for taxation upon only one fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

It is suggested that the company may have bonds, stocks or other investments which produce a part of the value of its capital stock, and which have a special situs in other States or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company and so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a State in its proceedings under such

tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court. *Pittsburgh, Cincinnati &c. Railway Co.* v. *Backus*, 154 U. S. 421, 443; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 23; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 227. Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the State treats its property as all taxable.

But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises and privileges into a single

unit of property, and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was "*mobilia personam sequuntur*," but that maxim was never of universal application, and seldom interfered with the right of taxation. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22. It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property for purposes of taxation was changed from the State of New York to that of New Jersey.

It is also true that a corporation is, for purposes of jurisdiction in the Federal courts, conclusively presumed to be a citizen of the State which created it, but it does not follow therefrom that its franchise to be is for all purposes to be regarded as confined to that State. For the transaction of its business it goes into various States, and wherever it goes as a corporation it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. The Southern Pacific Railway Company is a corporation chartered by the State of Kentucky, yet within the limits of that State it is said to have no tangible

property and no office for the transaction of business. The vast amount of tangible property which by lease or otherwise it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the States and Territories on the Pacific Slope. Do not these intangible properties — these franchises to do — exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every State in which that tangible property is found?

It is said that the views thus expressed open the door to possibilities of gross injustice to these corporations, through the conflicting action of the different States in matters of taxation. That may be so, and the courts may be called upon to relieve against such abuses. But such possibilities do not equal the wrong which sustaining the contention of the appellant would at once do. In the city of New York are located the headquarters of a corporation, whose corporate property is confessedly of the value of $16,000,000 — a value which can be realized by its stockholders at any moment they see fit. Its tangible property and its business is scattered through many States, all whose powers are invoked to protect its property from trespass and secure it in the peaceful transaction of its widely dispersed business. Yet because that tangible property is only $4,000,000 we are told that that is the limit of the taxing power of these States. In other words, it asks these States to protect property which to it is of the value of $16,000,000, but is willing to pay taxes only on the basis of a valuation of $4,000,000. The injustice of this speaks for itself.

In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires.

The petition for a rehearing is

*Denied.*

Syllabus.

# CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 129. Argued November 6, 9, 1896. — Decided March 1, 1897.

This court has authority to reëxamine the final judgment of the highest court of a State, rendered in a proceeding to condemn private property for public use, in which after verdict a defendant assigned as a ground for new trial that the statute under which the case was instituted and the proceedings under it were in violation of the clause of the Fourteenth Amendment, forbidding a State to deprive any person of property without due process of law, and which ground of objection was repeated in the highest court of the State; provided the judgment of the court by its necessary operation was adverse to the claim of Federal right and could not rest upon any independent ground of local law.

The prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

The contention that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defence. The judicial authorities of a State may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its action would be inconsistent with that amendment.

A judgment of a state court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

The clause of the Seventh Amendment of the Constitution of the United States declaring that "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" applies to cases coming to this court from the highest courts of the States in which facts have been found by a jury.

In a proceeding in a state court for the condemnation of private property for public use, the court having jurisdiction of the subject-matter and of the parties, the judgment ought not to be held in violation of the due

process of law enjoined by the Fourteenth Amendment, unless some rule of law was prescribed for the jury that was in absolute disregard of the right to just compensation.

In a proceeding in a state court in Illinois to ascertain the compensation due to a railroad company arising from the opening of a street across its tracks — the land as such not being taken, and the railroad not being prevented from using it for its ordinary railroad purposes, and being interfered with only so far as the right to its exclusive enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street — the measure of compensation is the amount of decrease in the value of its use for railroad purposes caused by its use for purposes of a street, the use for the purposes of a street being exercised jointly with the company for railroad purposes.

While the general rule is that compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded.

The railroad having laid its tracks within the limits of the city must be deemed to have done so subject to the condition — not, it is true, expressed, but necessarily implied — that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute.

When a city seeks by condemnation proceedings to open a street across the tracks of a railroad within its corporate limits, it is not bound to obtain and pay for the fee in the land over which the street is opened, leaving untouched the right of the company to cross the street with its tracks, nor is it bound to pay the expenses that will be incurred by the railroad company in the way of constructing gates, placing flagmen, etc., caused by the opening of the street across its tracks.

All property, whether owned by private persons or by corporations, is held subject to the power of the State to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people.

The expenses that will be incurred by the railroad company in erecting gates, planking the crossing and maintaining flagmen, in order that its road may be safely operated — if all that should be required — necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State, and must be borne by the company.

THE case is stated in the opinion.

*Mr. John J. Herrick* for the Chicago, Burlington and Quincy Railroad Company. *Mr. J. W. Blythe* was on his brief.

*Mr. E. E. Osborne* for the Chicago and Northwestern Railway Company. *Post*, 258.

*Mr. John S. Miller* for the city of Chicago. *Mr. William G. Beale* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The questions presented on this writ of error relate to the jurisdiction of this court to reëxamine the final judgment of the Supreme Court of Illinois, and to certain rulings of the state court which, it is alleged, were in disregard of that part of the Fourteenth Amendment declaring that no State shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.

The constitution of Illinois provides that "no person shall be deprived of life, liberty or property, without due process of law." Art. 2, § 2. It also provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken." Art. 2, § 13.

By the fifth article of the general statute of Illinois, approved April 10, 1872, and relating to the incorporation of cities and villages, it was provided that "the city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company, the city shall restore such railroad track, right of way or land

to its former state, or in a sufficient manner not to have impaired its usefulness." 1 Starr & Curtis' Anno. Stat. 452, 472, Art. V, § 89.

The ninth article of the same statute declared that when the corporate authorities of a city or village provided by ordinance for the making of any local improvement authorized to be made, the making of which would require that private property be taken or damaged for public use, the city or village should file in its name a petition in some court of record of the county praying "that the just compensation to be made for private property to be taken or damaged" for the improvement or purpose specified in the ordinance be ascertained by a jury.

That statute further provided: "§ 14. Any final judgment or judgments, rendered by said court, upon any finding or findings of any jury or juries, shall be a lawful and sufficient condemnation of the land or property to be taken upon the payment of the amount of such finding as hereinafter provided. It shall be final and conclusive as to the damages caused by such improvement, unless such judgment or judgments shall be appealed from; but no appeal or writ of error upon the same shall delay proceedings under said ordinance, if such city or village shall deposit, as directed by the court, the amount of the judgment and costs, and shall file a bond in the court in which such judgment was rendered, in a sum to be fixed, and with security to be approved by the judge of said court, which shall secure the payment of any future compensation which may at any time be finally awarded to such party so appealing or suing out such writ of error, and his or her costs. § 15. The court, upon proof that said just compensation so found by the jury has been paid to the person entitled thereto, or has been deposited as directed by the court (and bond given, in case of any appeal or writ of error), shall enter an order that the city or village shall have the right, at any time thereafter, to take possession of or damage the property, in respect to which such compensation shall have been so paid or deposited, as aforesaid." 1 Starr & Curtis, 487 *et seq.*

All of these provisions became a part of the charter of the city of Chicago in 1875.

By an ordinance of the city council of Chicago approved October 9, 1880, it was ordained that Rockwell Street in that city be opened and widened from West 18th Street to West 19th Street by condemning therefor, in accordance with the above act of April 10, 1872, certain parcels of land owned by individuals, and also certain parts of the right of way in that city of the Chicago, Burlington and Quincy Railroad Company, a corporation of Illinois.

In execution of that ordinance a petition was filed by the city, November 12, 1890, in the Circuit Court of Cook County, Illinois, for the condemnation of the lots, pieces or parcels of land and property proposed to be taken or damaged for the proposed improvement, and praying that the just compensation required for private property taken or damaged be ascertained by a jury.

The parties interested in the property described in the petition, including the Chicago, Burlington and Quincy Railroad Company, were admitted as defendants in the proceeding.

In their verdict the jury fixed the just compensation to be paid to the respective individual owners of the lots, pieces and parcels of land and property sought to be taken or damaged by the proposed improvements, and fixed one dollar as just compensation to the railroad company in respect of those parts of its right of way described in the city's petition as necessary to be used for the purposes of the proposed street.

Thereupon the railroad company moved for a new trial. The motion was overruled, and a final judgment was rendered in execution of the award by the jury. That judgment was affirmed by the Supreme Court of the State. 149 Illinois, 457.

The motion by the city to dismiss the writ of error for want of jurisdiction will be first considered. If the right now asserted under the Constitution of the United States was specifically set up or claimed by the defendant in the state court, the motion to dismiss must be overruled. Rev. Stat. § 709.

An examination of the statutes under which this proceeding was instituted will show that no provision is made for an answer by the defendants. In *Smith* v. *Chicago & Western Indiana Railroad*, 105 Illinois, 511, 516, the Supreme Court of Illinois said there was no rule of law or of practice authorizing the filing of an answer to a petition for the condemnation of land under the eminent domain act of that State; that the proceeding was purely statutory; and that although the statute was very minute in all its details, specifically setting forth every step to be taken in the progress of a cause from its inception to its final determination, it did not contain any allusion to an answer by the defendants.

It is not, therefore, important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that such right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court.

Now the right in question was distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial. Among the grounds for a new trial were the following: That the several rulings of the court in excluding proper evidence for the defendant, the statute under which the proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the Fourteenth Amendment declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its limits the equal protection of the laws.

When the trial court overruled the motion for a new trial and entered judgment it necessarily held adversely to these claims of Federal right.

But this is not all. In the assignment of errors filed by the defendant in the Supreme Court of Illinois, these claims of rights under the Constitution of the United States were distinctly reasserted.

It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United

States. But that circumstance is not conclusive against the jurisdiction of this court to reëxamine the final judgment of the state court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. "The true and rational rule," this court said in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143, "is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." In *Roby* v. *Colehour*, 146 U. S. 153, 159, it was said that "our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment." *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Brown* v. *Atwell*, 92 U. S. 327; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 577; *Sayward* v. *Denny*, 158 U. S. 180, 183. There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the National Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits.

The general contentions of the railroad company are —

That the judgment of the state court whereby a public street is opened across its land used for railroad purposes, and whereby compensation to the extent of one dollar only is awarded, deprives it of its property without due process of law contrary to the prohibitions of the Fourteenth Amendment; and,

That the railroad company was entitled by reason of the opening of the street to recover as compensation a sum equal to the difference between the value of the fee of the land sought to be crossed, without any restrictions on its right to use the land for any lawful purpose, and the value of the land burdened with a perpetual right in the public to use it for the purpose of a street subject to the right of the company, or those acquiring title under it, to use it only for railroad tracks or any purpose for which the same could be used without interfering with its use by the public.

The city contends that the question as to the amount of compensation to be awarded to the railroad company was one of local law merely, and as that question was determined in the mode prescribed by the constitution and laws of Illinois, the company appearing and having full opportunity to be heard, the requirement of due process of law was observed. If this position be sound, it is an end of the case, and we need not determine whether the state court erred in not recognizing the principles of law embodied in the instructions asked by the railroad company.

It is, therefore, necessary to inquire at the outset whether "due process of law" requires compensation to be made or secured to the owner of private property taken for public use, and also as to the circumstances under which the final judgment of the highest court of a State in a proceeding instituted to condemn such property for public use may be reviewed by this court.

It is not contended, as it could not be, that the constitution of Illinois deprives the railroad company of any right secured by the Fourteenth Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that

amendment against deprivation by the State, "violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the State has clothed one of its agents with power to annul or evade it." *Ex parte Virginia*, 100 U. S. 339, 346–347; *Neal* v. *Delaware*, 103 U. S. 370; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gibson* v. *Mississippi*, 162 U. S. 565. These principles were enforced in the recent case of *Scott* v. *McNeal*, 154 U. S. 34, in which it was held that the prohibitions of the Fourteenth Amendment extended to "all acts of the State, whether through its legislative, its executive or its judicial authorities"; and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment.

Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defence. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice — the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard — met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Leeper* v. *Texas*, 139 U. S. 462, 468. But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet

it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: "Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation." *Davidson* v. *New Orleans*, 96 U. S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.

It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.

In *Davidson* v. *New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. See also *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, 417. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three coördinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of

republican institutions. "Next in degree to the right of personal liberty," Mr. Broom in his work on Constitutional Law says, "is that of enjoying private property without undue interference or molestation." (p. 228.) The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." 2 Story Const. § 1790; 1 Bl. Com. 138, 139; Cooley's Const. Lim. *559; *People* v. *Platt*, 17 Johns. 195, 215; *Bradshaw* v. *Rodgers*, 20 Johns. 103, 106; *Petition of Mt. Washington Road Co.*, 35 N. H. 134, 142; *Parham* v. *The Justices &c.*, 9 Georgia, 341, 348; *Martin et al., Ex parte*, 13 Arkansas, 198, 206 *et seq.*; *Johnston* v. *Rankin*, 70 N. C. 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used

into due process of law, if the necessary result be to deprive him of his property without compensation.

In *Fletcher* v. *Peck*, 6 Cranch, 87, 135–136, this court, speaking by Chief Justice Marshall, said : " It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of legislative power, is well worthy of serious reflection."

In *Loan Association* v. *Topeka*, 20 Wall. 655, 663, Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism, said: " The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." No court, he said, would hesitate to adjudge void any statute declaring that " the homestead now owned by A should no longer be his, but should henceforth be the property of B." In accordance with these principles it was held, in that case, that the property of the citizen could not be taken, under the power of taxation to promote private objects, and, therefore, that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise of individuals was void because the object was a private, not a public, one. See also *Cole* v. *La Grange*, 113 U. S. 1.

In the early case of *Gardner* v. *Newburgh*, 2 Johns. Ch.

162, there being no provision in the constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In *Sinnickson* v. *Johnson*, 17 N. J. Law, 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature "can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state constitution." These cases are referred to with approval in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 178, and in *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 325, this court saying in the latter case: "And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

In *Searl* v. *School District*, 133 U. S. 553, 562, and in *Sweet* v. *Rechel*, 159 U. S. 380, 398, the court said that it was a condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner.

In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395–396, the late Mr. Justice Jackson, while Circuit Judge, had occasion to consider this question. After full consideration that able judge said: "Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment

to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the court on this question is, that since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution." To the same effect are *Henderson* v. *Central Passenger Railway*, 21 Fed. Rep. 358, and *Baker* v. *Village of Norwood*, 74 Fed. Rep. 997.

In *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, 519, in which the Fourteenth Amendment was invoked against a statute requiring the city of Boston to transfer certain cemetery property owned by it to a particular company, the court said: "The conclusion to which we have come is, that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the constitutions of Massachusetts and of the United States, so that the legislature has no power to require its transfer without compensation" — citing the constitution of Massachusetts, Declaration of Rights, Article X, and the Fourteenth Amendment of the Constitution of the United States.

In his work on Constitutional Limitations, Mr. Cooley says: "The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not any considerations of mere form. . . . When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. . . . In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid." pp. *356, *357. In his discussion as to the meaning and scope of the Fourteenth Amendment the same writer in his edition of Story on the Constitution, after observing that every species of individual property was subject to be appropriated for the special needs of either the State or national government, but that the power to appropriate was subject to the restriction, among others, that it must

not be exercised without making due compensation for whatever is taken, says: "Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed; and, second, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them." 2 Story Const. § 1956.

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

It remains to inquire whether the necessary effect of the proceedings in the court below was to appropriate to the public use any property right of the railroad company without compensation being made or secured to the owner.

The contention of the railroad company is that the verdict and judgment for one dollar as the amount to be paid to it was, in effect, an appropriation of its property rights without any compensation whatever; that the judgment should be read as if in form as well as in fact it made no provision whatever for compensation for the property so appropriated.

Undoubtedly the verdict may not unreasonably be taken as meaning that, in the judgment of the jury, the company's property, proposed to be taken, was not materially damaged; that is, looking at the nature of the property and the purposes for which it was obtained and was being used, that which was taken from the company was not, in the judgment of the jury, of any substantial value in money. The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, under all the

circumstances, is a fair and full equivalent for the thing taken from him by the public.

If the opening of the street across the railroad tracks did not unduly interfere with the company's use of the right of way for legitimate railroad purposes, then its compensation would be nominal. But whether there was such an interference, what was its extent, and what was the value of that lost by the company as the direct result of such interference, were questions of fact which the State committed to the jury under such instructions touching the law as were proper and necessary. It was for the jury to determine the facts, but it belonged to the court to determine the legal principles by which they were to be governed in fixing the amount of compensation to the owner.

Whatever may have been the power of the trial court to set aside the verdict as not awarding just compensation, or the authority of the Supreme Court of Illinois under the constitution and laws of the State to review the facts, can this court go behind the final judgment of the state court for the purpose of reëxamining and weighing the evidence, and of determining whether, upon the facts, the jury erred in not returning a verdict in favor of the railroad company for a larger sum than one dollar? This question may be considered in two aspects: first, with reference to the Seventh Amendment of the Constitution, providing that "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, with reference to the statute, Rev. Stat. § 709, which provides that the final judgment of the highest court of a State in certain named cases may be reëxamined in this court upon writ of error.

It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the

State. One of the objections made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it, facts tried by a jury could be reëxamined by the courts of the United States otherwise than according to the rules of the common law. The Seventh Amendment was intended to meet these objections, and to deprive the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to reëxamine facts tried by juries in the courts of the Union, and leave it open for those courts to reëxamine, in disregard of the rules of the common law, facts tried by juries empanelled in the state courts in cases which, by reason of the questions involved in them, could be brought under the cognizance of the courts of the United States.

In *The Justices* v. *Murray*, 9 Wall. 274, 278 — a case removed from a state court to a Circuit Court of the United States, after verdict in the state court, and brought from the latter court to this court by writ of error — the question was presented as to the constitutionality of so much of the 5th section of the act of March 3, 1863, c. 81, 12 Stat. 755, as authorized the removal of a judgment in a state court, in which the case was tried by a jury, to the Circuit Court of the United States for a retrial on the facts and the law. The argument was made that as by the construction uniformly given to the first clause of the amendment the suits there mentioned were only those in the Federal courts, the words "and no fact tried by a jury," mentioned in the second clause, relate to trial by jury only in such courts. But this court said: "It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common law cases coming up from an inferior Federal court, and also to the Circuit Court in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of Federal cognizance coming up from a state court? The terms of the amendment are general, and contain no qualification in respect of the restriction

upon the appellate jurisdiction of the courts, except as to the class of cases, namely, suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary interpretation, we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court. It seems to us also that cases of Federal cognizance, coming up from state courts, are not only within the words, but are also within the reason and policy of the amendment. They are cases involving questions arising under the Constitution, the laws of the United States and treaties, or under some other Federal authority; and, therefore, are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior Federal court. No other cases tried in the state courts can be brought under the appellate jurisdiction of this court or any inferior Federal court on which appellate jurisdiction may have been conferred. The case must be one involving some Federal question, and it is difficult to perceive any sensible reason for the distinction that is attempted to be made between the reëxamination by the appellate court of a cause coming from an inferior Federal court, and one of the class above mentioned coming up from a state court. In both instances the cases are to be disposed of by the same system of laws and by the same judicial tribunal." It was, therefore, held that Congress could not authorize a Circuit Court of the United States, upon the removal of a case tried by a jury in a state court, to retry "the facts and law."

Upon the reasoning in the case just referred to, it would seem to be clear that the last clause of the Seventh Amendment forbids the retrial by this court of the facts tried by the jury in the present case. This conclusion is not affected by the circumstance that this proceeding is to be referred to the State's power of eminent domain, in which class of cases it has been held that, in the absence of express constitutional provisions on the subject, the owner of private property taken for public use cannot claim, as of right, that his compensation

shall be ascertained by a common law jury. The reason for this rule is, that before the establishment of the government of the United States it had been the practice in this country and in England to ascertain by commissioners, special tribunals and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provisions in American constitutions, national and state, preserving the right of trial by jury, superseded that practice. Lewis on Eminent Domain, 311, 312, and authorities cited. But, in Illinois, such practice is not permitted in cases of the condemnation of private property for public use. The state constitution of 1848 provided that "the right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy." Art. 13, § 6. The constitution of 1870 provides that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate, but the trial of civil cases before the justices of the peace by a jury of less than twelve men may be authorized by law." Art. 2, § 5. And by the latter instrument, as we have seen, it is expressly provided that the just compensation required to be made to the owner of private property taken or damaged for public use "shall be ascertained by a jury as shall be prescribed by law." Art. 2, § 13. That the last-named provision prohibited the ascertainment of such compensation in any other mode than by a jury, is made clear by the decision of the Supreme Court of Illinois in *Kine* v. *Defenbaugh*, 64 Illinois, 291, in which it was adjudged that a provision in a statute of Illinois authorizing commissioners of highways, or three supervisors of the county on appeal from the commissioners, to ascertain the damages sustained by reason of the construction of a highway across the owner's premises, was superseded by the thirteenth section of article 2 of the state constitution —the court observing that a trial by jury was "a constitutional right of which the party may not be debarred either by the action or non-action of the legislature. *People* v. *McRoberts*, 62 Illinois, 38." The persons empanelled in this case to ascertain the just compensation due to the railroad

company constituted a jury as ordained by the constitution of Illinois in cases of the condemnation of private property for public use, and, being a jury within the meaning of the Seventh Amendment of the Constitution of the United States, the facts tried by it cannot be retried "in any court of the United States otherwise than according to the rules of the common law." The only modes known to the common law "to reëxamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings." *Parsons* v. *Bedford*, 3 Pet. 433, 447, 448; *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31.

To this may be added that Congress has provided that the final judgment of the highest court of a State in cases of which this court may take cognizance, shall be reëxamined upon writ of error, a process of common law origin, which removes nothing for reëxamination but questions of law arising upon the record. *Egan* v. *Hart*, 165 U. S. 188. Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, reëxamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

We say, "in absolute disregard of the company's right to just compensation," because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted.

In *Lent* v. *Tillson*, 140 U. S. 316, 331, which was a case of the widening of a public street, for the cost of which bonds were issued, to be paid by taxation on the lands benefited, in proportion to the benefits, and in which it was alleged by a property owner that the local statute had been so administered as to deprive him of his property without due process of law, this court said: "Errors in the mere administration of the statute, not involving jurisdiction of the subject-matter and of the parties, could not justify this court, in its reëxamination of the judgment of the state court, upon writ of error, to hold that the State had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont Street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the cost of the work, or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are none of them issues presenting Federal questions, and the judgment of the state court upon them cannot be reviewed here."

In harmony with those views, we may say in the present case that the state court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380.

The principal point of dispute between the parties was whether the railroad company, by reason of the opening of the street, was entitled to recover a sum equal to the difference

between the value of the land in question as land, without any restriction on its right to use it for any lawful purpose, and the value of the land when burdened with the right of the public to use it for the purposes of a street crossing.

In its opinion in this case the Supreme Court of Illinois says that when a city council, under the authority of the act of April 10, 1872, extends a street across railroad tracks or right of way, "it does not condemn the land of the railroad company nor prevent the use of the tracks and right of way." 149 Illinois, 457. We take this to be a correct interpretation of the local statute, and as indicating not only the interest acquired by the public through proceedings instituted for the extension of a street across the tracks and right of way of the railroad company, but also the extent to which the company was deprived, by the proceedings for condemnation, of any right in respect of the land. Such being the law of the State, it would necessarily follow that the jury, in ascertaining the amount of compensation, could not properly take as a basis of calculation the market value of the land as land. The land as such was not taken, the railroad company was not prevented from using it, and its use for all the purposes for which it was held by the railroad company was interfered with only so far as its *exclusive* enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street. The Supreme Court of Illinois well said that "the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for purposes of a street, such use for the purposes of a street being exercised jointly with the use of the companies for railroad purposes. In other words, the company is to be compensated for the diminution in its right to use its tracks caused by the existence and use of the street." 149 Illinois, 457.

But it was contended in the court below, and is here contended, that the land was subject to sale by the company for any lawful use; that after being condemned for purposes of a public street it could not be sold as land held for private use could be sold in the market; consequently, its salable value,

treating it as land simply, was practically destroyed by the opening of a public street across it. Touching this point the state court, observing that a railroad company can only acquire land, whether by voluntary purchase or otherwise, for railroad purposes as defined in its charter, and that in this case the descriptions of the strips of land conveyed to the appellant, as set forth in the conveyances introduced in evidence, show that the strips were purchased for railroad right of way, and they have been ever since so used, said: "It is manifest that the appellant is restricted in its use of the right of way over which this street is to be extended to those purposes for which such right of way is now used. The future use must be the same as the present use so long as the appellant continues to operate its railroad, unless the legislature shall permit it to change its route." 149 Illinois, 457, 461. The Supreme Court of Illinois, therefore, held that the trial court did not err in excluding evidence to show the general salable value of the right of way included in the crossing, or its general value for other uses than that to which it was applied. According to this view of the powers of the railroad company, it is clear that the jury could not properly have taken into consideration the possibility of such legislative permission being granted; that is, the power of the legislature to permit a change of route, and the possibility of the exercise of that power, could not be elements in the inquiry as to the compensation to be now awarded to the railroad company.

But even if it were true that the company, so long as it operated its railroad, could without legislative permission take up its tracks placed across the land in question, and use the land for purposes other than for a right of way, the jury could not properly have taken into consideration the possibility that at some future time the company would adopt that course, and thereby put itself in condition, if no street were opened across it, to sell its land for what it was worth as land, freed from any public easement. Such a possibility was too remote and contingent to have been taken into account. There was nothing in the evidence, introduced or

offered and excluded, suggesting any probability that the company intended to use or would in the near future use the land within the crossing for any other purpose than as a right of way. While, as held in *Boom Co.* v. *Patterson*, 98 U. S. 403, 408, the general rule is that compensation "is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future," it is well settled that "mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded." Pierce on Railroads, 217, and authorities cited; *Worcester* v. *Great Falls Manf. Co.*, 41 Maine, 159, 164; *Dorlan* v. *East Brandywine & Waynesburg Railroad*, 46 Penn. St. 520, 525.

The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition — not, it is true, expressed, but necessarily implied — that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute. Suppose the city had many years ago acquired the land in question by purchase or condemnation for the purpose of extending and had extended a street over it, and that the railroad company had thereafter acquired by condemnation the right to lay its tracks across the street upon making just compensation to the city. In ascertaining, in such a case, the compensation due the city, would it not be assumed, the street having once been opened, that the convenience of the public would always require it to be kept open, and that, therefore, compensation was to be ascertained, not upon the basis of the value of the city's land, as land, when crossed by the railroad tracks, but upon the basis that the land would always be a part of a public street? Both branches of this question must be answered in the affirmative. But they should not be so answered if the position of the railroad company be sound; for, according to its contention, the jury, in the case supposed, must have taken into account the possibility that the city might at some future

time discontinue the street, and sell the land or devote it to other purposes. There was and is no more probability that the city, in the case supposed, would close the street than, in this case, that the railroad company will take up its tracks from the land in question. Such a probability was too remote to be regarded as an element in the inquiry as to compensation. When these proceedings were instituted the railroad company had an exclusive right to use the land in question for tracks upon which to move its cars, and the city did not propose to interfere in any degree with the enjoyment of that right, otherwise than by the opening of a street across the tracks for public use. To what extent was the value of the company's right to use the land for railroad tracks unduly diminished by opening across it a public street? Under all the circumstances, in view of the purpose for which the railroad company obtained the land, for which the land was in fact used, and for which it was likely to be always used — which purpose is the most valuable one for the railroad company — that was the only question to be determined by the jury. As the right to open a street across the railroad tracks was all that the city sought to obtain by the proceeding for condemnation, it was not bound to obtain and pay for the fee in the land over which the street was opened. If, prior to the institution of these proceedings, the railroad company had constructed upon the land embraced within the crossing buildings to be used in its business, it would have been necessary for the jury, in ascertaining the just compensation to be awarded, to take into consideration the value of such buildings. But no such case is before us. The case is simply one of the opening of a street across land with no buildings upon it, and used only for railroad tracks.

It is next contended that error of law was committed by the refusal of the court to allow the company to prove that in the event of the opening of the street it would be necessary, in order that the railroad be properly and safely operated, to construct gates and a tower for operating them, plank the crossing, fill between the rails, put in an extra rail, and to incur an annual expense of depreciations, main-

tenance, employment of gatemen, etc. It was not claimed that the railroad company could recover specifically on account of such expenditures, but that the proof of their being made necessary by the opening of the street was admissible for the purpose of showing the compensation due to the company. There are some authorities that seem to support the view taken by the railroad company, but we are of opinion that no error was committed in excluding the evidence offered.

The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the State to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the State shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of *N. Y. & N. E. Railroad* v. *Bristol*, 151 U. S. 556, 567, this court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. "The governmental power of self-protection," the court said, "cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the im-

plied liability to governmental regulation in particulars essential to the preservation of the community from injury." See *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 671.

In *Toledo, Peoria & Warsaw Railway* v. *Deacon*, 63 Illinois, 91, the Supreme Court of Illinois said: "The State has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved, and which must inhere in the State, is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community." And in *Illinois Central Railroad* v. *Willenborg*, 117 Illinois, 203, where the question was whether a railroad company could be required to construct a farm crossing over its road years after the road had been built, the court said: "The point is made, however, that these provisions are not obligatory on this corporation because they were enacted many years since it received its charter from the State. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks, and the construction of farm crossings for the use of adjoining land owners, are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as to those to be thereafter constructed. They have reference to the public security both as to persons and to property. . . . No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattle guards, it may not be required also to construct farm crossings."

In *Chicago & Northwestern Railway Co.* v. *Chicago*, 140 Illinois, 309, 317–319, the question was whether, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad was entitled to be allowed, as a

part of its just compensation, the amount of its expenses in constructing and maintaining the street crossing. In that case it appeared that the railroad was constructed prior to the above act of 1872 for the incorporation of cities and villages, and before the passage of the act of 1874, which required that thereafter at all railroad crossings of highways "and streets" the railroad companies should construct and maintain such crossings, and the approaches thereto, within their respective rights of way, so that at all times they should be safe as to person and property. 2 Starr & Curt. Ann. Stat. 1927. The court said: "Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. . . . If railroads so far as they are public highways are, like other highways, subject to legislative supervision, then railroad companies in their relations to highways and streets which intersect their rights of way are subject to the control of the police power of the State; that power of which this court has said that 'it may be assumed that it is a power coextensive with self-protection and is not inaptly termed the law of overruling necessity.' *Lake View* v. *Rose Hill Cemetery Co.*, 70 Illinois, 191. The requirement embodied in section 8, that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. . . . The items of expense for

which appellant claims compensation are such only as are involved in its compliance with a police regulation of the statute. It is well settled that 'neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare.' *Chicago & Alton Railroad* v. *Joliet, Lockport &c. Railroad*, 105 Illinois, 388. It has been held by this court in a number of cases that railroad corporations may be required to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirements. *Galena & Chicago Union Railroad* v. *Loomis*, 13 Illinois, 548; *Galena & Chicago Union Railroad* v. *Dill*, 22 Illinois, 264; *Ohio & Mississippi Railroad* v. *McClelland*, 25 Illinois, 140; *Peoria & Pekin Union Railway* v. *Peoria & Farmington Railroad*, 105 Illinois, 110. . . . Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking or damaging without just compensation of private property, or of private property affected with a public interest." See also *Mugler* v. *Kansas*, 123 U. S. 623, 668; *Boston & Maine Railroad* v. *County Commrs.*, 79 *Maine*, 386; *Thorpe* v. *Railroad*, 27 Vermont, 140; *Lake Shore Railway* v. *Cincinnati & Sandusky Railway*, 30 Ohio St. 604; *Portland & Rochester Railroad* v. *Deering*, 78 Maine, 61, 70; *State* v. *Chicago &c. Railway*, (Neb.), 45 N. W. Rep. 469; *N. Y. & N. E. Railway* v. *Waterbury*, 60 Connecticut, 1; *Charlotte, Columbia &c. Railroad* v. *Gibbes*, 142 U. S. 386, 393.

We concur in these views. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated — if all that should be required — necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State. What was obtained, and all that

was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people. And the value to the railroad company of that which was taken from it is, as we have said, the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched. Upon that theory the case was considered by the jury, and the court did not err in placing it before them upon that basis as to compensation.

One of the instructions asked by the company, and refused by the court, was to the effect that if the land to be crossed by the proposed street was of such width and dimensions that it would be practicable for the company or those acquiring title under it to lay and operate other railroad tracks in addition to those already placed thereon, the company was entitled to recover as part of the compensation to be awarded the difference, if any, between the value of the strip for railroad purposes with the right to lay and operate thereon such additional tracks, and the value of the same for railroad purposes with the right to use and operate only the railroad tracks now on the same. This instruction was properly refused, because it assumed, as matter of law, that the opening of the street across the existing railroad tracks prevented the company from laying additional tracks across the land within the crossing, if there was room for such tracks. The right of the company to use the land or its right of way for as many tracks as it reasonably required for its business — if such right it had when the present proceedings were instituted — is not affected by the opening of the street in question. The opening of the street across the company's land — the city not acquiring the

fee simple title — was necessarily subject to the right, if any, of the company to lay down additional tracks if necessary in the proper conduct of its business.

Another instruction asked by the company, and to the refusal of which it excepted, was to the effect that if the land of the railroad company to be crossed by the proposed street was used by it for railroad purposes as part of "its railroad and terminal facilities," and the value of such railroad and terminal facilities would be depreciated and lessened by the use of the land by the public for the purposes of a street (such use for the purposes of a street being subject, however, to the use of the land by the company for railroad purposes), then the railroad company was entitled to recover from the city a sum equal to such depreciation in value as damages to part of its land not taken or crossed by the proposed street. This instruction was properly refused. It was objectionable for the reason, if there were no other, that it was too general. The words "its railroad and terminal facilities" included the company's entire line of road and terminal facilities within, at least, the corporate limits of the city. The land within the crossing is three miles inside the city limits, about four miles from the passenger depot of the company and a thousand feet from its nearest freight depot. If the instruction last referred to had been given, the range of inquiry as to the sum due the company for what was taken from it would have been extended far beyond what was required or permissible in order to ascertain the amount of compensation.

It is further contended that the railroad company was denied the equal protection of the laws in that by the final judgment individual property owners were awarded, as compensation for contiguous property appropriated to the public use by the same proceeding, the value of their land taken, while only nominal compensation was given to the company — the value of its land, simply *as land*, across which the street was opened, not being taken into account. This contention is without merit. Compensation was awarded to individual owners upon the basis of the value of the property actually taken, having regard to the uses for which it was best adapted

and the purposes for which it was held and used and was likely always to be used. Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public — the use of the company's right of way for a street crossing, having regard to the purposes for which the land in question was acquired and held and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad company was left in the possession and use of its property for the purposes for which it was being used and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the laws, unless it be that the public cannot have a street across the tracks of a railroad company, except upon the condition precedent that it shall condemn and acquire the absolute ownership of the land, *leaving untouched the right of the company to cross it with its tracks.* We do not think the equal protection of the laws imposes such a burden upon the people of a city within the limits of which a railroad company has been permitted to lay its tracks.

We have examined all the questions of law arising on the record of which this court may take cognizance, and which, in our opinion, are of sufficient importance to require notice at our hands, and finding no error, the judgment is

*Affirmed.*

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Chicago, Burlington and Quincy Railroad Company *v.* Chicago. Error to the Supreme Court of Illinois. No. 130. Argued with No. 129. *Ante,* 226, 228. Mr. Justice Harlan delivered the opinion of the court.

This was a proceeding for condemnation under the constitution and laws of Illinois similar to the one just disposed of. For the reasons stated in the above case, No. 129, the judgment of the Supreme Court of Illinois is

*Affirmed.*

Mr. Justice Brewer dissenting.

Dissenting Opinion: Brewer, J.

I dissent from the judgments in these cases. I approve that which is said in the first part of the opinion as to the potency of the Fourteenth Amendment to restrain action by a State through either its legislative, executive or judicial departments, which deprives a party of his property without due compensation; also the ruling that "due process" is not always satisfied by the mere form of the proceeding, the fact of notice and a right to be heard. I agree to the proposition that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction, for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment to the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

It is disappointing after reading so strong a declaration of the protecting reach of the Fourteenth Amendment and the power and duty of this court in enforcing it as against action by a State by any of its officers and agencies, to find sustained a judgment, depriving a party — even though a railroad corporation — of valuable property without any, or, at least, only nominal, compensation. It seems as though the denial which is so strenuously made as to the power of the State, through either its legislative, executive or judicial departments, is subject to one limitation; that is, the verdict of a jury. The abundant promises of the fore part of the opinion vanish into nothing when the conclusion is reached. They amount to a mere *brutum fulmen*. It is a case frequent in all our experiences in life, where the promise and the performance are sadly at variance, and suggest those many sayings, some serious and some jocular, which are used to picture the grotesque incongruity so often manifested between the beginning and the end, the proclamation and the act.

For what is the result which is sustained and adjudged rightful by this decision? The railroad company, which owns a tract of land within the limits of the city of Chicago, holds

it by deed from the original proprietors, having, therefore, the highest and best of all titles, a fee simple, and by virtue thereof a right to its exclusive use, with all the benefits and profits which attend thereon, is deprived of such exclusive use, forced to admit everybody to an equal use and occupation, to give to the public, indeed, all the use and occupation it has of any road or highway, including therein its power to require all owners of steam cars crossing such highways to plank at their own expense crossings, construct gates, employ gatemen and take all other necessary means to prevent accidents at such crossings, and receives for this only one dollar — merely nominal compensation. The property thus condemned is the private property of the company. *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403–417. The individual owners of tracts alongside and similarly situated are, for being deprived of the exclusive use (for in neither case is the fee taken) of their property, awarded damages at the rate of about five thousand dollars for an equal area of ground, and this without being exposed to any further burden than the loss of the use of the property condemned.

It is no answer to say that the company only uses this piece of ground for its tracks and the passage of its trains, and may still use it in the same way. It is not the present use but the possibilities of use which determine the value of property. Can the owner of vacant land have it taken from him without compensation simply because at the moment he does not use it? As said by this court in *Boom Company* v. *Patterson*, 98 U. S. 403, 408: "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses." The value of this property to the railroad company, its owner, does not depend alone on the uses to which it is now put, but also on the uses to which the company may rightfully put it; and as shown by the testimony in this case that portion of the ground on either side of the tracks is available and valuable for station houses, offices, coal chutes,

elevator offices, signal towers, switch stands, etc., the possibility of use for which purposes is taken away when the land is appropriated for a highway. The claim that the leaving of the present use of his property to the owner destroys the right of compensation is a proposition which to my mind is simply monstrous. Could another railroad company or an individual condemn and take from this company any use of its tracks, with only nominal compensation, simply because its own use was left to the company? And yet, if the taking of a crossing without compensation can be defended on this ground, why may not the taking of the use of the tracks without compensation also be defended?

Neither, as I submit, can the large matter of damages by liability to the expense of planking between the tracks, establishing gates, hiring gatemen and resorting to all other necessary means of guarding against accidents at the crossing, be ignored in any just estimate of compensation. It is no sufficient answer to say that wherever a crossing has been rightfully established the public may legally compel the company at its own expense to provide these means of protection. The company is liable to no such burden until the highway is opened. As long as the public had no right of crossing, the company was under no burden. The establishment of the crossing, the taking of the property for a highway, creates the right on the part of the public to cast the burden upon the company, and it seems to me monstrous to say that the public can create the right to cast a large burden of expense upon the company and yet be under no obligations to compensate therefor. It amounts simply to this, that the city says to the railroad company I will take your property and use it for a highway and pay you nothing for it or for your liability to bear such a burden of expense as I may see fit to cast upon you hereafter in order to protect that crossing against accident, and I can do all this without compensation, because if I had owned the property in the first place, and simply given you permission to cross my highway, I could compel you to bear such burden. The right to impose a burden after a public ownership is created is used as a justification

for creating the public ownership without compensation. I cannot agree to any such proposition.

This question was presented to the Supreme Court of Kansas in *Kansas Central Railroad Co.* v. *Commissioners*, 45 Kansas, 716, 724, where a highway was sought to be established across a railroad track, without any compensation, and the court denied the claim, saying: "Whether the duty imposed upon the railroad company of constructing cattle guards, fences, signs, etc., can be or is imposed upon it under the police power of the State, makes no difference in this case. If the highway should not be established across the railroad company's right of way, then it would not be necessary for any of these things to exist; but if a highway is so established, then the duty under the statutes immediately springs into existence, requiring the railroad to so construct these things. The establishment of the highway is therefore the cause of all these additional burdens being imposed upon the railroad company. And must the railroad company bear these burdens and suffer these losses without compensation? Why should it be treated differently from others who have interests in real estate? All others having interests in real estate are entitled to compensation for losses resulting from the location of a public highway interfering with their free and rightful use of such interests. *Smith County Commissioners* v. *Labore*, 37 Kansas, 480, 484 *et seq.*" See also the many cases cited in the opinion. Among them is *Grand Rapids* v. *Grand Rapids &c. Railroad*, 58 Michigan, 641, 648, in which it was said by Campbell, C. J.: "The damage done to a railroad by having a highway run across it must necessarily include all the additional expense entailed by such a crossing, which in a city may involve a considerable outlay in making the crossing safe, and providing guards against accidents." Again, in *Chicago & Grand Trunk Railway* v. *Hough*, 61 Michigan, 507, 508, the court observed, speaking by the same Chief Justice: "If a railroad interferes with an existing highway, it must bear all the expense of crossing and restoring the highway as far as practicable to safe condition, and the fencing and cattle-guards are necessary for that purpose.

But, as pointed out in 52 Michigan, 277, when a new highway is created, then it belongs to those who create it to bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions."

Indeed, in Illinois, as between two railroads, one seeking to obtain the right of crossing over the tracks of the other, the court, in *Chicago & Alton Railroad* v. *Springfield & N. W. Railroad*, 67 Illinois, 142, well said : " Appellants are entitled to such a sum for damages, to be paid by appellee in money as will enable appellants to construct and keep in repair all such works as may be necessary to keep their track in a safe and secure condition. Nothing short of this can amount to the 'just compensation' provided by law."

I do not care to enlarge upon this matter. These propositions seem to me so absolutely clear that the mere statement of them ought to carry conviction. And after a declaration by this court that a State may not through any of its departments take private property for public use without just compensation, I cannot assent to judgments which in effect permit that to be done.

The Chief Justice took no part in the consideration or decision of these cases.

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## *In re* POTTS, Petitioner.

ORIGINAL.

No. 12. Original. Argued March 1, 1897. — Decided March 15, 1897.

When a decree of the Circuit Court, at a hearing upon pleadings and proofs, dismissing a bill in equity for the infringement of a patent, has been reversed by this court on appeal, upon the grounds that the patent was valid and had been infringed by the defendant, and the cause remanded for further proceedings in conformity with the opinion of this court, the Circuit Court has no authority to grant or entertain a petition filed, without leave of this court, for a rehearing for newly discovered evidence; and, if it does so, will be compelled by writ of mandamus to set aside its orders, and to execute the mandate of this court.

Statement of the Case.

THIS was a petition, presented to this court on January 4, 1897, for a writ of mandamus to the Honorable George R. Sage, United States District Judge, sitting as a judge of the Circuit Court of the United States for the Southern District of Ohio, to command him to execute a mandate of this court, and to set aside orders made by him after receiving the mandate and inconsistent therewith. The case was as follows:

Upon a bill in equity for the infringement of letters patent, an answer denying patentable novelty and infringement, a general replication, and proofs taken and completed, the Circuit Court sustained the defence of want of novelty, and thereupon, on January 3, 1891, entered a final decree dismissing the bill, for want of equity, with costs. *Potts* v. *Creager*, 44 Fed. Rep. 680.

The plaintiff appealed to this court, which on January 7, 1895, held that the letters patent were valid, and had been infringed, and therefore, as appeared by its opinion and mandate, reversed the decree of the Circuit Court, and remanded the cause to that court for further proceedings in conformity with that opinion. 155 U. S. 597, 610.

On February 26, 1895, the Circuit Court entered a decree, "in conformity with the said mandate," setting aside its former decree, and adjudging that the letters patent were valid and had been infringed, referring the cause to a master to take an account of profits, and awarding a perpetual injunction against the defendants. On July 16, 1895, the master filed his report and account of profits.

Before any action of the Circuit Court upon the master's report, the defendants, on November 29, 1895, filed a petition for a rehearing, for newly discovered evidence affecting the novelty of the invention; and that court ordered notice to plaintiff to show cause on January 4, 1896, why that petition should not be granted. On that day, the plaintiff objected in writing to the consideration of the petition, "on the grounds that this court is without jurisdiction or authority in the premises; that the issues sought to be made by said evidence are not properly before it; and that the proceedings are and have been irregular, and not according to law." But the Circuit Court, on January 15, 1896, granted the petition for a rehear-

ing, for reasons stated in its opinion reported in 71 Fed. Rep. 574; and, after a hearing upon the new evidence, entered an order on December 21, 1896, by which, the court being of opinion that the letters patent were "void for want of invention, in view of said new evidence, and that therefore the equities are with the defendants, it is ordered that said petition stand as a supplemental answer, and that the replication as filed be considered as a replication thereto." Its opinion upon entering that order is reported in 77 Fed. Rep. 454.

All the decrees and orders of the Circuit Court, above mentioned, were made by Judge Sage.

*Mr. Ernest W. Bradford* and *Mr. Chester Bradford* for petitioners.

*Mr. Edward Boyd* opposing. *Mr. E. E. Wood* was on his brief.

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

The general rules which govern cases of this kind are stated, and the decisions by which those rules have been established are collected, in the recent case of *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, in which this court said: "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. But the Cir-

cuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly." 160 U. S. 255, 256.

In that case, the Circuit Court, at a hearing upon exceptions to an answer in equity, had sustained the exceptions, and, the defendant electing to stand by his answer, had entered a final decree for the plaintiff; and this court, upon appeal, ordered that decree to be reversed, and the cause remanded for further proceedings not inconsistent with its opinion. As the record stood, the only matter which was or could be decided by the Circuit Court, or by this court on the appeal, was the sufficiency of the answer; and, neither the Circuit Court, nor this court, upon adjudging the answer to be sufficient, could deprive the plaintiffs of the right to file a replication, putting the cause at issue. It was for that reason, and because no issue of fact had been joined or tried in either court, that this court held that the cause had been left open for a trial of the facts in controversy between the parties, and that the Circuit Court, for the purpose of more fully or clearly presenting those facts, was authorized to allow an amendment of the bill. This court therefore declined to grant a writ of mandamus, but took the precaution of adding, "The case is quite different, in this respect, from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal." 160 U. S. 259.

The case now in question comes exactly within the class of cases so referred to and distinguished. It was originally heard in the Circuit Court, not merely upon a question of sufficiency of pleading, but upon the whole merits. That court, at a hearing upon pleadings and proofs, involving the questions of the novelty of the alleged invention, and of its infringement by the defendants, entered a final decree dismissing the bill. Upon the appeal from that decree, both those questions

were presented to and considered by this court, and were by it decided in the plaintiff's favor. Its decision of those questions in that way was the ground of its opinion, decree and mandate, reversing the decree of the Circuit Court dismissing the bill, and remanding the cause to that court for further proceedings in conformity with the opinion of this court. The decision and decree of this court did not amount, indeed, technically speaking, to a final judgment, because the matter of accounting still remained to be disposed of. *Humiston* v. *Stainthorp*, 2 Wall. 106; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. But they constituted an adjudication by this court of all questions, whether of law or of fact, involved in the conclusion that the letters patent of the plaintiff were valid and had been infringed. Applying the rules stated at the beginning of this opinion, the questions of novelty and infringement were before this court, and disposed of by its decree, and must therefore be deemed to have been finally settled, and could not afterwards be reconsidered by the Circuit Court.

When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defences on the merits to be introduced by amendment of the answer. *Ex parte Story*, 12 Pet. 339; *Southard* v. *Russell*, 16 How. 547; *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Stewart* v. *Salamon*, 97 U. S. 361; *Gaines* v. *Rugg*, 148 U. S. 228. In this respect, a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in *Southard* v. *Russell*, above cited, said: "Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation

between the parties in chancery suits." 16 How. 570, 571. So, in *United States* v. *Knight*, 1 Black, 488, 489, Chief Justice Taney said that, in a case brought before this court exercising general jurisdiction in chancery, "the defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered."

The decree entered by the Circuit Court, presently after receiving the mandate, setting aside its former decree, and adjudging that the letters patent were valid and had been infringed, referring the case to a master for an account of profits, and awarding a perpetual injunction, was, as it purported to be, in conformity with the mandate of this court. But the subsequent orders of the Circuit Court, entertaining and granting the petition for a rehearing, without previous leave obtained from this court for the filing of such a petition, were irregular and unauthorized, based upon a misunderstanding of the mandate, and in practical, though unintentional, disobedience of the command thereof that further proceedings be had in conformity with the opinion of this court. Upon the record as it stands, a clear case is shown for issuing a writ of mandamus to set aside those orders, and to execute the mandate according to what appears to this court to be its manifest meaning and effect.

Upon the question whether an application for leave to file a petition for a rehearing in the Circuit Court could and should be entertained by this court, at the present stage of the case, no opinion is expressed, because no such application has been made.

Unless such an application shall be made to this court within twenty days, and shall upon consideration be granted by this court,[1] an order will be entered that the

*Writ of mandamus issue as prayed for.*

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[1] See DECISIONS ANNOUNCED WITHOUT OPINIONS, *post*.

# GIBSON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 155. Argued January 15, 1897. — Decided March 22, 1897.

Riparian ownership on navigable waters is subject to the obligation to suffer the consequences of an improvement of the navigation, under an act of Congress, passed in the exercise of the dominant right of the Government in that regard; and damages resulting from the prosecution of such an improvement cannot be recovered in the Court of Claims.

This was a petition to recover damages because of the construction of a dike by the United States in the Ohio River at a point off Neville Island, about nine miles west of the city of Pittsburgh. The Court of Claims made the following findings of fact:

"I. In the year 1885, and before, the claimant was the owner in her own right and in possession of a tract of land containing about 20 acres, situate on Neville Island, in the Ohio River, 9 miles below the city of Pittsburg, in the county of Allegheny and State of Pennsylvania.

"II. The claimant's land, at the time of the alleged grievance, was in a high state of cultivation, well improved with a good dwelling house, barn and other outbuildings. The claimant was in the year 1885, and is now, engaged in market gardening, cultivating and shipping strawberries, raspberries, potatoes, melons, apples, peaches, etc., to the cities of Pittsburg and Allegheny, Pa., for sale.

"III. The claimant's farm has a frontage of 1000 feet on the north, or main navigable, channel of the Ohio River, where the claimant has a landing, which was used in shipping the products from, and the supplies to, her said farm; that the said farm extends across the said Neville Island in a southwesterly direction to the south channel of said Ohio River, which is not navigable; that the said landing is the only one on claimant's farm from which she can ship the products from, and supplies to, her farm.

"IV. Congress, by the river and harbor acts of July 5, 1884, 23 Stat. 133, 147, and August 5, 1886, 24 Stat. 310, 327, authorized and directed the improvement of the said Ohio River as follows:

"'Improving the Ohio River: Continuing improvement, six hundred thousand dollars' . . . (act 1884).

"'Improving the Ohio River: Continuing improvement, three hundred and seventy-five thousand ($375,000) dollars' . . . (act 1886).

"Under said authority Lieut. Col. William E. Merrill, of the engineer corps of the U. S. Army, by the direction of the chief of engineers of the U. S. Army, and the Secretary of War, commenced, June 17, 1885, the construction of a dike 2200 feet in length to concentrate the water-flow in the main channel of the Ohio River, beginning at a point on said Neville Island 400 feet east of the claimant's farm and running in a northwesterly direction with the main or navigable channel of the said Ohio River to the outer point of a bar in said river known as Merriman's bar, contiguous to and extending into the said river from the northwest point of claimant's farm; that the said dike has been completed to, and beyond, the northeastern point of said Merriman's bar.

"V. The construction of said dike by the United States for the purposes aforesaid has substantially destroyed the landing of the claimant, by preventing the free egress and ingress to and from said landing on and in front of the claimant's farm, to the main or navigable channel of said river.

"The claimant is unable to use her landing for the shipment of products from, and supplies to, her farm for the greater part of the gardening season on account of said dike obstructing the passage of the boats; that she can only use the said landing at a high stage of water. That during the ordinary stage of water, the claimant cannot get the products off, or the supplies to, her farm, without going over the farms of her neighbors to reach another landing.

"VI. The claimant's land was worth $600 per acre before the construction of the said dike; that it is now greatly reduced in value (from $150 to $200 per acre) by the obstruction caused

by said dike; that the damage to the claimant's farm exceeds the sum of $3000.

"VII. Claimant's access to the navigable portion of the stream was not entirely cut off; at a 9-foot stage of the water, which frequently occurs during November, December, March, April and May, she could get into her dock in any manner; that from a 3-foot stage she could communicate with the navigable channel through the chute; that at any time she could haul out to the channel by wagon.

"VIII. There was no water thrown back on claimant's land by the building of said dike, and that said dike has not itself come into physical contact with claimant's land and has not been the cause of any such physical contact in any other way. In making the improvement the defendants did not recognize any right of property in the claimant, in and to the right alleged to be affected, did not attempt or assume to take private property in and by the construction of the dike, but proceeded in the exercise of a claimed right to improve the navigation of the river."

And upon these findings the court held, as a conclusion of law, that the claimant was not entitled to recover, and dismissed the petition.

The opinion of the court by Weldon, J., discusses the case at length, citing many decisions, and maintains the conclusion on the grounds that the court had no jurisdiction; and that, if it had, there still could be no recovery because the United States were not responsible to claimant for injuries suffered in the use and occupation of her property in consequence of the construction of the works. 29 C. Cl. 18.

*Mr. T. H. N. McPherson* (with whom was *Mr. N. W. Shafer* on the brief) for appellant.

*Mr. Assistant Attorney General Dodge* for appellees.

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

All navigable waters are under the control of the United

States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. *South Carolina* v. *Georgia*, 93 U. S. 4; *Shively* v. *Bowlby*, 152 U. S. 1; *Eldridge* v. *Trezevant*, 160 U. S. 452.

In *South Carolina* v. *Georgia*, a proposed improvement of the Savannah River consisted of the practical closing of one channel around an island and the throwing of water into other channels, to the substantial improvement of the harbor of Savannah. This court held that, in view of the general rule, although structures deemed by Congress to be in aid of navigation might in fact be in obstruction of certain methods of navigation of the particular stream, their construction was, nevertheless, within the Federal power, and Mr. Justice Strong, delivering the opinion of the court, said: "It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over interstate and foreign commerce is concerned, this is not to be doubted. . . . Upon this subject the case of *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.*, 18 How. 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation. . . . The case of *The Clinton Bridge*, 10 Wall. 454, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream."

Opinion of the Court.

In *Shively* v. *Bowlby*, the leading authorities of the courts of the United States and of most of the States, and of Great Britain, as to the character of the title to submerged land, are considered, and the conclusion announced that the title is in each State, with full power in the state legislature to confer it on individuals, subject at all times to the servitude of the Federal government for regulation and improvement of navigation.

In *Eldridge* v. *Trezevant*, the doctrine existing in the State of Louisiana that lands abutting on the rivers and bayous were subject to a servitude in favor of the public, whereby such portions thereof as were necessary for the purpose of making and repairing public levees might be taken, in pursuance of law, without compensation, was fully recognized as enforceable notwithstanding the Fourteenth Amendment.

By the established law of Pennsylvania, as observed by Mr. Justice Gray in *Shively* v. *Bowlby*, "the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it."

The constitution of that State, prior to 1873, provided that no man's property could "be taken or applied to public use without the consent of his representatives and without just compensation being made."

In *Monongahela Navigation Co.* v. *Coons*, 6 Watts & Searg. 101, plaintiff's mill site was destroyed by the backing up of water by a dam built by a canal company under authority of law for the improvement of navigation, and the Supreme Court of Pennsylvania held this to be a mere consequential damage resulting from the exercise of the public right to improve navigation; that it was *damnum absque injuria;* and that such flooding and injury did not amount to a taking under the constitution.

In the opinion of the court it was stated by Chief Justice Gibson:

"It cannot be said that the plaintiff's mill was taken or applied, in any legitimate sense, by the State, or by the company

invested with its power; nor can it be said that he was deprived of it. In the case of the *Philadelphia and Trenton Railroad*, 6 Whart. 25, the words in the first paragraph were allowed to have their obvious and popular meaning, so as to be restrained to property taken away, and not extended to property injured by an act which did not amount to an assumption of the possession; . . .

"Still, it is only to a case of taking that the obligation extends; and when a corporation acts by virtue of a constitutional law, it is subject to no other responsibility for acts of consequential damage, than is specially provided for. . . .

"It is not, therefore, enough to set before us a case of moral wrong, without showing us that we have legal power to redress it. Beyond constitutional restraint or legislative power, there is none but the legislative will, tempered by its sense of justice, which has happily been sufficient, in most cases, to protect the citizen. Compensation has been provided for every injury which could be foreseen, whether within the constitutional injunction or not, in all laws for public works by the State or a corporation; though cases of damage have occurred which could neither be anticipated nor brought within the benefit of the provision by the most strained construction. In one instance, a profitable ferry on the Susquehanna, at its confluence with the Juniata, was destroyed by the Pennsylvania canal; and, in another, an invaluable spring of water, at the margin of the river, near Selinsgrove, was drowned. These losses, like casualties in the prosecution of every public work, are accidental, but unavoidable; and they are but samples of a multitude of others."

Numerous subsequent cases sustain the rule thus laid down, which is, indeed, the general rule upon the subject.

The Pennsylvania constitution of 1873 contained this additional provision: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such

taking, injury or destruction"; and in *Pennsylvania Co.* v. *Marchant*, 119 Penn. St. 541, it was ruled that this had relation to such injuries to one's property as were the natural and necessary results of the original construction or enlargement of its works by a corporation, and not of their subsequent operation. *S. C.* 153 U. S. 380.

The Fifth Amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.

The applicable principle is expounded in *Transportation Co.* v. *Chicago*, 99 U. S. 635. In that case, plaintiff being an owner of lands situated at the intersection of La Salle street, in Chicago, with the Chicago River, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in his use thereof by the building of a tunnel under the Chicago River by authority of the state legislature, in accomplishing which work it was necessary to tear up La Salle Street, which precluded plaintiff from access to his property for a considerable time; also to build a coffer dam in the Chicago River, which excluded his vessels from access to his docks; and such an injury was held to be *damnum absque injuria*. This court said, again speaking through Mr. Justice Strong: "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest quali-

fication of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, and in *Eaton* v. *Boston, Concord &c. Railroad*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

*Judgment affirmed.*

## NELSON *v.* FLINT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 196. Argued and submitted March 3, 1897. — Decided March 22, 1897.

On the face of the papers contained in the record, the right of the plaintiff below to recover is clear.

Conversations between two makers of a note, in the absence of the payee, and without his knowledge, are not binding upon him, and are not admissible in evidence against him in an action to recover on the note.

A party cannot, by merely filing with the clerk an affidavit not incorporated

Statement of the Case.

in any bill of exceptions, bring into the record evidence of what took place at the trial.

The errors alleged were frivolous, and the writ of error was sued out for delay, for which, in affirming the judgment, ten per cent damages are allowed under clause 2 of Rule 23.

On June 3, 1892, the defendant in error commenced suit in the District Court of the Fourth Judicial District of the Territory of Utah for the county of Weber upon a promissory note, of which the following is a copy:

"$6700. Salt Lake City, Utah, *April* 3, 1891.

"On or before the 23d day of April, 1892, without grace, for value received, we or either of us promise to pay to the order of Richard Flint sixty-seven hundred dollars, negotiable and payable at Ogden, Utah, without defalcation or discount, with interest, at the rate of ten per cent per annum, from date until paid, both before and after judgment.

"Interest payable semi-annually.

"Alfred H. Nelson.
"Frank J. Cannon.
"A. H. Cannon."

The original answer denied that plaintiff was the owner or holder of the note, and alleged generally that it was made without consideration, and that plaintiff wrongfully obtained possession thereof. Subsequently an amendment was filed which stated that the plaintiff had been since about June 19, 1889, the holder and owner of two promissory notes signed by the defendants Nelson and Frank J. Cannon, amounting to $6700; that he offered to surrender those notes and waive all claim for interest if the makers would furnish him a new note signed by them and their codefendant in this case, A. H. Cannon; that in reliance upon such agreement the note sued upon was signed and the plaintiff obtained possession of it upon a promise to return the old notes, which he had failed to do. This amended answer was met by, in substance, a general denial. Upon a trial before the court and a jury a verdict and judgment were returned and entered

in favor of the plaintiff for the full amount of the note and interest. This judgment was thereafter affirmed by the Supreme Court of the Territory, 10 Utah, 261, to reverse which latter judgment of affirmance a writ of error was sued out from this court.

*Mr. Abbot R. Heywood* for plaintiffs in error.

*Mr. Pliny B. Smith* for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

On the face of the papers the right of the plaintiff to recover is clear. The record does not contain the entire testimony offered on the trial. It cannot, therefore, be said, even if this court were at liberty to examine the testimony, that it was not amply sufficient to sustain the verdict and judgment.

It is alleged that the trial court erred in ruling out evidence of a conversation between Frank J. Cannon and A. H. Cannon in the absence of the plaintiff — a conversation which it was claimed induced A. H. Cannon to sign the note. The mere statement of the proposition carries its own answer. Conversations between two makers of a note, in the absence of the payee, are clearly not binding upon the latter. No representations, true or false, made by one maker of a note to another, no secret understanding between such makers, no inducements offered by one to the other, affect the validity of the instrument in the hands of the payee unless he knew or was chargeable with notice of such facts. The vital question is not what passed between the makers by themselves, but what passed between the payee and any one of the makers.

It is also alleged that there was error in refusing to permit evidence as to certain collateral security, which it is claimed should have been exhausted before an action could be maintained on the note. It is a sufficient reply to this contention that there is no suggestion in the answer of any collateral

security, and the court properly refused to consider any defences not so presented.

A final matter is this: Frank J. Cannon testified that when he handed this note to plaintiff the latter promised to return the two original notes of $3200 and $3500 respectively, amounting in the aggregate to $6700, which he then held; that he failed to do so, or to cancel such prior notes. The bill of exceptions states that the defendants asked the following instruction:

"If you find that Flint took the note in suit under the representations that he would return it the following day or cancel the old notes, then you must find a verdict for defendants."

Upon which the court made this minute:

"Not handed in until after the instruction had been given.

"This request was not given the court until after the court had instructed the jury; therefore refused."

The instructions which were given are not copied in the record, nor is there anything in the bill of exceptions showing how long after the court had finished its charge to the jury this instruction was asked. It is true that there appears in the transcript, as printed, this affidavit of counsel:

"A. R. Heywood on oath says: I handed above request for instruction to judge immediately on his ceasing his own charge to jury, and on his refusal I took on the margin an exception to his refusal."

But no such affidavit can be considered by this court. A party cannot by merely filing with the clerk an affidavit not incorporated in any bill of exceptions, bring into the record evidence of what took place on the trial. So that upon the record as properly prepared we can only consider the question whether error can be adjudged in a refusal by the trial court to give an instruction presented at any time after it has finished its charge, and when it does not appear that the same matter has not already been fully and satisfactorily explained to the jury. Obviously but one answer can be given to this question. It cannot be that after the court has finished its charge, after perhaps the jury have retired to consider of their verdict, and at any time before such verdict is returned,

a party can hand up an instruction to the court and demand as of right that it shall be given to the jury; and then if the court fails to recall the jury, and give such instruction, and it embodies a proposition apparently correct, the judgment must be set aside without any showing as to what the charge of the court really was, or that it did not cover the matter contained in this instruction asked at such late time. It is unnecessary to consider whether the proposition of law as stated therein is correct or not. It is enough to hold that, so far as this record discloses the time and manner in which this instruction was presented, it does not affirmatively appear that it was presented under such circumstances as to demand consideration on the part of the court.

These are all the questions presented. We see no error in the record, and must affirm the judgment.

The defendant in error, plaintiff below, asks this court to add ten per cent damages, on the ground of the frivolousness of the errors alleged, and because the suing out of the writ of error was for delay. Under clause 2 of Rule 23 of this court we think this application should be granted.

*The judgment is affirmed, with costs, and ten per cent damages.*

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## PANAMA RAILROAD COMPANY *v.* NAPIER SHIPPING COMPANY.

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

No. 102. Argued January 25, 1897. — Decided March 22, 1897.

The libel in this case was dismissed by the trial court. The judgment of that court was reversed by the Court of Appeals, and the case was remanded for assessment of damages. After assessment and decree it was again taken to the Court of Appeals, where the decree of assessment was affirmed, whereupon a writ of certiorari from this court was granted. *Held*, that, upon such writ, the entire case was before this court for examination.

Statement of the Case.

Torts originating within the waters of a foreign power may be the subjects of a suit in a domestic court.

The facts in this case, as detailed in the statement below, do not show a negligence on the part of the railroad company and its agents, which makes it responsible to the shipping company for the damage caused by the accident to the Stroma.

This was a libel *in personam*, filed in the District Court for the Southern District of New York, to recover damages sustained by the libellant through injuries received by its steamer Stroma, while lying at the respondent's pier in the port of Colon.

The undisputed facts of the case were substantially as follows: The libellant was a British corporation and owner of the steamer Stroma, and the respondent a New York corporation, and the proprietor of certain piers known as piers Nos. 1 and 2 at Colon, in the Isthmus of Panama, and of a slip between those piers. These piers it was accustomed to let to vessels desiring to use the same, and to charge wharfage therefor. Between the piers, which were parallel to each other, was a slip about 135 feet wide, in which there was water to a depth of about 20 feet at the bulkhead, to 30 feet at the end of the pier. Pier No. 2 was about 450 feet in length, covered with a shed, in the sides of which were doors at intervals for the transfer of cargo to and from vessels lying at the pier.

For a few weeks prior to the arrival of the Stroma, respondent had been engaged in dredging the slip, and for this purpose had employed a steam dredge, 60 feet long by 30 feet wide, consisting of a shallow scow, upon which were a steam boiler, a crane operated by machinery and used for hoisting the refuse from the bottom of the slip, and a spindle about nine feet long, located in the middle of the forward end of the scow, constituting the pivot of the crane. On December 6, 1888, while the dredge was anchored in the slip between the piers, the port was visited by a storm known as a "norther," which was so violent that the vessel foundered and sank in the slip. Respondent secured a wrecking vessel and diver to raise the dredge and to remove it from the slip, operations

for which were begun December 15. The diver located the dredge as lying diagonally across the slip, the corner of the dredge being about 22 feet from pier No. 2; but owing to the turbidnes of the water he did not discover the spindle. He also found the crane and boiler detached from the dredge and lying upon the other side toward pier No. 1. He marked the dredge and detached machinery with buoys, located at the end of the crane, at the platform, at the boiler and at the two ends of the dredge, five buoys in all. Besides the buoys the wrecking boat itself was secured in the slip near the wreck, the head in and the stern towards the sea, with two lines running across to each pier.

The Stroma arrived in Colon about eight o'clock in the morning of December 31, drawing 11 feet forward and 13 feet aft, and, as she approached the piers, her consignee raised a flag at the end of pier No. 2 to indicate the berth she was to occupy. There was a shed on the pier, and in order to avail herself of the openings in the shed in the discharge of her cargo, the Stroma adjusted herself accordingly. She lay at the pier during the day discharging her cargo, and was there seen and visited by agents of the respondent. At about six o'clock in the evening, it was reported that there was something wrong in the engine-room, and upon the engineer going down, he heard a rush of water coming into the ship. An investigation disclosed a hole in the bilge of the ship's bottom on the starboard side, punctured by what was afterwards discovered to be the spindle rising from the deck of the sunken dredge. The deck of the dredge was fifteen feet under water; the spindle over seven feet in height, and about nine inches in diameter. The vessel continued to fill with water, and sank. Fifteen days later she was raised, temporarily repaired, and then brought to New York, where full repairs were made. A considerable portion of her cargo was ruined, and other portions damaged.

Upon a hearing in the District Court, the libel was dismissed, 42 Fed. Rep. 922, and upon appeal to the Circuit Court (in which court the appeal was pending when the act establishing the Court of Appeals was passed) the decree of

the District Court was affirmed *pro forma*, and an appeal taken to the Circuit Court of Appeals, which reversed the decree of the District and Circuit Courts, 1 U. S. App. 161, and remanded the cause to the Circuit Court for an ascertainment of damages, which were subsequently assessed in the Circuit Court, and a final decree rendered for $38,861.86. A second appeal was taken to the Circuit Court of Appeals, which, on April 19, 1894, affirmed the decree of the Circuit Court. 20 U. S. App. 568. Whereupon respondent was granted a writ of certiorari from this court.

*Mr. Frederic R. Coudert* (with whom was *Mr. David Keane* on the brief) for the railroad company.

*Mr. Wilhelmus Mynderse* for the shipping company.

Mr. Justice Brown delivered the opinion of the court.

The main question in this case is one of fact, and turns upon the point whether the accident to the Stroma was caused by the negligence of the respondent, or that of the libellant.

1. It is claimed that, upon this hearing, we are limited to the question of damages, for the reason that the writ of certiorari was issued after the decrees of the District and Circuit Courts, dismissing the libel upon the merits, had been reversed; the case remanded to the Circuit Court to assess the damages, a final decree of the Circuit Court for $38,861.86, and a second appeal to the Court of Appeals, which had pronounced an opinion affirming the decree of the Circuit Court, although no formal decree seems to have been entered at the time the writ of certiorari was issued. While this writ begins with a recital that "there is now pending" in the Circuit Court of Appeals, "a suit in which," etc., we think it is giving it too narrow a construction to hold that it was intended to bring before this court only the question of damages, then pending before the Circuit Court of Appeals, particularly in view of the fact that the petition for the writ

of certiorari set forth the facts of the case, and claimed that upon those facts the libel should have been dismissed — making no claim whatever that error had been committed in the assessment of damages. A difference of opinion existed in the courts below upon the question of liability, and the writ was granted to review the whole case as on appeal from the second decree of the Circuit Court, which was contrary to its first decree, and was entered in obedience to the direction of the Court of Appeals.

If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas, as was recently said in the case of *The Conqueror*, *ante*, 110, it is and generally should be issued only after a final decree. The case of *The Lady Pike*, 96 U. S. 461, is not in point. In that case there had been an appeal from a decree dismissing the libel, which was reversed by this court, and the cause remanded for an assessment of damages. A second appeal was taken from such assessment, and it was held that the reëxamination of the case could not extend to anything decided here upon the first appeal. So in *Ames* v. *Quimby*, 106 U. S. 342, it was held that after a new trial had been had, pursuant to the mandate of this court, and a second judgment rendered, no errors other than those committed after the mandate was received below can be considered here. To the same effect are *Roberts* v. *Cooper*, 20 How. 467; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Clark* v. *Keith*, 106 U. S. 464; and *Chaffin* v. *Taylor*, 116 U. S. 567. But while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination.

2. There is no difficulty about the jurisdiction of a court of admiralty in this case. So far as concerns the subject-matter of the libel it is covered by the case of *Philadelphia, Wilmington &c. Railroad* v. *Philadelphia & Havre de Grace Tow Boat Co.*, 23 How. 209, in which it was held that

the jurisdiction of a court of admiralty extended to an injury received by a vessel, by running upon certain piles which had been negligently left in the bed of the Susquehanna River at Havre de Grace. See also *Atlee* v. *Packet Company*, 21 Wall. 389, and 2 Brown's Civ. & Adm. Law, 203.

The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty has jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States, *The Commerce*, 1 Black, 574; *Holmes* v. *O. & C. Railroad*, 5 Fed. Rep. 75; *The Clatsop Chief*, 8 Fed. Rep. 767, the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court. The authorities upon this subject are fully reviewed in an exhaustive opinion by the late Judge Emmons in the case of *The Avon*, Brown's Adm. 170, wherein jurisdiction was taken of a collision occurring upon the Welland Canal in Canada. To the same effect are *Smith* v. *Condry*, 1 How. 28; *The Ticonderoga*, Swabey, 215; *The Griefswald*, Swabey, 430; *The Diana*, Lushington, 539; *The Courier*, Lushington, 541; *The Halley*, L. R. 2 Ad. & Ec. 3; *S. C.* L. R. 2 P. C. 193; *The Mali Ivo*, L. R. 2 Ad. & Ec. 356; *The M. Moxham*, 1 P. D. 43, 107.

Indeed, large numbers of collisions arise upon the Canadian side of the St. Clair, Detroit and St. Lawrence rivers, which would not be cognizable in our courts, if the general proposition claimed by the appellant were true, since by the treaty between this country and Great Britain the boundary line is located in or near the centre of the river.

Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case, though the better opinion is that, even under those circumstances, the court will take cognizance of torts to which both parties are foreigners; at least in the absence of a protest from a foreign consul. *The Maggie Hammond*, 9 Wall. 435; *The Belgenland*, 114 U. S. 355; *The Courier*,

Lushington, 541; *The Havana*, 1 Sprague, 402; *The Invincible*, 2 Gall. 29; *The Johann Friederich*, 1 W. Rob. 35; *The Charkieh*, L. R. 4 Ad. & Ec. 120; *The Vivar*, 2 P. D. 29; *The Anne Johanne*, Stuart, Vice Adm. 43; *Thomassen* v. *Whitwell*, 9 Ben. 113; *Chubb* v. *Hamburg-American Packet Co.*, 39 Fed. Rep. 431.

3. Was there any negligence on the part of the respondent, or, to state it more accurately, was there any negligence with respect to the libellant, or of which it was entitled to complain?

The owners of the Stroma were represented at Colon by one Andrews, who was acting as the agent for William Warriner, the regular agent of the West India and Pacific Steamship Company, and the consignee at Colon of the Stroma. Learning that the steamer was about to arrive, Andrews wrote to Mr. Abello, the harbor master of the port and the freight agent of the Panama Company, asking him that a berth be assigned to the Stroma, which was expected to arrive in a day or two. In reply, Mr. Abello came to him in person, and, as Abello says, told him the West Indian, also expected, could go to No. 1 wharf, but that he had no berth for the Stroma. Mr. Andrews suggested to him that the seaward end of the north side of No. 2 wharf might be a suitable place, and Abello assented to his putting her there. Andrews admits that he had seen the dredge sink in the slip, but claims that "at the time it sunk it was lying close to No. 1 wharf, to which it had been moored," the distance between the two wharves being about one hundred and fifty feet. As his office was opposite Abello's, and but a short distance from the dock, he must have known that a diver had been engaged in the work of raising the sunken dredge, although he testifies that he could not say that he saw the diver at work, and did not remember being informed that the dredge was broken into pieces, which were scattered about in several places in the slip. He could hardly have failed to observe that no vessel had been moored on that side of the slip since the dredge sank. He denies that he had seen any of the buoys which had been placed to mark the position of the sunken dredge, and says

that he took it for granted that the railroad company, having had a diver at work on the sunken dredge for several days, knew whether this berth was safe or not; that he relied upon their knowledge for a safe berth, and supposed that the wreck was on the north side of the slip where he saw the dredge sink. It appears, however, that operations for raising the wreck had been progressing for about three weeks prior to the arrival of the Stroma.

The steamer arrived at about 8 o'clock in the morning of December 31, was met by a boat sent out by the agent of the company to direct her to the dock, and was ordered by the man in charge to go to pier No. 2, and find a berth on the north side of the wharf. As the steamer approached, the company's flag was displayed from the corner of the wharf, indicating the position she should take. As she neared the wharf, Andrews spoke to the officer in charge, reminding him of the dredge being there, pointing him in the direction, and then called out to the captain "hug in close to the wharf, and you will clear the wreck." The testimony of the supercargo of the Stroma was that, as the steamer swung along parallel with the pier, Andrews called out to the captain "to be very careful in backing up the dock and not permit the stern of the ship to swing out into the dock, as there was a sunken dredge somewhere up the dock that it might run foul of"; and that similar instructions were given by Mr. Commager, an employé of the railroad company, who was standing on the dock awaiting her arrival.

This testimony is corroborated by Commager himself, who swears that, when he went down to meet the steamer, he reminded Andrews of the danger, saying: "I suppose you have not forgotten about that dredge," pointing out its position, and that Andrews did not answer him, but spoke to some officer of the boat, calling out and reminding him of the dredge being there. This testimony is also corroborated by that of the witness Muller, also an employé of the railroad company, who heard the conversation with Commager. It would appear that at this time the buoys which had been placed to mark the position of the wreck were still visible —

at least four witnesses swore to that effect, and there was practically nothing to contradict them. But as they do not seem to have been at all conspicuous we do not think that negligence can be imputed to any one for not observing them.

Had the respondent undertaken, through its agent, to provide a berth for the Stroma and see that she was properly moored, it would probably have been responsible for this accident; but it appears that Abello, the company's agent, on being applied to for a berth, merely assented to a suggestion made by Andrews, that the Stroma was a small steamer, and that he could very easily put her on the north side of No. 2 pier, on the other side of the obstruction (meaning thereby the seaward end of the wharf), to which Andrews replied that "if you will do that there will be no objection to your doing so." He further says that, in the same interview, Andrews told him that he had seen the dredge sink; that he had been on the wharf when she had sunk in the morning, and that he had witnessed her going down. Not only had Andrews undertaken himself to bring the ship to a berth, but he admits it to have been the custom of the place for the railroad company to leave the putting of the ship at the berth entirely under the management of the agent of the ship. Under such circumstances, it is clear that Andrews, knowing that the dredge was sunk somewhere in the slip, should have made further inquiries as to its exact location, since from their conversation, and from what Abello knew of Andrews' knowledge, he had a right to assume that Andrews had informed himself of the danger of the Stroma lying there, and of the spot where the dredge was sunk; or, at least, that he would look for the buoys and ascertain for himself.

In all the cases in which wharfingers have been held for casualties of this kind, the vessel has approached the slip in ignorance of the real condition of the bottom, and the respondent has been held liable, upon the theory that it was his duty to furnish a safe berth.

This test is manifestly inapplicable where the agent of the vessel is already acquainted with the danger, and assumes the responsibility of providing her with a safe berth. In this case

there was no misrepresentation or concealment, and if Abello did not point out the precise location of the dredge, it was evidently because he supposed, and had a right to suppose, that Andrews knew it already, or would make further inquiries if he deemed it necessary. It is altogether probable that both parties assumed that the Stroma, being a small steamer, drawing only thirteen feet of water, when there was twenty-two feet of clear water above the deck of the dredge, could safely lie inside, if not immediately over, the dredge, and that both overlooked the existence of the spindle; but if Andrews was apprised of the danger which the Stroma might incur by lying there, it is scarcely just to impose a liability upon the respondent for the consequences of the spindle — the existence of which did not appear to have been known either to Andrews or to Abello, and which, if known, neither party had considered of sufficient importance to specially provide against. It would doubtless have been more prudent for Abello to have informed Andrews fully and explicitly of the danger he was incurring, but we think that, under the circumstances, he discharged his legal obligation.

As the diver, who was sent down to locate and buoy the dredge, never discovered the spindle, owing to the extreme turbidness of the water, it is difficult to see how negligence can be imputed to the respondent for not having warned the master of the steamer specially against it. Indeed, so little appears to have been known about it that, when a consultation was called, after the accident occurred, at which Mr. Andrews and Mr. Dennis, an associate superintendent of the respondent, took part, no one of them was able to surmise what had caused the disaster — the general opinion seeming to be that the Stroma had settled upon a pile, or a piece of machinery dropped by a Spanish steamer. No one suspected that the dredge had caused the damage, until the diver and surveyors on the following day reported the fact. If, as we have already found, Mr. Andrews was either apprised of, or put upon inquiry, as to all the facts with regard to the location of the sunken dredge, respondent cannot be chargeable with negligence because it did not warn him specially against

the spindle, since it had not been informed of its existence by the diver, who does not seem to have been guilty of any negligence in not discovering it, and for whose negligence it is at least doubtful whether respondent would have been liable.

Inasmuch as we are of opinion that the Circuit Court of Appeals was in error in holding the respondent liable,

*The decree of the Circuit Court of July* 7, 1891, *must be affirmed, and the cause remanded to that court, with directions to dismiss the libel.*

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## UNITED STATES *v.* TRANS-MISSOURI FREIGHT ASSOCIATION.

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

No. 67. Argued December 8, 9, 1896. — Decided March 22, 1897.

The dissolution of the freight association does not prevent this court from taking cognizance of the appeal and deciding the case on its merits; as, where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law, and the jurisdiction of the court has attached by the filing of a bill to restrain such or like action under a similar agreement, and a trial has been had and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.

While the statutory amount must as a matter of fact be in controversy, yet the fact that it is so need not appear in the bill, but may be shown to the satisfaction of the court.

The provisions respecting contracts, combinations and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property.

The act of February 4, 1887, c. 104, "to regulate commerce," is not incon-

Statement of the Case.

sistent with the act of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit.

Debates in Congress are not appropriate sources of information, from which to discover the meaning of the language of a statute passed by that body.

The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable.

In order to maintain this suit the government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect.

This agreement, though legal when made, became illegal on the passage of the act of July 2, 1890, and acts done under it after that statute became operative were done in violation of it.

The fourth section of the act invests the Government with full power and authority to bring such a suit as this; and, if the facts alleged are proved, an injunction should issue.

On the 2d of July, 1890, an act was passed by the Congress of the United States, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209, c. 647. The act is given in full in the margin.[1]

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[1] An act to protect trade and commerce against unlawful restraints and monopolies.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

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

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

Sec. 3. Every contract, combination in form of trust or otherwise or conspiracy, in restraint of trade or commerce in any Territory of the United

Statement of the Case.

On the 15th day of March, 1889, all but three of the defendants, the railway companies named in the bill, made and entered into an agreement by which they formed themselves into an association to be known as the "Trans-Missouri Freight Association," and they agreed to be governed by the provisions contained in the articles of agreement.

The memorandum of agreement entered into between the railway companies named therein, stated, among other things, as follows: "For the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local, the subscribers do hereby form an association to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions."

"ARTICLE I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

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

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

SEC. 5. Whenever it shall appear to the court before which any proceed-

"1. All traffic competitive between any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, on the 95th meridian, thence north to the Red River; thence via that river to the eastern boundary line of the Indian Territory; thence north by said boundary line and the eastern line of the State of Kansas to the Missouri River at Kansas City; thence via the said Missouri River to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line, — the foregoing to be known as the 'Missouri River line,' — thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico, and thence via said gulf to the point of beginning, including business between points on the boundary line as described.

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

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

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

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

Approved, July 2, 1890.

"2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri River line."

Certain exceptions to the above article are then stated as to the particular business of several railway companies, which was to be regarded as outside and beyond the provisions of the agreement.

Article II provided for the election of a chairman of the organization and for meetings at Kansas City, or otherwise, as might be provided for. By section 2 of that article each road was to "designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is present. If unable to attend he shall send a substitute with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents."

Section 3 provides that: "A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

By section 4 it was provided that: "At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah."

Sections 5, 6, 7, 8, 9, 10 and 11 of article II read as follows:

"SEC. 5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decision of the association, as expressed, unless then and there

the parties shall give the association definite written notice that, in ten days thereafter, they shall make such modification notwithstanding the vote of the association: *Provided*, That if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates to take effect on the same day. By unanimous consent, any rate, rule or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"SEC. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule or regulations as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association, and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"SEC. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: *Provided, however*, That when one road has a proprietary interest in another, the divisions between such roads shall be

what they may elect, and shall not be the property of the association: *Provided, further*, That, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"SEC. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine, by a majority vote (the member against whom complaint is made to have no vote), what, if any, penalty shall be assessed, the amount of each fine not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"SEC. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"SEC. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"SEC. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented."

Articles 3, 5, 6 and 7 contain appropriate provisions for the carrying out of the purposes of the agreement, but it is not necessary to here set them forth in detail.

Article IV reads as follows:

"ARTICLE IV.

"Any wilful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules and regulations of any weighing association or inspection bureau, as established by it or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any wilful violation of them shall be subject to the penalties provided herein."

Article VIII provides that the agreement should take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from the same.

On the 6th of January, 1892, the United States, as complainant, filed in the Circuit Court of the United States for the District of Kansas, through the United States attorney for that district, and under the direction of the Attorney General of the United States, its bill of complaint against the Trans-Missouri Freight Association, named in the agreement above mentioned, the Atchison, Topeka and Santa Fé Railroad Company, and some seventeen other railroad companies, the officers of which had, it was alleged, signed the agreement above mentioned in behalf of and for their respective companies. The bill was filed by the Government for the purpose of having the agreement between the defendant railroad companies set aside and declared illegal and void, and to have the association dissolved.

It alleged that the defendant railroad corporations, signing the agreement, were at that time and ever since had been common carriers of all classes and kinds of freight and commodities which were commonly moved, carried and transported by railroad companies in their freight traffic, and at all such times had been, and then were, continuously engaged in transporting freight and commodities in the commerce, trade and traffic which is continuously carried on among and between the several States of the United States, and among

and between the several States and Territories of the United States, and between the people residing in, and all persons engaged in trade and commerce within and among and between, the States, Territories and countries aforesaid; that each of the defendants was, prior to the 15th day of March, 1889, the owner and in the control of, and that they were respectively operating and using, distinct and separate lines of railroad, fitted up for carrying on business as such carriers in the freight traffic above mentioned, independently and disconnectedly with each other, and that said lines of railroad had been and then were the only lines of transportation and communication engaged in the freight traffic between and among the States and Territories of the United States having through lines for said freight traffic in all that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean; that these lines of railroad furnish to the public and to persons engaged in trade and traffic and commerce between the several States and Territories and countries above mentioned separate, distinct and competitive lines of transportation and communication extending along and between the States and Territories of the United States lying westward of the Mississippi and Missouri rivers to the Pacific Ocean, and that the construction and maintenance of said several separate, distinct and competitive lines of railroad aforesaid had been encouraged and assisted by the United States and by the States and Territories in the region of country aforesaid, and by the people of the said several States and Territories, by franchises and by grants and donations of large amounts of land of great value, and of money and securities, for the purpose of securing to the public and to the people engaged in trade and commerce throughout the region of country aforesaid competitive lines of transportation and communication, and that prior to the 15th day of March, 1889, and subsequently and up to the present time, each and all of said defendants have been and are engaged as common carriers in the railway freight traffic connected with the interstate commerce of the United States.

It was then alleged in the bill as follows:

Statement of the Case.

"And your orator further avers that on or about the fifteenth day of March, 1889, the defendants not being content with the usual rates and prices for which they and others were accustomed to move, carry and transport property, freight and commodities in the trade and commerce aforesaid and in their said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, and to counteract the effect of free competition on the facilities and prices of transportation, and to establish and maintain arbitrary rates, and to prevent any one of said defendants from reducing such arbitrary rates, and thereby exact and procure great sums of money from the people of the said States and Territories aforesaid, and from the people engaged in the interstate commerce, trade and traffic within the region of country aforesaid, and from all persons having goods, wares and merchandise to be transported by said railroads, and intending to monopolize the trade, traffic and commerce among and between the States and Territories aforesaid, did combine, conspire, confederate and unlawfully agree together, and did then and there enter into a written contract, combination, agreement and compact, known as a memorandum of agreement of the Trans-Missouri Freight Association, which was signed by each of said above-named defendants."

The bill then set forth the agreement signed by the various corporations defendant.

It was further alleged that the agreement went into effect on the 1st day of April, 1889, and that since that time each and all of the defendants, by reason of the agreement, have put into effect and kept in force upon the several lines of railroads the rules and regulations and rates and prices for moving, carrying and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroads rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each

particular road, and the people of the States and Territories subject to said association, and all persons engaged in trade and commerce within, among and between the different States and Territories had been compelled to and were still compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the association, and ever since that date had been and still were deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and were deprived of the better facilities and cheaper rates of freight that might be reasonably expected to flow from free competition between the lines above mentioned, and that the trade, traffic and commerce in such region of country, and the freight traffic in connection therewith, had been and were monopolized and restrained, hindered, injured and retarded by the defendants by means of and through the instrumentality of such association.

The bill further averred that notwithstanding the passage of the act of Congress above mentioned on the 2d day of July, 1890, the "defendants still continue in and still engage in said unlawful combination and conspiracy, and still maintain said Trans-Missouri Freight Association, with all the powers specified in the memorandum of agreement and articles of association hereinbefore set forth, which said agreement, combination and conspiracy so as aforesaid entered into and maintained by said defendants is of great injury and grievous prejudice to the common and public good and to the welfare of the people of the United States."

The prayer of the bill was as follows:

"In consideration whereof, and inasmuch as your orator can only have adequate relief in the premises in this honorable court where matters of this nature are properly cognizable and relievable, your orator prays that this honorable court may order, adjudge and decree that said Trans-Missouri Freight Association be dissolved, and that said defendants, and all and each of them, be enjoined and prohibited from further agreeing, combining and conspiring and acting together to maintain rules and regulations and rates for carry-

ing freight upon their several lines of railroad to hinder trade and commerce between the States and Territories of the United States, and that all and each of them be enjoined and prohibited from entering or continuing in a combination, association or conspiracy to deprive the people engaged in trade and commerce between and among the States and Territories of the United States of such facilities and rates and charges of freight transportation as will be afforded by free and unrestrained competition between the said several lines of railroad, and that all and each of said defendants be enjoined and prohibited from agreeing, combining and conspiring and acting together to monopolize or attempt to monopolize the freight traffic in the trade and commerce between the States and Territories of the United States, and that all and each of said defendants be enjoined and prohibited from agreeing, combining and conspiring and acting together to prevent each and any of their associates from carrying freight and commodities in the trade and commerce between the States and Territories of the United States at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf."

The defendants were required to answer fully, etc., each and all of the matters charged in the bill, but such answer was not required to be under oath, an answer under oath being specially waived.

The Chicago, Kansas and Nebraska Railway Company, the Missouri, Kansas and Texas Railway Company and the Denver, Texas and Fort Worth Railroad Company denied being parties to the association. The other fifteen companies filed separate answers, each setting up substantially the same defence.

They admitted they were common carriers engaged in the transportation of persons and property in the States and Territories mentioned in the agreement, and they alleged that as such common carriers they were subject to the provisions of the act of Congress, approved February 4, 1887, c. 104, 24 Stat. 379, entitled "An act to regulate commerce," with the various amendments thereof and additions thereto,

and they alleged that that act and the amendments constituted a system of regulations established by Congress for common carriers subject to the act, and they denied that they were subject to the provisions of the act of Congress passed July 2, 1890, above set forth.

They admit that they severally own, control and operate separate and distinct lines of railroad constructed and fitted for carrying on business as common carriers of freight, independently and disconnectedly with each other; except that a common interest exists between certain companies, named in the answer. They admit that the lines of railroad mentioned in the bill furnish lines of transportation and communication to persons engaged in freight traffic between and among the States and Territories of the United States, having through lines for freight traffic in that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean, but deny that they are the only such lines, and allege that there are several others, naming them.

They further admitted that prior to the organization of the freight association the defendants furnished to the public and to persons engaged in trade, traffic and commerce between the several States and Territories named in the agreement, separate, distinct and competitive lines of transportation and communication, and they allege that they still continue to do so.

They admitted that some of the roads mentioned in the bill received aid by land grants from the United States, and others received aid from States and Territories by loans of credits, donations of depot sites and rights of way, and in a few cases by investments of money, and that the people of the States and Territories to a limited extent made investments in the stocks and bonds of some of the roads, while others, mentioned in the bill, were almost exclusively constructed by capital furnished by non-residents of that region.

It was also admitted that the purpose of the land grants, loans, donations and investments was to obtain the construction of competitive lines of transportation and communication to the end that the public and the people engaged in trade

and commerce throughout that region of country might have facilities afforded by railways in communicating with each other and with other portions of the United States and the world, and denied that they were granted for any other purpose.

The defendants admitted the formation on or about March 15, 1889, of the voluntary association described in the bill as the "Trans-Missouri Freight Association."

They denied the allegation that they were not content with the rates and prices prevailing at the date of the agreement; they denied any intent to unjustly increase rates, and denied that the agreement destroyed, prevented or illegally limited or influenced competition; they denied that arbitrary rates were fixed or charged, or that rates had been increased, or that the effect of free competition had been counteracted; they denied any purpose in the formation of the association to monopolize trade, traffic and commerce between the States and Territories within the region mentioned in the bill; and they denied that the agreement was in any respect the illegal result of any unlawful confederation or conspiracy. The defendants alleged that the proper object of the association was to establish reasonable rates, rules and regulations on all freight traffic, and the maintenance of such rates until changed in the manner provided by law; that the agreement was filed with the Interstate Commerce Commission as required by section 6 of the act of February 4, 1887. They also alleged that it was not the purpose of the association to prevent the members from reducing rates or changing the rules and regulations fixed by the association; that by the terms of the agreement each member might do so, the preliminary requirement being that the proposed change should be voted upon at a meeting of the association, after which, if the proposal was not agreed to, the line making the proposal could make such reduced rate notwithstanding the objection of the other lines; that the purpose of this provision was to afford opportunity for the consideration of the reasonableness of any proposed rate, rule or regulation by all lines interested and an interchange of views on the effect of such

reduction, and that reductions of rates had been made in numerous instances through said process by the association. They admitted that the agreement took effect April 1, 1889, and that it had remained in operation since, and that the rates, rules and regulations fixed and established from time to time under said agreement had been put into effect and maintained in conformity to law; and it was denied that by reason of the agreement or under duress of fines and penalties, or otherwise, the defendants had refused to establish and maintain just and reasonable rates; and it was alleged that the object of the association at all times had been and was to establish all rates, rules and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference. They denied that shippers or the public were in any way oppressed or injured by reason of the rates fixed by the association, but on the contrary they alleged that the agreement and the association established under it had been beneficial to the patrons of the railway lines composing the association and the public at large. These in substance were the allegations in the various answers.

The cause came on for hearing on bill and answer before the Circuit Court of the United States for the District of Kansas, First Division. That court dismissed the bill without costs against the complainant. 53 Fed. Rep. 440. The Government duly appealed from the judgment to the United States Circuit Court of Appeals for the Eighth Circuit, and that court after argument affirmed, in October, 1893, the judgment of the Circuit Court, without costs, Shiras, District Judge, dissenting. 19 U. S. App. 36. From that judgment the Government appealed to this court.

A motion was made upon affidavits to dismiss the appeal. The affidavits show that on the 18th of November, 1892, a resolution was adopted by the Trans-Missouri Freight Association, one of the defendants, providing that the organization should be discontinued from and after the 19th of November, 1892, and the secretary was instructed to wind up its affairs at as early a date as possible. It further appeared by the affidavits that the Trans-Missouri Freight Association was

actually dissolved and its existence ended on the above date, November 19, 1892, and that it has not since that date been revived, nor has it since that date had any activity of any kind, "and that it has not conducted or been engaged in any operations or business whatever, but that it has been dead and out of existence."

It also alleged as another ground for dismissing the appeal that the matter in controversy does not exceed $1000, and that the case does not come under any other provision of the act of 1891, allowing an appeal from the Circuit Courts of Appeals to this court. In opposition to the motion it appeared upon the part of the appellant that at the same meeting at which the resolution above referred to was adopted, the following resolution was also adopted: "*Resolved*, That a committee of seven be appointed by the chairman of this meeting to draw up a new agreement for the conduct of business now substantially covered by the Trans-Missouri agreement and to make a report to all lines in the Trans-Missouri Association at a meeting to be called in Chicago on December 6, 1892." A committee of seven was accordingly appointed, which adopted a resolution calling a meeting for the 6th of December, 1892, of the lines formerly members of the Trans-Missouri Association and representatives of other interested lines for the purpose of considering any changes in the tariffs and of business which was under the jurisdiction of that association and which might be submitted to the parties at that time, and to further consider the organization of one or more rate committees to govern the manner of making rates on such traffic until some permanent organization could be effected. In the early days of December, 1892, the meeting so called was held and was participated in by most of the railroad companies which were parties to the Trans-Missouri agreement, and at that meeting an agreement was made upon the subject of rates of freight, and a West-Missouri freight rate committee was appointed, the duties of which committee were to establish and maintain reasonable rates in the territory described, and other lines not therein represented but interested in the freight traffic of such territory were to be invited to become members. A plan for

Counsel for Parties.

the establishment of sub-rate committees for the purpose of agreeing upon rates was therein set forth and agreed to. The agreement was to become effective on the 1st of January, 1892, and to remain in force until the following April, during which time it was supposed that a new and permanent association to provide for an agreement relating to rates of freight might be founded. It does not appear whether such permanent association has been formed or that the temporary agreement has been actually terminated.

In answer to the motion to dismiss on the ground that the matter in controversy did not amount to over a thousand dollars, the parties have stipulated as follows: "It is hereby stipulated for the purposes of this case and no other, and without waiving any right to question the legal effect of such fact, that the daily freight charges on interstate shipments collected by all the railway companies at points where they compete with each other were, at the time of the agreement mentioned in the pleadings herein, and have been since, more than one thousand dollars."

To the motion made to dismiss the appeal for want of jurisdiction, briefs were filed as follows:

*Mr. W. F. Guthrie* filed a brief on behalf of the Burlington and Missouri River Railroad Company in support of the motion.

*Mr. Lloyd W. Bowers* filed a brief on behalf of the Atchison, Topeka and Santa Fé Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, the Fremont, Elkhorn and Missouri Valley Railroad Company, The Sioux City and Pacific Railroad Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company in support of the motion.

*Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* for the United States filed a brief opposing the motion.

At the hearing on the merits one hour additional time was, on motion of *Mr. Dillon*, allowed to each side.

*Mr. Attorney General* for the United States, appellants.

*Mr. John F. Dillon* for the Freight Association, appellees. *Mr. A. L. Williams*, *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on his brief.

*Mr. James C. Carter* for the Freight Association, appellees.

*Mr. E. J. Phelps* for the Freight Association and the New York Central and Hudson River Railroad Company, appellees.

*Mr. Attorney General* concluded for appellants.

*Mr. W. F. Guthrie* filed a brief on behalf of the Burlington and Missouri River Railroad Company.

*Mr. Lloyd W. Bowers* filed a brief for the Fremont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company.

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

The defendants object to the hearing of this appeal, and ask that it be dismissed on the ground that the Trans-Missouri Freight Association has been dissolved by a vote of its members since the judgment entered in this suit in the court below. A further ground urged for the dismissal of the appeal is that the requisite amount (over one thousand dollars) is not in controversy in the suit, and that as an appeal would only lie to this court in this character of suit under the act of March 3, 1891, c. 517, 28 Stat. 826, where that amount is in controversy, the appeal should be dismissed.

As to the first ground, we think the fact of the dissolution of the association does not prevent this court from taking cognizance of the appeal and deciding the case upon its merits.

The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines, etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future.

The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate and salutary one, and that it or one like it is necessary to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion.

As an answer to the fact of the dissolution of the association, it is shown on the part of the Government that these very defendants, or most of them, immediately entered into a substantially similar agreement, which was to remain in force for

a certain time, and under which the companies acted, and in regard to which it does not appear that they are not still acting. If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.

Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by

the Government. That question the Government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided.

We think, therefore, the first ground urged by defendants for the dismissal of the appeal is untenable.

We have no difficulty either in sustaining the jurisdiction of this court in regard to the second ground, that of the amount in controversy in the suit.

The bill need not state, in so many words, that a certain amount exceeding one thousand dollars is in controversy in order that this court may have jurisdiction on appeal. The statutory amount must as a matter of fact be in controversy, yet that fact may appear by affidavit after the appeal is taken to this court, *Whiteside* v. *Haselton*, 110 U. S. 296; *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, or it may be made to appear in such other manner as shall establish it to the satisfaction of the court. A stipulation between the parties as to the amount is not controlling, but in the discretion of the court it may be regarded in a particular case, and with reference to the other facts appearing in the record as sufficient proof of the amount in controversy to sustain the jurisdiction of this court.

The bill shows here an agreement entered into (as stated in the agreement itself) for the purpose of maintaining reasonable rates to be received by each company executing the agreement, and the stipulation entered into between the parties hereto shows that the daily freight charges on interstate shipments collected by the railway companies at points where they compete with each other were, at the time of the making of the agreement mentioned in the pleadings herein and have been since, more than one thousand dollars. This agreement so made, the Government alleges, is illegal as being in restraint of trade, and was entered into between the companies for the purpose of enhancing the freight rates. The companies, while denying the illegality of the agreement or its purpose to be other than to maintain reasonable rates, yet allege that without some such agreement the competition between them for

traffic would be so severe as to cause great losses to each defendant and possibly ruin the companies represented in the agreement. Such a result, it is claimed, is avoided by reason of the agreement. Upon the existence, therefore, of this or some similar agreement directly depends (as is alleged) the prosperity, if not the life, of each company. It must follow that an amount much more than a thousand dollars is involved in the maintenance of the agreement or in the right to maintain it or something like it. These facts, appearing in the record and the stipulation, show that the right involved is a right which is of the requisite pecuniary value. A reduction of the rates by only the fractional part of one per centum would, in the aggregate, amount to over a thousand dollars in a very few days. This is sufficient to give the court jurisdiction on appeal. *South Carolina* v. *Seymour*, 153 U. S. 353, 357. There is directly involved in this suit the validity and the life of this agreement, or one similar to it. Out of this agreement directly springs the ability as well as the right to maintain these rates, and each company is interested in maintaining the validity of the agreement to the same extent as all the others. As against the agreement the Government represents the interest of the public, and thus the parties stand opposed to each other — the one in favor of dissolving and the other of maintaining the agreement.

Unlike the case of *Gibson* v. *Shufeldt*, 122 U. S. 27, and the cases therein cited in the opinion of the court delivered by Mr. Justice Gray, the defendants here are jointly interested in the question, and it is not the case of a fund amounting to more than the requisite sum which is to be paid to different parties in sums less than the jurisdictional amount.

For the reasons above stated, we think the jurisdictional fact in regard to each defendant appears plainly and necessarily from the record and the stipulation, and that the duty is thus laid upon this court to entertain the appeal.

Coming to the merits of the suit, there are two important questions which demand our examination. They are, first, whether the above-cited act of Congress (called herein the Trust Act) applies to and covers common carriers by railroad;

and, if so, second, does the agreement set forth in the bill violate any provision of that act?

As to the first question:

The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. *State Freight Tax case*, 15 Wall. 232, 275; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464.

An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce. What amounts to a restraint within the meaning of the act if thus construed need not now be discussed.

We have held that the Trust Act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1, because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the act to take effect upon.

Nor do we think that because the sixth section does not forfeit the property of the railroad company when merely engaged in the transportation of property owned under and which was the subject of a contract or combination mentioned in the first section, any ground is shown for holding the rest of the act inapplicable to carriers by railroad. It is not perceived why, if the rest of the act were intended to apply to such a carrier, the sixth section ought necessarily to have provided for the seizure and condemnation of the locomotives and cars of the carrier engaged in the transportation between the States of those articles of commerce owned as stated in that sixth section. There is some justice and propriety in forfeiting those articles, but we see none in forfeiting the locomotives or cars of the carrier simply because such carrier was transporting articles as described from one State to another, even though the carrier knew that they had been manufactured or sold under a contract or combination in violation of the act. In the case of a simple transportation of such articles the carrier would be guilty of no violation of any of the provisions of the act. Why, there-

fore, would it follow that the sixth section should provide for the forfeiture of the property of the carrier if the rest of the act were intended to apply to it? To subject the locomotives and cars to forfeiture under such circumstances might also cause great confusion to the general business of the carrier and in that way inflict unmerited punishment upon the innocent owners of other property in the course of transportation in the same cars and drawn by the same locomotives. If the company itself violates the act, the penalties are sufficient as provided for therein.

But it is maintained that an agreement like the one in question on the part of the railroad companies is authorized by the Commerce Act, which is a special statute applicable only to railroads, and that a construction of the Trust Act (which is a general act) so as to include within its provisions the case of railroads, carries with it the repeal by implication of so much of the Commerce Act as authorized the agreement. It is added that there is no language in the Trust Act which is sufficiently plain to indicate a purpose to repeal those provisions of the Commerce Act which permit the agreement; that both acts may stand, the special or Commerce Act as relating solely to railroads and their proper regulation and management, while the later and general act will apply to all contracts of the nature therein described, entered into by any one other than competing common carriers by railroad for the purpose of establishing rates of traffic for transportation. On a line with this reasoning it is said that if Congress had intended to in any manner affect the railroad carrier as governed by the Commerce Act, it would have amended that act directly and in terms, and not have left it as a question of construction to be determined whether so important a change in the commerce statute had been accomplished by the passage of the statute relating to trusts.

The first answer to this argument is that, in our opinion, the Commerce Act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring either directly or by implication any authority to make it. If the agreement be legal it does not owe its

validity to any provision of the Commerce Act, and if illegal it is not made so by that act. The fifth section prohibits what is termed "pooling," but there is no express provision in the act prohibiting the maintenance of traffic rates among competing roads by making such an agreement as this, nor is there any provision which permits it. Prior to the passage of the act the companies had sometimes endeavored to regulate competition and to maintain rates by pooling arrangements, and in the act that kind of an arrangement was forbidden. After its passage other devices were resorted to for the purpose of curbing competition and maintaining rates. The general nature of a contract like the one before us is not mentioned in or provided for by the act. The provisions of that act look to the prevention of discrimination, to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and the short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and, in the language of counsel for defendants, "without reference to the location of those points or the lines over which it is necessary for the traffic to pass," to procuring uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates. Competing and non-connecting roads are not authorized by this statute to make an agreement like this one.

As the Commerce Act does not authorize this agreement, argument against a repeal by implication, of the provisions of the act which it is alleged grant such authority, becomes ineffective. There is no repeal in the case, and both statutes may stand, as neither is inconsistent with the other.

It is plain, also, that an amendment of the Commerce Act would not be an appropriate method of enacting the legislation contained in the Trust Act, for the reason that the latter act includes other subjects in addition to the contracts of or combinations among railroads, and is addressed to the

prohibition of other contracts besides those relating to transportation. The omission, therefore, to amend the Commerce Act furnishes no reason for claiming that the later statute does not apply to railroad transportation. Although the commerce statute may be described as a general code for the regulation and government of railroads upon the subjects treated of therein, it cannot be contended that it furnishes a complete and perfect set of rules and regulations which are to govern them in all cases, and that any subsequent act in relation to them must, when passed, in effect amend or repeal some provision of that statute. The statute does not cover all cases concerning transportation by railroad and all contracts relating thereto. It does not purport to cover such an extensive field.

The existence of agreements similar to this one may have been known to Congress at the time it passed the Commerce Act, although we are not aware, from the record, that an agreement of this kind had ever been made and publicly known prior to the passage of the Commerce Act. Yet if it had been known to Congress, its omission to prohibit it at that time, while prohibiting the pooling arrangements, is no reason for assuming that when passing the Trust Act it meant to except all contracts of railroad companies in regard to traffic rates from the operation of such act. Congress for its own reasons, even if aware of the existence of such agreements, did not see fit when it passed the Commerce Act to prohibit them with regard to railroad companies alone, and the act was not an appropriate place for general legislation on the subject. And at that time, and for several years thereafter, Congress did not think proper to legislate upon the subject at all. Finally it passed this Trust Act, and in our opinion no obstacle to its application to contracts relating to transportation by railroads is to be found in the fact that the Commerce Act had been passed several years before, in which the entering into such agreements was not in terms prohibited.

It is also urged that the debates in Congress show beyond a doubt that the act as passed does not include railroads. Coun-

sel for the defendants refer in considerable detail to its history from the time of its introduction in the Senate to its final passage. As the act originally passed the Senate the first section was in substance as it stands at present in the statute. On its receipt by the House that body proposed an amendment, by which it was in terms made unlawful to enter into any contract for the purpose of preventing competition in the transportation of persons or property. As thus amended the bill went back to the Senate, which itself amended the amendment by making the act apply to any such contract as tended to raise prices for transportation above what was just and reasonable. This amendment by the Senate of the amendment proposed by the House was disagreed to by that body. The amendments were then considered by conference committees, and the first conference committee reported to each house in favor of the amendment of the Senate. This report was disagreed to and another committee appointed, which agreed to strike out both amendments and leave the bill as it stood when it first passed the Senate, and that report was finally adopted, and the bill thus passed.

Looking at the debates during the various times when the bill was before the Senate and the House, both on its original passage by the Senate and upon the report from the conference committees, it is seen that various views were declared in regard to the legal import of the act. Some of the members of the House wanted it placed beyond doubt or cavil that contracts in relation to the transportation of persons and property were included in the bill. Some thought the amendment unnecessary as the language of the act already covered it, and some refused to vote for the amendment or for the bill if the amendments were adopted on the ground that it would then interfere with the Interstate Commerce Act, and tend to create confusion as to the meaning of each act. Senator Hoar (who was a member of the first committee of conference from the Senate), when reporting the result arrived at by the judiciary committee recommending the adoption of the House amendment, said: "The other clause of the House amendment is that contracts or agreements entered into for the purpose of

preventing competition in the transportation of persons or property from one State or Territory into another shall be deemed unlawful. That, the committee recommend shall be concurred in. *We suppose that it is already covered by the bill as it stands;* that is, that transportation is as much trade or commerce among the several States as the sale of goods in one State to be delivered in another, and, therefore, that it is covered already by the bill as it stands. But there is no harm in agreeing in an amendment which expressly describes it, and an objection to the amendment might be construed as if the Senate did not mean to include it; so we let it stand."

Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* v. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* v. *Hertford College*, 3 Q. B. D. 693, 707.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort

to the history of the times when it was passed. (Cases cited, *supra.*) If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation.

It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the state governments to successfully cope with them because of their commercial character and of their business extension through the different States of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust and many others, and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed, and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of "the history of the times" shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different

roads. Whether these complaints were well or ill founded we do not presume at this time and under these circumstances to determine or to discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature above set forth that this legislation was directed, that the subject of the opinions of the people in regard to the actions of the railroad companies in this particular is referred to. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom.

Our attention is also called to one of the rules for the construction of statutes which has been approved by this court; that while it is the duty of courts to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so in order to carry out the legislative intent. *Brewer* v. *Blougher*, 14 Pet. 178, 198; *Petri* v. *Commercial Bank of Chicago*, 142 U. S. 644, 650; *McKee* v. *United States*, 164 U. S. 287. It is therefore urged that if, by a strict construction of the language of this statute it may be made to include railroads, yet it is evident from other considerations now to be mentioned that the real meaning of the legislature would not include them, and they must for that reason be excluded. It is said that this meaning is plainly to be inferred, because of fundamental differences both in an economic way and before the law between trade and manufacture on the one hand, and railroad transportation on the other. Among these differences are the public character of railroad business, and as a result the peculiar power of control and regulation possessed by the State over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or

unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business. It is also urged that there are evils arising from unrestricted competition in regard to railroads which do not exist in regard to any other kind of property, that it is so admitted by the latest and best writers on the subject, and that practical experience of the results of unrestricted competition among railroads tends directly to the same view; that the difference between railroad property on the one hand, and all other kinds of property on the other hand, is so plain that entirely different economic results follow from unrestricted competition among railroads from those which obtain in regard to all other kinds of business. It is also said that the contemporaneous industrial history of the country, the legal situation in regard to railroad properties at the time of the enactment of this statute, its legislative history, the ancient and constantly maintained different legal effect and policy regarding railway transportation and ordinary trade and manufacture, together with a just regard for interests of such enormous magnitude as are represented by the railroads of the country, all tend to show that Congress in passing the Anti-Trust Act never could have contemplated the inclusion of railroads within its provisions. It is, therefore, claimed to be the duty of the court, in carrying out the rule of statutory construction, above stated, to restrict the meaning of these general words of the statute which would include railroads, because, from the considerations above mentioned, it is plain that Congress never intended that railroads should be included.

Many of the foregoing assertions may be well founded, while at the same time the correctness of the conclusions sought to be drawn therefrom need not be conceded. The points of difference between the railroad and other corporations are many and great. It cannot be disputed that a railroad

is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things. But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct, so that its business should be carried on with as much reference to the proper and fair interests of the public as possible. While the points of difference just mentioned and others do exist between the two classes of corporations, it must be remembered they have also some points of resemblance. Trading, manufacturing and railroad corporations are all engaged in the transaction of business with regard to articles of trade and commerce, each in its special sphere, either in manufacturing or trading in commodities or in their transportation by rail. A contract among those engaged in the latter business by which the prices for the transportation of commodities traded in or manufactured by the others is greatly enhanced from what it otherwise would be if free competition were the rule, affects and to a certain extent restricts trade and commerce, and affects the price of the commodity. Of this there can be no question. Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce, which when carried out affect the interests of the public. Why should not a railroad company be included in general legislation aimed at the prevention of that kind of agreement made in restraint of trade, which may exist in all companies, which is substantially of the same nature wherever found, and which tends very much towards the same results, whether put in practice by a trading and manufacturing or by a railroad company? It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggran-

dizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress and, perhaps, ruin shall be its accompaniment in regard to some of those who were engaged in the old methods. A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purpose, leave behind them for the time a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes. It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment, by reason of such changes as we have spoken of, may find opportunities for labor in other departments than those to which they have been accustomed. It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the com-

bination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common. It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business; but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same

statute by general language sufficiently broad to include them both. We see nothing either in contemporaneous history, in the legal situation at the time of the passage of the statute, in its legislative history, or in any general difference in the nature or kind of these trading or manufacturing companies from railroad companies, which would lead us to the conclusion that it cannot be supposed the legislature in prohibiting the making of contracts in restraint of trade intended to include railroads within the purview of that act.

Neither is the statute, in our judgment, so uncertain in its meaning, or its language so vague, that it ought not to be held applicable to railroads. It prohibits contracts, combinations, etc., in restraint of trade or commerce. Transporting commodities is commerce, and if from one State to or through another it is interstate commerce. To be reached by the Federal statute it must be commerce among the several States or with foreign nations. When the act prohibits contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign. Transportation of commodities among the several States or with foreign nations falls within the description of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the States or with foreign nations which is not confined to their mere transportation. It includes their purchase and sale. Precisely at what point in the course of the trade in or manufacture of commodities the statute may have effect upon them, or upon contracts relating to them, may be somewhat difficult to determine, but interstate transportation presents no difficulties. In *United States* v. *E. C. Knight Co.* 156 U. S. 1, heretofore cited, it was in substance held, reiterating the language of Mr. Justice Lamar in *Kidd* v. *Pearson*, 128 U. S. 1, that the intent to manufacture or export a manufactured article to foreign nations or to send it to another State did not determine the time when the article or product passed from the control of the State and

belonged to commerce. The difficulty in determining that question, however, is no reason for denying effect to language which, by its terms, plainly includes the transportation of commodities among the several States or with foreign nations, and which may also be the subject of contracts or combinations in restraint of such commerce. The difficulty of the subject, so far as the trade in or the manufacture of commodities is concerned, arises from the limited control which Congress has over the matter of trade or manufacture. It was said by Mr. Justice Lamar in *Kidd* v. *Pearson* (*supra*): "If it be held that the term" (commerce) "includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include the productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries and mining — in short, every branch of human industry."

In the *Knight Company case* (*supra*) it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life. It is readily seen from these cases that if the act do not apply to the transportation of commodities by railroads from one State to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative.

Still another ground for holding the act inapplicable is urged, and that is that the language covers only contracts or combinations like trusts or those which, while not exactly trusts, are otherwise of the same form or nature. This is clearly not so.

While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.

We think, after a careful examination, that the statute

covers, and was intended to cover, common carriers by railroad.

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the

act; that the common law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion

of that subject they have shown that there has been a gradual though great alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory. So long as the sale was the *bona fide* consideration for the promise and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to granting to a vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own. A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the law-making body that enacted it.

The great stress of the argument for the defendants on this branch of the case has been to show, if possible, some reason in the attendant circumstances, or some fact existing in the nature of railroad property and business upon which to found the claim, that although by the language of the statute agreements or combinations in restraint of trade or commerce are included, the statute really means to declare illegal only those contracts, etc., which are in unreasonable restraint of trade. In order to do this the defendants call attention to many facts which they have already referred to in their argument, upon the point that railroads were not included at all in the statute. They again draw attention to the fact of the peculiar nature of

railroad property. When a railroad is once built, it is said, it must be kept in operation; it must transport property, when necessary in order to keep its business, at the smallest price and for the narrowest profit, or even for no profit, provided running expenses can be paid, rather than not to do the work; that railroad property cannot be altered for use for any other purpose, at least without such loss as may fairly be called destructive; that competition while, perhaps, right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors instead of in that of its owners and the public; that a contest between a receiver of an insolvent corporation and one which is still solvent tends to ruin the latter company, while being of no benefit to the former; that a receiver is only bound to pay operating expenses, so he can compete with the solvent company and oblige it to come down to prices incompatible with any profit for the work done, and until ruin overtakes it to the destruction of innocent stockholders and the impairment of the public interests.

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will

be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in restraint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments it must be confessed bear with much force upon the policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is

the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

It must also be remembered that railways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen *in invitum* is not the least, *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 657; that many of them are the donees of large tracts of public lands and of gifts of money by municipal corporations, and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for

their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community — the farmer, the artisan, the manufacturer and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation and prevents the deadly competition so liable to result in the ruin of the roads and to thereby impair their usefulness to the public, and in that way to prejudice the public interest. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public and by those who assume to defend its interests both in and out of Congress. Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

It was said in *Gibbs* v. *Baltimore Gas Company*, 130 U. S. 396, at page 408, by Mr. Chief Justice Fuller, as follows: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Shepard* v. *Milwaukee Gas Co.*, 6 Wisconsin, 539; *Chicago Gas Light & Coke Co.* v. *People's Gas Light & Coke Co.*, 121 Illinois, 530; *St. Louis* v. *St. Louis Gas Light Co.*, 70 Missouri, 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, *Printing &c. Registering Co.* v. *Sampson*, L. R. 19 Eq. 462, yet in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or

sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co.* v. *Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago &c. Gas Co.* v. *People's Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co.* v. *American Union Telegraph Co.*, 65 Georgia, 160."

It is true that in the *Gibbs case* there was a special statute which prohibited the company from entering into any consolidation, combination or contract with any other gas company whatever, and it was provided that any attempt to do so or to make such combination or contract should be utterly null and void. The above extract from the opinion of the court is made for the purpose of showing the difference which exists between a private and a public corporation — that kind of a public corporation which, while doing business for remuneration, is yet so connected in interest with the public as to give a public character to its business — and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests.

The plaintiffs are, however, under no obligation in order to maintain this action to show that by the common law all agreements among competing railroad companies to keep up rates to such as are reasonable were void as in restraint of trade or commerce. There are many cases which look in that direction if they do not precisely decide that point. Some of them are referred to in the opinion in the *Baltimore Gas Company case*, above cited. The case of the *Mogul Steamship Company* v. *McGregor*, 21 Q. B. D. 544; 23 Q. B. D. 598; 1892, App. Cas. 25, has been cited by the courts below as holding in principle that contracts of this nature are valid at common law. The agreement held valid there was

an agreement for lowering rates of transportation among the parties thereto, and it was entered into for the purpose of driving out of trade rival steamships in order that thereafter the rates might be advanced. The English courts held that the agreement was not a conspiracy, and that it was valid, although the result aimed at was to drive a rival out of the field, because so long as the injury to such rival was not the sole reason for the agreement, but self-interest the predominating motive, there was nothing wrong in law with an agreement of that kind. But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The provisions of the Interstate Commerce Act relating to reasonable rates, discriminations, etc., do not authorize such an agreement as this, nor do they authorize any other agreements which would be inconsistent with the provisions of this act.

The general reasons for holding agreements of this nature to be invalid even at common law, on the part of railroad companies are quite strong, if not entirely conclusive.

Considering the public character of such corporations, the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that Congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.

It is true that, as to a majority of those living along its line, each railroad is a monopoly. Upon the subject now under consideration it is well said by Judge Oliver P. Shiras, United States District Judge, Northern District of Iowa, in his very able dissenting opinion in this case in the United States Circuit Court of Appeals, as follows:

"As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of this corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer and the merchant, from the sale of the products of the farm, the workshop and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country. . . . A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein. . . . In the opinion of the court are found citations from the reports of the Interstate Commerce Commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the com-

peting lines. It may be entirely true that as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that because railway companies *through their own action cause evils to themselves* and the public by sudden changes or reductions in tariff rates they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce Act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress, in the enactment of that statute, to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates."

The whole opinion is a remarkably strong presentation of the views of the learned judge who wrote it.

Still, again, it is answered that the effects of free competition among railroad companies, as described by the counsel for the companies themselves in the course of their argument, are greatly exaggerated. According to that argument, the moment an agreement of this nature is prohibited the railroads commence to cut their rates, and they cease only with their utter financial ruin, leaving, perhaps, one to raise rates indefinitely when its rivals have been driven away. It is said that this is a most overdrawn statement, and that while absolutely free competition may have in some instances and for a time resulted in injury to some of the railroads, it is not at all clear that the general result has been other than beneficial to the whole public, and not in the long run detrimental to the prosperity of the roads. It is matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. Rate wars go on notwithstanding any agreement to the contrary, and the struggle for business among competing roads keeps on, and in the nature of things will keep on, any alleged agreement to the contrary notwithstanding, and it is only by the exercise of good sense and by the presence of a common interest that railroads, without entering into any affirmative agreement in regard thereto, will keep within the limit of exacting a fair and reasonable return for services rendered. These agreements have never been found really effectual for any extended period.

The Interstate Commerce Commission, from whose reports quotations have been quite freely made by counsel for the purpose of proving the views of its learned members in regard to this subject, has never distinctly stated that agreements among competing railroads to maintain prices are to be commended, or that the general effect is to be regarded as beneficial. They have stated in their fourth annual report that competition may degenerate into rate wars, and that such wars are as unsettling to the business of the country

as they are mischievous to the carriers, and that the spirit of existing law is against them. They then add: "Agreements between railroad companies which from time to time they have entered into with a view to prevent such occurrences have never been found effectual, and for the very sufficient reason, that the mental reservations in forming them have been quite as numerous and more influential than the written stipulations." It would seem true, therefore, that there is no guaranty of financial health to be found in entering into agreements for the maintenance of rates, nor is financial ruin or insolvency the necessary result of their absence.

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.; one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such mournful results will follow, and it is urged that there is a necessity, in order that the public interest may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property.

The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any con-

tract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.

The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt

that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

One or two subsidiary questions remain to be decided.

It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise.

It is also argued that the United States have no standing in court to maintain this bill; that they have no pecuniary interest in the result of the litigation or in the question to be decided by the court. We think that the fourth section of

the act invests the Government with full power and authority to bring such an action as this, and if the facts be proved, an injunction should issue. Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy. The subject is fully and ably discussed in the case of *In re Debs*, 158 U. S. 564. See also *Cincinnati, New Orleans &c. Railway* v. *Interstate Commerce Commission*, 162 U. S. 184; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197.

For the reasons given, the decrees of the United States Circuit Court of Appeals and of the Circuit Court for the District of Kansas must be

*Reversed, and the case remanded to the Circuit Court for further proceedings in conformity with this opinion.*

Mr. Justice White, with whom concurred Mr. Justice Field, Mr. Justice Gray and Mr. Justice Shiras, dissenting.

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

The contract between the railway companies which the court holds to be void because it is found to violate the act of Congress of the 2d of July, 1890, 26 Stat. 209, substantially embodies only an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret under-cutting of rates is sought to be avoided, and the rates as stated in the published rate sheets, and which, as a general rule, are required by law to be filed with the Interstate Commerce Commission, are secured against arbitrary and sudden changes. I content myself with giving this mere outline of the results of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of

the court rests upon that hypothesis. I commence, then, with these two conceded propositions, one of law and the other of fact, first, that only such contracts as unreasonably restrain trade are violative of the general law, and, second, that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it.

The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason. The question, then, is, is the act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

The argument upon which it is held that the act forbids those reasonable contracts which are universally admitted to be legal is thus stated in the opinion of the court, and I quote the exact language in which it is there expressed, lest in seeking to epitomize I may not accurately reproduce the thought which it conveys:

"Contracts in restraint of trade have been known and

spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain trade. Some of such contracts have been held void and unenforcible in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforcible as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

To state the proposition in the form in which it was earnestly pressed in the argument at bar, it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word "some" for the word "every." If Congress had meant to forbid only restraints of trade which were unreasonable it would have said so; instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.

Is the proposition which is thus announced by the court, and which was thus stated at bar, well founded? is the first question which arises for solution. I quote the title and the first section of the act which, it is asserted, if correctly interpreted, destroys the right to make just and reasonable contracts:

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

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

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade"? I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms every contract in restraint of trade. The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in 6 Year Book 5, 2 Hen. V, and is known as *Dier's case*. That was an action of damages upon a bond conditioned that the defendant should not practise his trade as a dyer at a particular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of

the subject were forbidden. The doctrine declared in that case was applied in subsequent cases in England prior to the case of *Mitchel* v. *Reynolds*, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England, not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was set finally at rest by the House of Lords in *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*, reported in (1894) App. Cas. 535. In that case it was held that the distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and if unreasonable it was.

The decisions of the American courts substantially conform to both the development and ultimate results of the English cases. Whilst the rule of partial and general restraint has been either expressly or impliedly admitted, the exact scope of the distinction between the two has been the subject of discussion and varying adjudication. And although it is accurate to say that in the cases expressions may be found speaking of contracts as being in form, in restraint of trade and yet valid, it results from an analysis of all the American cases, as it does from the English, that these expressions in no way imply that contracts which were valid because they only partially restrained trade were yet considered as embraced within the definition of contracts in restraint of trade. On the contrary, the reason of the cases, where contracts partially restraining trade were excepted and hence held to be valid, was because they were not contracts in restraint of trade in the legal meaning of those words. Referring to the modern and Ameri-

can rule on the subject, Beach in his recent treatise on the Modern Law of Contracts, at section 1569, says:

"The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more *by exceptions and qualifications*, and a gradual change has taken place, brought about by the growth of industrial activities, and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment."

The fact that the exclusion of reasonable contracts from the doctrine of restraint of trade was predicated on the conclusion that such contracts were no longer considered as coming within the meaning of the words "restraint of trade," is nowhere more clearly and cogently stated than in the opinion of the Court of Appeals of the State of New York, in the case of *Matthews* v. *Associated Press of New York*, 136 N. Y. 333. In considering the contention that a by-law of the defendant association which prohibited its members from receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose" was void, because it tended to restrain trade and competition and to create a monopoly, the learned judge said (p. 340):

"We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. *The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England.* The

cases in this court which are the latest manifestations of the turn in the tide are cited in the opinion in this case at general term, and are *Diamond Match Co.* v. *Roeber*, 106 N. Y. 73; *Hodge* v. *Neill*, 107 N. Y. 244; *Leslie* v. *Lorillard*, 110 N. Y. 519.

"So that when we agree that a by-law which is in restraint of trade is void, we are still brought back *to the question what is a restraint of trade in the modern definition of that term?* The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that *it is not in restraint of trade as the courts now interpret that phrase.*"

This lucid statement aptly sums up the process of reasoning by which partial and reasonable contracts came no longer to be considered as included in the words contracts in restraint of trade, and points to the fallacy embodied in the proposition that contracts which were held not to be in restraint of trade were yet covered by the words in restraint of trade; that is, that although they were not such contracts, yet they continued so to be. After analyzing the provisions of the by-law the opinion proceeds as follows (p. 341):

"Thus a by-law of the nature complained of would have a tendency to strengthen the association and to render it more capable of filling the duty it was incorporated to perform. A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up all such business as he had theretofore done. *Such an agreement would not be in restraint of trade*, although its direct effect might be to restrain to some extent the trade which had been done."

This adds cogency to the demonstration, and shows in the most conclusive manner that the words contracts in restraint of trade do not continue to define those contracts which are no longer covered by the legal meaning of the words.

This court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is

not whether in a measure it produces such effect, but whether under all the circumstances it is reasonable. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, 68; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 409. As it is unnecessary here to enter into a detailed examination of the cases, I append in the margin a reference to decisions of some of the state courts and to several writers on the subject of contracts in restraint of trade, by whom the doctrine is reviewed and the authorities very fully referred to.[1]

It follows from the foregoing statement that at common law contracts which only partially restrain trade, to use the precise language of Maule, Justice, in *Rannie* v. *Irvine*, 7 Man. & G. 969, 978, were "*an exception engrafted upon that rule*," that is, the rule as to contracts in restraint of trade, "*and that the exception is in furtherance of the rule itself.*" I submit, also, manifestly that the further development of the doctrine by which it was decided that if a contract was reasonable it would not be held to be included within contracts in restraint of trade, although such contract might, in some measure, produce such an effect, was also an exception to the general rule as to the invalidity of contracts in restraint of trade. The theory, then, that the words restraint of trade define and embrace all such contracts without reference to whether they are reasonable, amounts substantially to saying that, by the common law and the adjudged American cases, certain classes of contracts were carved out of and excepted from the general rule, and yet were held to remain embraced within the general rule from which they were removed. But the obvious conflict which is shown by this contradictory result to which the contention leads rests not upon the mere form of statement but upon the

[1] *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Leslie* v. *Lorillard*, 110 N. Y. 519, 533; *Beal* v. *Chase*, 31 Michigan, 490, 518; *National Benefit Co.* v. *Union Hospital Co.*, 45 Minnesota, 272; *Ellerman* v. *Chicago Junction Railways &c. Co.*, 49 N. J. Eq. 215, 217; *Richards* v. *Am. Desk &c. Co.*, 87 Wisconsin, 503, 514; Note to 2 Parsons on Contracts, p. 748; Note to *Angier* v. *Webber*, 92 Am. Dec. 751 (1867); Note to *Mitchel* v. *Reynolds*, 1 Smith's Leading Cases, 705, and Supplemental Note, 9th Am. ed. 716 (1888); Review of Cases by A. M. Eaton in 4 Harv. Law Review, p. 129 (1890); Patterson on Restraint of Trade (1891).

reason of things. This will, I submit, be shown by a very brief analysis of the reasons by which partial restraints were held not to be embraced in contracts in restraint of trade, and by which ultimately all reasonable contracts were likewise decided not to be so embraced. That is to say, that the reasoning by which the exceptions were created conclusively shows the error of contending that the words contracts in restraint of trade continued to embrace those reasonable contracts which those words no longer described.

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But as trade developed it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. Hence, from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract or of trade they were not in contemplation of law contracts in restraint of trade. And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade. To define, then, the words "in restraint of trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words "contracts in restraint of trade" so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue and should not be restrained, is shown by an argument advanced, and which has been com-

pelled by the exigency of the premise upon which it is based. Thus, after insisting that the word "every" is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not "supposed" to be within the letter or spirit of the statute. But how, I submit, can it be held that the words "*every* contract in restraint of trade" *embrace all* such contracts, and yet at the same time be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason. It must either result from the exclusion of particular classes of contracts, whether they be reasonable or not, or it must arise from the fact that the contracts referred to are merely collateral contracts. But many collateral contracts may contain provisions which make them unreasonable. The exception which is relied upon, therefore, as rendering possible the existence of trade to be restrained is either arbitrary or it is unreasonable.

But, admitting *arguendo* the correctness of the proposition by which it is sought to include every contract, however reasonable, within the inhibition of the law, the statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is "An act to protect trade and commerce against unlawful restraints and monopolies." The word "unlawful" clearly distinguishes between contracts in restraint of trade which are lawful and those which are not. In other words, between those which are unreasonably in restraint of trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act the well-settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? Whilst it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction. In *United States*

v. *Palmer*, 3 Wheat. 610, where general language found in the body of a criminal statute was given a narrow and restricted meaning, Mr. Chief Justice Marshall, in the course of the opinion, said (p. 631): "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is 'An act for the punishment of certain crimes against the United States.' It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish."

So, also, in *United States* v. *Union Pacific Railroad*, 91 U. S. 72, where the construction of a statute was involved, it was held that the interpretation adopted was supported by the title, which disclosed the general purpose which Congress had in view in adopting the law under consideration. The same rule was announced in *Smythe* v. *Fiske*, 23 Wall. 374, 380, and *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, and cases there cited.

Pretermitting the consideration of the title, it cannot be denied that the words "restraint of trade" used in the act in question had long prior to the adoption of that act been construed as not embracing reasonable contracts. The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created. Thus in *United States* v. *Palmer* (*supra*), Mr. Chief Justice Marshall, referring to the term "robbery" as used in the statute, said (p. 630): "Of the meaning of the term 'robbery,' as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law."

If these obvious rules of interpretation be applied, it seems to me they render it impossible to construe the words every restraint of trade used in the act in any other sense than as excluding reasonable contracts, as the fact that such contracts were not considered to be within the rule of contracts in restraint of trade, was thoroughly established both in England and in this country at the time the act was adopted. It is, I submit, not to be doubted that the interpretation of the words "every contract in restraint of trade," so as to embrace within its purview every contract, however reasonable, would certainly work an enormous injustice and operate to the undue restraint of the liberties of the citizen. But there is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way, and exacts that the spirit which vivifies, and not the letter which killeth, is the proper guide by which to correctly interpret a statute. In *Smythe* v. *Fiske*, 23 Wall. 374, 380, this court declared that "a thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." In *Lau Ow Bew* v. *The United States*, 144 U. S. 47, this court, speaking through Mr. Chief Justice Fuller, said (p. 59):

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *United States* v. *Kirby*, 7 Wall. 482; *Oates* v. *National Bank*, 100 U. S. 239."

In all the cases there cited the literal language of the statutes was disregarded, in order to restrict its operation within reason. To those cases may also be added *United States* v. *Mooney*, 116 U. S. 104, where it was contended that by the act of March 3, 1875, c. 137, the Circuit Courts were vested with jurisdiction concurrent with District Courts over certain suits. The plausibility of the argument, based upon the literal language of the statute, was conceded by the court, but the

results which would follow from sustaining the construction contended for were pointed out by the court, and it was observed (p. 107): "A construction which involves such results was clearly not contemplated by Congress."

Indeed, it seems to me there can be no doubt that reasonable contracts cannot be embraced within the provisions of the statute if it be interpreted by the light of the supreme rule commanding that the intention of the law must be carried out, and it must be so construed as to afford the remedy and frustrate the wrong contemplated by its enactment.

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom. Progress and not reaction was the purpose of the act of Congress. The construction now given the act disregards the whole current of judicial authority and tests the right to contract by the conceptions of that right entertained at the time of the year-books instead of by the light of reason and the necessity of modern society. To do this violates, as I see it, the plainest conception of public policy; for as said by Sir G. Jessel, Master of the Rolls, in *Printing &c. Company* v. *Sampson*, L. R. 19 Eq. 462, "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

The remedy intended to be accomplished by the act of Congress was to shield against the danger of contract or combi-

nation by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held in a case involving a combination among workingmen, that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. *In re Debs*, 64 Fed. Rep. 724, 745–755; 158 U. S. 564. The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the doctrine of the invalidity of contract or combinations in restraint of trade, and they were only held not to be embraced within that doctrine either by statutory exemption therefrom or by the progress which made reason the controlling factor on the subject. It follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition. It is therefore, as I see it, absolutely true to say that the construction now adopted which works out such results not only frustrates the plain purpose intended to be accomplished by Congress, but also makes the statute tend to an end never contemplated, and against the accomplishment of which its provisions were enacted.

But conceding for the sake of argument that the words "every contract in restraint of trade," as used in the act of Congress in question, prohibits all such contracts however reasonable they may be, and therefore that all that great body of contracts which are commonly entered into between individuals or corporations and which promote and develop trade, and which have been heretofore considered as lawful, are no longer such; and conceding also that agreements entered into by associations of workingmen to peaceably better their condition either by obtaining an increase or preventing a decrease

of wages, or by securing a reduction in the hours of labor, or for mutually protecting each other from unjust discharge, or for other reasonable purposes, have become unlawful, it remains to consider whether the provisions of the act of 1890 were intended to apply to agreements made between carriers for the purpose of classifying the freight to be by them carried, or preventing secret cutting of the published rates; in other words, whether the terms of the statute were intended to apply to contracts between carriers entered into for the purpose of securing fairness in their dealings with each other and tending to protect the public against improper discrimination and sudden changes in rates. To answer this question involves deciding whether the act here relied upon was intended to abrogate the provisions of the act of Congress of the 4th of February, 1887, and the amendments thereto, commonly known as the Interstate Commerce Act. The question is not whether railway companies may not violate the terms of the statute of 1890 if they do acts which it forbids and punishes, but whether that statute was intended to abrogate the power of railway companies to make contracts with each other which are either expressly sanctioned by the Interstate Commerce Act or the right to make which arises by reasonable implication from the terms of that act; that is to say, not whether the act of 1890 is not operative upon all persons and corporations, but whether, being so generally operative, it was intended to forbid, as in restraint of trade, all contracts on the subjects embraced within and controlled by the interstate commerce law. The statute, commonly known as the Interstate Commerce Act, was a special act, and it was intended to regulate interstate commerce transported by railway carriers. All its provisions directly and expressly related to this subject. The act of 1890, on the contrary, is a general law, not referring specifically to carriers of interstate commerce. The rule is that a general will not be held to repeal a special statute unless there be a clear implication unavoidably resulting from the general law that it was the intention that the provisions of the general law should cover the subject-matter previously, expressly and specifically provided for by particular legislation. The doctrine on this

subject is thus stated in *Ex parte Crow Dog*, 109 U. S. 556, 570:

"'The general principle to be applied,' said Bovill, C. J., in *Thorpe* v. *Adams*, L. R. 6 C. P. 135, 'to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald* v. *Champenys*, 30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31–54, 'that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterward to derogate from its own act when it makes no special mention of its intention so to do.'"

These principles thus announced are treated as elementary by the text writers. Endlich on Interpretation of Statutes, § 223; Sedgwick on Statutory Construction, §§ 157, 158; Sutherland on Statutory Construction, § 157.

Does, therefore, the implication irresistibly arise that Congress intended in the act of 1890 to abrogate, in whole or in part, the provisions of the act of 1887, regulating interstate commerce? It seems to me that the nature of the two enactments clearly demonstrates that there was no such intention. The act to regulate interstate commerce expressed the purpose of Congress to deal with a complex and particular subject which, from its very nature, required special legislation. That act was the initiation of a policy by Congress looking to the development and working out of a harmonious system to regulate the highly important subject of interstate transportation.

Conceding *arguendo* that the debates which took place at the time of the passage of the act of 1890 may not be resorted to as a means of interpreting its text, yet a review of the proceedings connected with the passage of the act of July 2, 1890, through the two houses of Congress, it seems to me, leaves no room for question that the act was not designed to cover the particular subjects which had been theretofore specially regulated by provisions of the interstate commerce law.

Dissenting Opinion: White, Field, Gray, Shiras, JJ.

Prior to the passage of the act of 1890, various reports had been made to Congress concerning the operations of the Interstate Commerce Act, in which the commission pointed out the desirability and necessity of contracts between railroad companies in the matter of classification, stable rates, etc. After the act of 1890 had been adopted in the Senate, it was amended in the House of Representatives so as to specifically include among the contracts declared lawful "contracts for the transportation of persons or property from one State or Territory into another." Cong. Rec. vol. 21, part 5, pp. 4099, 4144. On the return of the bill to the Senate the amendment was agreed to with the added provision that the contracts for transportation to be prohibited, "should only be such as raise the rates of transportation above what is just and reasonable." Ib. 4753. The House refused to concur in the Senate amendment. A conference committee was appointed by both bodies, which recommended that the House of Representatives recede from its disagreement to the amendments of the Senate and agree to the same, modified by the addition of the provision that "nothing in this act shall be deemed or held to impair the powers of the several States in respect to any of the matters in this act mentioned." In a statement accompanying the report, Mr. Stewart, for the conferees on the part of the House, said:

"A majority of the committee of conference on the part of the House on the disagreeing votes of the two houses on Senate bill one, submit the following statement:

"In the original bill two things were declared illegal, namely: contracts in restraint of interstate trade or commerce, and the monopolization of such trade.

"Its only object was the control of trusts, so called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.

"The House amendment extends the scope of the act to all agreements entered into for the purpose of preventing competition, either in the purchase or sale of commodities, or in the transportation of persons or property within the jurisdiction of Congress.

"It declares illegal any agreement for relief from the effects of competition in the two industries of transportation and merchandising, however excessive or destructive such competition may be.

"The amendment reported by the conferees is the Senate amendment with the added proviso that the power of the States over the subjects embraced in the act shall not be impaired thereby.

"It strikes from the House amendment the clause relating to contracts for the purchase of merchandise, and modifies the transportation clause by making unlawful agreements which raise rates above what is just and reasonable." Cong. Rec. vol. 21, part 6, p. 5950.

The House rejected the report of the conference committee and adhered to its amendments. A new conference committee was appointed, and the recommendation of that committee that both houses recede was concurred in, and the bill as it originally passed the Senate was adopted. Cong. Rec. vol. 21, part 9, p. 6212.

It thus appears that the bill was originally introduced in the form in which it now appears; that this form was thought not to be sufficient to embrace railroad transportation, and that a determined effort was made by the proposed amendment to include such contracts, and that the effort was unsuccessful. The reports to Congress by the commission and by the conference committee being facts proper to be noticed in seeking to ascertain the intention of Congress, *Church of Holy Trinity* v. *United States*, 143 U. S. 457, it would seem to be manifest therefrom that there was no intention by the act to interfere with the control and regulation of railroads under the Interstate Commerce Act or with acts of the companies which had therefore been recognized as in conformity to and not in conflict with that act.

That there was and could have been no intention to repeal by the act of 1890 the earlier "act to regulate interstate commerce" is additionally evidenced by the fact that no reference is made in the later act to the prior one, and that no language is contained in the act of 1890 which could in any way be con-

strued as abrogating any of the rights conferred or powers called into existence by the Interstate Commerce Act. Nowhere, contemporaneous with the act of 1890, is there anything indicating that any one supposed that the provisions of that act were intended to repeal the Interstate Commerce Act. The understanding of Congress in this respect is shown by the circumstance that the Interstate Commerce Act has been amended in material particulars and treated as existing since the adoption of the act of 1890; and this conception of the legislative department of the Government has also been that entertained by the executive and judicial departments, evidenced by the appointment of new members of the commission, and by decisions of the courts enforcing various provisions of that act, and treating it as still subsisting in its entirety. The two laws then coexisting — is the agreement of the carriers to secure a uniform classification of freight and to prevent secret changes of the published rates, in other words, to secure just and fair dealings between each other, sanctioned by the act to regulate interstate commerce, and, therefore, not within the inhibition of the act of 1890?

The Interstate Commerce Act provided for the appointment of a commission to whom was to be confided the supervision of the execution of the law. Without going into detailed mention of the provisions of the statute, I adopt and quote the summary statement of the leading features of the original act contained in the first annual report made to Congress by the commission, as required by the act. It is as follows:

"All charges made for services by carriers subject to the act must be reasonable and just. Every unjust and unreasonable charge is prohibited and declared to be unlawful.

"The direct or indirect charging, demanding, collecting or receiving for any service rendered a greater or less compensation from any one or more persons than from any other for a like and contemporaneous service, is declared to be unjust discrimination and is prohibited.

"The giving of any undue or unreasonable preferences, as between persons or localities, or kinds of traffic, or the subject-

ing any one of them to undue or unreasonable prejudice or disadvantage, is declared to be unlawful.

"Reasonable, proper and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding and delivering of passengers and property between connecting lines is required, and discrimination in rates and charges as between connecting lines is forbidden.

"It is made unlawful to charge or receive any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

"Contracts, agreements or combinations for the pooling of freights of different and competing railroads, or for dividing between them the aggregate or net earnings of such railroads or any portion thereof, are declared to be unlawful.

"All carriers subject to the law are required to print their tariffs for the transportation of persons and property, and to keep them for public inspection at every depot or station on their roads. An advance in rates is not to be made until after ten days' public notice, but a reduction in rates may be made to take effect at once, the notice of the same being immediately and publicly given. The rates publicly notified are to be the maximum as well as the minimum charges which can be collected or received for the services respectively for which they purport to be established.

"Copies of all tariffs are required to be filed with this commission, which is also to be promptly notified of all changes that shall be made in the same. The joint tariffs of connecting roads are also required to be filed, and also copies of all contracts, agreements or arrangements between carriers in relation to traffic affected by the act.

"It is made unlawful for any carrier to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination."

These provisions substantially exist in the act as now in force, except that by an amendment made March 2, 1889, it was provided that rates should not be reduced by carriers except upon three days' public notice of an intention so to do.

This summary of the act, which omits reference to a number of its provisions relating to the power of the commission and the mode in which these powers are to be exercised, will suffice for an examination of the matter in hand.

Now, a consideration of the terms of the statute, I submit, makes it clear that the contract here sought to be avoided as illegal is either directly sanctioned or impliedly authorized thereby. That the act did not contemplate that the relations of the carrier should be confined to his own line and to business going over such line alone, is conclusively shown by the fact that the act specifically provides for joint and continuous lines; in other words, for agreements between several roads to compose a joint line. That these agreements are to arise from contract is also shown by the fact that the law provides for the filing of such contracts with the commission. And it was also contemplated that the agreements should cover joint rates, since it provides for the making of such joint tariffs and for their publication and filing with the commission. The making of a tariff of this character includes necessarily agreements for the classification of freight, as the freight classification is the essential element in the making up of a rate. That the interstate commerce rates, all of which are controlled by the provisions as to reasonableness, were not intended to fluctuate hourly and daily as competition might ebb and flow, results from the fact that the published rates could not either be increased or reduced, except after a specified time. It follows, then, that agreements as to reasonable rates and against their secret reduction conform exactly to the terms of the act. Indeed, the authority to make agreements on this subject not only results from the terms of the act just referred to, but from its mandatory provisions forbidding discrimination against or preference to persons and places. The argument that these provisions referred to joint lines alone and not to competitive lines is without force; since joint rates necessarily relate to and

are influenced by the rates on competitive lines. To illustrate, suppose three joint lines of railroads between Chicago and New York, each made up of many roads. How could a joint rate be agreed on by the roads composing one of these continuous lines, without an ascertainment of the rate existing on the other continuous line? What contract could be made with safety for transportation over one of the lines without taking into account the rate of all the others? There certainly could be no prevention of unjust discrimination as to the persons and places within a given territory, unless the rates of all competing lines within the territory be considered and the sudden change of the published rates of all such lines be guarded against.

I do not further elaborate the reasons demonstrating that classification is essential to rate making, and that a joint rate to be feasible must consider the competitive rates in the same territory, since these propositions are to me self-evident, and their correctness is substantiated by statements found in the reports of the Interstate Commerce Commission to Congress, of which reports judicial notice may be taken. *Heath* v. *Wallace*, 138 U. S. 573, 584.

I excerpt from some of these reports of the commission to Congress statements bearing on these subjects, as well as other statements indicating that agreements among carriers, competitive as well as connecting, for the purpose of securing a uniform classification and preventing of undercutting of rates, underbilling, etc., existed prior to the Interstate Commerce Act, were continued thereafter, and were deemed not to be forbidden by law, but, on the contrary, were considered as instruments tending to secure its successful evolution. Whilst it is doubtless true that in a recent report the commission, as now constituted, has said that agreements between competitors to prevent the undercutting of rates may operate to cause carriers to disregard the lawful orders of the commission, this fact does not change the legal inference to be deduced from the construction placed upon the law by those charged with its administration in the period immediately following its adoption and which was then reported to Congress.

On the subject of relative rates, the commission at page 39 of their first annual report said: "Questions of rates on one line or at one point cannot be considered by themselves exclusively; a change in them may affect rates in a considerable part of the country. . . . Just rates are always relative; the act itself provides for its being so when it forbids unjust discrimination as between localities." That is to say, if one continuous line made joint rates and fixed and published them, and the other then made a different rate, not only would the first joint rate be injurious to the interests of the railroads making it, during the period in which it could not be changed, but would also be against the interests of the public and of those who had contracted to ship, since it would create among shippers and the receivers that inequality which it was the express purpose of the act to prevent.

In the same report of the commission, at page 33, not only the expediency but the necessity of contractual relations between railroad companies is pointed out in the following language:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements, an interchange of cars and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and even if they were not, could be best settled and all the incidents and qualifications fixed by the voluntary action of the parties in control of the roads respectively."

Also at page 35, after referring to the fact that the former railroad associations had been continued in existence since the enactment of the interstate commerce law, though pooling had been prohibited, among other objects, for the "making of regulations for uninterrupted and harmonious railroad communication and exchange of traffic within the territories embraced by their workings," the commission observed that "some regulations in addition to those made by the law are almost if not altogether indispensable."

On the same page the fact is emphasized that classification had not been taken, by the act, out of the hands of the carriers,

and it was observed that classification was best made by the joint action of the railroads themselves. In its second annual report the commission, in commenting upon the evils arising from the want of friendly business relations between railroads and the injury that a short road might cause by simply abstaining from extending accommodation that could not be lawfully forced from it, said (p. 28):

"The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibility, just as far as may be possible, so that the public may have in the service performed all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers, as well as to the public, and their voluntary extension may be looked for until in the strife between the roads the limits of competition are passed and warfare is entered upon. But in order to form them great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

At page 29 of the report the existence of traffic arrangements between railroads is called to the attention of Congress in the following language:

"While the commission is not at this time prepared to recommend general legislation towards the establishment and promotion of relations between the carriers that shall better subserve the public interest than those that are now common, it must nevertheless look forward to the possibility of something of that nature becoming at some time imperative, unless a great improvement in the existing condition of things is voluntarily inaugurated."

So, also, the existence of traffic associations, between competitive roads, for purposes recognized by the act as lawful,

and their favorable tendency seems to be conceded in the fourth annual report of the commissioners, where, at page 29, it is said:

"If the regulations which are established by the railroad associations were uniformly, or even generally, observed by their members, respectively, there would be little difficulty in enforcing a rule of reasonable rates, for the competition between the roads which even then would exist would be such as would prevent the establishment of rates which are altogether unreasonable, and the public would not be likely to complain if they were satisfied that the rate sheets were observed."

The character of associations such as that under consideration is alluded to at page 26 of the same report, where, in discussing the subject of how best to secure a unity of railroad interests, it was observed " without legislation to favor it little can be done beyond the formation of consulting and advisory associations, and the work of these is not only necessarily defective, but it is also limited to a circumscribed territory."

The significance of the statement that to obtain uniformity of classification, a result most desirable for the best interests of the public, agreements between the railroads themselves was essential, is apparent from the fact, frequently declared by the commission in its reports, that uniformity of classification is one of the prerequisites of uniformity of rates. 1 Ann. Rep. 30, 35; 2 Ann. Rep. 40; 3 Ann. Rep. 51, 52; 4 Ann. Rep. 32. The very great importance of uniform and stable rates has also frequently been reiterated in the reports of the commission. Thus, at page 6 of the first annual report, in reviewing the causes which led to the adoption of the Interstate Commerce Act, it is said:

"Permanence of rates was also seen to be of very high importance to every man engaged in business enterprises, since without it business contracts were lottery ventures. It was also perceived that the absolute sum of the money charges exacted for transportation, if not clearly beyond the bounds of reason, was of inferior importance in comparison with the obtaining of rates that should be open, equal, relatively just

as between places and as steady as in the nature of things was practicable."

That unstable rates between competing carriers lead to injurious discrimination, one of the evils sought to be remedied by the act, was mentioned in the same report at pages 36 and 37, in connection with a discussion of the subject of reasonable charges, in the following language:

"Among the reasons most frequently operating to cause complaints of rates may be mentioned: the want of steadiness in rates. . . . More often, perhaps, growing out of disagreements between competing companies, which, when they become serious, may result in wars of rates between them. Wars of rates, when mutual injury is the chief purpose in view, as is sometimes the case, are not only mischievous in their immediate effects upon the parties to them, and upon the business community whose calculations and plans must for a time be disturbed, but they have a permanently injurious influence upon the railroad service because of their effect upon the public mind."

The evil effects of shifting rates was also treated of at page 22 of the second annual report, where the commission inserted a letter received from a business man of Kansas City, not connected with railroads, who said:

"The frequent and violent changes in railway rates which have taken place during the past few years, and which seem likely to be unabated, seems to me to call for new legislation in the way of amendment of the interstate commerce bill. These changes are ruinous to all business men, as well as the railways, and are the cause of great discontent among shippers everywhere, and especially to the farmers. What is needed is a fixed permanent rate, which shall be reasonable, and which can be counted upon by any one engaging in business."

So, also, in the fourth annual report it was observed that shifting, unstable rates, by competing roads, was contrary to the purpose of the Interstate Commerce Act, and hampered the operations of the commission. It was said at page 21:

"In former reports the commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and the most serious difficulty in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of existing law is against them."

In addition to the text of the law heretofore commented on, the section which forbids pooling adds cogency to the construction that the law could not have been intended to forbid contracts between carriers for the purpose of preventing the doing of those things which the law forbade. For, as I have said, it cannot be denied that at the time of the passage of the act there existed associations and contracts between carriers for other purposes than the pooling of their earnings. Whilst the exact scope of these contracts is not shown, the fact that their existence was considered by Congress results from the face of the act, since it requires that agreements and contracts between carriers shall be filed with the commission. Moreover, the earlier reports of the commission, as I have shown, refer to such traffic agreements, and state that after the passage of the act they continued to exist as they had existed before eliminating only the pooling feature.

In view of these facts, when the act *expressly forbids contracts and combinations between railroads for pooling, and makes no mention of other contracts*, it is clear that the continued existence of such contracts was contemplated, and they are not intended to be forbidden by the act. The elementary rule of *expressio unius* entirely justifies this implication.

And it is, I submit, no answer to this reasoning to say that the record does not show the terms of these contracts, since judicial notice may be taken of the reports made by the commission to Congress, from which reports the nature of the contracts is sufficiently pointed out to authorize the conclusion that they were of the general character of the one here assailed.

Whilst the excerpts from the reports of the commission which have been heretofore made, serve to elucidate the text

of the act, they also, I submit, constitute a contemporaneous construction of the provisions of the act made by the officers charged with its administration, which is entitled to very great weight. *Brown* v. *United States*, 113 U. S. 568, 571, and cases there cited.

The rule sustained by these authorities receives additional sanction here, from the fact that the construction at the time made by the commission was reported to Congress, and the act was subsequently amended by that body without any repudiation of such construction.

It is, I submit, therefore not to be denied that the agreement between the carriers, the validity of which is here drawn in question, seeking to secure uniform classification and to prevent the undercutting of the published rates, even though such agreements be made with competing as well as joint lines, is in accord with the plain text of the Interstate Commerce Act, and is in harmony with the views of the purposes of that law contemporaneously expressed to Congress by the body immediately charged with its administration, and tacitly approved by Congress.

But, departing from a consideration of the mere text and looking at the Interstate Commerce Act from a broader aspect, in order to discover the intention of the lawmaker and to discern the evils which it was intended to suppress and the remedies which it was proposed to afford by its enactment, it seems to me very clear that the contract in question is in accord with the act and should not be avoided.

It cannot be questioned that the Interstate Commerce Act was intended by Congress to inaugurate a new policy for the purpose of reasonably controlling interstate commerce rates and the dealings of carriers with reference to such rates. Two systems were necessarily presented: the one a prohibition against the exaction of all unreasonable rates and subject to this restriction, allowing the hourly and daily play of untrammelled competition, resulting in inequality and discrimination; the other imposing a like duty as to reasonable rates, and whilst allowing competition subject to this limitation, preventing the injurious consequences arising from a

constant and daily change of rates between connecting or competing lines, thus avoiding discrimination and preference as to persons and places.

The second of these systems is, I submit, plainly the one embodied in the Interstate Commerce Act. At the outset reasonable rates are exacted, and the power to strike down rates which are unreasonable is provided. In the subsequent provisions discrimination against persons and against places to arise from daily fluctuation in rates is guarded against by requiring publication of rates and forbidding changes of the published rates, whether by way of increase or reduction during a limited time. To hold, then, the contract under consideration to be invalid when it simply provides for uniform classification, and seeks to prevent secret or sudden changes in the published rates, would be to avoid a contract covered by the law and embodied in its policy. It cannot, I think, be correctly said that whilst the avowed purpose of the contract in question embraced only the foregoing objects, its ulterior intent was to bring about results in conflict with the interstate commerce law. The answers to the bill of complaint specially denied the allegations as to the improper motives of the parties to the contract, and also expressly averred their lawful and innocent intention. As the case was heard upon bill and answer, improper motives cannot therefore be imputed. Indeed, the opinion of the court sustains this view, since it eliminates all consideration of improper motives and holds that the validity of the contract must depend upon its face, and deduces as a legal conclusion from this premise that the contract is invalid, because even reasonable contracts are embraced within the purview of the act of 1890. To my mind, the judicial declaration that carriers cannot agree among themselves for the purpose of aiding in the enforcement of the provisions of the interstate commerce law, will strike a blow at the beneficial results of that act, and will have a direct tendency to produce the preferences and discriminations which it was one of the main objects of the act to frustrate. The great complexity of the subject, the numerous interests concerned in it, the vast area over which it

operates, present difficulties enough without, it seems to me, its being advisable to add to them by holding that a contract which is supported by the text of the law is invalid, because, although it is reasonable and just, it must be considered as in restraint of trade.

Nor, do I think that the danger of these evil consequences is avoided by the statement that if the contract be annulled, these dangers will not arise, because experience shows that contracts such as that here in question, when entered into by railroads, are never observed, and therefore it is just as though the contract did not exist. How, may I ask, can judicial notice be taken of this fact, when it is said that judicial notice cannot be taken of the fact that there are such contracts? How, moreover, may I ask, can it be said on one branch of the case that the contract, although reasonable, must be avoided, because it is a contract in restraint of trade, and then on the other branch declared that contracts of that character never do restrain trade because they are never carried out between the parties who enter into them?

There is another contention which, I submit, is also unsound, that is the suggestion that it is impossible to say that there can be such a thing as a reasonable contract between railroads seeking to avoid sudden or secret changes in reasonable rates because the question of railroad rates is so complex and is involved in so much difficulty that to say that a rate is reasonable is equivalent to saying that it must be fixed by the railroads themselves, as no mind outside of the officials of the particular roads can determine whether a rate is reasonable or not. But this proposition absolutely conflicts with the methods of dealing with railroad rates adopted in England and expressly put in force by Congress in the Interstate Commerce Act and by many of the States of the Union. For years, the rule in England was reasonable rates enforced by judicial power, and subsequently by enactment securing such reasonable rates by administrative authority. The Interstate Commerce Act especially provides for reasonable rates, and vests primarily in the commission, and then in the courts the power to enforce the provision and like machinery is provided

in many of the States. Will it be said that Congress and other legislative bodies have provided for reasonable rates and created the machinery to enforce them, when whether rates are reasonable or not is impossible of ascertainment? If this proposition be correct, what, may I ask, becomes of the judgment of this court in *Cincinnati, New Orleans &c. Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, where it is held that the order of the commission finding certain rates charged by a railroad to be unreasonable was correct?

In conclusion, I notice briefly the proposition that though it be admitted that contracts, when made by individuals or private corporations, when reasonable, will not be considered as in restraint of trade, yet such is not the case as to public corporations, because any contract made by them in any measure in restraint of trade, even when reasonable, is presumptively injurious to the public interests, and therefore invalid. The fallacy in this proposition consists in overlooking the distinction between acts of a public corporation which are *ultra vires* and those which are not. If the contract of such a corporation which is assailed be *ultra vires*, of course the question of reasonableness becomes irrelevant, since the charter is the reason of the being of the corporation. The doctrine is predicated on the following expressions taken from the opinion of the court expressed by Mr. Chief Justice Fuller in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 408:

"That in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interests, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co.* v. *Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago &c. Gas Co.* v. *People's Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co.* v. *American Union Telegraph Co.*, 65 Georgia, 160."

But, manifestly, this language must be construed with reference to the facts of the case in which it was used. What the facts were in that case is shown by the statement in the

opinion (p. 406) that the contract there considered "was an agreement for the abandonment by one of the companies of the discharge of its duties to the public." It is also to be remembered that it was this character of contract, that is, one which was *ultra vires*, which was held to be illegal in the West Virginia, Illinois and Georgia cases, which were cited in the *Gibbs case* in support of the excerpt just quoted. That the language in the *Gibbs case* referred to conditions of fact like that there passed upon, that is, contracts *ultra vires*, is shown by the subsequent case of *Chicago &c. Railway Co.* v. *Pullman Car Co.*, 139 U. S. 79, where a contract of the railway company was assailed as in restraint of trade, and the court held that although by the contract the company had restrained itself for a long period of years from using other than certain drawing room and sleeping cars, the contract was yet a valid and proper contract. Manifestly, this decision is utterly irreconcilable with the view that in the case of a railroad company, every restraint imposed by contract upon its freedom of action is necessarily injurious to the public interests, and hence invalid. Indeed, the proposition that any restraint of its conduct which a railroad may create by contract is invalid, because such road is a public corporation, is demonstrated to be erroneous by the Interstate Commerce Act, which, in the provisions heretofore referred to, not only expressly authorizes, but in some instances, commands agreements from which restraint of the action of the corporation necessarily arises.

I am authorized to say that MR. JUSTICE FIELD, MR. JUSTICE GRAY, and MR. JUSTICE SHIRAS concur in this dissent.

# THE MAJESTIC.[1]

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

No. 163. Argued January 20, 21, 1897. — Decided March 29, 1897.

By printed contract the Oceanic steamship company agreed with the libellants, in consideration of the passage money paid, to land them with their luggage in New York. The contract ticket had attached to it a "notice to passengers," printed in fine type, that the contract was made subject to "conditions," among which were the following: "3. Neither the Shipowner nor the Passage Broker or Agent is responsible for loss of or injury to the Passenger or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the Steamer, her machinery, gear or fittings, or from act of God, Queen's enemies, perils of the sea or rivers, restraints of princes, rulers and peoples, barratry or negligence in navigation, of the Steamer or of any other vessel: 4. Neither the Shipowner nor the Passage Broker or Agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the Passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before the issue of this Contract Ticket, and freight at current rates for every kind of property (except pictures, statuary and valuables of any description upon which one per cent will be charged) is paid." "7. All questions arising on this Ticket shall be decided according to English law, with reference to which this Contract is made." The ticket was purchased for libellants by their father, was not examined by him, was not examined by them, and neither he nor they knew of these conditions, nor was their attention called to them. On the voyage the luggage of libellants was flooded with water, which came in through a broken port-hole, from causes described by the court in its statement of facts and opinion, and which are held not to be an "act of God," necessarily exempting the company from liability. *Held*,

(1) That by the rule in England the "conditions" were notices, and nothing more; and that it could not be held as matter of law that, whether they were regulations for the conduct of business, or limitations upon common law obligations, they constituted any part of the contract;

(2) That the rule was not otherwise in this country;

(3) That on the evidence the court cannot conclude that the libellants should be held bound, as matter of fact, by any of the alleged

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[1] The docket title of this case is *Oceanic Steam Navigation Company, Claimant &c. Appellant* v. *Grace Howard Potter et al.*

conditions or limitations, as they were not included in the contract proper, in terms or by reference.

The "act of God," which would exempt from liability under such circumstances, is limited to causes in which no man has any agency whatever.

LIBELLANTS, the Misses Potter and their maid, were passengers on the steamship Majestic, which sailed from Liverpool on January 20, 1892, and arrived at New York on the 28th. On disembarking, the contents of their trunks were found badly damaged by sea water, and this libel was filed in the District Court for the Southern District of New York to recover for the loss.

The libel alleged that the Oceanic Steam Navigation Company, owner of the Majestic, for a valuable consideration agreed to carry and transport libellants, with their personal baggage, to New York; and charged that the damage to the baggage was caused by negligence and want of proper care. The answer admitted the delivery of the baggage on board in good order, and its condition on arrival at New York, but put in issue the allegations of negligence and want of proper care. It set up certain stipulations as contained in the ticket under which libellants took passage, by which it was averred the ship was discharged of liability, or, in any case, was not liable for any injury beyond the amount of ten pounds; and it finally alleged that the injury, if any, was caused by the act of God or the perils of the sea, and was in nowise caused or contributed to by the neglect or misconduct of any of its agents or servants.

The so called ticket issued to the three libellants, omitting numbering and the display headings, was as follows:

**"Cabin Passenger's Contract Ticket.**

*These Directions and the Notices to Passengers below, form part of, and must appear on, each Contract Ticket.*

1. A Contract Ticket in this Form must be given to every Cabin Passenger engaging a Passage in a Passenger Ship from the United Kingdom to any place out of Europe, and not being within the Mediterranean Sea, under a penalty not exceeding £50.
2. Unless the Passengers are to have a free Table, the Victualling Scale for the Voyage must be appended to the Contract Ticket.
3. All the Blanks must be correctly and legibly filled in, and the Ticket must be legibly signed with the Christian Names and Surname, and Address in full of the Party issuing the same.

Statement of the Case.

4. The Day of the Month on which the Ship is to sail must be inserted in Words and not in Figures only.
5. When once issued, this Ticket must not be withdrawn from the passenger, nor any alteration or erasure made in it unless with his consent.

*British Steam-ship* Majestic *of* 4,244 *Tons register, to sail from* LIVERPOOL, *for* NEW YORK, *on the* twentieth *day of* January, 1892.

| NAMES. | No. of Persons. Adults above 12 Years. | Children. 12 Years & under. |
|---|---|---|
| | | |
| Miss GRACE HOWARD POTTER. | a | |
| Miss B. HOWARD POTTER | a | |
| & maid. | s | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| Total No. of Persons.. | Three. | |

IN CONSIDERATION of the sum of £ 124 10/ I hereby agree with the Person named in the margin hereof that such Person shall be provided with First Class Cabin Passage in the above-named British Steam-ship, to sail from the Port of Liverpool for the Port of NEW YORK, in North America, with not less than Twenty Cubical Feet for Luggage for each Person, and that such Person shall be victualled as First Class Cabin Passenger during the voyage, and the time of detention at any place before its termination: and I further engage to land the Person aforesaid with their Luggage, at the last mentioned Port, free of any Charge beyond the Passage Money aforesaid; and I hereby acknowledge to have received the sum of £. paid in full Payment of such Passage Money.

For and on behalf of the
OCEANIC STEAM NAVIGATION COMPANY, LIMITED, OF GREAT BRITAIN,
THOMAS HENRY ISMAY,
Per R. MARTCKELLELL.
Liverpool, 16th Jan'y, 1892.

*Deposit*...£
*Balance*..£ *to be paid at the office, 10, Water Street, Liverpool, one day before the above date for sailing.*
*Total*.....£ full

**NOTICE TO CABIN PASSENGERS.**

1.—If Cabin Passengers, through no default of their own, fail to obtain a passage in the Ship, and on the day named in this Contract Ticket, they may obtain Redress for Breach of Contract by summary Process, under the 73d Section of the Passengers' Act, 1855.

2.—Cabin Passengers must produce, on Demand, their Contract tickets to the

Government Emigration Officer under a Penalty not exceeding £10. This Ticket should therefore be preserved, and kept in readiness to be produced on board the Ship. N.B. — This Contract Ticket is exempt from Stamp Duty.

CAUTION. — To prevent the possibility of robberies occurring before the steamer leaves the wharf, Passengers are requested to be careful to leave their baggage in charge of the Company's Servants only, and to give money, jewellery and other valuables in care of the Purser, who will issue a receipt and deposit the articles in the Ship's Safe. This Ticket is only available for the date for which issued.

[SEE BACK.

[On the back:]

**"NOTICE TO PASSENGERS.**

This contract is made subject to the following conditions: —

1. The Steamer may tow and assist vessels in all situations, put back or into any port, and deviate from the direct and customary course.

2. If the Steamer shall be prevented by any cause from sailing or proceeding in the ordinary course the Passenger may, at the Shipowner's expense, be transhipped to any other steamer bound for the port of destination.

3. Neither the Shipowner nor the Passage Broker or Agent is responsible for loss of or injury to the Passenger or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the Steamer, her machinery, gear, or fittings, or from act of God, Queen's enemies, perils of the sea or rivers, restraints of princes, rulers, and peoples, barratry or negligence in navigation, of the Steamer or of any other vessel.

4. Neither the Shipowner nor the Passage Broker or Agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the Passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before the issue of this Contract Ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description upon which one per cent. will be charged) is paid.

5. The Passenger is not liable in respect of his luggage or personal effects to pay or entitled to receive any general average contribution.

6. If the Passenger does not use this Ticket for the ship and date mentioned on the face of it, or if it is lost or mislaid, it is to be considered as cancelled and the passage money will be absolutely forfeited.

7. All questions arising on this Ticket shall be decided according to English law, with reference to which this Contract is made.

For and on behalf of the
OCEANIC STEAM NAVIGATION COMPANY, LIMITED, OF GREAT BRITAIN,
THOMAS BRUCE ISMAY."

**"New United States Immigration Act, in effect April 1st, 1891.**

The following Information is required by the United States' Authorities before Passengers will be permitted to land. Agents will please either fill up the blanks or request Passengers to do so themselves."

[Here followed certain unfilled blanks.]

The signature "R. Martckellell" was in writing, the other signatures in print.

The ticket was purchased at London by direction of the father of the young ladies; was brought to the office of his firm; and, as was usual, was held in a particular department until given to those for whom it was intended; he had no rec-

ollection of having seen it, and, if he did, did not examine it. One of the libellants received the ticket in an envelope; did not look at it, and knew nothing of its contents, and the others did not see it. There was no proof whatever that Mr. Potter or the libellants ever had their attention called to the notices on the back of the paper, or ever read or assented to what was printed thereon.

The injured baggage was checked from London to New York direct, after it had been properly marked and labelled for the hold, in accordance with an arrangement between the steamship company and the London and Northwestern Railway for checking baggage through, the practice of the company being to furnish its alternative labels for passengers' baggage, indicating the place in which the baggage should be put.

The baggage was not put in the hold proper but stowed in compartment No. 3 of the Orlop deck, where the mails were also. This compartment was about twenty-five feet in length, had watertight bulkheads at each end, was ordinarily a safe place for the baggage of passengers, and frequently so used. It had three or four portholes on each side, considerably above the water line, closed in the usual way, with glass, covered over with an iron protector called a dummy.

On the morning of January 25, it was found that a porthole was broken in Orlop No. 3, and that the whole compartment was flooded with sea water. On which side of the ship the shattered porthole was located was not shown.

The log contained this entry: "Jany. 25th. Commenced with clear weather and a high westerly swell. From seven to eight A.M. vessel passed through a quantity of wood, apparently deck planking, and about eight A.M. it was found that the after port in the mail room had been broken through by the sea or by wreckage, and that a large quantity of water had found its way in and damaged the mails and baggage. The broken port was at once replaced by a spare one, and measures were taken to remedy the damage as much as possible."

The captain testified: "When I got up in the morning, the

first thing I saw when I came out of the chart room were some planks, floating wreckage that the ship had evidently passed through in the dark, and was passing through at the time; and there was a pretty rough sea. I saw this port after it was stove in, and it was forced right in. The glass had broken in a great many pieces, and the iron dummy protecting it was forced off the hinges and turned right back — which could not possibly have been done by the sea alone."

The chief officer was called as a witness by libellants, and testified that he was on the bridge on the morning of the 25th from six to eight; that they "had rough seas; a bad choppy sea"; that he "saw one piece of wreckage; it looked like deal; it was a good sized piece of timber; it was on the port side, away from the ship." His evidence leaves it doubtful whether he inspected Orlop No. 3 on the day the voyage commenced. As to whatever inspection he made, he states: "I merely opened the watertight door and looked in." At first he said that he had not made an examination of Orlop No. 3 before the 25th since leaving port, but afterwards that he was mistaken and that he was down to the Orlop "the day after we left Queenstown"; and that the accident might have occurred on any one of the intervening days. He was asked on cross-examination on behalf of the steamship: "What called your attention to this damage to the baggage? A. The wash of the water when I opened the door. You see, it is all in total darkness." He was further asked and answered on cross-examination as follows: "Q. Were these portholes in Orlop No. 3 just as securely protected as any of the other portholes in the hold? A. Oh, yes; more so if anything. They are examined by an officer in Liverpool, and he signs a paper to that effect — says the ports are secure. Q. Were these ports examined on this voyage in Liverpool? A. Yes, sir." There was no other evidence as to inspection at Liverpool in respect of the security of the ports.

Decree was entered in favor of libellants for the full amount of damages claimed together with interest and costs. 56 Fed. Rep. 244. From this decree the steamship company appealed to the Circuit Court of Appeals for the Second Circuit. After

the appeal was taken, a motion was made before a judge of that court for leave to take new proofs under the rules of that court, which was denied. Subsequently claimant moved for leave to put in evidence certain reported cases, and this motion was denied.

The Circuit Court of Appeals directed the District Court to enter a decree in favor of each of the libellants for the sum of $48.67 and interest from January 25, 1892, and costs in the District Court, with costs of the appeal to the company. 20 U. S. App. 503. Whereupon the cause was brought here by a writ of certiorari. Afterward diminution of the record was suggested, and a writ of certiorari issued to bring up the transcript of the proceedings on the application to take additional testimony, etc., and it was transmitted accordingly; but as the court found nothing justifying revision in this regard this requires no further notice.

*Mr. Frederick W. Whitridge* and *Mr. Willard Parker Butler* for libellants.

*Mr. Everett P. Wheeler* for steamship company.

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

By the contract in this case, the steamship company agreed to land libellants with their luggage at the port of New York, and none of the alleged exceptions or conditions were referred to therein. They were notices and nothing more, and it cannot be held as matter of law, that, whether they were regulations for the conduct of business or limitations upon common law obligations, they constituted any part of the contract.

Such is the rule in England, where this contract between the ship owner, a British corporation, and citizens of the United States, was entered into.

In *Richardson, Spence & Co. et al.* v. *Rowntree*, (1894) App. Cas. 217, the respondent had paid passage money for a voy-

age on appellants' steamer, and had received a ticket folded up so that no writing was visible unless she opened it, but on which were the words: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions." One of the conditions was: "The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage." Respondent having brought an action against appellants to recover damages exceeding one hundred dollars for personal injuries, certain questions were left to the jury, in response to which they found that she knew there was writing or printing on the ticket, but did not know that the writing or printing contained conditions relating to the terms of the contract of carriage, and that appellants did not do what was reasonably sufficient to give her notice of the conditions; and returned a verdict in her favor for one hundred pounds. The House of Lords affirmed the judgment of the Court of Appeal that there was evidence upon which the jury could properly find as they did, and that judgment was properly entered for plaintiff upon the findings.

The Lord Chancellor, Lord Herschell, said: "Now, those are questions which the majority of the Court of Appeal, in the case of *Parker* v. *South Eastern Railway Company*, pointed out, by their judgment, ought to be left to the jury. That was a case, in its broad features, very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of one of the railway companies, and received in return for the deposit of the luggage a ticket on which there was printed 'See back,' and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the Court of Appeal held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods the plaintiff was bound by the conditions; that there were questions to be determined by the jury, and that upon their determination would depend the liability of the defendants.

"My Lords, the only question that now comes before this

House is whether there was any evidence to go to the jury upon which they could properly find the answer that they did to the last two questions. Now, what are the facts, and the only facts, bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is, and must be, this, that where there are no facts beyond those which I have stated the defendants are entitled, as a matter of law, to say that the plaintiff is bound by those conditions. That, my Lords, seems to me to be absolutely in the teeth of the judgment of the Court of Appeal in the case of *Parker* v. *South Eastern Railway Company*, with which I entirely agree; nor does it seem to me consistent with the case of *Henderson* v. *Stevenson* in your Lordships' House when that case is carefully considered." *Parker* v. *South Eastern Railway Company*, 2 C. P. D. 416; 1 C. P. D. 618; *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470.

In *Henderson* v. *Stevenson*, a ticket having on its face only the words "Dublin to Whitehaven," was given by a steam packet company to a passenger, who without looking at it, paid for it, and went on board their steamer. The ship was wrecked, the passenger lost all his luggage, and brought an action against the company. The defence was that on the back of the ticket these words were printed: "This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury or delay to the passenger, or to his (or her) luggage, whether arising from the act, neglect or default of the company or their servants, or otherwise." Judgment was given against the company and affirmed by the House of Lords. The Lord Chancellor, Lord Cairns, said, among other things: "It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to

be held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him. I am glad to find that there is no authority for such a proposition in any of the cases that have been cited." It was held that a mere notice from the steam packet company, without the passenger's assent, would not discharge it from performing its duty to carry safely and securely unless prevented by unavoidable accident.

The rule is not otherwise in this country, and is stated in Wheeler on the Modern Law of Carriers, 263, thus: "A notice or memorandum, even though printed upon the bill of lading or other contract of the carrier, unless referred to in the body of the contract and thus made a part of it, is no more than a notice, and does not form a part of the contract between the shipper and the carrier."

In *Michigan Central Railroad* v. *Mineral Springs Manufacturing Co.*, 16 Wall. 318, it was held that although a common carrier might limit his common law liability by special contract, assented to by the consignor of goods, an unsigned notice printed on the back of a receipt did not amount to such contract, though the receipt with such notice on it might have been taken by the consignor without dissent. And *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 344, was cited to the point that nothing short of an express stipulation by parol or in writing should be permitted to discharge the carrier from duties which the law has annexed to his employment.

In *New York Central & Hudson River Railroad* v. *Fraloff*, 100 U. S. 24, 27, this court said: "It is undoubtedly competent for carriers of passengers, by specific regulations, *distinctly*

*brought to the knowledge of the passenger*, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk."

In *Malone* v. *Boston & Worcester Railroad*, 12 Gray, 388, it was ruled that there was no presumption of law that a passenger on a railroad has read a notice limiting the liability of the railroad corporation for baggage, printed upon the back of a check delivered him, having on the face the words "Look on the back," and that the question of notice was properly submitted to the jury as a question of fact. And see *Brown* v. *Eastern Railroad*, 11 Cush. 97; *Merchants' Despatch Transportation Co.* v. *Theilbar*, 86 Illinois, 71; *Rawson* v. *Pennsylvania Railroad*, 48 N. Y. 212; *Wilson* v. *Chesapeake & Ohio Railroad*, 21 Grattan, 654.

On the evidence, we are unable to conclude that the libellants should be held bound, as matter of fact, by any of the alleged conditions or limitations. They were not included in the contract proper, in terms or by reference.

The contract was signed in writing on behalf of the steamship company, but the notices were not. Libellants did not sign, nor were they required to do so, nor was it contemplated that they should.

The ticket was sent to the office of the father of two of the libellants and was forwarded or handed to one of them in an envelope. It was not seen by her until taken up in the middle of the ocean, nor by either of the others at all. The attention of neither of them was called to the notices, nor in any way to the ticket, nor had either of them read it, or read any of the printed matter, in fine type, by which the contract for passage was surrounded. The father of the two young ladies had directed passage to be engaged, and it is true that he had been in the habit of using such tickets himself in crossing, but there was no evidence that his attention had ever been particularly called to them; he had never read them; and he had no idea that the limitations contended for had ever been claimed to have been imposed thereby.

We quite agree with Lord O'Hagan in *Henderson* v. *Stevenson*, that "when a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted."

But while we hold that libellants were not subjected to these alleged conditions and limitations, and that, therefore, the Court of Appeals erred in its conclusion that each of them was limited in recovery to £10, a limitation which we must say does not strike us as exactly reasonable in view of the "twenty cubical feet" of luggage for each, which the company had expressly contracted to carry, the question still remains, on the doctrine of implied exceptions, whether the injury here was by the act of God, for which the company was not liable. The burden in this respect is on the carrier. *Clark* v. *Barnwell*, 12 How. 272; *Transportation Company* v. *Downer*, 11 Wall. 129; *The Edwin I. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124.

The act of God, said Chancellor Kent (vol. 2, p. 597), means "inevitable accident, without the intervention of man and public enemies"; and again (vol. 3, p. 216), that "perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be, *quod damno fatali contingit, cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity." The words "perils of the sea" may, indeed, have grown to have a broader signification than "the act of God," but that is unimportant here.

Judge Shipman in the Court of Appeals quotes from 1 Parsons on Shipping, 255, the definition there given of the "act of God," and the reason for it, as follows: "The 'act of God' is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were *possible*, he should be held."

We think it quite clear that the damage complained of can-

not be held to have been the result of such inevitable accident. The evidence was wholly unsatisfactory as to any inspection of the porthole before the vessel left Liverpool. What the chief officer says in that regard, in answer to leading questions, is manifestly not of his own personal knowledge, but on the assumption that such inspection had taken place, because it should have, which could have been established, yet was not, by calling the person whose duty it was to make it. Whether the ports were properly closed when the vessel sailed was not made out, nor was any such inspection of the compartment, after she sailed, proven, as, if the ports were not properly closed, would have detected the fact. The two or three feet of water in the mail room, Orlop No. 3, was perhaps not more than might have been taken in during the first four or five days of the voyage, if the port were not securely fastened and partially open. As remarked by the District Judge, whether the covers to all of the ports in the mail room, where this baggage was placed, were screwed down tight, or whether some of them were left open for light or any other purpose, was not affirmatively shown. The theory of the defence was that the breaking of the port was caused by floating wreckage, and while that might possibly have been so, there was no evidence directly tending to establish it as a fact. If it had been shown that when the vessel sailed the ports were in proper condition and properly closed, and that this was their condition on the day before the accident was discovered, that would have presented a different question. The captain testified that the iron dummy was turned back in a way which could not have been done by the sea, but he admitted that his memory was treacherous, after the lapse of time; and the log stated that the port was broken "either by the sea or by wreckage," while the chief officer, who was on the bridge, as the captain was not, said that, between six and eight that morning, he saw only one large piece of wreckage, which was "a good sized piece of timber"; "on the port side; away from the ship."

And, as Judge Brown held, if the wreckage referred to was of a kind adequate to force open an iron cover properly constructed and firmly screwed down over the port, then it de-

volved upon the company to show why the ship did not steer away from the wreckage or slacken speed while passing through it; and this was not attempted. In our opinion the steamship company failed to show that the accident was one which could not have been prevented by human effort, sagacity and care, and we perceive no reasonable ground for disagreeing with the judgment of the District Court upon the facts.

*The order of the Circuit Court of Appeals is reversed, and the decree of the District Court affirmed, with costs.*

## ST. LOUIS *v.* WESTERN UNION TELEGRAPH COMPANY.

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

No. 219. Argued March 18, 19, 1897. — Decided April 5, 1897.

*Grayson* v. *Lynch*, 163 U. S. 468, followed to the point that the special finding of facts referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is not a mere report of the evidence, but a finding of those ultimate facts, upon which the law must determine the rights of the parties; and, if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions, and in such case the bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

An action was brought in the Circuit Court of the United States for the Eastern District of Missouri by the city of St. Louis, seeking to recover from the Western Union Telegraph Company the sum of five dollars per annum per pole for 1509 telegraph poles which the defendant maintained on the streets of that city between July 1, 1884 and July 1, 1887. The case was tried without a jury, and resulted, on June 17, 1889, in a judgment in favor of the defendant, the court holding that the burden imposed was a privilege or license tax, which the city had no authority to impose. A writ of error was sued out

of this court, where it was held that the municipal charge in question was not in the nature of a privilege or license tax, but was a rental charge for the permanent and exclusive appropriation of those spaces in the streets which are occupied by the telegraph poles. To the defence asserted by the telegraph company that by ordinance the city had contracted with defendant to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm of any pole for its own telegraph purposes, free of charge, it was replied by this court that there was nothing in the record to show that any of the poles were erected under or by virtue of the ordinance mentioned, and that, therefore, so far as the facts appeared there was simply a temporary matter of street regulation, and one subject to change at the pleasure of the city. But this court did not find it necessary to consider the matter of this ground of defence at length, as, on the new trial awarded, the facts in respect thereto could be more fully developed. It was further claimed by the telegraph company that the ordinance charging five dollars a pole per annum was unreasonable. But this court thought this question also should be passed for further investigation on the new trial. 148 U. S. 92.

Thereafter, in January, 1894, the second trial was proceeded with, a jury being waived, and resulted in a judgment in favor of the defendant. The present writ of error was then sued out from this court.

*Mr. W. C. Marshall* for plaintiff in error.

*Mr. John F. Dillon* and *Mr. Eleneious Smith* for defendant in error. *Mr. George H. Fearons* and *Mr. Joseph Dickson* were on their brief.

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

We are urged in the argument for the plaintiff in error to convict the Circuit Court of error in holding that a contract existed between the city and telegraph company, which con-

tract would be impaired by the ordinance imposing a charge upon the company for maintaining its poles upon the streets, and in holding that said ordinance was void because unreasonable and oppressive.

But, in the view that we take of this record, those questions are not presented for our determination. The case was tried by the court without a jury, and the record shows simply a general finding and a rendition of judgment in favor of the defendant. There is no special finding of facts, and therefore inquiry in this court must be limited to the sufficiency of the complaint, and the rulings, if any be preserved, on questions of law arising during the trial. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. *Norris* v. *Jackson*, 9 Wall. 125, 128; *Lehnen* v. *Dickson*, 148 U. S. 71.

When all the evidence had been adduced in the case the plaintiff asked the court to declare the law to be as follows:

"The court declares the law to be that, under the pleadings and evidence herein, ordinance No. 11,604" (which was the ordinance which granted the company the right to maintain its poles, upon condition that the city should occupy the top cross-bar free of charge), "is not a contract between the plaintiff and defendant, but is simply a municipal regulation, which the city has a right to change at any time it sees fit, and that ordinance No. 12,783" (which was the ordinance imposing the charge of five dollars per pole annually) "is a valid ordinance regulation, and that the defendant is bound thereby."

"The court declares the law to be that upon the pleadings and evidence in this case ordinance, No. 12,733 is a valid ordinance and is not void as being unreasonable, oppressive or unjust."

"The court declares the law to be that upon the pleadings and evidence in this case the plaintiff is entitled to recover from the defendant the sum of $22,635, with interest thereon at the rate of six per cent from the 7th day of April, 1888."

The refusal of the court so to hold was excepted to and is assigned for error. But these were rulings which involved a determination of facts, and as those facts are not found for

us by a special finding by the court, and as the evidence which developed the facts is not brought to our notice by exception to its competency or relevancy, no questions of law are presented for our review.

It is true that an agreed statement of facts was stipulated into the record of the case from the former trial; but additional evidence was introduced at this trial, and the prayers were based on the entire evidence.

It was said in *Grayson* v. *Lynch*, 163 U. S. 468, 472, that "this court has held in a series of cases that the special findings of facts, referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and, if the findings of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions, and that in such case a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury." *Norris* v. *Jackson*, 9 Wall. 125; *Dirst* v. *Morris*, 14 Wall. 484; *Boogher* v. *Insurance Co.*, 103 U. S. 90; *Lehnen* v. *Dickson*, 148 U. S. 72.

The judgment of the Circuit Court is accordingly

*Affirmed.*

## IASIGI *v.* VAN DE CARR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 746. Argued March 22, 1897. — Decided April 5, 1897.

Iasigi, Consul General of Turkey in Boston, was arrested in New York, February 14, 1897, on a warrant issued by a magistrate of the latter city, to await the warrant of the governor of New York on the requisition of the governor of Massachusetts for his surrender as a fugitive from justice in that State, where he was charged with having committed the crime of embezzlement. On the 18th of February he applied to the District Court of the United States for a writ of *habeas corpus*, on the

ground that the proceedings before the city magistrate were without authority or jurisdiction, because of his consular office. The writ was issued and a hearing had March 12. The District Court dismissed the writ, and remanded the prisoner, from which judgment an appeal was taken. On the 19th of March the State Department was informed that Iasigi had been removed from his consular office by the Turkish government on the 9th of that month. *Held*, that the order of the District Court remanding him to custody was not erroneous.

*Nishimura Ekiu* v. *United States*, 142 U. S. 651, followed to the point that the object of a writ of *habeas corpus* is to ascertain whether the prisoner applying for it can be legally detained in custody; and if sufficient ground for his detention be shown, he is not to be discharged for defects in the original arrest or commitment.

The case is stated in the opinion.

*Mr. Frederic R. Coudert, Jr.*, for appellant. *Mr. Charles Frederic Adams* and *Mr. David Keane* were on his brief.

*Mr. John D. Lindsay* for appellee. *Mr. W. M. K. Olcott* and *Mr. Albert Stickney* were on his brief.

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

Joseph A. Iasigi, a native born citizen of Massachusetts, was arrested, February 14, 1897, on a warrant issued by one of the city magistrates of the city of New York, as a fugitive from the justice of the State of Massachusetts, charged with having committed the crime of embezzlement in that State, and, upon examination, was committed, February 16, to the custody of the warden and keeper of the city prison of the city of New York to await the warrant of the governor of New York on the requisition of the executive authority of the State of Massachusetts for his surrender as such fugitive, pursuant to Part six, Chapter I of Title 4, of the Code of Criminal Procedure of New York, §§ 828, 830.

On the 18th of February he filed a petition for the writ of *habeas corpus* in the District Court of the United States for the Southern District of New York, to procure his release from custody, which averred that he was the Consul General of the Sultan of Turkey at Boston, duly recognized as such

by the government of the United States; that the embezzlement was charged to have occurred on July 1, 1892; that he had never been indicted by a grand jury for the commission of any crime; that he was arrested while on a visit to New York, where access was impossible to his books and papers to vindicate himself; and that the proceedings before the city magistrate were without authority or jurisdiction because of his consular office.

The writ was issued and a hearing had, and on the twelfth day of March the District Court entered an order dismissing the writ and remanding Iasigi to custody. From this order an appeal was allowed to this court.

The contention of petitioner was that no court of the State of Massachusetts had jurisdiction to entertain a criminal prosecution against him by reason of the matters specified in the commitment, jurisdiction being vested, because of his official position, exclusively in the Federal courts; but the conclusion of the District Court rested on the ground that whatever implications in favor of exclusive Federal jurisdiction might be claimed, they were in no way incompatible with the preliminary arrest by the magistrate for removal to the State where the crimes charged against him were alleged to have been committed, and where all questions as to the proper tribunal for trial could be more properly heard and determined.

On the argument in this court, it appeared from a communication from the Assistant Secretary of State, under date of March 19, that Iasigi had been removed from his consular office, and that all official connection between him and the Turkish government had been severed, as the Department of State had been officially informed by the Turkish minister on the ninth of March.

Therefore when the order remanding Iasigi to the custody of the state officer was entered, he was not holding a consular office, and the supposed objection to his detention for extradition to Massachusetts did not exist.

As under § 761 of the Revised Statutes it is the duty of the court, justice or judge granting the writ, on hearing, "to dispose of the party as law and justice require," the question

at once arises whether the order of the District Court dismissing the writ should be reversed, and petitioner absolutely discharged, because the objection existed when the writ issued, although it did not when the order was entered, even if such an objection were ever tenable, which we do not intend in the slightest degree to intimate it could be.

If the application for the writ had been made on the twelfth of March, it could not have been awarded, on the ground alleged in this petition, and as, on that day, the petitioner could not have been discharged on that ground, in accordance with the principles of law and justice, we are unable to hold that the order of the District Court was erroneous. *Ex parte Royall*, 117 U. S. 241; *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 2, 111.

In *Ex parte Hitz*, 111 U. S. 766, an application was made for a writ of certiorari commanding the Supreme Court of the District of Columbia to certify to this court an indictment, and the proceedings thereunder, against Hitz in that court, on the ground that when the indictment was filed and when the offences charged thereunder were committed, he was the diplomatic representative of the Swiss Confederation duly accredited and recognized by the United States under the title of Political Agent. It appeared that Hitz was for many years the Consul General of the Swiss Confederation within the United States, and was also accredited to the United States by the same government as Political Agent. On the 30th of May, 1881, he was requested by the Swiss government to resign both these offices, and this he did on the 15th of June. The indictment was filed on the 17th of June, and on the 20th of June his resignations were accepted. The writ of certiorari was denied.

In *Nishimura Ekiu* v. *United States*, 142 U. S. 651, the writ of *habeas corpus* was sued out May 13, 1891, by a female subject of the Emperor of Japan, detained at San Francisco by a state inspector of immigration, with the approval of the collector, for the reason that, under existing laws, she should not be permitted to land in the United States. After the issue of the writ, and before a hearing, and on May 14, one

Syllabus.

John L. Hatch was appointed United States inspector of immigration at that port, who, on May 16, made the inspection and examination required by the act of March 3, 1891, c. 551, which he reported to the collector, and, on May 18, he intervened in opposition to the writ of *habeas corpus*, stating his doings and insisting that under the act his finding and decision were reviewable by the superintendent of immigration and the Secretary of the Treasury only. The Circuit Court sustained the intervention and remanded petitioner, and its order was affirmed on appeal by this court. It was said by Mr. Justice Gray, delivering the opinion, that: "A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can legally be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

The proceeding here was a state proceeding in aid of a prosecution for the violation of state laws, and under such circumstances the courts of the United States may exercise a discretion in determining the question of discharge. *Cook* v. *Hart*, 146 U. S. 183.

And we think the case falls within the principle of the rule laid down in *Nishimura Ekiu* v. *United States*.

*Order affirmed.*

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## HOOE *v.* JAMIESON.

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

No. 374. Submitted March 1, 1897. — Decided April 5, 1897.

A citizen of the District of Columbia cannot maintain an action against a citizen of Wisconsin, on the ground of diverse citizenship, in a Circuit Court of the United States in that State; even though a competent person be joined with him as co-plaintiff.

THE case is stated in the opinion.

*Mr. A. R. Bushnell* for plaintiffs in error.

*Mr. S. S. Barney* for defendants in error.

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

This was an action of ejectment brought in the Circuit Court of the United States for the Western District of Wisconsin, by the complaint in which plaintiffs in error alleged that they resided in and were citizens of the city of Washington, D. C., and that defendants all resided in and were citizens of the State of Wisconsin. Defendants moved to dismiss the action on the ground that the Circuit Court had no jurisdiction as the controversy was not between citizens of different States. The Circuit Court ordered that the action be dismissed unless plaintiffs within five days thereafter should so amend their complaint as to allege the necessary jurisdictional facts. Plaintiffs then moved for leave to amend their complaint by averring that three of them were when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the State of Minnesota, and that each was the owner of an undivided one fourth of the lands and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied and the action dismissed. Plaintiffs sued out this writ of error under the act of March 3, 1891, c. 517, § 5, and the Circuit Court certified to this court these questions of jurisdiction:

"First. Whether or not said complaint sets forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof:

"Second. Whether or not said complaint as so proposed to be amended would, if so amended, set forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof."

The judicial power extends under the Constitution to con-

troversies between citizens of different States, and the Judiciary Act of 1789 provided,as does the act of March 3, 1887, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, that the Circuit Courts of the United States should have original cognizance of all suits of a civil nature at common law or in equity in which there should be a controversy between citizens of different States.

We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn* v. *Ellzey*, 2 Cranch, 445, February term, 1805, "that the members of the American confederacy only are the States contemplated in the Constitution"; that the District of Columbia is not a State within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a State.

In *Strawbridge* v. *Curtiss*, 3 Cranch, 267, it was held that if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction; and in *Smith* v. *Lyon*, 133 U. S. 315, *Strawbridge* v. *Curtiss* was followed, and it was decided that under the acts of 1887 and 1888 the Circuit Court has not jurisdiction, on the ground of diverse citizenship, if there are two plaintiffs to the action who are citizens of and residents in different States and the defendant is a citizen of and resident in a third State, and the action is brought in the State in which one of the plaintiffs resides.

*New Orleans* v. *Winter*, 1 Wheat. 91, was an action in ejectment brought by two plaintiffs claiming as joint heirs, and it appeared that one of them was a citizen of the State of Kentucky, and that the other was a citizen of the Territory of Mississippi. It was held that jurisdiction could not be maintained, and Chief Justice Marshall, delivering the opinion of the court, said: "Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the District Court of Louisiana. Is his case mended by being associated with others who are capable of suing in

that court? In the case of *Strawbridge* v. *Curtiss*, it was decided, that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

In *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631, the interests of the parties being separate and distinct, but depending on one contract, plaintiffs elected to sue on the common obligation, and the case was dismissed under the rule in *New Orleans* v. *Winter*.

In *Barney* v. *Baltimore*, 6 Wall. 280, 287, which was a bill for partition, it appeared that some of the defendants were citizens of the District of Columbia and some of them citizens of Maryland, and, in dismissing the case for want of jurisdiction, the court, through Mr. Justice Miller, said: "In the case of *Hepburn* v. *Ellzey*, it was decided by this court, speaking through Marshall, C. J., that a citizen of the District of Columbia was not a citizen of a State within the meaning of the Judiciary Act, and could not sue in a Federal court. The same principle was asserted in reference to a citizen of a Territory, in the case of *New Orleans* v. *Winter*, and it was there held to defeat the jurisdiction, although the citizen of the Territory of Mississippi was joined with a person who, in suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by the courts when the point has arisen."

Many other decisions are to the same effect, and in the late case of *Merchants' Cotton Press Co.* v. *Insurance Co.*, 151 U. S. 368, 384, the rule in *New Orleans* v. *Winter* was applied and it was held that "the voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite."

In the case at bar no application was made for leave to discontinue as to the three plaintiffs who were citizens of the

Counsel for Plaintiff in Error.

District of Columbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota. Jurisdiction of the case as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one. The Circuit Court was right and its judgment is

*Affirmed.*

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HOOE v. WERNER. No. 373. Submitted with No. 374, above, and on the same briefs.

THE CHIEF JUSTICE: The only difference between this case and that just decided is that the proposed amendment was allowed and the action then dismissed for want of jurisdiction. For the reasons above given, this case must take the same course as that.

*Judgment affirmed.*

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## MARTIN *v.* ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 170. Submitted January 25, 1897. — Decided April 5, 1897.

The plaintiff in error was in the employment of the defendant in error as a common laborer. While on a hand car on the road, proceeding to his place of work, he was run into by a train, and seriously injured. It was claimed that the collision was caused by carelessness and negligence on the part of other employés of the company, roadmaster, foreman of the gang of laborers, conductor, etc. *Held*, that the co-employés whose negligence was alleged to have caused the injury were fellow-servants of the plaintiff, and hence that the defendant was not liable for the injuries caused by that negligence.

THE case is stated in the opinion.

*Mr. Neill B. Field* for plaintiff in error.

Opinion of the Court.

*Mr. E. D. Kenna* and *Mr. Robert Dunlap* for defendant in error.

Mr. Justice Peckham delivered the opinion of the court.

This action was brought by the plaintiff in error to recover damages for injuries sustained by him by being run over by a train on a railroad belonging to the defendant, near Albuquerque, New Mexico. The case was tried before a jury in the District Court of the Second Judicial District of that Territory, and resulted in a verdict for the plaintiff in the sum of $8000. Judgment having been entered, the railroad company took the case, by writ of error, to the Supreme Court of the Territory, which court reversed the judgment, and directed judgment for the railroad company, and for costs against the plaintiff, who thereupon sued out a writ of error from this court, and the case is now here for review.

On the trial evidence was given showing substantially the following facts: The plaintiff had been employed by the railroad company at Albuquerque, New Mexico, as a common laborer, "fixing the road, straightening out the rails and fixing ties wherever required"; he was about thirty-nine years of age and had been so employed by the company, through one of its section foremen, for several months prior to the happening of the accident. He was under the orders of the section foreman and was to do what the foreman told him. The section foreman was employed by the roadmaster and the foreman employed the men; the roadmaster directed the section foremen what work to do and where to do it; he laid out the work for them and told them what to do. The section foreman employed the men and saw that they did the work properly. If the foreman thought a man ought to be discharged, he would see the roadmaster or send him a request that the man should be discharged, and the roadmaster had the power to discharge him. The men under the section foreman, like the plaintiff, were paid by the agents of the company, who came along the line in a pay car.

On June 5, 1889, while the plaintiff was thus employed, he

came to the station at Albuquerque about 6.45 o'clock in the morning for the purpose of going to his work on a hand car with one Mares, his co-laborer, and Charles Smith, his section foreman. The place where they were to work was about eight or nine miles north from Albuquerque on the line of the road. A few minutes before seven the party, consisting of the section foreman, Mares and the plaintiff, started on a hand car for the place where they were to work during the day. They went north upon the road for three or four hundred yards and there the car was stopped, and the men got off and procured a barrel of water, which was placed on the car, and the men again started north to continue their ride. All three men worked the crank on the hand car, but just as they started Mares said to the foreman that he thought the work train seemed to be starting from Albuquerque towards them. The track at that point was straight and the view to the station was unobstructed. Plaintiff then turned his head backwards towards the station, when the foreman told him not to do that; that he had no business to do it, and that it was not his business to watch for trains, and that he, the foreman, would take care of that. Plaintiff thereupon turned his head away from the station and continued to look north, the way they were going. They worked the crank so that the car was going as rapidly as they could make it, all three men having their heads turned towards the north. In the meantime a work train backed out from the station at Albuquerque, going north, and continued backing rapidly until it was moving at the rate of seventeen or eighteen miles an hour. Before the men on the hand car had proceeded very far along the road they were overtaken by the work train, which ran over them, killing the foreman and badly injuring the plaintiff and Mares. Neither of the latter had heard the approach of the train; it was under the management of a conductor, and at that time there was a roadmaster on the train who had control of the line of road where the accident occurred. He was not in charge of the running of the train, but the train went to different points on the road as he had occasion to visit them for working purposes. Some of the hands on the work train saw the

hand car a short distance before it was struck, and one of them tried to communicate with the engineer of the train, but failed. No one on the hand car was looking backward or saw the approach of the work train.

It was claimed in the petition on the part of the plaintiff that the accident occurred from the neglect of the conductor and of the hands on the work train, and also by reason of the neglect of the section foreman on the hand car with the plaintiff in ordering plaintiff to face north while working the car, and in not keeping a lookout himself for the approach of the train from behind.

The defendant had filed a plea of not guilty.

Upon the trial of the action, after the evidence for both sides had been introduced and each side had rested the case, the defendant moved the court "to instruct the jury to find for the defendant upon the ground that the negligence, if any, through which the plaintiff was injured was the negligence of the fellow-servants of the plaintiff, for which the defendant is not liable." After hearing arguments, the court overruled the defendant's motion, and counsel for the defendant then and there excepted.

After the verdict for plaintiff had been rendered and judgment entered thereon, the defendant obtained a writ of error from the Supreme Court of the Territory to review the rulings of the District Court. Various assignments of errors were made, and among them was the eighth, which reads as follows: "The court erred in not sustaining defendant's motion to instruct the jury to find a verdict in favor of the defendant, and the defendant not guilty."

The Supreme Court held that whatever negligence was proved, as against the employés of the defendant, such negligence was that of fellow-servants with the plaintiff, and on that ground the judgment was reversed and judgment ordered in favor of the defendant, with costs.

The plaintiff seeks here a reversal of the last judgment.

We think the decision of the Supreme Court was right and that the judgment entered thereon must be affirmed.

The cases of *Baltimore & Ohio Railroad Company* v. *Baugh*,

149 U. S. 368; *Northern Pacific Railroad Company* v. *Hambly*, 154 U. S. 349; *Northern Pacific Railroad Company* v. *Peterson*, 162 U. S. 346; and *Northern Pacific Railroad Company* v. *Charless*, 162 U. S. 359, cover this case in all its aspects, and render it entirely clear that the employés of the defendant herein, whose negligence caused the injury to the plaintiff, were his fellow-servants at that time, and hence the defendant cannot be held liable to plaintiff for the injuries sustained by him as a result of that negligence.

The counsel for the plaintiff has argued before us that the defendant must be held responsible because the plaintiff had been directed by the foreman, under whose orders he was placed, to look north while he was on the car, and had received the foreman's assurance that he (the foreman) would warn him of the approach of danger, and that as the foreman failed to do so it was the failure of the defendant to do something which it was bound as a master to do in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence nor is any claim made that the hand car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit in and of itself from the station at Albuquerque to the point where the plaintiff was going to work. The negligence of the section foreman in failing to note the approaching train and to give the proper warning, so that the car might be taken from the track, was not the neglect of the defendant in regard to the performance of any duty which as master it owed the plaintiff. If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow-servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south.

Upon an examination of the cases above cited it will be found that the principles therein laid down clearly and plainly cover this case.

The judgment must be

*Affirmed.*

Mr. Justice Harlan dissented.

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## THE UMBRIA.[1]

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

No. 28. Argued March 27, 30, 1896; March 2, 3, 1897. — Decided April 5, 1897.

The Umbria, a passenger steamer carrying the mails, coming out from the harbor of New York at full speed about midday in a fog which was at times dense and at times intermittent, collided with the Iberia about eleven miles from the entrance to the harbor and sank her. *Held*, that the Umbria was gravely at fault in the matter of speed, and that this fault was not lessened by the fact that passenger steamers carrying the mails run at full speed in a fog in order to pass the foggy belt.

Accepting, in the absence of other evidence, the testimony of the officers and crew of the Iberia as conclusive, the court, while of opinion that it would have been more prudent not to have changed her course in manner as set forth in the Statement of the Case, is unwilling to say that the doing so was necessarily a fault on her part.

The general consensus of opinion in this country is that in a fog a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law.

The damages should not have been divided by the court below. The majority of this court think that the Iberia was not in fault under the circumstances set forth in the statement of the case, and the other members of the court are of opinion that her fault, if any, did not contribute to the collision.

In cases of total loss estimated profits of a charter party not yet entered upon are always rejected; and there is nothing in the facts to take this case out of the general rule.

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[1] The docket title of this case is: *The Cunard Steamship Company (limited) owner of the Steamship Umbria* v. *Cyprien Fabre, Manager of the Compagnie Française de Navigation à vapeur.*

Statement of the Case.

This was a suit in admiralty, brought in the District Court for the Eastern District of New York, by the owners of the French steamship Iberia against the British steamship Umbria, to recover damages for a collision, which took place about a quarter past one in the afternoon of November 10, 1888, in a dense fog off the coast of Long Island, about eleven miles from the entrance to New York harbor, and six miles south of Rockaway Beach.

The Iberia was a French steamship 240 feet long, of 1059 tons register, capable of a speed of from 9½ to 10 knots an hour, was laden with a valuable cargo, and bound from the Red Sea and Mediterranean ports to New York. She had been in a fog since 8 o'clock in the morning, was running with her engines "easy," the lowest order short of stopping, at a speed of 3½ to 4 knots an hour on a W.N.W. course, and making occasional soundings with her lead. On two occasions, within a half hour preceding the collision, she had heard the whistle of an approaching steamer a little on her port bow, had altered her course two points to the starboard, kept on until the whistles indicated that the steamers were passed, and then returned to her former course. About a quarter of an hour after passing the last of these steamers she heard a whistle which proved to be that of the Umbria, bearing about two points on her port bow. Immediately, as on the previous occasions, her head was put two points more to starboard, a short whistle was blown, her helm was steadied upon a N.W. course, and held so. While so proceeding, after four or five minutes, several more of the Umbria's whistles were heard, all bearing about the same direction from the Iberia (allowing two points for the porting), the sound rapidly increasing in volume. Finally the Umbria herself came into view about 900 feet away, and bearing about five points on her port hand. She then put her engines full speed ahead in an attempt to escape the Umbria by crossing her bow and had nearly passed her, when the Umbria struck her stem on at an angle of about six or seven points, and cut her stern completely off.

The Umbria was a steamship of the Cunard line, 525 feet

long, of 3450 tons register, capable of a speed of 19½ knots an hour, and was bound upon a voyage from New York to Liverpool, laden with a cargo, and having on board a number of passengers. After passing Sandy Hook and discharging her pilot, she was put upon a compass course of E. by S. ¾ S. From half past twelve, when she discharged her pilot at the outer buoy, until the collision, she was kept at full speed more or less of the time, as the intermittent character of the fog permitted, sounding her whistle at intervals of a minute or two. The French steamship Normandie discharged her pilot ahead of the Umbria, and proceeded on her course a little more to the southward than the latter; at times being in sight of the Umbria and again being concealed by the fog. Her whistle was heard from time to time on board the Umbria and off her starboard quarter, the latter having passed her before she reached the place of collision. Shortly after one o'clock the fog thickened, and while the Umbria was running at full speed, a very faint single blast of a whistle, which subsequently proved to be from the Iberia, was thought to be heard on the Umbria's starboard bow, apparently a long distance off and well to the southward. Upon hearing this whistle, and at ten minutes past one, her speed was reduced by order of her master, and attention given toward the direction of the sound for a repetition of the signal. Shortly afterwards a second, and, as some say, a third, whistle was heard, still apparently a long distance off, on the Umbria's starboard bow, and well to the southward. The master of the Umbria thereupon determined that the signals which had been heard were from a steamship approaching on a course parallel to his own; and concluding that the Umbria was clear of her, and that she would probably port her helm to avoid the Normandie, ordered her engines full speed ahead at eleven minutes past one o'clock. Within a minute from the time such order was given, another whistle was heard closer to the Umbria and drawing ahead of her, and almost simultaneously the Iberia loomed in sight, a little on the Umbria's starboard bow, on a course crossing her own nearly at right angles, and about twice the Umbria's length away. The Umbria's engines were

Counsel for Parties.

immediately reversed at full speed, her helm put hard aport, but before the Iberia had crossed her course the collision ensued. She struck the Iberia on the port side, about thirty feet forward of her stern, cut her completely in two, and passed on out of sight in the fog.

Upon this state of facts the District Court held the Umbria to have been solely in fault for the collision, entered an interlocutory decree, January 13, 1890, to that effect, 40 Fed. Rep. 893, and referred the question of damages to a commissioner, who made a report to which both parties filed exceptions. One of the exceptions taken by the libellant, the owner of the Iberia, was sustained by the court, and in accordance therewith a new report was made and a final decree entered July 3, 1891, for the sum of $147,500.17. Claimant appealed to the Circuit Court of Appeals for the Second Circuit, which rendered a decision by a divided court, sustaining the decree of the District Court as to the fault of the Umbria, but finding the Iberia also to have been in fault; first, because, after hearing the first whistle of the Umbria, she changed her course without knowing the latter's bearing, course or speed; and second, because she violated Article 18 of the International Regulations, by continuing on, when she knew, or ought to have known, that the courses of the two vessels were crossing, and thereby involving risk of collision. 1 U. S. App. 614. The decision of the District Court was also reversed upon the question involved in the exception to the master's report. A rehearing having been refused, libellant applied to this court for a writ of certiorari, which was granted.

The case was argued on the 27th and 30th March, 1896.

*Mr. Frank D. Sturges* and *Mr. Frederic R. Coudert* for the Umbria. *Mr. Edward L. Owen* was on their brief.

*Mr. Robert D. Benedict* for the Iberia.

On the 21st December, 1896, the case was ordered to be restored to the docket for reargument on the question whether the Iberia was in fault. This reargument took place March 2, 3, 1897.

*Mr. Frederic R. Coudert* for the Umbria.

*Mr. Robert D. Benedict* for the Iberia.

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

1. That the Umbria was gravely in fault in the matter of speed is too clear for serious argument. She was within twelve miles of one of the most frequented harbors in the world, in the track of vessels bound into and out of this harbor, and was running at a speed of from sixteen to nineteen knots an hour through an intermittent or variable fog, which was sometimes so dense that vessels could not see each other more than one or two lengths off. She had heard at least two whistles from the Iberia, and without waiting definitely to locate her, had ordered her engines full speed ahead within a minute from the time she hove in sight. Her excuse is that the first whistle of the Iberia, which does not seem to have been heard by the master, but was heard by some of the other officers, appeared to be upon the starboard bow, apparently a long distance off; that the second whistle also seemed a long distance off and well to the southward; and the master, supposing they were from a steamer approaching upon a course parallel to his own, concluded that he was clear of her or had shaken her off; that the approaching steamer would probably port her helm to avoid the Normandie, which was coming up on the Umbria's starboard quarter, and therefore ordered his engines full speed ahead to avoid the danger consequent upon such a movement on the part of the Iberia. This assumption was clearly an insufficient excuse for the order. It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance; and while a whistle continues to be heard so nearly ahead, it is manifestly unsafe to assume that she is upon a course that will take her clear. The assumption might be justified if the signals were often repeated and kept constantly growing fainter or broader off the bow; but in this case the Umbria

heard but two, or possibly three, whistles from the Iberia, the last one of which must have seemed nearer than the first, since the steamers were rapidly approaching each other. The Iberia could not have appeared to be further to southward than when her first signal was blown, since she had then ported two points, and was really further to the northward. In resuming his speed under such circumstances, the master acts at his peril. As was said by Sir Robert Phillimore, in the case of *The Kirby Hall*, 8 P. D. 71: "We wish to state with as much emphasis as possible, that those in charge of a ship, in such a dense fog as was described in this case, should never conjecture anything when they hear a whistle in such close proximity, as was the case here, whether the sound appears to them to come from a vessel approaching them or not." Of course there is a point depending upon the number, distinctness and apparent position of the approaching signals, beyond which precautions are unnecessary and the master has the right to assume that he has shaken off the other vessel, but it is entirely clear that that point had not been reached in this case, and that the immediate cause of the collision was the order to go ahead at full speed before the course and position of the Iberia had been definitely ascertained. Indeed, so gross was the fault of the Umbria in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor. It was suggested upon the argument that it was customary for large passenger steamers carrying the mails to run at full speed in a fog, and that this was really the safer course for them, as the greater the speed the sooner they pass the foggy belt. However this may be, the custom is not one to which the courts can lend their sanction, as it implies a flagrant disregard of the safety of other vessels.

2. But notwithstanding the negligence of the Umbria, the Iberia was chargeable with the duty of taking proper precautions, and, in judging of the propriety of her manœuvres,

we are obliged to accept the testimony of her officers and crew as conclusive, since there is no other testimony to contradict it.

It appears that she was bound toward New York harbor upon a course crossing to the northward, but still not far from parallel to that of the Umbria, and was proceeding at a speed of from three and a half to four knots an hour. Her officers say that they heard the Umbria's first whistle about two points on her port bow; that her helm was immediately ported and her head put two points more to starboard, bringing her upon a northwest course, which she held until she came in sight of the Umbria. This brought her upon a course more than two points divergent from that of the Umbria. While proceeding under this course, several more whistles were heard from the Umbria, bearing in about the same direction (allowing two points for the porting), and rapidly increasing in volume. There could be but one interpretation put upon these signals. A steamer was drawing rapidly nearer upon a course crossing that of the Iberia. That she was nearing her was evident from the increasing loudness of each succeeding whistle; that she was not upon a parallel course was evident from the fact that the Iberia was herself upon a course which, if continued, would have carried her ashore upon Rockaway Beach. The probabilities all were that the other steamer was bound out from New York harbor.

Under such circumstances, and in view of the fact that the exact position and course of the Umbria could not be determined, we think it would have been more prudent on the part of the Iberia not to have changed her course until the position and course of the approaching steamer had been definitely ascertained, although we should be reluctant to hold that such change of course was a fault on her part, which should condemn her in a moiety of the damages. There are undoubtedly authorities and some expressions of this court to the effect that a change of the helm, in ignorance of the exact position and course of an approaching vessel, is a fault, although we have never held that it would be a fault in every case presenting these conditions. *The Sea Gull*, 23 Wall. 165, 175, 177; *The*

*City of New York*, 147 U. S. 72, 85; *The James Watt*, 2 W. Rob. 270; *The Alberta*, 23 Fed. Rep. 807, 811; *The Bougainville*, L. R. 5 P. C. 316; *The Franconia*, 4 Ben. 181, 185; *The Shakespeare*, 4 Ben. 128; *The Lorne*, Stu. Vice Adm. 177; *Western Metropolis*, 2 Ben. 399, 402; *The Hammonia*, 4 Ben. 515, 522; *The Northern Indiana*, 3 Blatch. 92, 110; *The North Star*, 43 Fed. Rep. 807; *S. C.* 22 U. S. App. 242, 252; *The Fountain City*, 22 U. S. App. 301; *The Arthur Orr*, 69 Fed. Rep. 350; *The Resolution*, 6 Asp. Mar. Cas. 363.

We think, however, that a more reasonable position in this connection was taken by the House of Lords in the case of *The Vindomora*, (1891) App. Cas. 1, in which it was held that there was no rigid rule that where two steamships were approaching each other in a fog so as to involve risk of collision, neither ship ought to alter her helm until the signals of the other gave clear indication of her direction; and that each case must depend upon its own circumstances, which might afford reasonable ground for believing what the direction must be. In that case it was argued that one of the steamers concerned must be held in fault for having starboarded before her officers knew the direction in which the approaching steamer was coming. In considering this, Lord Herschell remarked: "I do not think the cases which the learned counsel cited support the proposition that there is any such absolute hard and fast rule as that a vessel having only the indication of a single whistle from the other vessel is never justified in manœuvring, and must always be held to blame if she does manœuvre. I should be very sorry to say anything to indicate any dissent from the view that where two vessels are approaching one another in a fog, without any sufficient indication to justify action, neither vessel would be justified in altering her course. I think the proper steps to be taken in such a case would be for each vessel to keep the course on which she was proceeding. But although I entirely agree that that is a good general rule to lay down, yet that rule must be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all cir-

cumstances, to all parts of the seas, and to all positions of vessels." In that case, as the whistle of the approaching steamer was heard broad off the starboard bow, it was held that the other vessel was not in fault for starboarding, and that such starboarding did not contribute to the collision. See, also, *The Frankland & Kestrel*, L. R. 4 P. C. 529, 533.

Upon these considerations, while we think it would have been more prudent in the Iberia not to have changed her course, yet in view of the fact that the whistle of the Umbria appeared to come from off her port bow, we should be unwilling to say that it was necessarily a fault on her part to port her helm two points, the effect of which would be to give the Umbria more room. It is possible that, under the peculiar circumstances, the Iberia had a right to assume that the Umbria was outward bound from New York, and pursuing a course substantially parallel to her own.

The question whether the Iberia performed her whole duty in continuing upon her course, even at a low rate of speed, instead of stopping when the whistles of the Umbria were repeated and apparently drawing nearer, remains to be considered. The only two articles of the Revised International Regulations of 1885 (23 Stat. 438) which have any pertinence to the case are the following:

"Art. 13. Every ship, whether a sailing ship or a steamship, shall in a fog, mist or falling snow go at a moderate speed."

"Art. 18. Every steamship, when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse, if necessary."

The former of these articles deals with the general speed of ships in a fog; the latter, with the special precautions to be observed after the proximity of another vessel has been ascertained by her signals. As the general speed of the Iberia did not exceed four knots an hour — the lowest speed necessary to the maintenance of steerageway — it is clear that she was guilty of no violation of the thirteenth article.

Her conduct, after the whistles of the Umbria began to be heard by the Iberia's officers, is deserving of more serious

consideration. We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead. Under such circumstances she may proceed at a reduced rate of speed; but if the whistle be repeated two or three times, and appear to be drawing nearer, the authorities generally hold that, if the fog be dense, prudent navigation requires that she shall stop her engines and drift ahead, until the approaching steamer comes in sight, or her whistles indicate that the two vessels are well clear of each other.

A review of the leading cases upon the subject will exhibit the circumstances under which it has been held that steamships, navigating in a fog or other atmospheric obscuration, are bound to stop upon hearing signals from vessels, the exact position and course of which it is impossible to ascertain.

In the case of *The Hypodame*, 6 Wall. 216, the earliest case in this court, a steamer proceeding at the rate of six to eight miles heard a hail before it from a vessel exhibiting no light, and immediately slowed her engines, and then stopped. She was held to have been in fault for not *instantly* stopping and reversing her engines.

The next is that of *The Colorado*, 91 U. S. 692. In this case a propeller was proceeding in a dense fog at the rate of five or six miles an hour. Hearing the blast of a fog horn from a sailing vessel, which was crossing her course at the rate of four miles an hour, it was held that her speed was excessive, and that any speed was too great which did not enable the steamer to perform the duty imposed upon her by the act of Congress "to keep out of the way of the sailing vessel," if the latter has in all respects complied with the rules of navigation.

In *The City of New York*, 147 U. S. 72, it was held that a steamer proceeding at her usual speed, upon hearing the fog horn of a bark only one point on her starboard bow, should at once have checked her speed, and if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other.

And in *The Martello*, 153 U. S. 61, a steamer leaving the port of New York in a dense fog, at a speed of five to six miles an hour, heard a blast from a fog horn on her starboard bow, indicating that a vessel was approaching from a direction which might take her across the steamer's bow, and was held to have been in fault for not at once stopping, until, by repeated blasts of the horn, she could assure herself of the exact bearing, speed and course of the approaching vessel.

The English cases, upon the subject of speed, are much more numerous and explicit. In that of *The Frankland & Kestrel*, L. R. 4 P. C. 529, two steamships were approaching each other in a fog so dense that vessels could not be seen at a greater distance than 200 or 300 feet. The speed of each vessel was *not over two to two and a half knots* through the water. The finding of the admiralty court was that "both vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other"; and the opinion of that court, fortified by that of its nautical assessors, was "that upon hearing the whistles of each other so near and approaching each other, each vessel ought not only to have stopped, but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding; and by that means the collision would or might have been avoided." The Privy Council was of the opinion that both vessels were going at a moderate speed; but that the Frankland, the only vessel which appealed, having heard a whistle sounded many times, indicating that a steamer was approaching her and had come very near to her — so near indeed that if the vessels had then stopped they would have been within hailing distance — should not only have stopped the motion of her engines, but should have reversed them, and that she ought not to have waited until the vessels sighted each other, when such a manœuvre would have been too late.

In *The Kirby Hall*, 8 P. D. 71, it was said to be the first duty of those who have charge of a steamship in motion during a dense fog, on first hearing the whistle of a steamship in such close proximity to them that a risk of collision is involved,

to bring their vessel immediately to a standstill, and not to execute any manœuvre with her helm until they have definitely ascertained the position and course of the other ship. In this case, although the Kirby Hall was going *dead slow*, it was held that she was to blame for not stopping when the whistle of the approaching steamer was heard the first time near at hand, instead of going ahead without knowing where the other vessel was or what she was doing. And said the court: "We wish to state with as much emphasis as possible, that those in charge of a ship in such a dense fog as was described in this case should never conjecture anything when they hear a whistle in such close proximity as was the case here, whether the sound appears to them to come from a vessel approaching them or not." The fog was "as dense a fog as one can well imagine."

In *The John McIntyre*, 9 P. D. 135, a steamer hearing a whistle on her port bow in a *dense* fog, "so thick that she can hardly see before her," slackened her speed. Later on the whistle was repeated two or three times, clearly nearing her and in her vicinity, but she did not then stop and reverse; and it was held that she was in fault. The approaching steamer, the Monica, though making only three knots an hour, was admitted to have been in fault.

In *The Dordogne*, 10 P. D. 6, the master of the Dordogne, while running in a dense fog, heard a whistle three points off her starboard bow. On hearing it, the engines were stopped. The whistle was again heard broader on the starboard bow, and was replied to and the engines again set ahead. The engines were again stopped and again moved ahead. It was held that, considering the way in which these vessels were approaching each other, the officer in charge ought to have brought the Dordogne to a standstill, and, when the other vessel was coming nearer to him, he should have stopped and reversed. The other vessel — the Edith — was admitted to be in fault, though proceeding "dead slow."

In the case of *The Ebor*, 11 P. D. 25, the rule was still more stringently enforced. In this case, the plaintiff's steamer heard a whistle almost directly ahead in a "thick" fog. She was

then going only about three knots an hour, and continued at this speed for about a minute, until a second whistle was heard, when the order was given to stop and reverse; but the defendants' steamer coming in sight, a collision occurred. The defendants admitted that they were to blame, though making only three knots an hour, but it was also held that the officer in charge of the plaintiff's steamer, on hearing the first whistle, should have reduced her speed to as slow a rate as possible, only keeping her under command, and was in fault for failing so to do.

In the case of *The Ceto*, 14 App. Cas. 670, it was held that where two steamships, invisible to each other by reason of a *dense* fog, find themselves gradually drawing nearer until they are within a few ship's lengths, each of them ought at once to stop and reverse; unless the fog signals of the other vessel have unequivocally indicated that she is steered so as to pass clear without involving risk of collision; or unless other circumstances exist which make it dangerous to stop and reverse. The exact speed of the two steamers was not given, although it is stated in one of the opinions that the Ceto was going "dead slow," while the Lebanon had reduced her speed to "easy." Both were held to blame. In the latest English case upon this point, *The Lancashire*, (1894) App. Cas. 1, two steamships were approaching one another on opposite courses in a fog. They came in sight of each other at a distance of 450 feet. The Ariel was conceded to be in fault. The Lancashire, although proceeding only at the rate of three and one half knots an hour, stopped her engines on hearing the repeated whistles of the Ariel a point and a half on her starboard bow, but was held in fault for not reversing.

It is apparent from an examination of these cases that they are distinguishable from the one under consideration in two important particulars, viz., that the fog was dense, and that the approaching vessel was herself running at a comparatively low rate of speed.

In every case the fog was described as "dense" — in *The Frankland & Kestrel*, "so dense that vessels could not be seen at a greater distance than two or three hundred feet" —

in the Kirby Hall, "as dense as one can well imagine," 6 Asp. Mar. Law Cas. 90, — in the John McIntyre, "so thick she can hardly see before her," 6 Asp. Mar. Law Cas. 278, and in the others simply as "dense," or "thick." Under such circumstances, it might well be held to be the duty of each steamer to stop and reverse her engines and feel her way, until the course of the other had been definitely ascertained. But in cases of this kind much depends upon the density of the fog, and something must be left to the judgment and discretion of the master. Precautions, which might be indispensable in a fog so thick that vessels are invisible at a distance of three hundred feet, might become unnecessary and even burdensome if they can be seen at a distance of a thousand feet. It was said in the early case of *The Batavier*, 9 Moore P. C. 286, that "at whatever rate she was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate." This language was quoted with approval in *The Colorado*, 91 U. S. 692, 703.

So, too, in the case of *The Great Eastern*, Browning & Lushington, 287, it was said that "their lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place." Similar language was used by this court in the case of *The Nacoochee*, 137 U. S. 330, 339.

The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway.

The fog in this case was what is termed intermittent; sometimes dense; sometimes light; occasionally lifting so much as

to permit other vessels to be seen, and again shutting down so as to hide them completely. That, immediately prior to the collision, it was not a dense fog is shown by the admitted fact that the steamers became visible to each other at a distance of from nine hundred to a thousand feet. Under such circumstances, if the Umbria herself had been observing the rule with regard to moderate speed, we think it would have been possible for the two steamers, by prompt reversal of their engines, to have avoided each other — at any rate, the master of the Iberia might, in the exercise of sound judgment, have concluded that it was safer for him to maintain a low rate of speed than to come to a standstill.

It should also be borne in mind that she had a right to assume that, even if the Umbria were not pursuing the moderate speed required by the statute, at least she was not guilty of maintaining the extraordinary and reckless speed of nineteen knots per hour. While the signals of the Umbria indicated that she was approaching her very fast, the bearing of these signals tended to show that she was broadening off from, rather than bearing in upon, her course, and that the Iberia would probably pass the point of intersection before the Umbria reached it. Indeed, if it be true, as sworn by her witnesses, that the Iberia was proceeding on a N.W. course after she had ported, and the Umbria was proceeding on a course E. by S. $\frac{3}{4}$ S., and the whistles were several times heard four points on the bow of the Iberia, there could not have been any collision, since the courses of the two vessels would have crossed each other far astern of the Iberia. It is probably also true that, considering the great speed of the Umbria, it were better that the Iberia should keep her steerageway rather than stop her engines and reverse, since she would respond to her wheel more readily, if her engines were kept in motion than if her headway were entirely stopped. The case presented is not one where, if both vessels had stopped and reversed, the collision might have been avoided; but whether, under the facts as they subsequently appeared to be, the Iberia could be deemed in fault for a manœuvre which would have tended to avoid the collision rather than bring

it about, by aiding her in keeping out of the way of the Umbria.

The English cases are also distinguishable in the fact that the approaching vessel was herself running at a low rate of speed — generally at "dead slow," or, as in one or two of the cases, at "easy speed." Indeed, it does not appear that either vessel was running at a speed to exceed three and one half or four knots an hour, which, however, was held to be too great to enable two vessels to avoid a collision after they came in sight of each other. Under such circumstances, these decisions can have but an imperfect application to a case where one of the steamers is proceeding at "dead slow," and the other at her full speed of sixteen to nineteen knots an hour. While we do not question the soundness of Lord Halsbury's observations in the case of *The Ceto*, that the solution of the question of speed must not depend upon the state of facts afterwards ascertained, unless there was enough to tell both parties at the time what the condition of fact was, still the whole theory of the cases which hold it to be the duty of a steamer, meeting another steamer in a fog, to stop or reverse, is based upon the hypothesis that a collision may thereby be avoided; and if the facts afterwards ascertained indicate that such manœuvre, under the circumstances of a particular case, could not have subserved any useful purpose, the steamer ought not to be held in fault for the non-observance of the rule. These rules are intended solely for the prevention of collisions, and if it be clearly apparent that the observance of a certain rule would not have prevented a collision in the particular case, the non-observance of such rule becomes immaterial. Thus, there are a number of cases holding that after two vessels have approached each other so near that a collision has become inevitable or imminent, the master of either may, in the exercise of a sound judgment, put his engines at full speed with a possibility thereby of escaping contact, or of easing the blow (as was actually done by the Iberia in this case); although if he had done it before the collision had become imminent, it would have been a gross fault. Indeed, Article 23 of the International Regulations makes special provision for exceptional

cases by declaring that "in obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Upon this subject, it was said by this court in *The Cayuga*, 14 Wall. 270, 275: "Persons engaged in navigating vessels upon the seas are bound to observe the nautical rules enacted by Congress, whenever they apply, and in other cases to be governed by the rules recognized and approved by the courts. Nautical rules, however, were framed and are administered to prevent such disasters and to afford security to life and property, but it is a mistake to suppose that either the act of Congress, or the decisions of the courts, require the observance of any given rule in a case where it clearly appears that the rule cannot be followed without defeating the end for which it was prescribed or without producing the mischief which it was intended to avert."

In the English cases above cited, both vessels were proceeding at a rate of speed no greater than that of the Iberia, and both were held in fault for not stopping and reversing, because, if that had been done promptly, no collision would have occurred; but, if it turn out that the approaching vessel was proceeding at such a rate of speed that a collision could not possibly have been avoided by the other stopping and reversing, it cannot be said to have been at fault with respect to such approaching vessel, that she still continued to keep her engines in motion. In this case it is manifest that no precautions on the part of the Iberia would have been of the slightest avail, in view of the extraordinary speed of the Umbria. It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was, she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test. The propriety of certain manœuvres cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection *at the same time*, but by the question whether their speed can be stopped

before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their manœuvres must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect — in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no manœuvre on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible.

The court is, therefore, unanimously of opinion that the damages should not have been divided. The majority think that the Iberia was not in fault, while other members of the court rest their conclusion upon the view that, even if she were in fault, such fault did not contribute to the collision.

3. Error is also alleged in the refusal of the Court of Appeals to allow as an item of damage the probable profits of a charter party made October 27, 1888, about a fortnight before the collision, under which the Iberia, described as then being on a voyage from Aden to New York, was to proceed to Cadiz in Spain with a cargo of tobacco. There was clearly no error in rejecting this item. There is nothing in the peculiar facts of the case to take it out of the general rule that in cases of total loss by collision damages are limited to the value of the vessel, with interest thereon, and the net freight pending at the time of the collision. The probable net profits of a charter may be considered in cases of delay, occasioned by a partial loss, where the question is as to the value of the use of the vessel pending her repairs. In such cases the net profits of a charter, which she would have performed except for the delay, may be treated as a basis for estimating the value of her use. *Williamson* v. *Barrett*, 13 How. 101, 110, 112; *The Potomac*, 105 U. S. 630; *The Mayflower*, Brown's Adm. 376; *The Belgenland*, 36 Fed. Rep. 504; *The Gorgas*, 10 Ben. 666; *The Argenturo*, 13 P. D. 191; *S. C.* 14 App. Cas. 519; *The Mary Steele*, 2 Lowell, 370.

But in cases of total loss the probable profits of a charter, not yet entered upon, are always rejected. In the case of *The*

*Amiable Nancy*, 3 Wheat. 546, which was one of an illegal seizure by privateers, a claim made for loss of supposed profits of the voyage on which the vessel was originally bound was held to have been properly rejected. Said Mr. Justice Story: "The probable or possible benefits of a voyage as yet *in fieri*, can never afford a safe rule by which to estimate damages in cases of a marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court cannot believe it proper to entertain it. In several cases in this court, the claim for profits has been expressly overruled; and in *Del Col* v. *Arnold*, 3 Dall. 333, and *The Anna Maria*, 2 Wheat. 327, it was, after strict consideration, held, that the prime cost, or value of the property lost, at the time of the loss, and in case of injury, the diminution in value, by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages."

So, in England, in the case of *The Columbus*, 3 W. Rob. 158, it was held that where the vessel was sunk in a collision and compensation awarded to the full value of the vessel, as for a total loss, the plaintiff would not be entitled to recover anything in the way of demurrage for the loss of the employment of his vessel, or his own earnings, in consequence of the collision. See, also, *The Clyde*, Swabey, 23; *The North Star*, 44 Fed. Rep. 492.

In cases of a partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs, but in cases of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owner were entitled to recover the profits of a future voyage or charter, there would seem to be no limit to such right so far as respects the time of its continuance; and if the vessel were under a charter which had months or years to run, the allowance of the probable profits of such charter might work a great practical injustice to the owner of the vessel causing the injury.

The cases relied upon by the libellant do not support his con-

tention. *The Canada*, Lushington, 586, was a case of total loss, in which the measure of the loss of freight was said to be the gross freight contracted for at the time of the accident, less the charges which would have been necessarily incurred in earning it. The case is somewhat imperfectly reported. The vessel was carrying a cargo from Cadiz to St. Johns, New Brunswick, and was lost before reaching that place. She was also under a charter to carry timber from Quebec to England, but it does not appear clearly from the report whether the freight upon this charter was allowed, or whether the freight spoken of in the report was not limited to the freight earned upon the voyage from Cadiz to St. Johns. *The Star of India*, 1 P. D. 466, was a case of partial loss, and, in addition to demurrage pending repairs, the vessel was allowed a compensation for the loss of a charter party which had been cancelled by reason of her being unable to take the cargo at the time agreed upon. This does not differ materially from the rule in this country. So, too, in the case of *The Consett*, 5 P. D. 229, the vessel was injured by collision, and compelled to put into port to repair. The repairs occupied so long a time that it was not possible for her to fulfil a charter into which she had entered, and so was allowed damages for its loss. In the case of *The Freddie L. Porter*, 8 Fed. Rep. 170, a vessel, totally lost by collision, was chartered for a fixed time, and was lost during the continuance of the charter, before it had expired. Her owner was allowed the profits of the whole charter. The decision was admitted to be an advance upon any which had been previously made, but it is no authority for the allowance of a charter, the performance of which had not been entered upon.

Upon the whole, we think the opinion of the Court of Appeals dividing the damages was erroneous, and that

*The decree of the District Court of January* 13, 1890, *with respect to the question of liability should have been affirmed, and the case is therefore remanded to that court with directions to enter a new decree in conformity with this opinion.*

# HUNT *v.* UNITED STATES.

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

No. 230. Submitted March 25, 1897. — Decided April 12, 1897.

A writ of *scire facias* upon a recognizance to answer to a charge of crime in a District Court of the United States is a "case arising under the criminal laws of the United States," in which the judgment of the Circuit Court of Appeals is made final by the act of March 3, 1891, c. 517, § 6.

THE case is stated in the opinion.

*Mr. Hugh C. Ward* for plaintiffs in error.

*Mr. Assistant Attorney General Whitney* for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a writ of *scire facias* from the District Court of the United States for the Western District of Missouri against Millard C. Curtis, Robert H. Hunt and Hugh C. Ward, upon a forfeited recognizance in the sum of $3000, entered into by Curtis as principal and Hunt and Ward as sureties, the condition of which was that Curtis should appear at the next term of that court to answer a charge of embezzling moneys of a national banking association, in violation of section 5209 of the Revised Statutes, and should abide the judgment of the court, and not depart without its leave. The recognizance was taken before the clerk of the court, under written authority of the judge, while the court was not in session.

An answer to the writ of *scire facias* was filed by Hunt and Ward, and a demurrer and a replication to the answer by the United States. A jury was waived in writing, and the case tried by the court, which gave judgment for the United States. The case was taken by writ of error to the Circuit Court of Appeals, which affirmed the judgment, and denied a

petition for a rehearing. 19 U. S. App. 683; 27 U. S. App. 287. The defendants thereupon sued out this writ of error.

They contended that the recognizance was void, because taken before the clerk, and not before the judge; and that the only authority for taking a recognizance to answer for an offence against the laws of the United States was under section 1014 of the Revised Statutes, which provides that, "for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence."

But the first question presented by the record is whether this court has jurisdiction of this writ of error. The United States contend that the case is one "arising under the criminal laws," of which the jurisdiction of the Circuit Court of Appeals is made final by the act of March 3, 1891, c. 517, § 6. 26 Stat. 828. The plaintiffs in error, on the other hand, contend that the writ of *scire facias* upon a recognizance is a civil action, and therefore not a case arising under the criminal laws.

How far a writ of *scire facias* upon a recognizance to answer for an offence should be considered a civil action is a question upon which there has been some diversity of judicial opinion, depending in some degree upon the manner in which the question has arisen, and upon the comparative regard to be paid to the form of the proceedings, and to the purpose for which and the circumstances under which such a recognizance is taken.

In the earlier judiciary acts of the United States, the general jurisdiction of the courts of the United States, as depending upon the suit being of a criminal or of a civil nature, was usually defined by the words "any cause, civil

or criminal"; Rev. Stat. § 637; or "any civil suit or criminal prosecution"; Rev. Stat. §§ 641, 643; or, on the one hand, by the words, "crimes and offences"; and, on the other hand, by the words "suits of a civil nature, at common law or in equity," or "suits at common law," or "civil actions." Act of September 24, 1789, c. 20, §§ 9, 11, 22; 1 Stat. 76–79, 84; act of March 3, 1875, c. 137, §§ 1, 2; 18 Stat. 470; Rev. Stat. § 563, cls. 1, 4; § 629, cls. 1, 3, 20; § 633.

Under those acts, a writ of *scire facias* upon a recognizance to answer a criminal charge might have been deemed a civil action. *Stearns* v. *Barrett*, 1 Mason, 153; *United States* v. *Payne*, 147 U. S. 687, 690; *Commonwealth* v. *M'Neill*, 19 Pick. 127; *Commonwealth* v. *Stebbins*, 4 Gray, 25; *State* v. *Kinne*, 41 N. H. 238. Yet see *Respublica* v. *Cobbet*, 3 Dall. 467; *S. C.* 2 Yeates, 352; *Commonwealth* v. *Philadelphia Commissioners*, 8 S. & R. 151; *State* v. *Cornig*, 42 La. Ann. 416; *State* v. *Murmann*, 124 Missouri, 502, 507.

But the phraseology of the act of March 3, 1891, c. 517, is quite different in this respect. After providing, in section 5, that writs of error may be taken from the District Courts or from the existing Circuit Courts directly to this court "in cases of conviction of a capital or otherwise infamous crime," (since restricted by the act of January 20, 1897, c. 18, to convictions of capital crimes only,) it provides, in section 6, that in all cases, other than those provided for in section 5, the Circuit Courts of Appeals shall have appellate jurisdiction, and that their judgments shall be final "in all cases arising" "under the criminal laws." 26 Stat. 828.

A writ of *scire facias* upon a recognizance to answer to a charge of crime, even if it be, technically considered, a civil action, and only incidental and collateral to the criminal prosecution, is certainly a case arising under the criminal laws; for it is a suit to enforce the penalty of a recognizance taken to secure the appearance of the principal to answer the charge and to abide any sentence against him; the provision of section 1014 of the Revised Statutes, under which the recognizance in suit was taken, is contained in chapter 18 of Title 13 of the Revised Statutes, under the

head of "Criminal Procedure," and in the first of the sections regulating arrest, bail, indictments, pleadings, commitments, challenges, witnesses, trial, verdict, sentence and execution, in criminal cases; and this recognizance is, as it is described in section 1020, a "recognizance in a criminal cause."

*Writ of error dismissed for want of jurisdiction.*

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## GLADSON *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 240. Argued March 26, 1897. — Decided April 12, 1897.

A statute of a State, requiring every railroad corporation to stop all regular passenger trains, running wholly within the State, at its stations at all county seats long enough to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and does not take property of the company without due process of law; nor does it, as applied to a train connecting with a train of the same company running into another State, and carrying some interstate passengers and the United States mail, unconstitutionally interfere with interstate commerce, or with the transportation of the mails of the United States.

THE case is stated in the opinion.

*Mr. Emerson Hadley* for plaintiff in error. *Mr. James D. Armstrong* was on his brief.

*Mr. H. W. Childs*, Attorney General of the State of Minnesota, for defendant in error. *Mr. George B. Edgerton* was on his brief.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a complaint to a justice of the peace of the county of Pine and State of Minnesota, by a passenger on a regular passenger train of the St. Paul and Duluth Railroad Company, running between the cities of St. Paul and Duluth in the State,

and not being "a train entering this State from another State, or going from this State to another State, or a transcontinental train," against the engineer of the train, for not stopping it on July 22, 1893, at the station in the village of Pine City, the county seat of Pine county, as required by the statute of Minnesota of March 31, 1893, c. 60, by which it was enacted as follows:

"All regular passenger trains, run by any common carrier operating a railway in this State, or by any receiver, agent, lessee or trustee of said common carrier, shall stop a sufficient length of time at its stations at all county seats within this State to take on and discharge passengers from such trains with safety; and any engineer, conductor or other agent, servant or employé of, or any person acting for such common carrier, or for any receiver, agent, lessee or trustee of such common carrier, who violates any provision of this act, is guilty of a misdemeanor, and is punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than three months: Provided, however, that this act shall not apply to through railroad trains entering this State from any other State, or to transcontinental trains of any railroad." Minnesota Laws of 1893, p. 173.

The defendant was convicted before the justice of the peace, and appealed to the district court for the county. Upon the trial in that court, the case appeared to be as follows:

The St. Paul and Duluth Railroad Company was a corporation of the State of Minnesota; and had become vested, under the laws of the State, with the lands received by the State under the act of Congress of May 5, 1864, c. 79, "making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior," and providing that "the said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States"; that "the United States mail shall be transported over said road, under the direction of the Post Office Department," at prices to be fixed

by Congress or by the Postmaster General; and that "any railroad which may hereafter be constructed from any point on the Bay of Superior in the State of Wisconsin shall be permitted to connect with the said railroad." 13 Stat. 64, 65; Minnesota Special Laws of 1865, c. 2, p. 19; *State* v. *Luther*, 56 Minnesota, 156.

On the afternoon of July 2, 1893, the complainant was a passenger on a train of the company running from St. Paul to Duluth, and held a ticket for a passage from Rush City to Pine City, both being stations on the line between St. Paul and Duluth, and Pine City being a village of eight hundred inhabitants and the county seat of Pine county; but, although he showed his ticket to the conductor, the train was not stopped at Pine City. The train was a fast express train, known as "the limited," carrying passengers and the United States mail, running daily from St. Paul to Duluth only, stopping for wood and water at Hinckley, and at railroad crossings and junctions at Rush City and elsewhere, but not scheduled to stop nor actually stopping at Pine City or other stations on the way. The mail, and about one third of the passengers, on the average, were destined for West Superior, and were transferred at West Duluth in the State of Minnesota to another train of the same company running thence to the city of West Superior in the State of Wisconsin, just across the line between the two States. To have stopped the train at Pine City would have caused a loss of time of from five to seven minutes, and an expense of from $1.25 to $1.60. Two passenger trains and a mixed train passed daily each way over the road from St. Paul to Duluth, stopping at Pine City.

The defendant, as stated in his bill of exceptions, "moved the court for his discharge, on the ground that the statute under which the complaint is made is unconstitutional on its face, not falling within the legitimate scope of the police power of the State, consequently being a taking of the property of this railroad company without due process of law; that, even if it is not unconstitutional on its face, it is unconstitutional as applied to the train in controversy: in the first place, being an attempt on the part of the State to regu-

late interstate commerce; and secondly, being an unlawful interference with and an attempt to regulate the United States mail."

The court denied the motion, and submitted the case to the jury, who returned a verdict of guilty, upon which judgment was rendered. The defendant appealed to the Supreme Court of the State, which affirmed the judgment. 57 Minnesota, 390. The defendant sued out this writ of error.

The principles of law which govern this case are familiar, and have been often affirmed by this court. A railroad corporation created by a State is for all purposes of local government a domestic corporation, and its railroad within the State is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 333, 334; *Smith* v. *Alabama*, 124 U. S. 465, 481, 482; *Hennington* v. *Georgia*, 163 U. S. 299, 308, 317; *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628, 632.

In Minnesota, as in other States, the county seat of each county is the place appointed for holding the meetings of the county commissioners and the sessions of the district court, and for keeping the offices of the clerk of that court, the

judge of probate, the county auditor, the county treasurer, the sheriff and the register of deeds. Minnesota Gen. Stat. 1878, c. 8, §§ 102, 129, 148, 174, 195, 220, 227, 258.

The legislature of the State may well treat it, as one important object of establishing a railroad within the State, that public officers, parties to actions, jurors, witnesses and citizens generally, should be enabled the more promptly to reach and leave the centres to which their duties or business may call them. To require every regular passenger train, running wholly within the limits of the State, to stop at all stations at county seats, directly in its course, for the few minutes, and at the trifling expense, needed to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and cannot be considered a taking of property of the company without due process of law, nor an unconstitutional interference with interstate commerce or with the transportation of the mails of the United States.

The recent case of *Illinois Central Railroad* v. *Illinois*, 163 U. S. 142, cited by the plaintiff in error, was essentially different from the present case.

In that case, the statute of the State of Illinois, as construed and applied by the Supreme Court of the State, required a fast train, carrying interstate passengers and the United States mail from Chicago in the State of Illinois to places in other States south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus travelling seven miles which formed no part of its course, before proceeding on its way; and, as the court observed, the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the State, was not presented, and could not be decided, upon the record in that case. 163 U. S. 153, 154.

But, in the case at bar, the train in question ran wholly

within the State of Minnesota, and could have stopped at the county seat of Pine county without deviating from its course; and the statute of Minnesota expressly provides that "this act shall not apply to through railroad trains entering this State from any other State, or to transcontinental trains of any railroad."

*Judgment affirmed.*

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

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## *In re* HIEN, Petitioner.

ORIGINAL.

No. 16. Original. Argued March 22, 1897. — Decided April 12, 1897.

The Court of Appeals of the District of Columbia was duly authorized by § 6 of the act creating the court, as well as by § 6 as amended by the act of July 30, 1894, to make rules limiting the time of taking appeals to the court from the decisions of the Commissioner of Patents; and there was no restriction on this power by reason of Rev. Stat. § 4894.

THE case is stated in the opinion.

*Mr. W. H. Singleton* for petitioner. *Mr. F. W. Ritter* was on his brief.

*Mr. W. A. Megrath*, by special leave, opposing.

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

The Commissioner of Patents, in an interference proceeding between Philip Hien and one William A. Pungs, awarded priority of the invention in controversy to Pungs, June 9, 1894. Hien gave notice to the Commissioner, March 12, 1896, of an appeal from his decision, under § 4912 of the Revised Statutes, to the Court of Appeals for the District of Columbia, and filed his petition of appeal in that court,

June 2, 1896, which was dismissed on the third day of the following December because the appeal was not taken within the time prescribed by the rules of the court. 24 Wash. Law Rep. 827. December 12, 1896, Hien moved that his appeal be reinstated on the ground that the Court of Appeals had no authority to make the rules in question, which was denied. 25 Wash. Law Rep. 8. Hien then applied to this court for leave to file a petition for a writ of mandamus; leave was granted; the petition filed; and a rule to show cause entered, to which return was duly made.

Section 780 of the Revised Statutes of the District of Columbia, approved June 22, 1874, reads:

"SEC. 780. The Supreme Court, sitting in banc, shall have jurisdiction of and shall hear and determine all appeals from the decisions of the Commissioner of Patents, in accordance with the provisions of sections forty-nine hundred and eleven to section forty-nine hundred and fifteen, inclusive, of chapter one, Title LX, of the Revised Statutes, 'PATENTS, TRADE-MARKS AND COPY-RIGHTS.'"

The sections of the Revised Statutes thus referred to are as follows:

"SEC. 4911. If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc.

"SEC. 4912. When an appeal is taken to the Supreme Court of the District of Columbia, the appellant shall give notice thereof to the Commissioner, and file in the Patent Office, within such time as the Commissioner shall appoint, his reasons of appeal, specifically set forth in writing.

"SEC. 4913. The court shall, before hearing such appeal, give notice to the Commissioner of the time and place of the hearing, and on receiving such notice the Commissioner shall give notice of such time and place in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the Commissioner shall furnish the court with the

grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. And at the request of any party interested, or of the court, the Commissioner and the examiners may be examined under oath, in explanation of the principles of the thing for which a patent is demanded.

"SEC. 4914. The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, upon the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.

"SEC. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

Sections 6 and 9 of the act to establish the Court of Appeals

for the District of Columbia, approved February 9, 1893, c. 74, 27 Stat. 434, provided:

"SEC. 6. That the said Court of Appeals shall establish a term of the court during each and every month in each year excepting the months of July and August, and it shall make such rules and regulations as may be necessary and proper for the transaction of the business to be brought before it, and for the time and method of the entry of appeals and for giving notice of appeals thereto from the Supreme Court of the District of Columbia, and such other rules and regulations as may be necessary and proper in the premises." . . .

"SEC. 9. That the determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the Court of Appeals created by this act; and in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals."

By the act of July 30, 1894, c. 172, 28 Stat. 160, section six was amended so as to read as follows:

"SEC. 6. That said Court of Appeals shall establish by rule of court such terms of the court in each year as to it may seem necessary: *Provided, however*, That there shall be at least three terms in each year, and it shall make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court." . . .

The Court of Appeals, June 5, 1893, promulgated a set of rules, among which were these:

"Rule IX — 1. No order, judgment or decree of the Supreme Court of the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within twenty days, Sundays excluded, after the order, judgment or decree complained of shall have been made or pronounced."

"Rule XIX — 6. The appeals from the Commissioner of Patents shall be subject to all the rules of this court provided for other cases therein, except where such rules, from the nature of the case, or by reason of special provisions inconsistent therewith, are not applicable."

The Commissioner of Patents issued an order May 16, 1894, that "All Examiners are hereby directed to withhold from issue the application of the prevailing party in interference cases for thirty days from the date of final issue in order that an appeal may be taken to the Court of Appeals of the District of Columbia, if desired." This order was published in the Official Gazette of June 5, 1894. (Off. Gazette, Vol. 67, p. 1195.)

The Court of Appeals promulgated a new set of rules September 29, 1894, of which Rule 20 related to appeals from the Commissioner of Patents, the second subdivision reading thus:

"XX — 2. The appellant, upon complying with the preceding section of this rule, shall file in the case a petition, addressed to the court, in which he shall briefly set forth and show that he has complied with the requirements of sections 4912 and 4913 of the Revised Statutes of the United States, to entitle him to an appeal, and praying that his appeal may be heard upon and for the reasons assigned therefor to the Commissioner; and said appeal shall be taken within forty days from the date of the ruling or order appealed from, and not afterwards."

The order of May 16, 1894, was modified by the Commissioner, April 27, 1896, so as to direct the Examiners to withhold from issue the application of the prevailing party in interference cases for forty-five days from the date of the final decision.

The contention is that the Court of Appeals of the District of Columbia was without authority to promulgate a rule limiting the time of taking appeals from the decisions of the Commissioner of Patents; and that, by analogy, two years were allowed therefor in view of § 4894 of the Revised Statutes.

The general rule undoubtedly is that courts of justice possess the inherent power to make and frame reasonable rules

not conflicting with express statute; but apart from that we think it clear that the Court of Appeals was duly authorized by § 6, of the act creating the court, as well as by § 6, as amended by the act of July 30, 1894, to make rules limiting the time of taking appeals to the court from the decisions of the Commissioner of Patents. Since by § 9 the Court of Appeals was vested with authority to review such decisions, we do not think it can properly be held that under the original act the authority in respect of appeals was limited only to appeals from the Supreme Court of the District of Columbia, or to the conduct of appeals after they had come before the appellate court.

Of the rules of June 5, 1893, Rule XIX is to be read with Rule IX, as limiting the time of appeals to the court from the decisions of the Commissioner to twenty days, exclusive of Sundays, which time was enlarged to forty days by Rule XX, promulgated September 29, 1894, the rule specifically declaring that such appeals could not be taken after the expiration of the time prescribed.

And if the original act were not so comprehensive as above indicated, the result would be the same under the amendatory act, in respect of the power imparted by which there can be no question. The petitioner complied neither with the rule of June 5, 1893, nor with the rule of September 29, 1894, and if not governed by the former was certainly subject to the latter, for although this was promulgated after the decision of the Commissioner of Patents in the case, the Court of Appeals was quite right in holding that "the right of appeal is not a vested right that may not be altered by statute, or by rule of court made in pursuance of statutory authority to enact such rules."

In compliance with section 4912 of the Revised Statutes, Hien gave notice to the Commissioner of Patents, under date of May 12, 1896, of an appeal from his decision to the Court of Appeals, and filed his petition, under the rule, on June 2. These proceedings, if they had been in time, amounted to the taking of an appeal, but as they were not initiated and prosecuted within the time limited, they were ineffectual. We have

no doubt that the Court of Appeals had authority, in regulating the taking of appeals, to limit the time in which the conditions of such taking had to be performed; and that there was no restriction thereon by reason of section 4894 of the Revised Statutes as contended.

That section is as follows:

"SEC. 4894. All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

This has no relation to the limitation on appeals under section 4911, but has reference solely to the abandonment of an application by failure to prosecute it.

In *Gandy* v. *Marble*, 122 U. S. 432, which was a bill in equity under section 4915 of the Revised Statutes, to obtain an adjudication in favor of the granting of a patent, we held that while such a proceeding was a suit according to the ordinary course of equity practice and procedure, and not a technical appeal from the Patent Office, confined to the case as made in the record of that office, yet that the requirement of section 4894 that the application should be regarded as abandoned if the applicant failed to prosecute the same within two years after any action therein, of which notice should have been given him, unless it were "shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable," was applicable, and that the court could not adjudge that the applicant was entitled, "according to law, to receive a patent," unless he showed to the satisfaction of the court that the delay of two years "was unavoidable, under an allegation to that effect in the bill." It was held that the bill in equity was *sub modo* a branch of the application for the patent, and was governed by the rule as to laches and delay declared by section 4894. But this had nothing to do with the time within which an appeal from the Commis-

sioner of Patents must be taken, but merely decided that a bill in equity under section 4915 would be defeated where the application had been abandoned in the Patent Office under section 4894.

The bill in equity provided for by section 4915 is wholly different from the proceeding by appeal from the decision of the Commissioner under consideration in this case. The one is in the exercise of original, the other, of appellate, jurisdiction.

The court under section 4914, on petition, is to hear and determine the appeal and to revise the decision appealed from in a summary way "upon the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal."

Section 4915 provides, as to the remedy by bill in equity, that "the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention as specified in his claim, or for any part thereof, as the facts in the case may appear."

In *Butterworth* v. *Hoe*, 112 U. S. 50, 61, this court distinguished the proceeding by bill in equity under section 4915 from an appeal under section 4911, and said: "This means a proceeding in a court of the United States having original equity jurisdiction under the patent laws, according to the ordinary course of equity practice and precedure. It is not a technical appeal from the Patent Office, like that authorized in § 4911, confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits."

This being so, § 4894 was inapplicable, and the power of the Court of Appeals to limit the time of appeal was not affected thereby.

*Writ denied.*

# ABERDEEN BANK *v.* CHEHALIS COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 38. Argued April 30, 1896. — Decided April 12, 1897.

This court is bound by the decision of the Supreme Court of the State of Washington, (in which it concurs,) that § 21 of the act of that State of March 9, 1891, relating to the taxation of national banks in that State, is to be read in connection with § 23 of the same act, and that when so read they do not impose upon such banks a tax forbidden by Rev. Stat. § 5219. *National Bank* v. *Commonwealth,* 9 Wall. 353, affirmed and followed in this matter.

Money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and investments in mortgages, does not come into competition with the business of national banks, and is therefore not within the meaning of the provision in Rev. Stat. § 5219, forbidding state taxation of its shares at a greater rate than is assessed upon other moneyed capital in the hands of citizens of the State.

Insurance stocks may be taxed on income instead of on value; and deposits in savings banks and moneys belonging to charitable institutions may be exempted without infringing the provisions of that section of the Revised Statutes.

The allegations of the complaint do not show that any moneyed capital of the bank of the character defined by the decisions of this court was omitted or intended to be omitted by the assessor, and those allegations are so general in these respects that they cannot be made the basis of action.

The First National Bank of the city of Aberdeen, State of Washington, a banking corporation organized under the national banking laws of the United States, filed its complaint in the Superior Court of the said State, for the county of Chehalis, May 16, 1892, against the county of Chehalis and J. M. Carter, as *ex officio* tax collector of the county, seeking to enjoin the defendants from levying upon the safes, time locks and other personal property of the complainant, for the purpose of collecting a tax upon the shares of its capital stock. The defendants demurred to the complaint, and the demurrer having been sustained, and the complainant having refused to amend its complaint, judgment was entered in the said court,

Statement of the Case.

September 13, 1892, in favor of the defendants. The complainant took the case upon writ of error to the Supreme Court of the State, where the judgment was affirmed. 6 Washington, 64. The complainant then sued out a writ of error bringing the case here.

The essential allegations of the complaint were that the capital stock of the bank consisted of 500 shares of $100 each; that all of the stock was paid up, and was owned in part by citizens of the State of Washington resident therein, and in part by citizens of the United States residing outside of the State; that the assessor of the said county was charged, under the provisions of an act of the legislature of the said State, approved March 9, 1891, entitled "An act to provide for the assessment and collection of taxes in the State of Washington and declaring an emergency," with the duty of preparing an assessment roll of all the property subject to taxation in the said county, as owned and there subject to taxation on April 1, 1891; that thereupon the assessor proceeded to make out an assessment roll, wherein he listed to the complainant, as owner thereof, all of its capital stock, and, though informed by the complainant of the residence of each of the stockholders, and of the amount of stock held by each of them on April 1, 1891, assessed the capital stock *in solido* to the complainant as owner thereof, at a total valuation of $50,000; that upon the said assessment the defendant Carter, as treasurer, was officially directed to collect from the complainant a tax in the amount of $686.25; that the tax not having been paid, the said defendant, as treasurer, on March 1, 1892, declared the same delinquent, and added thereto a certain sum by way of penalty for non-payment, and a certain sum as interest, and was about to proceed to collect the total amount, being $787.22, by levying upon the safes, time locks and other property used by the bank, and that if he were permitted so to do the complainant would suffer irreparable injury. That on April 1, 1891, there existed in the said county moneyed capital, other than that invested in shares of stock of national banks and banking business, owned by citizens of the State resident in that

Counsel for Parties.

county, and there invested in loans and securities owing by other citizens of the State residing in the county, exceeding the sum of $237,400; that there existed in the State moneyed capital owned by citizens of the State who were residents of other counties thereof (aside from the capital invested in banks and banking business), invested in loans and securities owing by citizens of the State residing in counties other than the county aforesaid, exceeding the sum of $14,000,000; that the total capitalization of national banks located in the State was the sum of $7,000,000, and the total capitalization of banks there located, incorporated under the laws of the State, the sum of $4,000,000; that large amounts of moneyed capital were invested in the State, by residents thereof, in the stocks and bonds of insurance, wharf and gas companies, which amounts, together with all the moneyed capital above mentioned, made an aggregate of at least $26,000,000; that these facts were well known to the several assessors and other taxing officers throughout the State, but that the moneyed capital referred to, other than the said capital of the national and state banks, was purposely omitted from assessment and taxation in pursuance of an agreement entered into before April 1, 1891, between the assessors of the several counties, based upon an opinion rendered by the attorney general of the State, advising such omission. That this omission necessarily operated as a discrimination in favor of the other moneyed capital in the hands of individual citizens of the State and against shares of stock of the national banking corporations located within the State, and necessarily resulted in the taxation of the shares of the national banks at a greater rate than other moneyed capital in the hands of the individual citizens of the State.

*Mr. James B. Howe* for plaintiff in error. *Mr. Eugene M. Carr*, *Mr. Harold Preston* and *Mr. M. T. Cochran* were on his brief.

*Mr. James A. Haight* for defendants in error. *Mr. W. C. Jones* was on his brief.

Opinion of the Court.

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

It is contended on behalf of the plaintiff in error that an assessment and taxation of all the shares of the stock of a national bank *in solido* to the bank direct, as owner thereof, constitutes a tax upon the bank forbidden by section 5219 of the Revised Statutes of the United States.

The tax in question was assessed under section 21 of an act of the legislature of the State of Washington, approved March 9, 1891, Laws of Washington, 1891, pp. 280–289, in the following terms:

"Every individual, firm, corporation or association of persons, carrying on a general banking business in this State, whether the same has been organized under the banking laws of this State or the United States, or conducted under the style of private bankers, shall be assessed and taxed in the county, town, city or village where such bank or banking association is located, and not elsewhere, in the following manner: Annually, at such times as provided for listing property for taxation, every such bank or banking association as contemplated in this section shall, by its accounting officer, furnish the county or city assessor a statement verified by oath giving the amount of paid-up capital stock, the amount of surplus or reserved fund and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus and undivided profits shall be assessed and taxed as other like property in the State is assessed and taxed: *Provided*, At the time of listing the capital stock, the amount and description of its legally authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus and undivided profits, and the remainder then taxed as above provided."

If this section stood alone there might be ground for the contention that it contemplates taxation of the capital of the bank. But section 23 of the statute provides that "each bank

and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner under the provisions of this act, and may pay the same out of their individual profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their ownership."

The Supreme Court of Washington held in this case that these two sections are to be read together, and that, so read, their provisions are not inconsistent with those of the Federal statute.

That the two sections of the state law should be read together is obviously proper, and, at any rate, we are bound by the judgment of the Supreme Court of the State in the mere matter of the construction of that law.

In holding that the state law, in the provisions under consideration, was not in contravention of the Federal statute, the Supreme Court of Washington claimed to follow the case of *National Bank* v. *Commonwealth*, 9 Wall. 353; and we agree with that court in thinking that the case referred to is decisive of the contention now made. In that case it appeared that a statute of the State of Kentucky provided that a tax should be laid on "the bank stock or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies"; and further provided that "the cashier of a bank, whose stock is taxed, shall, on the first day of July in each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent upon the amount."

It was claimed by the bank that the shares of the stock were the property of the individual stockholders, and that the bank could not be made responsible for a tax levied on those shares, and could not be compelled to collect and pay such tax to the State. In delivering the opinion of the court, Mr. Justice Miller said:

"It is strongly urged that it is to be deemed a tax on the

capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the States for a long time to require of its corporations thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. . . . A very nice criticism of the proviso to the forty-first section of the National Bank Act" — now section 5219 of the Revised Statutes — "which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit state taxation to the shares of the bank as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore,

that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy."

This case was followed in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 239, and *Van Slyke* v. *Wisconsin*, 154 U. S. 581; and its doctrine, that the statutory appointment of the bank to pay the whole tax as agent of the stockholders, is not inconsistent with the Federal law pertaining to national banks, was correctly interpreted and applied by the state court to the case in hand. It was not alleged in the bill, or claimed on argument, that the bank was not in possession of funds, belonging to the stockholders severally, sufficient to pay the tax, proportioned to their ownership of the stock.

It is also contended that the Supreme Court of Washington erred in not holding that the bill of complaint showed that the taxation of the shares of capital stock of the plaintiff was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of Washington, and was, therefore, void under section 5219 of the Revised Statutes of the United States.

As the case was disposed of in the court below on a demurrer to the bill, it is proper to have before us the very language of the bill which presents this question, and which was as follows:

"That on the first day of April, 1891, there existed in the county of Chehalis, State of Washington, taxable moneyed capital (other than and beyond that invested in shares of stock of national banks and banking business), owned by citizens of said State, resident in said county and there invested in loans and securities to them payable, and owing by other citizens of said State residing in said county, of vast amount, to wit, exceeding the sum of two hundred and thirty-seven thousand four hundred dollars: That on said first day of April, 1891, there existed in the State of Washington, in counties other than the county of Chehalis aforesaid, other taxable capital in money and moneyed capital (aside from the moneyed capital referred to in the paragraph preceding, and aside from the capital in banks and banking business), owned by citizens of the State of Washington resident in said State (in counties other than the county of Chehalis), and there invested in loans

and securities to them payable and owing by other resident citizens of said State in counties other than the county of Chehalis, of vast amount, to wit, exceeding the sum, as complainant is informed and believes, of fourteen million dollars: That on the said first day of April, 1891, the total capitalization of national banks located in the State of Washington was the sum of seven million dollars; that the total capitalization of banks there located, but incorporated under the laws of the State of Washington, was the sum of four million dollars; and that at the same time large amounts of moneyed capital were invested in the State of Washington by residents of said State in the stocks and bonds of insurance, wharf and gas companies; and in addition to the foregoing there then existed in said State other moneyed capital amounting to at least twenty-six million dollars, being the other moneyed capital hereinbefore referred to; that in no case, as complainant is informed and believes and so charges the fact to be, is the stock of any national bank or the shares of the stock of any national bank located in the State of Washington valued for assessment for taxation in said State at a less sum or assessed upon a value of less than eighty-five per cent of the par value thereof; and, further, that the total assessment and total valuation in the assessment for taxation throughout the State of Washington for the year 1891 of and upon the bonds and shares of banks, banking corporations, insurance, gas, wharf and other corporations, was the sum of eight million two hundred and five thousand five hundred and three dollars.

"That the facts alleged in the preceding paragraphs thereof were then and during all of the times intervening between the first day of April, 1891, and the time of the return of the several assessment rolls throughout the State of Washington by the county assessors to the county auditors, well known to the assessor of the county of Chehalis and all other county assessors throughout the State of Washington, and during all of said times and until the first day of March, 1892, were well known to the several county and state officers hereinbefore referred to, and also to the boards of equalization and boards of county commissioners and the auditor of each of the counties

in said State, and since the first day of March, 1892, have been and are now well known to the defendant, the treasurer of Chehalis County: That on said first day of April, 1891, the entire capital, surplus and undivided profits of complainant were invested as follows, to wit: $12,500.00 bonds of the United States, and the remainder in loans to residents of the State of Washington, in furniture and fixtures; that all of said other moneyed capital referred to in the foregoing paragraphs was purposely omitted from the assessment and from taxation whatsoever by each and every of the county assessors and other taxing officers throughout the State of Washington, and the same and the whole thereof has escaped taxation throughout the State of Washington; that the omission by the several county assessors and taxing officers of the several counties in said State to either assess or tax other moneyed property or capital last aforesaid was made through, under and by reason and in pursuance of an agreement entered into prior to the first day of April, 1891, between the several county assessors of the several counties in said State, whereby it was agreed upon between them that such omission should be made by them and all of them; and said omission and agreement to omit was in pursuance of an opinion rendered by the attorney general of the State of Washington to the said several county assessors at their request, advising such omission, the said attorney general being by virtue of his office required by the laws of the State of Washington to render such opinion upon the request of said assessors; that such omission necessarily operated as a discrimination in favor of other moneyed capital in the hands of individual citizens of said State and against shares of stock of national banking corporations located within this State, including complainant, and necessarily resulted in taxation of the shares of such national banks, including complainant, at a greater rate than other moneyed capital in the hands of the individual citizens of said State, all of which was well known to and most wrongfully intended by said several county assessors and taxing officers, and all of which is in direct violation of and forbidden by the provisions of the Revised Statutes hereinbefore specifically referred to."

Opinion of the Court.

It is claimed by the plaintiff in error that the withdrawal from taxation of so large a proportion of moneyed capital in the hands of individual citizens, as is shown by these allegations, had the effect of taxing national bank shares at a greater rate than the remaining moneyed capital in the hands of individual citizens was taxed.

Before we consider the legal import of these statements in the complaint, we shall briefly review some of the previous decisions of this court in which similar questions have been dealt with.

In *People* v. *Commissioners*, 4 Wall. 244, the question presented was whether a tax imposed, under a law of the State of New York, on shares of a national bank, was invalid, as a discrimination against the shareholders, because no allowance or deduction was made on account of investments made by the bank in United States bonds, whereas such a deduction or allowance was made in assessments upon insurance companies and individuals. The answer given by this court was that upon a true construction of that clause of the act which provided that taxation of such shares by state authority should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States, "the meaning and intent of the lawmakers were that the rate of taxation of the shares should be the same, or not greater than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens." And it was said that "it is known as sound policy that, in every well-regulated and enlightened State or government, certain descriptions of property, and also certain institutions — such as churches, hospitals, academies, cemeteries and the like — are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordered that it should be uniform."

In *Lionberger* v. *Rouse*, 9 Wall. 468, a shareholder in the Third National Bank of St. Louis resisted payment of a tax

of nearly two per cent on his stock, imposed under a law of the State of Missouri, because there were in that State two banks which by a contract the State had, prior to the passage of the national bank laws, disabled itself from taxing at a greater rate than one per cent; and it was claimed that the tax complained of was assessed in disregard of that provision of the Federal statute which enacted "that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." Speaking through Mr. Justice Davis, this court said:

"It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the national banks. The measure itself had reference to prospective legislation by the States, and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing, as that the power of the State to tax should depend on its doing an act, which it had obliged itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contracts with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different States; while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes, others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, in this condition of things in the country, meant to confer a privilege by one section of a law which by another it made practically unavailable? If the construction contended for by the plaintiff in error be allowed,

then a State so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power to tax the shares of national banks. And this further consequence would follow, that the shareholders of national banks located in one State would escape all taxation, while those whose property was invested in banks in a different locality would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to such manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say [that], in our opinion, Congress meant no more by the limitation in the national bank act, than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

By a statute of Pennsylvania of March 31, 1870, all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate were made exempt from taxation except for state purposes. The stock of one Hepburn in the First National Bank of Carlisle, the par value of which was one hundred dollars a share, was subjected, at its market value of one hundred and fifty dollars per share, to taxation for county, school and borough purposes. The validity of such taxation was upheld by the Supreme Court of Pennsylvania, and the case was brought to this court. It was contended on behalf of the shareholder that as, by the Pennsylvania statute, other moneyed capital in the hands of individuals in the county where the bank was located was not subject to taxation for local purposes, such taxes upon shares in a national bank were in the nature of a discrimination and void. It was also contended that in valuing these shares at fifty per cent above par the tax was made fifty per cent greater than on "other moneyed capital in the hands of individuals."

Both these contentions were overruled by this court; and, in disposing of the argument that the taxes in question made

an illegal discrimination against national bank shares, it was said:

"It is next insisted that no municipal or school taxes could be assessed upon the shares of the First National Bank of Carlisle, located within the borough of Carlisle, . . . because by the laws of Pennsylvania, as is claimed, other moneyed capital in the hands of individual citizens at that place is exempt from such taxation. In support of this claim it is shown that all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation in that borough except for state purposes. This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. . . . Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt. Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it. In this case it has not been made to appear." *Hepburn* v. *School Directors*, 23 Wall. 480.

To the same effect was the case of *Adams* v. *Nashville*, 95 U. S. 19.

In *People* v. *Weaver*, 100 U. S. 539, it was held that the statute of a State which establishes a mode of assessment by which shares in a national bank are valued higher in proportion to their real value than other moneyed capital is in conflict with section 5219 of the Revised Statutes, although no greater percentage is levied on such valuation than on that of other moneyed capital; and that the statutes of New York which permit a party to deduct his just debts from the valuation of all his personal property, except so much thereof as consists of such shares, tax them at a greater rate than other moneyed capital, and were, therefore, void as to them.

In *Boyer* v. *Boyer*, 113 U. S. 689, there was brought into question the validity of a county tax levied on national bank shares under a law of the State of Pennsylvania, where other

moneyed capital in the hands of individual citizens within the same taxing district was exempted from such taxation. The previous decisions of the court respecting state taxation of shares in national banks were reviewed, and the conclusion reached was that those decisions did not sustain the proposition that national bank shares may be subjected, under the authority of the State, to local taxation where a very material part, relatively, of other moneyed capital in the hands of individual citizens is exempt. It was observed that "as the act of Congress does not fix a definite limit as to percentage of value, beyond which the States may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality."

That case, like the present one, was determined in the court below on bill and demurrer, and this court thought the better course was to remand the cause with a recommendation that the defendants should be put to answer, so that the facts of the case might be more fully disclosed.

In *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237, a question was raised, in behalf of citizens of other States, of the validity of a law of the State of Pennsylvania which imposed a tax upon the nominal or face value of corporation bonds, instead of a tax upon their actual value; and, while it was not a case of taxation of national bank stock, some observations were made by Mr. Justice Bradley, in expressing the views of the court, that are applicable to the question before us:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, except certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of exercise upon various products; it may tax real estate and personal property in a different man-

ner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. 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 would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

*Mercantile Bank* v. *New York*, 121 U. S. 138, was the case of a bill filed by a national bank in the city of New York, the object of which was to restrain the collection of taxes assessed upon its stockholders on the ground that the taxes assessed were illegal and void under section 5219 of the Revised Statutes of the United States, as being at a greater rate than those assessed under the laws of New York upon other moneyed capital in the hands of the individual citizens of that State. From the decree of the Circuit Court of the United States dismissing the bill an appeal was prosecuted to this court.

The question presented was thus stated by Mr. Justice Matthews, who delivered the opinion of this court:

"The proposition which the appellant seeks to establish is that the State of New York, in seeking to tax national bank

shares, has not complied with the condition contained in section 5219 of the Revised Statutes, that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, 'in that it has by its legislation expressly exempted from all taxes in the hands of individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000) and state bank shares (having a like value of $22,815,700) to taxation upon their full actual value, less only a proportionate amount of real estate owned by the bank.' This exemption, it is claimed, is of a 'very material part relatively' of the whole, and renders the taxation of national bank shares void."

The exemptions referred to were classified as follows: Shares of stock in the hands of the individual shareholders of all incorporated moneyed or stock corporations deriving an income or profit from their capital or otherwise, incorporated by the laws of New York, not including trust companies and life insurance companies, and state or national banks — the value of such shares was admitted to be $755,018,892; trust companies and life insurance companies — the value of whose shares was admitted to be $35,558,900 — in addition the life insurance companies owned personal property composed of mortgages, loans and bonds to the amount of $195,257,305; savings banks and the deposits therein amounting to $437,107,501, and a surplus of $68,669,001; certain municipal bonds, issued by the city of New York under an act passed in 1880, of the value of $13,467,000; shares of stock in corporations created by States other than New York, in the hands of individual holders, resident of said State, amounting to $250,000,000.

The contention on behalf of the national bank was that within the doctrine of the case of *Boyer* v. *Boyer*, 113 U. S. 689, these exemptions constituted so material a part relatively of the moneyed capital in the hands of individual citizens as to make the tax upon the shares of national banks an unfair discrimination against that class of property.

On the part of the State it was claimed that the shares of stock in the various companies incorporated by the laws of New York as moneyed or stock corporations, deriving an income or profit from their capital or otherwise, including trust companies, life insurance companies and savings banks, were not moneyed capital in the hands of the individual citizen within the meaning of the act of Congress; that, if any of them are, then the corporations themselves were taxed under the laws of New York in such a manner and to such an extent that the shares of stock therein are in fact subject to a tax equal to that which was assessed upon shares of national banks; and that if there are any exceptions, they were immaterial in amount and based upon considerations which excluded them from the operation of the rule of relative taxation intended by the act of Congress. Upon a careful review of the cases the following conclusions were reached by the court:

"That 'moneyed capital in the hands of individual citizens' does not necessarily embrace shares of stock held by them in *all* corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in *some* corporations, according to the nature of their business, may be such moneyed capital. . . . The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect,

because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress in fixing limits to state taxation, on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy. Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not 'moneyed capital,' the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated

value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling 'moneyed capital,' and its business may not consist in any kind of dealing in money, or commercial representatives of money. So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments and others of that description are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress.

Opinion of the Court.

"That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have seen, the shares of stock in such companies held by individuals are not moneyed capital.

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank* v. *Britton*, 105 U. S. 322: 'The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, moneys loaned at interest, and demands against persons or corporations, are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly, there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal prop-

erty is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.'"

In respect to trust companies the court held that it was evident, from the powers granted them in the legislation of New York, that they were not banks in the commercial sense of that word, and did not perform the function of banks in carrying on the exchanges of commerce, and that, taxed as they were, on their franchises based on income, it could not be said that there existed any discrimination against national banks. As to savings banks it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must also be exempted; that it was part of the policy of the State to encourage the accumulation of small savings belonging to the industrious and thrifty, and it was within the reasonable exercise of the power of the State to exempt particular kinds of property, and the conclusion of the court, in respect to savings banks, was thus expressed: "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded on just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and investments in mortgages,

does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks; and that exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by section 5219 of the Revised Statutes of the United States.

We shall now, in the light of the previous decisions, advert to the allegations contained in the bill of complaint.

The substance of those allegations is: First, that there was taxable moneyed capital in Chehalis County, which escaped taxation, amounting to $237,400; second, that there was also unassessed moneyed capital in other portions of the State exceeding $14,000,000; third, that the moneyed capital invested in banks, national and state, was $11,000,000; fourth, that there was invested in the stocks and bonds of insurance, wharf and gas companies and other moneyed institutions, moneyed capital amounting to at least $26,000,000.

Even if it be conceded that the stocks and bonds of insurance, wharf and gas companies were, in point of fact, exempted from taxation, such companies are not, as we have seen, competitors for business with the national banks, and, therefore, might be legally exempted. As to the sum of $237,400, alleged to be invested by individual citizens of Chehalis County in loans and securities to them payable and owing by other citizens of that county, we are not informed by the bill of the nature of such loans and securities, and, as against the pleader, we may well assume that they belong to a class of investments which does not compete with the business of national banks. The same is true of the sum of $14,000,000 alleged to be invested in loans and securities by citizens of the State of Washington and to them payable and owing by other citizens of said State.

It is, indeed, alleged in the bill that these investments were "taxable capital," but that is an averment in the nature of a

legal conclusion. If those loans and securities had been identified in the bill, or their character described, the court might have reached a different conclusion as to their taxable character.

There is an allegation in the bill that the omission by the taxing officers of these classes of capital from assessment and taxation was in pursuance of an opinion rendered by the attorney general of the State of Washington; and it is alleged that the said attorney general was required by the laws of the State to render opinions upon request of the assessors. But the bill does not set forth that opinion, or the reasons upon which the attorney general proceeded. The Supreme Court of the State of Washington, adverting to this allegation of the bill, suggests that it is probable that the opinion referred to was one dated February 5, 1891, addressed to the state auditor, and in which the attorney general advised that accounts, promissory notes and mortgages were to be exempted, in order, perhaps, to avoid double taxation. And the Supreme Court well observes that if the action of the assessors was based upon this decision of the law officer of the State, and went no further, the allegations of the bill would certainly turn out to be unsupported. 6 Washington, 64.

We agree with the Supreme Court of Washington in thinking that the allegations of this complaint nowhere show that any moneyed capital of the character defined by the Federal Supreme Court was omitted or intended to be omitted by the assessors; or if the intention of the complaint be to cover any such existing cases, the allegations are so general and indefinite that they cannot be made the basis of action.

The judgment of the Supreme Court of Washington is

*Affirmed.*

Mr. Justice Harlan, Mr. Justice Brown and Mr. Justice White are of opinion that the bill makes a *prima facie* case of illegal discrimination against capital invested in national bank stock, and, therefore, that the demurrer should have been overruled.

# BANK OF COMMERCE *v.* SEATTLE.

# SEATTLE BANK *v.* SEATTLE.

# PUGET SOUND BANK *v.* SEATTLE.

# WASHINGTON BANK *v.* KING COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Nos. 223, 224, 225, 226. Argued March 23, 1897. — Decided April 12, 1897.

*Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, affirmed, followed and applied to the several facts in these respective cases.

THE case is stated in the opinion.

*Mr. Harold Preston* for plaintiffs in error. *Mr. Eugene M. Carr* and *Mr. James B. Howe* were with him on the briefs.

*Mr. Andrew F. Burleigh* for defendants in error in No. 226. *Mr. James A. Haight* and *Mr. Samuel Piles* were on his briefs.

*Mr. John K. Brown* for defendants in error in Nos. 223, 224 and 225. *Mr. John B. Allen* and *Mr. F. B. Tipton* were on his briefs.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The bills of complaint in these cases are substantially of the same legal import, so far as any Federal question is concerned, with that considered in the case of *The First National Bank of Aberdeen* v. *The County of Chehalis*, *ante*, 440, in which the opinion of this court has just been delivered.

The only difference that we notice is that, in connection with the allegation that there existed large amounts of taxable moneyed capital owned by resident citizens and invested in interest-bearing loans and securities, there is made the ad-

ditional allegation that all of said other moneyed capital referred to was all the moneyed capital in the city owned by resident individual citizens and invested in interest-bearing loans, discounts and securities, except that invested in incorporated banks located in the city.

It is not perceived that this additional allegation calls for any different conclusion than the one reached in the previous case. We are still uninformed whether the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks. The averment that the moneyed capital exempted was "taxable" does not enable us to say that it therefore consisted of investments within the meaning of the term "moneyed capital" as used in the act of Congress.

The judgment of the Supreme Court of Washington is, in each case,

*Affirmed.*

Mr. Justice Harlan, Mr. Justice Brown and Mr. Justice White dissent for the reason stated in their memorandum of dissent in No. 38, *ante*, 440, 462.

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## AMERICAN PUBLISHING COMPANY *v.* FISHER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 242. Argued March 29, 1897. — Decided April 12, 1897.

The statute of the Territory of Utah (Compiled Laws of 1888, § 3371, as amended in 1892) providing that "in all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury," if not invalid under the Seventh Amendment to the Constitution, is so as violating the provision in the act of September 9, 1850, c. 51, admitting Utah as a Territory, that "the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provisions thereof may be applicable," and the act of April 7, 1874, c. 80, "concerning the practice in territorial courts, and appeals therefrom," which provided that no party

Statement of the Case.

"shall be deprived of the right of trial by jury in cases cognizable at common law."

Litigants in common law actions in the courts of that Territory, while it remained a Territory, had a right to trial by jury, which involved unanimity in the verdict, and this right could not be taken away by territorial legislation.

The power of a State to change the rule in respect of unanimity of juries is not before the court in this case.

On April 29, 1891, plaintiffs in error commenced an action in the District Court of Salt Lake County, Territory of Utah, to recover of defendants the sum of $20,844.75 on a contract for furnishing labels, cards, etc. After answer the case came on for trial before a jury on December 10, 1892, and resulted in a verdict in favor of the defendants, signed by nine jurors, the others not concurring. Judgment was rendered upon this verdict, which was sustained by the Supreme Court of the Territory. 10 Utah, 147.

This action of the trial and Supreme Courts in sustaining a verdict returned by only nine of the jurors was under the authority of an act of the legislature of Utah, approved March 10, 1892 (Laws Utah, 1892, page 46), which provides as follows:

"Sec. 1. That section 3371 of the Compiled Laws of 1888, of Utah, is hereby amended so as to read as follows:

"Sec. 3371. In all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury."

The bill of exceptions contains this recital in respect to an instruction and the verdict:

"The court further charges you that the concurrence of nine or more members of the jury is essential to your verdict, and that all who agree to it should sign it.

"(To which last charge the plaintiff duly excepted.)

"The jury having retired and deliberated, returned a written verdict into court on the 12th day of December, 1892, 'finding the issues for the defendant,' signed by nine (9) of its members —the others refusing to concur therein. Which verdict the court then and there received and caused to be entered upon the record.

"To which action of the court the plaintiff excepted."

*Mr. Jeremiah M. Wilson* (with whom was *Mr. F. W. von Cotzhausen* on the brief) for plaintiff in error.

*Mr. J. L. Rawlins* for defendants in error.

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

As the amount in controversy is over $5000 this court in any view has jurisdiction of the case, and may inquire into all matters properly preserved in the record. The recital in the bill of exceptions shows that proper exceptions were taken to the charge of the court in respect to the number of jurors whose concurrence was essential to the verdict, and also to its action in receiving and entering of record such verdict.

The territorial statute was relied upon as authority for this action. Its validity, therefore, must be determined. Whether the Seventh Amendment to the Constitution of the United States, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," operates *ex proprio vigore* to invalidate this statute, may be a matter of dispute. In *Webster* v. *Reid*, 11 How. 437, an act of the legislature of the Territory of Iowa dispensing with a jury in a certain class of common law actions was held void. While in the opinion, on page 460, the Seventh Amendment was quoted, it was also said: "The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787, over the Territory, so far as they are applicable"; and the ordinance of 1787, article 2, in terms provided that "the inhabitants of the said Territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury." So the invalidity may have been adjudged by reason of the conflict with Congressional legislation. In *Reynolds* v. *United States*, 98 U. S. 145, 154, it was said, in reference to a criminal case coming from the Territory of Utah, that "by the Constitution of the United States (Amendment VI) the accused was entitled to a trial by

an impartial jury." Both of these cases were quoted in *Callan* v. *Wilson*, 127 U. S. 540, as authorities to sustain the ruling that the provisions in the Constitution of the United States relating to trial by jury are in force in the District of Columbia. On the other hand, in *Mormon Church* v. *United States*, 136 U. S. 1, 44, it was said by Mr. Justice Bradley, speaking for the court: "Doubtless, Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." And in *McAllister* v. *United States*, 141 U. S. 174, it was held that the constitutional provision in respect to the tenure of judicial offices did not apply to territorial judges.

But if the Seventh Amendment does not operate in and of itself to invalidate this territorial statute, then Congress has full control over the Territories irrespective of any express constitutional limitations, and it has legislated in respect to this matter. In the first place, in the act to establish a territorial government for Utah, act of September 9, 1850, c. 51, § 17, 9 Stat. 453, 458, it enacted "that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable." A subsequent statute has more specific reference to jury trials. Act of April 7, 1874, c. 80, 18 Stat. 27. The first section of this act, after confirming the statutes of the various Territories so far as they authorize a uniform course of proceeding in all cases whether legal or equitable, closes with this proviso: "Provided, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

This, of course, implies not merely that the form of a jury trial be preserved, but also all its substantial elements. *Walker* v. *Southern Pacific Railroad*, 165 U. S. 593.

Therefore, either the Seventh Amendment to the Constitution, or these acts of Congress, or all together, secured to

every litigant in a common law action in the courts of the Territory of Utah the right to a trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of the substance of that right. Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring.

In order to guard against any misapprehension it may be proper to say that the power of a State to change the rule in respect to unanimity of juries is not before us for consideration. *Walker* v. *Sauvinet*, 92 U. S. 90; *Hurtado* v. *California*, 110 U. S. 516.

The judgment will be

*Reversed, and as the questions involved in the case are not of a Federal nature, and diverse citizenship is not alleged, the case must be remanded to the Supreme Court of the State for further proceedings.*

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## UNITED STATES *v.* AMERICAN TOBACCO COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 742. Submitted March 29, 1897. — Decided April 12, 1897.

The tobacco company purchased from an internal revenue officer of the United States revenue stamps to the amount of $4100.10, to be put upon its tobacco as manufactured. April 2, 1893, its factory in New York and all the contents were destroyed by fire. Among the contents were the stamps so purchased. Of these, stamps to the value of $1356.63 had not been used, and stamps to the value of $2743.47 had been put upon packages of tobacco which were still in the factory, unsold. The prop-

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erty was insured. In settling with the insurers the latter paid the tobacco company the value of the destroyed stamps, and it was understood that the insurers were entitled to whatever might be received or recovered from the Government under the provisions of the statute amending the laws relating to internal revenue. Act of March 1, 1879, c. 125. The company under the provisions of that act applied to the Treasury Department for the return of the destroyed stamps. The rules of the department required the applicant for such repayment to make oath that he had not theretofore presented a claim for the refunding of the amount asked for, and that its amount or any part thereof had not been received by him. Instead thereof the company filed an oath that the amount had not been claimed of the Government, and that no portion of it had been received from the Government. The department having refused payment, the company thereupon brought this action in the Court of Claims.

*Held*,

(1) That the action was properly brought in the name of the insured for the use of the insurers;

(2) That payment by the insurer to the company did not bar the right of the latter to recover from the United States;

(3) That by recovering from the United States the company would become the trustee of the insurers, who were its equitable assignees;

(4) That upon the facts found by the Court of Claims the action could be maintained, as the payment by the insurers constituted no bar;

(5) That there was a substantial compliance with the Treasury regulation concerning the oath when the oath was filed on the part of the company of the fact of the destruction, and that no claim for refunding had been presented to the Government, and no portion of the claim had been paid by it;

(6) That the company had an insurable interest in the stamps destroyed;

(7) That it was too late to set up for the first time in this court that the Government had the election to reimburse the claimant by giving stamps instead of by payment in cash.

This action was brought in the Court of Claims for the purpose of recovering the value of certain internal revenue stamps, alleged to have been destroyed by fire before they had been used. The action is founded upon the provisions of section 3426 of the United States Revised Statutes, as amended by chapter 125 of the laws of 1879, 20 Stat. 327, 349, the first paragraph of section 17 of which reads as follows:

"The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal revenue act, as may have been

spoiled, destroyed or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof; but no allowance or redemption shall be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why the same cannot be so returned: *Provided*, That nothing herein shall be held as authorizing redemption of, or allowance for, any of the stamps allowance for which is prohibited by the provisions of 'An act relative to the redemption of unused stamps,' approved July twelfth, 1876."

On the 27th of May, 1895, the American Tobacco Company filed its petition in the Court of Claims in its own name for the use of certain insurance companies named in the petition, to recover the value of the stamps destroyed by fire in its factory. The facts as to the loss and destruction of the stamps were set forth and judgment asked for the value thereof. The usual general denial of all the allegations of the petition was filed by the Attorney General on behalf of the United States, and the case went to trial, and after the evidence had been submitted the court found the following facts: That the tobacco company was a manufacturer of tobacco, occupying a building in New York city, which was established solely as a manufactory, no sales of tobacco being made at the factory, the shipments therefrom being made in bulk after the tobacco had been stamped according to law. On the 2d of April, 1893, the factory and its entire contents were destroyed by fire. Among those contents were internal revenue stamps of the United States of the face value of $4100.10. These stamps had been purchased by the company from the

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United States Collector of Internal Revenue for use in the factory. Some of the stamps were unattached to packages of tobacco, and had never been used, and they were of the face value of $1356.63; the balance of the stamps of the face value of $2743.47 had been attached to packages of tobacco which had not been sold or offered for sale or removed from the factory for sale. The tobacco company had purchased and paid for these stamps, which were totally destroyed, and there were no unsettled claims against the company on behalf of the United States.

The court also found the following facts:

"IV. On or about the 1st day of November, 1893, the claimant filed with the Treasury Department, under the rules and regulations of said department, a claim for the redemption of said stamps so destroyed, with proof of said loss, which claim was examined and certified as true and correct by the United States Internal Revenue Collector for said district, but without recommendation of payment, for the reason, stated by the collector, 'that the claimant had been paid by the insurance companies for the value of the stamps'; and on the 14th day of February, 1894, the department rendered its decision upon said application, declining to allow the same, for the reason 'that satisfactory evidence has been furnished to this office that you have received reimbursement of the value of said stamps by the recovery of insurance thereon.'

"V. Thereafter, on or about the 2d day of April, 1895, the claimant, by its attorneys, filed an amended petition for the redemption of said stamps, and asked for a rehearing; and on April 10, 1895, the Treasury Department rendered a decision declining to grant a rehearing, and this suit was brought.

"VI. The contents of said factory were insured to the American Tobacco Company, by the insurance companies for whose use this suit is brought, in the full sum of $139,500. The total loss by fire as adjusted and settled with said claimant was $78,635.47, which sum said companies have paid to the American Tobacco Company in proportions as the face of their several policies bears to the whole sum insured. The

face value of said United States internal revenue stamps destroyed as aforesaid, namely, $4100.10, was a part of the sum so paid by said insurance companies.

"VII. In the adjustment of the losses and the payment thereof it was understood between the claimant and the insurance companies that the insurance companies were entitled to have and should receive, in the proportions their several policies bore to the entire amount insured, the amount of the redemption money for the destroyed stamps to be recovered upon the application aforesaid or in this suit.

"VIII. This suit was brought by the claimant, for the use of said insurance companies in the proportions aforesaid, to recover the value of said stamps so destroyed.

"IX. By an existing regulation of the Commissioner of Internal Revenue, made June 12, 1873, by authority of the act of June 30, 1864, section 11, afterwards reënacted as Revised Statutes, section 3426, all claims arising under that section were required to be made upon a certain printed form, called 'Form 38,' and ever since some time in 1875, and probably earlier, all claimants under the said section have been required to make oath, upon Form 38, that they have 'not heretofore presented any claim for the refunding of the abovementioned amount or any part thereof,' and 'that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly.'

"X. In presenting the claim as stated in Finding IV, the claimant's general manager did not make the oath referred to in Finding IX in the form required by the Commissioner of Internal Revenue, but, instead of taking the required oath, he made oath that the claimant had 'not heretofore presented any claim *to the Government* for the refunding of the abovementioned amount, or any part thereof,' and 'that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly, *from the Government*.'"

As a conclusion of law the court found that claimant was entitled, for the use of the companies, to recover the sum of

$4100.10. Judgment pursuant to the finding of the court was entered, from which an appeal was taken to this court.

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

*Mr. Charles W. Needham* and *Mr. John B. Cotton* for appellee.

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

Three assignments of errors, alleged to have been made by the court below, have been filed on the part of the Government, as follows:

"1. In holding that the use appellees had an equitable claim against the appellant which could be enforced by a suit in the name of the nominal appellee.

"2. In holding that section 3426 of the Revised Statutes, as amended in 1879, required the Commissioner of Internal Revenue to refund the tax represented by the face value of destroyed tobacco-tax stamps, or to furnish others in their place, in cases where the full amount represented by such face value had been recovered by the tobacco manufacturer from insurance companies, so that he had been subjected to no loss.

"3. In entering judgment in favor of the appellee for the sum of $4100.10."

It is argued upon the part of the Government that as the insurance companies have paid the tobacco company in full for the value of the stamps destroyed by fire, they have thereby become the actual plaintiffs in this suit, and that the connection of the tobacco company is merely nominal; the case must, therefore, be decided as one between the United States and the insurance companies. Dealing with the companies in that light, it is further urged that their right to sue is based upon the ground that they are subrogated to the rights of the tobacco company, and consequently if there be no right of subrogation, there is no right of recovery; there

is no right of subrogation, because there was no insurable interest in the stamps on the part of the tobacco company; and there was no insurable interest because the tobacco company could obtain from the Government either other stamps in lieu of the stamps destroyed, or the amount or value thereof, upon giving satisfactory evidence of the necessary facts to the Commissioner of Internal Revenue, and therefore the tobacco company was not liable to suffer any loss, and as a consequence had no insurable interest in the stamps.

The argument, as we think, is not well founded. The case is not to be treated or decided as one between the United States and the insurance companies. On the contrary, the rights of the companies, as between them and the Government, are not the subject-matter of the suit. The insurance companies, as such, have no right of action against the Government. It is the right of the claimant, the tobacco company, which is to be passed upon, and unless that company has a legal cause of complaint no recovery can be had in this suit. The companies must recover in the name of the tobacco company and by reason of its rights. *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 372, and cases cited.

The suit is properly brought in the name of the insured for the use of the insurers, but the cause of action rests on the rights of the owner. Ibid.; *Phœnix Ins. Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, 321, and cases cited.

Payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of *his* right to recover *in his name*. *Rockingham Mutual Fire Ins. Co.* v. *Bosher*, 39 Maine, 253, 255.

The question then arises as to what right, if any, the tobacco company has under the statute above cited, when it appears that the company has received payment from the insurance companies for the value of the stamps destroyed. Is that fact a bar to its right to claim payment under that section in a case where the recovery is sought for the purpose of reimbursing

the insurance companies for the payments made by them to the extent of the value of the stamps?

We think upon the facts found by the Court of Claims the action can be maintained, and the payments by the insurance companies constitutes no bar.

No question is made in regard to the sufficiency of the proof in regard to the destruction of the stamps by fire or of the *bona fides* of the tobacco company. The claim was examined and certified as true and correct by the United States Collector of Internal Revenue for the district in which the factory was situated, but he failed to recommend payment of the claim, for the reason, as stated by him, "that the claimant had been paid by the insurance companies for the value of the stamps"; and the department itself, when the claim was made, rendered its decision upon the application, declining to allow the same, for the reason "that satisfactory evidence has been furnished to this office that the claimant has received reimbursement of the value of the stamps by the recovery of insurance thereon."

It is true that the claimant was unable to comply with the regulations of the department in one particular regarding the oath to be made by such claimant. It could not truthfully be said that the claimant had not theretofore received directly or indirectly the value or reimbursement of the value of the stamps. This oath was required by what is called "Form 38," which was a certain printed form of oath to be taken by all claimants for reimbursement for stamps claimed to have been destroyed within the meaning of the section of the Revised Statutes heretofore quoted.

The claimant, however, through its proper officer, did make oath that it "had not heretofore presented any claim *to the Government* for the refunding of the above-mentioned amount, or any part thereof," and "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant directly or indirectly *from the Government.*"

While the regulation prescribed by the Commissioner of Internal Revenue would be regarded as proper and appropriate for the purpose of satisfying him of the fact of the

destruction of the stamps, yet we think there was a substantial compliance with that regulation on the part of the tobacco company in this case, when it made oath through its proper officer to the fact of such destruction, and that it had not presented any claim for the refunding of the amount or any part thereof to the Government, nor had the value of said stamps, or any portion thereof, been theretofore received by the claimant, either directly or indirectly, from the Government.

The real object of the regulation, it must be assumed, was to prevent fraud upon or improper claims against the Government and to protect it from itself twice paying for the loss. If the object of the regulation were to discover whether the stamps had been insured and whether payment therefor had been made by the insurance company, and if so, to base a refusal to reimburse upon that fact, we think that portion of the regulation was unreasonable, and compliance with the form as provided was unnecessary.

The purpose of the statute was to have the Government reimburse the person who had bought and paid for internal revenue stamps which had been destroyed under the circumstances mentioned in the statute, before they had been used. To make such reimbursement would be no loss to the Government, while to retain the amount paid would be highly inequitable. The Government recognized this fact by the passage of the statute in question. The company did not purchase the stamps in payment of any tax then due from it to the Government; they were purchased as a matter of convenience and to be thereafter affixed to packages of tobacco which were to be sold in the future. The tax was laid upon sales of tobacco and the stamps were resorted to as a convenient means of collecting the tax on such sales. Of course, if no sales of packages of tobacco took place upon which the stamps might be affixed, no tax had become due to the Government, and therefore if after the purchase of the stamps they were destroyed by fire, the purpose of their purchase was frustrated and the Government was not entitled, upon any equitable ground, to retain the money paid for the stamps.

In *Jones* v. *Van Benthuysen*, 103 U. S. 87, 88, Mr. Justice Miller said, speaking for the court:

"Undoubtedly this statute, 15 Stat. 125, 152, only intended to impose a tax upon the sales of tobacco, and if the dealer was also the owner of stamps to be used in paying the duties on tobacco, he could sell them separately in any quantity, without being liable to a tax for such sales. When unattached to the tobacco they do not enter into its value, and they can be bought and sold at their face value as an independent commodity, to be used when and wherever the purchasers choose to do so. For such sales no tax is imposed upon the seller or the buyer.

"On the other hand, we are of opinion that when they are once attached to the tobacco and cancelled, and can never be lawfully used again, they cease to have any separate and independent value, and that which they had previously has become merged into that of the tobacco. All subsequent sales are made upon the basis of the increased value the tobacco has acquired by the payment of the stamp duty, and can never be estimated apart from this.

"It would seem to follow from this that if the stamps for which the plaintiff was charged by the collector were not affixed to the tobacco at the time he made the sale, no tax should be charged to him for that value. On the other hand, if the stamps were affixed at the time of the sale, they then entered into the value of the tobacco purchased, and the broker who made the sale should be taxed on the price of the tobacco as it was sold."

Where the stamps have been destroyed under the circumstances detailed in this case, and those who paid for them apply to the Government to be reimbursed for their value, what materiality is there in the fact that the applicant has been paid the value of such stamps by an insurance company under and by virtue of a separate contract made with that company on the part of the claimant upon good consideration? That circumstance does not alter the fact that the Government has been paid for the stamps which were to be used for a certain purpose — the payment of taxes thereafter to become due the

Government — and that by reason of the destruction of the stamps by fire they cannot be used for the purpose for which they were intended. Whatever sales of tobacco might be thereafter effected by the tobacco company would have to be evidenced by the attaching of other stamps upon the packages sold. Unless, therefore, the Government repaid the value of these stamps so destroyed, or provided other stamps in lieu thereof without any further payment, the Government would be in the position of one who retained money to which it had no equitable right. It would be no answer to that fact to show that some other person had reimbursed the claimant the amount it had paid for the stamps. That would not alter the position of the Government. We cannot think that the payment to the claimant by the insurance companies absolved the Government in the slightest degree from the duty, under that statute, of paying back the money which it had received and for which it had delivered stamps that had been destroyed by fire before the contemplated use of them had been made. Whether or not the insurance companies could have made a successful defence (to the extent of the value of the stamps in question) to an action on their policies by the assured, because of an alleged lack of insurable interest in the stamps by the assured, is beside the question. They were not bound to make such defence. Having received the premiums they had the right to fulfil their contract, and the tobacco company after such payment might still ask the Government to pay to it the value of the stamps in order that it might thereafter repay the insurance companies. The Government loses nothing by payment in such case. It simply repays money which it has no equitable right to retain. The technical question of insurable interest does not arise in this case, which involves simply the construction of the statute cited and the right of the claimant to recover. As was said in *Mason* v. *Sainsbury*, 3 Dougl. 61, 64, by Mansfield, Lord Chief Justice, in reference to a defence of payment by the insurance companies: "The case is clear: the act puts the Hundred, for civil purposes, in the place of the trespassers; and upon principles of policy, as in the case of other remedies against the Hundred, I am satisfied

that it is to be considered as if the insurers had not paid a farthing." This was a case against the Hundred, upon a statute making it liable for damages to property caused by a mob. Although the insurance company had paid the damages, the action in the name of the owner of the property was sustained exactly the same as if there had been no payment by the insurers. The liability of the Hundred, under the statute, was not thereby in the least affected. This case under the statute cited is still stronger because the Government suffers no actual loss by the repayment, while it would secure an unjust and inequitable profit by its refusal to pay.

We are also of opinion that the tobacco company had an insurable interest in the stamps. It owned them absolutely, having purchased and paid for them. The right of reimbursement under the conditions named in the statute did not affect that insurable interest, nor prevent the possibility of loss or prejudice arising from the destruction of the stamps. Because an owner of property may be able to reimburse himself in case of its destruction, from other sources, is no reason for denying to such owner an insurable interest in the property. An owner has an insurable interest in his property to the extent of the value of the building on it, notwithstanding the existence of a mortgage on the property sufficient to absorb it. Per Bradley, J., in *Insurance Co.* v. *Stinson*, 103 U. S. 25, 29; May on Insurance, §§ 81, 82. The amount of interest or its character is not material in determining the question whether a party who attempts to recover under a policy has an insurable interest. (Ibid.)

Upon all the facts, we think the objections above alluded to are untenable.

Another objection raised by the Government is that, under the section of the statute cited, the Commissioner of Internal Revenue had the choice, in making an allowance or redemption, either to give other stamps in lieu of the stamps so allowed for or redeemed, or to refund in money the amount or value to the owner of the stamps, and that as he had such election when he was applied to by the owner, an action thereafter commenced to recover the face value of the stamps in

money deprived him of that election, and hence could not be maintained.

The statute does give to the Commissioner of Internal Revenue the choice as to how reimbursement for the loss of stamps should be made; whether by delivering other stamps or by payment of the face value thereof in money. When the claim in this case was filed with the Treasury Department, the Commissioner had then the choice, upon being satisfied of the necessary facts, to reimburse the claimant in either way he thought proper, either in stamps or in money. That was the time when his election could properly have been made. Instead thereof he refused absolutely to do either, and gave as his reason that the claimant had already been paid for the stamps by the recovery of the insurance thereon. If that were a sufficient reason in law, the Commissioner was justified in his refusal. As it was not a sufficient reason, the Commissioner was not justified, however sincerely he believed that he was. The claimant was, therefore, by reason of this refusal, compelled to resort to the courts in order to obtain its legal rights under the statute. Having filed its claim in the Court of Claims and asked for judgment for the money value of the stamps, and a trial upon the merits as to the liability of the Government to respond at all having been had in the court below, and so far as appears from the record no question of this kind having been therein made, it is too late, upon argument in this court, for the Government for the first time to question the form of the remedy, whether it should be a demand for money only or one which left the election still with the Commissioner to reimburse claimant by giving stamps instead of payment in cash. The objection does not go to the merits of the claim, but is one of procedure only; hence, even if it would have been valid if taken in time, it may be and was waived by the failure of the Government, so far as the record shows, to take the objection until the argument of the case in this court.

We find no error in the record authorizing a reversal of the judgment of the Court of Claims, and it is, therefore,

*Affirmed.*

# *In re* ECKART, Petitioner.

ORIGINAL.

No. 14. Original. Submitted March 22, 1897. — Decided April 19, 1897.

When a state court has jurisdiction of an indictment for murder, and the laws of the State divide that offence into three degrees and make it the province of the jury to determine under which degree the case falls, the conviction of the accused of murder in the first degree and sentence accordingly, without a finding as to which degree he was guilty of, though erroneous, is not a jurisdictional defect, remediable by writ of *habeas corpus*.

THE case is stated in the opinion.

*Mr. Rublee A. Cole* for petitioner.

*Mr. W. H. Mylrea*, Attorney General of the State of Wisconsin, opposing.

MR. JUSTICE WHITE delivered the opinion of the court.

This is an application for the allowance of a writ of *habeas corpus*, to obtain the discharge of the petitioner from an alleged unlawful imprisonment in the Wisconsin state prison.

From the statements in the petition and return, it appears that petitioner has been detained in custody since April 13, 1878, under a judgment of the Circuit Court of Jefferson County, Wisconsin, entered upon a verdict of a jury finding him "guilty," after trial had, upon an information which charged Eckart with having "on the 13th day of December in the year 1877 at Jefferson County, State of Wisconsin, unlawfully, feloniously and of his malice aforethought killed and murdered Charles Paterson, against the peace and dignity of the State of Wisconsin." The ground relied upon to establish that the imprisonment, under the judgment referred to, was unlawful is that under the laws of Wisconsin murder is divided into three degrees, the punishment varying according to the degree, and that as the verdict in question failed to specify the degree

of murder of which the accused was found guilty, the trial court was without jurisdiction to pass sentence and judgment upon the accused, and the deprivation of liberty under such judgment is without due process of law.

It also appears from the statements in the petition and answer to the rule that in September, 1893, Eckart unsuccessfully applied to the Supreme Court of Wisconsin for the allowance of a writ of *habeas corpus*, asserting in his petition the same detention and the same grounds for his right to release as are relied upon in the present application, and that in his petition to the Wisconsin court he specially set up that he was restrained of his liberty "contrary to the Constitution of the United States and laws enacted thereunder, and without the due process of law guaranteed by the Fourteenth Amendment to that instrument."

It has been held by the Supreme Court of Wisconsin that under the statutes of that State an allegation of the commission of crime in language such as was employed in the information upon which Eckart was tried would justify a conviction of murder in either the first, second or third degree, and it has also been there held that the jury must find the degree in their verdict, in order that the court may impose the proper punishment. *Hogan* v. *State*, 30 Wisconsin, 428, 434; *Allen* v. *State*, 85 Wisconsin, 22; *La Tour* v. *State*, 67 N. W. Rep. 1138.

In its decision refusing the writ applied for by Eckart, the Supreme Court of Wisconsin held that while the conviction under the sentence in question was erroneous, the error in passing sentence was not a jurisdictional defect and the judgment was, therefore, not void. In this view we concur. The court had jurisdiction of the offence charged and of the person of the accused. The verdict clearly did not acquit him of the crime with which he was charged, but found that he had committed an offence embraced within the accusation upon which he was tried. It was within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning, and if in so doing he erred, and held the verdict to be sufficiently certain to authorize the imposition of punishment for the highest grade of the offence charged, it

was an error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of *habeas corpus*. The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offence against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offences within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus*, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime. *In re Coy*, 127 U. S. 731, 756–758, and cases there cited.

The ruling in *Ex parte Belt*, 159 U. S. 95, is also applicable. There an application was presented for leave to file a petition for a writ of *habeas corpus* directed to the superintendent of the Albany county penitentiary, in the State of New York, for the discharge of Belt from custody under a sentence of the Supreme Court of the District of Columbia. Belt had been indicted for the crime of larceny. In the course of the trial the record of a former conviction of larceny was introduced to establish that the offence for which the prisoner was then upon trial was a second offence, which fact, if established, subjected the accused to a greater punishment than would otherwise be authorized. Objection was taken to the admission of the record, on the ground that it showed a waiver of the right of trial by a jury on the part of the prisoner and a trial and conviction by the court alone without a jury, a mode of procedure claimed to be in violation of the Constitution of the United States, and rendering the subsequent proceedings null and void. The objection was overruled, and Belt was convicted and sentenced. The judgment being affirmed on appeal, Belt made the application to this court referred to, asking to be relieved from imprisonment under the alleged void sentence and judgment. It was argued on his behalf

that the constitutional requirement of trial by a jury in criminal cases could not be waived by the accused, though in pursuance of a statute authorizing such a waiver, and on the assumption that the first conviction was necessarily void, the second conviction predicated thereon was likewise a nullity. Upon the authority, however, of *Ex parte Bigelow*, 113 U. S. 328, it was held that the ground of application did not go to the jurisdiction or authority of the trial court, but was allegation of mere error, which was not reviewable on *habeas corpus*, citing on this latter proposition *In re Schneider*, 148 U. S. 162.

The case of *Ex parte Bigelow* determined that the action of a trial court in overruling a plea of former jeopardy could not be reviewed on *habeas corpus*. In the course of the opinion, the court said (p. 330):

"The trial court had jurisdiction of the offence described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defences offered by him. The matter now presented was one of those defences. Whether it was a sufficient defence was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury, under the instruction of the court, must pass, if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal — a much stronger case than this — the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offence, and if the identity of the offence were in dispute it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea, both as

matter of law and of fact, cannot be doubted. . . . It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action, when erroneous, a nullity. But the general rule is that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities."

In the *Belt case*, this court, speaking through Mr. Chief Justice Fuller, said (p. 99):

"Without in the least suggesting a doubt as to the efficacy, value and importance of the system of trial by jury in criminal as well as in civil actions, we are clearly of opinion that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offence, and this being so, we cannot review the action of that court and the Court of Appeals in this particular on *habeas corpus*."

The case presented by the record is not within any of the exceptions to the general rule, that when a court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities which can be collaterally attacked. The writ of *habeas corpus* cannot be made to perform the functions of a writ of error. *United States* v. *Pridgeon*, 153 U. S. 48. It follows that

*The rule must be discharged and the writ refused.*

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## ZADIG *v.* BALDWIN.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 222. Argued and submitted March 19, 1897. — Decided April 19, 1897.

There was printed in the record, as filed in this court, what purported to be an extract from the closing brief of counsel presented to the Supreme Court of the State, in which a Federal question was discussed, and it was asserted orally at the bar here, that in the argument made in the

Opinion of the Court.

Supreme Court of the State a claim under the Federal Constitution was presented. *Held*, that such matters formed no part of the record, and were not adequate to create a Federal question, when no such question was decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the State.

THE case is stated in the opinion.

*Mr. Edmund Tauszky* for plaintiffs in error.

*Mr. T. C. Van Ness* for defendant in error submitted on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

The action below was originally instituted in the Superior Court of the State of California in and for the county of San Francisco by the defendant in error to recover from plaintiffs in error the sum of five hundred and ninety-five dollars, with interest and costs. The complaint was in the ordinary form for money had and received, and did not otherwise indicate the the nature or character of plaintiff's alleged cause of action. A demurrer to the complaint having been overruled, defendants filed an answer simply denying any indebtedness to the plaintiff.

Upon the trial before the court without a jury, it developed that the plaintiff based her right to recover upon section 26 of article IV of the constitution of the State of California, which provides as follows: "All contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." The defendants were shown to be partners, engaged in business as stock brokers, and the amount claimed from them was the aggregate of sums asserted to have been paid them from time to time as margins upon purchases of stock for account of the plaintiff.

The record clearly establishes that at the trial the validity of the constitutional provision referred to was assumed, and

that the sole contention was whether or not the dealings between the parties as shown by the evidence were of the character prohibited by the state constitution. At the close of the testimony for the plaintiff the defendants moved for a non-suit upon the single ground "that it has not been shown that there was any transaction in margins between the parties, such as is inhibited by the constitution; there is no evidence here showing what constitutes a margin contract, or that there was any contract for the sale of stocks on margin between plaintiff and defendants."

The court having rendered its decision in favor of the plaintiff, the defendants filed a motion for a new trial, and with it a statement in conformity to the state practice, containing specifications of errors in law occurring at the trial and of particulars in which the evidence was insufficient to sustain the decision, as also specifications of the particulars in which the decision was against law. Nowhere, however, in such motion or statement, was any question raised as to the validity of the constitutional provision, nor was there contained therein any assertion that rights of the defendants under the Federal Constitution were invaded. From the judgment entered an appeal was taken to the Supreme Court of the State. That appeal was heard in department 1 of the court, by which tribunal the judgment was modified by excluding interest. The opinion of the court, 104 California, 594, discloses that the questions passed upon were solely those which were presented by the record as brought up from the trial court. A petition was subsequently filed for a rehearing of the case in banc, but the application was denied. Thereupon the case was brought to this court for review.

The errors assigned assert that section 26 of article IV of the constitution of the State is repugnant to section 1 of the Fourteenth Amendment of the Constitution of the United States and to section 8 of article I of the same instrument, and that the decision of the Supreme Court of the State holding that the contracts between the parties constituted sales of stocks on margins within the meaning of the state constitution impaired the obligation of a contract and was repugnant

to section 10 of article I of the Constitution of the United States.

It is clear, however, that we have no jurisdiction to pass upon the questions presented in these assignments, for the reason that it nowhere appears in the record that the plaintiffs in error at any time questioned the validity, under the Constitution of the United States, of the section of the state constitution relied on to support the claim made against them, or in any manner specially set up or claimed the protection of any clause of the Constitution of the United States.

The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the Supreme Court of the State, in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the Supreme Court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the State. *Pim* v. *St. Louis*, 165 U. S. 273; *Chicago & Northwestern Railway* v. *Chicago*, 164 U. S. 454, 457; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63, 70; *Ansbro* v. *United States*, 159 U. S. 695; *Sayward* v. *Denny*, 158 U. S. 180, and cases there cited.

*Dismissed for want of jurisdiction.*

# ELECTRIC COMPANY *v.* DOW.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

No. 258. Submitted April 1, 1897. — Decided April 19, 1897.

The statute of New Hampshire providing for proceedings against mill-owners to recover damages resulting from overflows of land caused by dams erected by them, contained, among other things, a provision that "if either party shall so elect, said court shall direct an issue to the jury to try the facts alleged in the said petition and assess the damages; and judgment rendered on the verdict of such jury, with fifty per cent added, shall be final, and said court may award costs to either party at its discretion." In this case both parties elected trial by jury, which resulted in a verdict for damages for the defendant in error. *Held*, that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in the trial for the assessment of damages, was precluded from denying the validity of that provision which prescribes that fifty per cent shall be added to the amount of the verdict, as the plaintiff in error was at liberty to exercise the privilege or not, as it thought fit.

This was a writ of error to reverse a judgment of the Supreme Court of New Hampshire against the Electric Company, a corporation of the State of New Hampshire, the plaintiff in error, upon a petition filed by Samuel I. Dow for the assessment of damages occasioned to his land by an overflow caused by a dam erected by the defendant company in the Piscataquog River. The defendant company also filed a petition praying for an inquisition into the question of damages. The proceedings were had under the general mill act of that State, approved July 3, 1868. Both parties elected trial by jury, which resulted in a verdict for Dow in the sum of $1500. The plaintiff moved that fifty per cent be added to the amount of the verdict in pursuance of a provision of the statute which is as follows:

"If either party shall so elect, said court shall direct an issue to the jury to try the facts alleged in the said petition and assess the damages; and judgment rendered on the verdict of such jury, with fifty per cent added, shall be final, and said court may award costs to either party at its discretion."

The defendant objected to this motion on the ground that said provision of the statute, requiring the court to add fifty per cent to the damages assessed by the jury, was in violation of the Constitution of the United States. The question thus raised was reserved by the trial judge and certified to the law term of the Supreme Court of the State, which overruled the defendant's contention, and judgment was accordingly entered in the Supreme Court for the amount of the verdict, with fifty per cent added and costs, to review which this writ of error was sued out.

*Mr. H. E. Loveren* and *Mr. David Cross* for plaintiff in error.

*Mr. Henry M. Baker* for defendant in error.

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

We agree with the Supreme Court of New Hampshire in thinking that the plaintiff in error, by availing itself of the power conferred by the statute, and joining in a trial for the assessment of the damages, is precluded from denying the validity of that provision which prescribes that fifty per cent shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not as it thought fit.

*Clay* v. *Smith*, 3 Pet. 411, was a case where the plaintiff below, a citizen of the State of Kentucky, instituted a suit against the defendant, a citizen of the State of Louisiana, for the recovery of a debt incurred in 1808, and the defendant pleaded his discharge by the bankrupt law of Louisiana in 1811, under which, according to the provisions of the law, "as well his person as his future effects," were forever discharged from all the claims of his creditors. Under this law, the plaintiff, whose debt was specified in the list of the defendant's creditors, received a dividend of ten per cent on his debt, declared by the assignees of the defendant. It was held

by this court that the plaintiff, by voluntarily making himself a party to those proceedings, abandoned his extraterritorial immunity from the operation of the bankrupt law of Louisiana, and was bound by that law to the same extent to which the citizens of Louisiana were bound.

In *Beaupré* v. *Noyes*, 138 U. S. 397, a similar question was presented. There it was contended on behalf of creditors, the plaintiffs in error, that an alleged assignment was conclusively fraudulent as to them for want of an immediate delivery, followed by an actual and continued change of possession of the goods assigned; that their right so to treat the assignment, although such right was specially set up and claimed, was denied; and that consequently they were denied a right arising under an authority exercised under the United States. But this court said:

"Whether the state court so interpreted the territorial statute as to deny such right to the plaintiffs in error we need not inquire, for it proceeded, in part, upon another and distinct ground not involving any Federal question, and sufficient in itself to maintain the judgment without reference to that question. That ground is, that there was evidence tending to show that the defendants, [plaintiffs in error,] acquiesced in and assented to all that was done, and waived any irregularity in the mode in which the assignee conducted the business; and that the question whether the defendants so acquiesced and assented with knowledge of all the facts, and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury. The state court evidently intended to hold that, even if the assignment was originally fraudulent as against the creditors, . . . it was competent for the plaintiffs in error to waive the fraud and treat the assignment as valid for all the purposes specified in it. That view does not involve a Federal question. Whether sound or not, we do not inquire. It is broad enough in itself to support the final judgment without reference to the Federal question."

In July, 1887, William J. Eustis brought an action in the Supreme Judicial Court of Massachusetts against Bolles and

Wilde, wherein he sought to recover the balance on a note remaining unpaid after the receipt of one half received under insolvency proceedings under a state act passed after the creation of the debt. The defendants pleaded the proceedings in insolvency, their offer of composition, its acceptance by the majority in number and value of their creditors, their discharge, and the acceptance by Eustis of the amount coming to him under the offer of composition. To this answer the plaintiff demurred. The trial court, which overruled the demurrer, made a finding of facts, and reported the case for the determination of the full court.

The Supreme Judicial Court was of opinion that Eustis, by accepting the benefit of the composition, had waived any right that he might otherwise have had to object to the validity of the composition statute as impairing the obligation of a contract made before its enactment. 146 Mass. 413.

The case was brought to this court, where it was argued, on behalf of the plaintiff in error, that a composition act was, as to debts existing prior to its passage, void and in contravention of the Constitution of the United States, and that a creditor, where demand is saved from the operation of a state statute or of a state decree by the Constitution of the United States, does not waive the benefit of this constitutional immunity by accepting the part of his demand which the state statute or decree says shall constitute full satisfaction.

This court held that the Supreme Judicial Court of Massachusetts, in holding that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer or would reject it and rely upon his right to enforce his debt against his debtors, notwithstanding their discharge, did not decide a Federal question, and that hence the question as to the constitutionality of the State statute did not arise. *Eustis* v. *Bolles*, 150 U. S. 361.

The plaintiff in error accepted the powers and rights conferred by the act of 1868, and joined in the proceedings for the assessment of damages. It must, therefore, be deemed to have agreed that the damages should be assessed in the manner provided for in the act. At all events, the Supreme

Court of the State has so decided, and as its judgment was not based on any Federal question we have no jurisdiction to review it, and the writ of error is accordingly

*Dismissed.*

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## CARTER *v.* RUDDY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 250. Submitted March 30, 1897. — Decided April 19, 1897.

Generally a patent is necessary for transfer of the legal title to public lands.

It is well settled that an action of ejectment cannot be maintained in the courts of the United States on a merely equitable title; and there is nothing in this case to exempt it from the rule that a patent is necessary to convey legal title.

The verdict of a jury determines questions of fact at issue and this court cannot review such determination, or examine the testimony further than to see that there was sufficient to justify the conclusions reached.

If the trial court gives the law fully and accurately, covering all the ground necessary to advise the jury of the rights of the parties, it is not necessary to instruct them in the very language of counsel.

When a tract of land is held as a separate and distinct tract, with boundaries designated so that they may be known, the possession by the owner or his tenants of a part operates as a possession of all; but if the tract is cut up into distinct lots, marked and treated as distinct tracts, the claimant to all must show possession of all.

On April 12, 1889, plaintiff in error commenced an action of ejectment in the District Court of Shoshone County, Territory of Idaho, to recover of defendants the possession of a portion of the north half of block 22 in the town of Wallace in said county and Territory, and damages for the detention thereof. After answers by the several defendants (Idaho having been admitted into the Union as a State), the case was, on application of the plaintiff, transferred to the Circuit Court of the United States for the District of Idaho. The petition for the transfer alleged two grounds: one, diverse citizenship, and the other, the existence of Federal questions, to wit, the construction of the act of Congress, of date July 17, 1854,

c. 83, authorizing the issue and location of Sioux half-breed scrip, 10 Stat. 304, the construction of sections 2387 to 2389, Revised Statutes, relating to town sites, and the question whether section 4556, Idaho Revised Statutes, 1887, is or is not inconsistent with the laws of Congress governing the possession and disposition of the public lands. A trial was had before a jury, commencing on December 4, 1891, which resulted in a verdict for the defendants. Upon this verdict judgment was entered in their favor, which judgment was affirmed by the Court of Appeals. 15 U. S. App. 129. Thereupon the case was brought here on error.

*Mr. W. B. Heyburn*, *Mr. Albert Allen* and *Mr. John R. McBride* for plaintiff in error.

*Mr. Edgar Wilson* for defendants in error.

Mr. Justice Brewer, after making the above statement, delivered the opinion of the court.

The first question arises on the plaintiff's claim of a legal title by virtue of a location of Sioux half-breed scrip. It appears that under the act of Congress a certificate, No. 430, Letter C, for 80 acres, was issued to Walter Bourke. This certificate, which was marked "not transferable or assignable," was dated November 24, 1856. On June 5, 1886, it was presented by W. R. Wallace at the local land office at Cœur d'Alene, accompanied by an irrevocable power of attorney to him executed by Walter Bourke and his wife, on February 27, 1883, and was located upon 80 acres, within which was the property in dispute. When the location papers were transmitted to the General Land Office at Washington it was discovered that Bourke had on October 26, 1870, applied to the department for a duplicate certificate, on a representation that the original had been lost or destroyed; that such application had been sustained and a duplicate certificate issued; that on March 9, 1880, he had located such duplicate on land in Dakota, and received a patent therefor. Upon the dis-

closure of these facts the Commissioner of the General Land Office cancelled this location in Idaho.

Now, the contention of plaintiff is that the location of this scrip operated to transfer the legal title to Bourke, by deed from whom the plaintiff claimed; that no patent was necessary, and that whatever of wrong Bourke may have committed, the legal title was in him and could only be divested by a suit in equity brought by the United States. This scrip is of the same character as that which was before this court in *Felix* v. *Patrick*, 145 U. S. 317. While it is true that the act of 1854 does not in terms provide for the issue of a patent, and simply authorizes the location of the scrip upon any public lands, yet the general rule is that a patent is necessary for the transfer of the legal title to public lands. In *Bagnell* v. *Broderick*, 13 Pet. 436, 450, it was said: "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance the fee is in the Government; by the patent, it passes to the grantee, and he is entitled to recover the possession in ejectment." See also *Wilcox* v. *Jackson*, 13 Pet. 498, 516; *Langdon* v. *Sherwood*, 124 U. S. 74, 83, in which it was said: "It has been repeatedly decided by this court, that such certificates of the officers of the land department do not convey the legal title of the land to the holder of the certificate, but that they only evidence an equitable title, which may afterwards be perfected by the issue of a patent, and that in the courts of the United States such certificates are not sufficient to authorize a recovery in an action of ejectment." *Hussman* v. *Durham*, 165 U. S. 144.

It is true there are exceptions to this rule. One is specially provided by statute, Rev. Stat. § 2449, which makes a certification to a State equivalent to a patent as a conveyance of title. Again, as said in *Wilcox* v. *Jackson* (*supra*), "One class of cases to be excepted is, where an act of Congress grants land, as is sometimes done in words of present grant." This

exception was recognized in *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1; *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241.

It is well settled that an action of ejectment cannot be maintained in the courts of the United States on a merely equitable title. See in addition to *Langdon* v. *Sherwood* (*supra*); *Johnson* v. *Christian*, 128 U. S. 374, 382, and cases cited.

With reference to the power of the Commissioner of the General Land Office to cancel an erroneous certificate of location issued by local land officers see *Cornelius* v. *Kessel*, 128 U. S. 456; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 177; *Orchard* v. *Alexander*, 157 U. S. 372. It is, however, unnecessary to enter into any inquiry as to the power of the land department to issue duplicate in lieu of original scrip alleged to have been lost or destroyed, or even as to the regularity of the proceedings by which this certificate of location was cancelled. It is enough that there is nothing to exempt this case from the ordinary rule that a patent is necessary to convey the legal title; that the certificate of location created at best but an equitable title, and that such a title is not sufficient to sustain an action of ejectment in the Federal courts.

We pass, therefore, to the other question which arises on the contention of the plaintiff that he was in peaceable possession, holding under a claim of title, when the defendants forcibly dispossessed him, and that such prior possession under claim of title is sufficient to sustain this action against mere intruders. To an understanding of this question some further facts must be stated. In May, 1886, and before the certificate of location, one Trask, a surveyor, surveyed this tract of 80 acres and laid it off into lots and blocks. This was done at the instance of Wallace, who held the scrip and power of attorney from Bourke, and who was proposing to establish the town of Wallace. On this plat block 22 was laid off into 24 lots, 12 facing north and 12 south, with an alley between them. On July 31, 1886, Bourke, by his at-

torney Wallace, conveyed this block to plaintiff, the description in the deed being "block 22 (twenty-two) in said town of Wallace, consisting of twenty-four town lots, each of 25 × 100 ft., and bounded on the north by Lockey St., on the south by Bank St. and on the west by Sixth St., on the east by Seventh St., the title of said land having been vested in the party of the first part by location of half-breed Sioux scrip issued to the said Walter Bourke, under an act of Congress of July 17th, A.D. 1854, in exchange for lands held by said party of the first part at Lake Pepin, Minnesota, and now located and duly recorded in the U. S. land office with field-notes of survey as provided by said act of Congress, at Cœur d'Alene City, Idaho Territory."

At the time of the certificate of location and of the deed the 80-acre tract was covered with a dense growth of timber, and plaintiff, who put up a saw mill near by, proceeded, under contract with Wallace, to cut down the trees and convert them into lumber at his mill. In this way block 22 was substantially cleared of standing timber. Prior to February 19, 1889, plaintiff had built two houses on the north half of the block. These houses were on lots not in controversy in this action. There was no fencing around the block, or any part of it. Some board sidewalk had been placed by plaintiff in front of some of the lots and on one side of the block, but it was claimed by defendants that this was done in order to accommodate the travel passing between the depot and a hotel belonging to the plaintiff some little distance from the lots in controversy. There was a conflict in the testimony as to the condition of the block other than the lots upon which the houses were built, the defendants' testimony tending to show that it was covered over with stumps, fallen timber and brush. In May, 1888, proceedings were taken before the county commissioners of Shoshone County for the incorporation of the town of Wallace. On February 19, 1889, there was a general taking possession of vacant lots, done apparently with a view to the acquiring of title under the town site acts of Congress; and among other lots these in controversy were taken possession of and fenced by the several defendants. There was

other testimony bearing upon the question of the alleged possession by plaintiff, but enough has been stated to outline the nature of the dispute between the parties. Of course, the verdict of the jury determines the questions of fact adversely to the plaintiff, and it is not the province of this court to review such determination or to examine the testimony further than to see that there was sufficient to justify the conclusions reached by the jury.

We pass, therefore, to consider the charge of the court and the instructions asked and refused. The plaintiff insists that he entered into possession by virtue of the deed of July 31, 1886; that his actual possession of two lots by virtue of the erection of houses thereon must be taken as constructive possession of the entire block, there being at the time no pretence of any adverse possession, and that, therefore, he was entitled to a peremptory instruction directing a verdict in his favor. He cites in support of the extent of his possession *Clarke* v. *Courtney*, 5 Pet. 319, 354, in which this court said: "Where a person enters into land under a deed or title, his possession is construed to be coextensive with his deed or title; and, although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseized to the extent of the boundaries of such deed or title."

The court declined to give such peremptory instruction, but charged as follows:

"It is the law that where a party holds a tract of land as a separate and distinct tract and as one tract under a claim of title as the boundaries of the tract are so designated, described and marked that they may be known, his possession, either by himself or tenants, of a part of the tract operates as possession of all.

"If in this case you find that this half block was held by plaintiff as one tract or parcel of land, and that it was so marked out and designated in any way that defendants could know its location and plaintiff had possession of any part of it, such possession extended to and gave him possession of the entire tract; but if, on the contrary, it was cut up into separate and distinct lots and so marked upon the ground and was held

and treated as distinct tracts, then he must show the possession of all thereof."

* * * * *

"11th. The next question is, what are the acts of ownership and possession to which your attention must be directed? As acts of ownership and possession the plaintiff claims he entered upon the premises in good faith in pursuance of his deed; that he thereupon proceeded to clear the land of its timber and to prepare it for occupation; that he put sidewalks along the sides of a portion of it; that he put them there as the owner of the ground for its convenient use and to improve and enhance its value; that as such owner and claimant he caused water to be conducted to some part of the premises; that he paid taxes on the premises, and that he has always, since purchasing the ground, claimed to own it, and has openly and publicly exercised control over it.

"If these assertions of plaintiff are true, and these acts were done by him or by his agents, you are instructed that they constituted in him such a possessory title to the premises in dispute as the Government will protect as against any other person claiming by a similar or subsequent possessory title.

"12th. On the contrary the defendants claim that the plaintiff's entry on the land was not in good faith to hold it; that his object was to cut therefrom for milling purposes the timber thereon; that he did not clear the land; that the sidewalks were not constructed for the benefit of the property, or because plaintiff owned it, but to benefit and add to the convenient use of other property he owned and business he was operating in that vicinity; that the water he had conducted there was not to benefit the premises, but was a part of the town system of water works, and that the plaintiff had, through himself or his agents, ceased to exercise control over the property, and that on the 19th day of February, 1889, it was vacant unoccupied lands of the United States, and that on such day they peaceably entered the premises.

"If you find the claim of the defendants to be true then their entry and possession was lawful."

It is not necessary for a court to give instructions in the very language of counsel. It is enough if it gives the law fully and accurately, and we think this charge not only stated the law accurately, but also covered all the ground which was necessary in order to fully advise the jury of the rights of the plaintiff. While his deed was of block 22 it describes the block as composed of 24 lots, and the plat upon which the deed was based shows that there was an alley running through the block and separating the 12 lots on the north from the 12 lots on the south. It was, therefore, not a single tract. Further, plaintiff, in his complaint, thus described the property for which he sued:

"Said half block being 300 feet long in an east and west, and 100 feet wide in a north and south direction (except two separate lots, pieces or parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block twenty-two (22), each of said lots being 25 feet wide and 100 feet long)."

In respect to which the Court of Appeals, in its opinion, well said:

"It may be observed that plaintiff alleged that the lots which he claims to have been in possession of tenants were 'two separate lots, pieces and parcels of land' from the land sued for. Can their possession, therefore, be the possession of land from which they were 'separate'?"

We do not think it could have been properly held as matter of law that the plaintiff was in constructive possession of this entire half block, and the rule of law in respect to such constructive possession was in the charge we have quoted correctly stated. In this respect, it may not be inappropriate to notice two sections of the territorial statutes, 4040 and 4556, Idaho Rev. Stat. 1887, the first of which, referring to property held for five years under a claim of title founded upon a written instrument, declares that the property so included in such instrument is deemed to have been adversely held, "except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract"; and the second provides that in an

action for the possession of "a lot or parcel of land, situated in any city, town or village on the public lands," the plaintiff is required to prove an actual enclosure of the whole lot, or the erection of a dwelling house or other substantial building on some part thereof, and adds that "proof of such building, with or without enclosure, is sufficient to hold such lot or parcel to the bounds thereof, as indicated by the plat of such city, town or village, if there be one, and if there be no such plat, then to hold the same, with its full width and extent from and including such building to the nearest adjacent street, where the intervening space has not been previously claimed by adverse possession."

As to the circumstances to be considered in determining the question of possession other than the instrument under which the title is claimed, we think the court, in paragraphs 11 and 12, heretofore quoted, stated the law in such a way as to give the plaintiff no ground of objection, and as upon these instructions the jury found the facts adversely to the plaintiff we must accept that finding as conclusive. We see no error in the record, and the judgment of the Court of Appeal is

*Affirmed.*

## ALLEN *v.* CULP.

ERROR TO THE COURT OF COMMON PLEAS, NO. 4, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

No. 252. Argued and submitted March 30, 1897. — Decided April 19, 1897.

When letters patent are surrendered for the purpose of reissue, they continue valid until the reissue takes place, and if the reissue is refused they stand as if no application had been made.

Whether, if the reissue be void, the patentee may fall back on his original patent, is not decided.

This was an action originally instituted in the Court of Common Pleas for the County of Philadelphia, by the defendant in error, Andrew J. Culp, against Alonzo W. Allen, to recover half of the profits made by the defendant from a cer-

tain patent for a cop and bobbin winding machine, granted jointly to Culp and Allen, and subsequently assigned to the defendant Allen.

The alleged consideration for the transfer of plaintiff's half interest was a promise on the part of the defendant that he would divide with him the profits made by the sale of the device, of which they were the joint owners, and also all damages which might be recovered against infringers of the patent; the principal object of the transfer being to enable the defendant to have title thereto for the purpose of prosecuting these infringers. It seems that in November, 1892, the defendant was advised by his counsel to apply for a reissue, in order to more fully protect the invention, and he thereupon obtained the signature of the plaintiff, his co-inventor, to the application by renewing the promises he had already made. Both parties joined in the surrender of their patent and in the application for a reissue, which, however, was rejected on the ground of unreasonable delay, and also upon the further ground that the new claims of the reissue had been anticipated by other patents. Counsel for the defendant, who appears to have had absolute control of the reissue proceedings, made no effort to meet the formal objection of the examiner, and permitted the application to lapse by his failure to prosecute it within two years. He also neglected to take an appeal from the rejection of the application.

In January, 1893, defendant informed the plaintiff that he did not intend to take any further proceedings with reference to the patent, and refused to fulfil his promise with reference to the division of profits.

Thereafter plaintiff began this suit to recover, under his contract with the defendant, the half of the profits which the latter had made out of the patent. The suit resulted in a verdict for the plaintiff for $225. A new trial being refused, defendant carried the case to the Supreme Court of Pennsylvania, by which the judgment of the Court of Common Pleas was affirmed, and the record remitted to that court. 166 Penn. St. 286. Thereupon defendant sued out this writ of error.

Opinion of the Court.

*Mr. Hector T. Fenton* for plaintiff in error submitted on his brief.

*Mr. George Bradford Carr* for defendant in error. *Mr. Conway Dillingham* was on his brief.

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

Upon the trial, the plaintiff having offered evidence in support of his case, the defendant put in evidence a certified copy of the application for a reissue of the letters patent in question, and also a model of the tension device made and sold by the defendant. The application for a reissue was made by Culp and Allen jointly, who prayed that they might be allowed to surrender the patent, and that the same might be reissued to Allen for the same invention upon an amended specification. To the specification was appended the usual affidavit to the effect that the deponents believed that the patent surrendered was inoperative or invalid, by reason of a defective and ineffective specification, in that it failed to properly describe the essential and important features of the invention, and that such errors arose from inadvertency, accident and mistake, and without any fraudulent or deceptive intention. The record also contained a communication from the examiner refusing the reissue upon the ground of unreasonable delay, and also because the new claims had been substantially anticipated by other patents.

Thereupon the court charged the jury, at the request of the plaintiff, that "where the reissue of letters patent is applied for the surrender takes effect only upon the issue of the amended patent, and if the issue is refused, the original patent is returned to its owner"; and that "the action of the Patent Office in refusing to reissue the patent in suit did not affect its validity, and the contract between the plaintiff and defendant in reference thereto was not rendered invalid by such action."

In this connection the court also refused to charge the jury,

at the request of the defendant, that "the joint act of the parties in surrendering the patent in question, and applying for a reissue thereof on November 18, 1892, amounted to a cancellation of the patent; and, being followed by a refusal on the part of the Government to grant the reissue, operated to end and determine the contract sued upon as to any of the patented machines made after such surrender."

The first statutory provision for the reissue of letters patent made its appearance in the act of July 3, 1832, repeated and expanded in the thirteenth section of the patent act of 1836, which provided generally that whenever any patent should be inoperative or invalid, by reason of a defective description or specification, or by reason of the patentee claiming more than he had a right to, if the error arose from inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it should be lawful for the Commissioner, upon the surrender to him of such patent, to cause a new one to be issued for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification. This was but little more than putting in statutory form a power which this court had already held to exist, prior to the act of 1832, in the Secretary of State in the absence of a statute. *Grant* v. *Raymond*, 6 Pet. 218. But in construing this statute it was uniformly held by this court that the surrender of the patent for reissue was a legal cancellation and extinguishment of it; that no rights could afterwards be asserted upon it, and that suits pending for an infringement of such patent fell with its surrender, because the foundation, upon which they were begun, no longer existed. *Moffitt* v. *Garr*, 1 Black, 273; *Reedy* v. *Scott*, 23 Wall. 352, 364; *Peck* v. *Collins*, 103 U. S. 660.

To obviate the injustice to inventors occasioned by the peremptory requirement that the patent should be treated as extinguished from the moment it was surrendered for a reissue, it was provided, in section 53 of the patent act of 1870, amending the thirteenth section of the act of 1836, that upon the surrender of a patent for that purpose a reissue should be

granted "for the unexpired part of the term of the original patent, *the surrender of which shall take effect upon the reissue of the amended patent.*" These words were obviously inserted for the purpose of preventing the surrender taking immediate effect, and to postpone its legal operation until the patent should be reissued. When a patent is thus surrendered, there can be no doubt that it continues to be a valid patent until it is reissued, when it becomes inoperative; but if a reissue be refused, it is entirely clear that the surrender never takes effect, and the patent stands as if no application had ever been made for a reissue. Whether, if the reissue be void, the patentee may fall back on his original patent, has never yet been decided by this court, although the question was raised in *Eby* v. *King*, 158 U. S. 366; but as the original patent in that case was also held to be void, it did not become necessary to express an opinion upon the question. But if the original application for a reissue be rejected, the original patent stands precisely as though a reissue had never been applied for, unless at least the reissue be refused upon some ground equally affecting the original patent. If it were otherwise, every patentee who applies for a reissue would do so at the peril, not only of having his application refused, but of losing what he already possessed. This was the very contingency the act of 1870 was designed to provide against.

It is true that, in making his surrender, the patentee declares that his patent is inoperative and invalid, but this is not necessarily so for all purposes, but for the purpose for which he desires to have it reissued. Such a patent might be inoperative and invalid as against certain persons who had pirated the underlying principle of the patent, and avoided infringing the exact language of the claims, and yet be perfectly valid as against others, who were making machines clearly covered by their language. Such was the case here, since the defendant in his affidavit of defence admitted that, "after the dissolution of said firm, each party on his individual account continued the same business, deponent having made some of said patented machines." But in addition to this, the court charged the jury that unless the devices

made by the defendant were essentially the same as that covered by the patent there could be no recovery, and the verdict necessarily established their identity.

There was no error in the ruling of the court below, and its judgment is, therefore,

*Affirmed.*

## FORSYTH *v.* HAMMOND.

CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 615. Argued January 20, 1897. — Decided April 19, 1897.

Under the judiciary act of March 3, 1891, c. 517, the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeals and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court.

While this power is coextensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy this court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of the Nation, in its internal or external relations, demands such exercise.

As, in the contests between the parties to this suit, the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana had reached opposite conclusions as to their respective rights, and as all the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, it seemed to this court that, although no final decree had been entered, it was its duty to bring the case and the questions here for examination at the earliest possible moment.

The plaintiff in error having voluntarily commenced an action in the Supreme Court of the State to establish her rights against the city of Hammond, and the questions at issue being judicial in nature and within the undoubted cognizance of the state court, she cannot, after a decision by that court be heard in any other tribunal to collaterally deny its validity.

Though the form and causes of action be different, a decision by a court of

Statement of the Case.

competent jurisdiction in respect to any essential fact or question in one action is conclusive between the parties in all subsequent actions.

The matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, is to be finally and absolutely determined by the authorities of the State.

The construction of the constitution and laws of a State by its courts is, as a general rule, binding on Federal courts.

The case of *Burgess* v. *Seligman*, 107 U. S. 20, distinguished from this case.

THE legislation of Indiana authorizes the annexation of contiguous territory to the limits of a city with or without the consent of the owner. The statutory provisions in respect thereto, found in 1 Horner's An. Ed. Ind. Stat. 1896 are printed in the margin.[1]

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[1] 3195. EXTENSION OVER PLATTED LOTS — 84. Whenever there shall be or may have been lots laid off and platted adjoining such city, and a record of the same is made in the recorder's office of the proper county, the common council may, by a resolution of the board, extend the boundary of such city so as to include such lots; and the lots thus annexed shall thereafter form a part of such city and be within the jurisdiction of the same. The common council shall immediately thereafter file a copy of such resolution, defining the metes and boundaries of such addition, in the office of the recorder aforesaid; which shall be recorded.

3196. EXTENSION OVER CONTIGUOUS LANDS — ACTION OF COUNCIL — 85. The limits of any city may be extended over any lands or contiguous territory, by the consent of the owner thereof in writing, and a resolution of the common council, passed by a two-thirds vote, extending the limits of such city over such lands or territory; which written consent and resolution shall be entered at length in the records of such city; and the common council shall cause a certified copy of both to be recorded in the recorder's office of the proper county. If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and, at the same time, present to such board an accurate description, by metes and bounds, accompanied with a plat of the lands or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some newspaper of the city, of the intended petition, describing in such notice the territory sought to be annexed.

3197. PROCEEDINGS BY COUNTY BOARD — 86. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation; and if, after inspection of the map and of the proceedings had in the case, such board is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order book, specifying the territory

Statement of the Case.

The city of Hammond is situated in the county of Lake, and in 1893 it instituted proceedings to extend its limits over a large tract of contiguous territory, some of which at least was not laid off and platted into lots. The application was denied by the board of county commissioners of Lake County, whereupon the city appealed to the Circuit Court of that county, and the case thus appealed was thereafter transferred by change of venue to the circuit court of Porter County, Indiana, which court, upon the verdict of a jury, entered a decree in favor of the city for the annexation of the territory.

The present plaintiff was a party to these proceedings. She was the owner of about seven hundred and twenty-five acres within the area attempted to be annexed. After the decision

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annexed, with the boundaries of the same according to the survey; and they shall cause an attested copy of the entry to be filed with the recorder of such county, which shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts in this State.

3243. Appeal from County Board — 1. In proceedings before the board of county commissioners for the annexation of territory to cities and towns against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed may appeal to the Circuit Court from the final decision of the board, by filing, within thirty days, with the auditor, a bond or undertaking for the due prosecution of the appeal and payment of all costs that may be adjudged against the appellant, with sureties, to be approved by the board or the auditor. But no appeal shall be dismissed for want of a sufficient bond or undertaking, if one shall be filed, under the direction of the court, at any time before the trial.

3244. Auditor's Duty — 2. Within twenty days after filing the appeal bond or undertaking, the auditor shall deliver it, with all the other papers in the cause and a complete transcript of the proceedings of the board to the clerk of the Circuit Court, who shall docket it with the other causes pending therein.

3245. Trial — 3. The appeal shall stand for trial, when taken during the session of the board, at the first term after the papers shall have been filed ten days, and, when taken in vacation, at the first term after summons shall have been served upon the appellee ten days before the first day of such term. The appeal shall be tried and determined as an original cause.

3246. Effect of Appeal — 4. All further proceedings in the annexation of territory shall be suspended until the final disposition of the appeal. The court may make a final determination of the proceeding and compel its execution, or may send its decision to the board, with direction how to proceed, and require compliance.

by the circuit court of Porter County the city levied taxes on the property to the amount of $3500, whereupon on April 26, 1895, she filed her bill in the Circuit Court of the United States for the District of Indiana, praying for an injunction to restrain the collection of those taxes. An amended bill was filed on May 1, 1895, upon which amended bill a hearing was had, resulting in a denial of the motion for an injunction and the dismissal of the suit. 68 Fed. Rep. 774. From such dismissal she appealed to the Court of Appeals for the Seventh Circuit, by which court, on January 16, 1896, the decree of the Circuit Court dismissing the bill was reversed, and the case remanded to that court, with directions for further proceedings. 34 U. S. App. 552. Whereupon the city of Hammond applied to this court for a certiorari, directed to the Court of Appeals, which application was sustained, and on October 19, 1896, a certiorari was ordered.

Before the filing of the bill in the United States Circuit Court this plaintiff with others had appealed from the decree of the circuit court of Porter County to the Supreme Court of Indiana, and by that court, on April 11, 1895, the decree had been affirmed. 142 Indiana, 505. A petition for rehearing was denied on November 8, 1895. 142 Indiana, 516. While this decision of the Supreme Court, though announced before the disposition of the case in the United States Circuit Court of Appeals, has not been formally incorporated into the record by an amendment of the pleadings or otherwise, it was made a matter of consideration by the Court of Appeals, and has been discussed and treated by counsel in the arguments before us as a fact in the case and to be considered in determining the questions that are presented.

The bill alleged that the plaintiff's lands were used solely for pasturage and hay and other agricultural purposes; that the real value did not exceed $100 per acre; that the land had no market value, but only one speculative and prospective, dependent upon the location, not yet secured, of manufacturing establishments whose market and offices would be in Chicago; that no part of the land had ever been mapped or platted with a view to the sale of lots; that on the entire

tract there were but twenty-one dwelling houses, ten of them being in a row and within about a quarter of a mile of the town of Whiting, in the county of Lake, in which town the tenants of all said houses were engaged in business and work; that the houses on the lands were four and one half miles distant from any police station, fire-engine house or gas lamp of the city of Hammond, so that in the nature of things no benefit could be received from the municipal government of that city; that the lands were valued for taxation by the city at the rate of $250 to $500 per acre, and the taxes thereon amounted to about $5 per acre; that the valuation was enormously in excess of the real value and the taxes exorbitant, oppressive and extortionate. The bill further alleged that at the time the annexation proceedings were instituted the city of Hammond did not contain more than 6000 or 7000 inhabitants; that it had territory about three miles long by two miles wide; that on the northern boundary and within the limits of the city were about two square miles of lands, no part of which had ever been laid off into lots and blocks, on one of which there was not a single house or road and on the other but seven houses and one road; that this vacant tract was between the settled parts of the city and the lands of the complainant; that the part of the city of Hammond laid off into lots is much larger than is likely to be required for city purposes for many years to come; that the city's boundaries contained nearly four thousand acres, and that the territory attempted to be annexed consisted of about five square miles of practically vacant lands lying directly north of the city limits and extending all the way from such limits to the shores of Lake Michigan. Other facts were alleged also tending to show the impropriety of the annexation of this comparatively vacant territory to the city of Hammond. It was specifically charged that the city of Hammond had a municipal debt amounting to nearly twice the constitutional limit, and that the purpose of the annexation was by adding new property at an exaggerated valuation to so increase the appraised taxables of said city as to lift it out of its constitutional dilemma without regard whatever to the advantages or benefits to the

property so sought to be annexed. The bill further set forth the proceedings before the county commissioners and in the state Circuit Court, but averred that those proceedings were void because the enlargement of the limits of a city was a matter of legislative and not of judicial cognizance, and that it was not competent for the legislature to entrust to the courts the decision of such questions.

*Mr. Benjamin Harrison* and *Mr. W. H. H. Miller* for Mrs. Forsyth. *Mr. John B. Elam* was on their brief.

*Mr. Charles H. Aldrich* for the city of Hammond. *Mr. Frank F. Reed* and *Mr. E. W. Crumpacker* were on his brief.

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

The first proposition of counsel for plaintiff is that the writ of certiorari was prematurely issued, and that this court could not at that time rightfully take jurisdiction of the case because there had been no final decree. The Court of Appeals simply reversed the decree of the Circuit Court and remanded the case for further proceedings. This contention involves two matters: First, the question of power, and second, that of propriety. It may be that the question of propriety should be considered as foreclosed by the action of the court in awarding the writ of certiorari, but the question of power, being one of jurisdiction, is always open, and must whenever presented be considered and determined.

This question of power has, indeed, already been decided by this court in prior cases, *American Construction Company* v. *Jacksonville, Tampa, &c. Railway Company*, 148 U. S. 372, 383; *The Three Friends*, 166 U. S. 1; but as it has again been discussed by counsel, a brief reference to those cases and the reasons therein stated may not be inappropriate. Up to the time of the passage of the act of 1891, creating the Circuit Courts of Appeal, the theory of Federal jurisprudence had been, a single appellate court, to wit, the Supreme Court of

the United States, by which a final review of all cases of which the lower Federal courts had jurisdiction was to be made. It is true there existed certain limitations upon the right of appeal and review, based on the amount in controversy and other considerations; but such limitations did not recognize or provide for the existence of another appellate court, and did not conflict with the thought that this court was to be the single tribunal for reviewing all cases and questions of a Federal nature. The rapid growth of the country and the enormous amount of litigation involving questions of a Federal character so added to the number of cases brought here for review, that it was impossible for this court to keep even pace with the growing docket. The situation had become one of great peril, and many plans for relief were suggested and discussed.

The outcome was the act of March 3, 1891, c. 517, 26 Stat. 826, the thought of which was the creation in each of the nine circuits of an appellate tribunal composed of three judges, whose decision in certain classes of cases appealable thereto should be final. *McLish* v. *Roff*, 141 U. S. 661, 666. While this division of appellate power was the means adopted to reduce the accumulation of business in this court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision. As the Courts of Appeal would often be constituted of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved. Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there

was placed in the act creating the Courts of Appeal, in addition to other provisions for review by this court, this enactment:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The general language of this clause is noticeable. It applies to every case in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this court would have in any case brought to it by appeal or writ of error. Unquestionably, the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination. Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice.

So it has been that this court, while not doubting its power, has been chary of action in respect to certioraries. It has

said: "It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeal should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked." *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 372, 383.

We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. *Chicago & Northwestern Railway* v. *Osborne*, 146 U. S. 354. On the other hand, in *The Three Friends*, at the present term, *ante*, 1, we issued a writ of certiorari in a case appealed to the Circuit Court of Appeals before any action had been taken by that court; but this was in view of the fact that the question involved was one affecting the relations of this country to foreign nations, and therefore one whose prompt decision by this court was of importance, not merely for the guidance of the Executive Department of the Government, but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal

and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

Among the considerations thus suggested are those which indicate why in this case the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana. The latter court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and, therefore, that that territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals by its decision in this case had declared that such annexation proceedings were invalid; and that the property of this petitioner was not within the city limits. This tract of plaintiff's was not on the extreme limit of the lands sought to be incorporated into the city, and if the decision of the Circuit Court of Appeals was enforced there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the Supreme Court of the State, withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made, and, although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment.

Coming now to the merits of the case it appears that on the pivotal question of the validity of the annexation proceedings the decision of the Supreme Court of the State is one way and that of the Court of Appeals directly the reverse. It is insisted by the plaintiff that the determination of the boundaries of a municipal corporation in the first instance, and any subsequent change in its boundaries by annexation of outside territory, are matters solely of legislative cognizance, and not judicial in their nature; that such

is the general rule obtaining in the several States of the Union and up to the time of the decision of the Supreme Court of Indiana in this controversy, recognized in that State as elsewhere; that, therefore, the judicial proceedings in respect to this controversy in the courts of the State, culminating in the decision of its highest court, were beyond the jurisdiction of such courts, and not to be regarded as creating an adjudication binding upon other tribunals. Article 3 of the state constitution is referred to, which reads: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided." It is not denied that questions of a judicial nature may grow out of proceedings to annex territory to a municipal corporation, but it is insisted that the annexation itself is a legislative function, and must be determined by direct action of the legislature or some subordinate body exercising legislative functions. The Supreme Court of Indiana in its opinion on the petition for rehearing, 142 Indiana, 516, said: "It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board." This suggestion is vigorously attacked by counsel for plaintiff, as lifting the *ex parte* action of one party to a controversy to the dignity of the exercise of a legislative function and making it the equivalent of a legislative determination.

But back of any criticism of the reasoning of the Supreme Court in its two opinions lies the fact of its decision. And here these things appear. The city of Hammond sought to bring within its limits, among other territory, the lands of plaintiff. After action by the city council, the city instituted proceedings before the county commissioners, which proceedings were subsequently taken by appeal, as prescribed by statute, to the Circuit Court, a court of general jurisdiction, and in that court a decree was entered annexing plaintiff's

lands to the city of Hammond. Were or were not these proceedings valid, and was or was not such decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question certainly is one of a judicial nature. Now, it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of

*res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions. *Cromwell* v. *Sac County*, 94 U. S. 351; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Stout* v. *Lye*, 103 U. S. 66; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683.

But there is another aspect of this case. The matter in controversy is one peculiarly within the domain of state control. *Kelly* v. *Pittsburgh*, 104 U. S. 78. It is for the State to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. We do not mean to hold that in the creation or change of municipal boundaries there may not be action taken by the State which involves a trespass upon rights secured by the Federal Constitution; or that in proceedings looking to such change no questions can arise which are of a Federal nature, and in respect to which the judgment of the courts of the nation must be controlling. All that we mean to decide is that the matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, to be finally and absolutely determined by the authorities of the State. The opinion of the Court of Appeals in this case is devoted to questions arising under the state constitution and statutes; and the amended bill filed in the Circuit Court rests the jurisdiction of that court, not upon the existence of any right claimed under the Federal Constitution, but simply on adverse citizenship.

The construction by the courts of a State of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a State has miscon-

strued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. In *Claiborne County* v. *Brooks*, 111 U. S. 400, 410, it was said: "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State." See also *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Bucher* v. *Cheshire Railroad*, 125 U. S. 555; *Detroit* v. *Osborne*, 135 U. S. 492; *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622; *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254; *McElvaine* v. *Brush*, 142 U. S. 155; *Stutsman County* v. *Wallace*, 142 U. S. 293, quoting *Norton* v. *Shelby County*, 118 U. S. 425, and *Gormley* v. *Clark*, 134 U. S. 338; *Morley* v. *Lake Shore &c. Railroad*, 146 U. S. 162; *Bauserman* v. *Blunt*, 147 U. S. 647; *May* v. *Tenney*, 148 U. S. 60; *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, 373; *Lewis* v. *Monson*, 151 U. S. 545; *Balkam* v. *Woodstock Iron Co.*, 154 U. S. 177, quoting *Leffingwell* v. *Warren*, 2 Black, 599, 603.

It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution.

It is conceded that the judgment of the Supreme Court of Indiana in this controversy could not be reviewed by this court on writ of error; that the questions involved and decided by that court are not of a Federal nature or such as to vest any appellate jurisdiction in this court. But if this court cannot set aside such judgment on the ground of error of law, it would seem to follow that no subordinate Federal court has the power on the same ground to strike it down. What the highest court of the United States cannot do directly would seem to be beyond the reach of a subordinate court in a collateral attack. The case of *Burgess* v. *Seligman*, *supra*, is largely relied upon in the opinion of the Court of Appeals, but there are several reasons why that authority does not justify its action. In the first place the decision of the Supreme Court of the State was rendered before the filing of this bill in the Circuit Court of the United States, and not as in the *Burgess case* after the judgment in the Circuit Court. In the second place the decision was upon a question of a local nature, involving the internal policy of the State, and therefore is such a decision as should be, generally speaking, recognized and followed by the Federal courts. And, thirdly, it was a final adjudication between the same parties, and should have been respected as binding and conclusive upon the principle of *res judicata.*

For these reasons we think that the decision of the Court of Appeals was erroneous. Its decree will be

*Reversed, and the case remanded to the Circuit Court of the United States for the District of Indiana with instructions to sustain the demurrer to the bill and dismiss the suit.*

# WASHINGTON AND GEORGETOWN RAILROAD COMPANY *v.* HICKEY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 253. Argued March 30, 1897. — Decided April 19, 1897.

A car upon a street horse railroad in Washington, arriving at a point where the street crossed a steam railroad at grade, found the gate bars lowered. A train on the steam railroad was seen to be approaching. Before it arrived at the crossing the bars were raised. The driver of the horse car attempted to cross, notwithstanding the approaching train. The gate bars were lowered again and the horse car was caught upon the track. It was filled with passengers, among whom was Mrs. H., one of the defendants in error, sitting upon an open outer seat. The frightened passengers rushed precipitately from the car. Their doing this caused Mrs. H. to be thrown from the car, whereby she was seriously injured. The railroad train was stopped just before reaching the horse car. The bars were again raised, and the horse car went off the railroad track uninjured. Mrs. H. and her husband sued both railroad companies to recover damages; alleging that she was pushed and shoved from her seat and thrown violently to the ground; claiming that the steam railroad company was liable by reason of the negligence of its servant in managing the gates, and that the horse railroad company was liable by reason of the negligence of its driver in not waiting till the train should have passed; and demanding a recovery of thirty thousand dollars as damages. The court charged the jury that if they should find from all the evidence that the plaintiffs were entitled to recover, they might award damages within the limits claimed in the declaration. The jury returned a verdict for twelve thousand dollars. The court thought this to be excessive. With the plaintiffs' consent it was reduced to six thousand dollars, and judgment entered for that amount. *Held*,

(1) That the driver of the horse car was guilty of negligence in attempting to cross the track of the steam railroad under the circumstances;

(2) That there was evidence to warrant the jury to find that the gateman was the servant of the steam railroad company, and that that company was responsible for the results of his negligence;

(3) That as no exception was taken to the charge respecting damages, no question upon it is before the court;

(4) That whether Mrs. H. was injured by falling from the car or from being pushed from it was immaterial, in view of the causes of the injury.

THE case is stated in the opinion.

*Mr. Samuel Maddox* for the Baltimore & Potomac Railroad Company.

*Mr. M. J. Colbert* and *Mr. G. E. Hamilton* for defendants in error.

*Mr. Walter D. Davidge* for the Washington & Georgetown Railroad Company. *Mr. Walter D. Davidge, Jr.*, was on his brief.

Mr. Justice Peckham delivered the opinion of the court.

This action was brought by the defendants in error, who are husband and wife, to recover from the defendants (the one being a horse car company and the other a steam railroad company) damages for personal injuries sustained by the wife on account of the alleged negligence of the servants of the defendants. The facts of the negligence were alleged in the declaration, and each defendant filed a plea of not guilty, upon which issue was joined. A trial was had in the Supreme Court of the District of Columbia, resulting in a verdict for the plaintiffs, the judgment upon which having been affirmed by the Court of Appeals, the defendants have brought the case here for review.

On the trial evidence was given tending to show these facts: Mrs. Hickey, one of the plaintiffs, who was living with her husband in the city of Washington, left her home therein on the morning of the 12th day of August, 1889, and took a street car of the defendant horse railroad company at the corner of Pennsylvania Avenue and Seventh Street for the purpose of going south along the last-named street; the car was a summer car and crowded with people going to the river on an excursion; she sat on the outside of the third seat in the front of the car and in a very small space; the people seemed in a hurry and some of them called out frequently to the driver to "hurry up"; upon coming to the crossing of Seventh Street and Maryland Avenue, where the car tracks of the two corporations intersect each other, the steam cars were seen approach-

ing the intersection at quite a rapid rate; the street car stopped upon coming to the crossing, as the railroad gates were lowered; then and before the steam train came on they were raised, and the street car was started, and after it got on the track of the steam cars the gates were again lowered, shutting in the street car, the gates coming down, one on the car and one just behind the horses. When the street car entered upon the steam car crossing, the train on the tracks of the latter company was still moving quite rapidly towards the crossing and but a short distance away and in plain sight from the horse car; after getting partially upon the steam railroad track, the gates, as stated, came down, and then they were again raised, and the driver of the horse car whipped up his horses and the car got across. Before the horse car had crossed the tracks, the steam cars were coming pretty fast; the men who were sitting down in the horse car all got up and the women commenced screaming; the people on the horse car rushed to get off, and Mrs. Hickey was, in the course of the excitement and commotion, pushed off the car and was badly and permanently injured; when she fell, the steam cars were coming down and the horse car (the gates having been raised) was then driven across to the other side; the train was so close to the horse car that it just got off the track in time to escape being run over, while Mrs. Hickey says she was so near the steam car tracks when the train passed that she felt the air from the engine upon her head.

One of the witnesses said that the driver of the street car first noticed the train when he was about 50 feet from the steam car track. His car was moving at the rate of four and a half to five miles an hour, and the train was then between Eighth and Ninth streets, about 300 feet from Seventh Street. The driver wanted to cross the steam car tracks before the gate went down, and thought he could do so without danger; he did not see that the gates were being lowered as he approached, and did not put on the brakes or make other effort to stop the car until "he got the bell." The gates were once lowered and then raised to let the car pass, and then they were again lowered, and it was when they were

lowered the second time that they came down between the car and the horses, penning the car in on the steam track. The gates were raised again, and the driver succeeded in getting the horse car across the track before the train approached.

The counsel for the horse car company claimed that the cause of the accident was the commotion immediately preceding it, and by reason of which the plaintiff was pushed from the car and injured, and the question was, what caused the commotion? He urged that the commotion was caused by the improper and negligent lowering of the gates at the time when they penned the horse car between them and prevented its progress across the tracks of the steam car company, and that if the gates had not been thus lowered the horse car would have had plenty of time to cross, and there would have been no commotion and no accident. He, therefore, made several requests to the court to charge the jury upon that subject. The point of such requests was that if the jury should find that the commotion and confusion which led to the accident were caused by the sudden and negligent lowering of the gates upon the street car, which the driver of that car had no reason to believe would be thus lowered, and if the driver could have crossed in safety but for such lowering, then the horse car company was not responsible, and no recovery could be had against it.

A further request was made to charge that there was no evidence that the management of the horse car entered into or contributed to the negligence of the gatekeeper, and if the jury should find that the injury was caused by the negligence of the gatekeeper, the verdict must be in favor of the horse car company; also, that if the jury should find that the horse car would have passed the steam car track without injury to the plaintiff except for the lowering of the gates upon the horse car, and that the lowering was the cause of the injury and was an act of negligence on the part of the gatekeeper, then the horse car company was not responsible for the injury; also, that if the jury found the injury to have been the result of negligence of the gatekeeper in the management of the gates, and that but for such negligence the injury

would not have been sustained by the plaintiff, and that the driver of the horse car did not know and had no reason to believe that the gatekeeper would be negligent, then the plaintiffs were not entitled to recover against the horse car company.

The refusal of the court to charge as requested was excepted to and is now made a ground for the reversal of the judgment by this court. In his argument here the counsel for the horse car company said: "The gist of all of which instructions is that no matter whether it was negligence or not for the street car company to drive its car upon the steam car track, yet, if the jury found that it was the lowering of the gates (and not the negligence, if it were such, in going upon the steam track) that caused the injury, then they should find for the street car company. The gist of the instructions is that it was the lowering of the gates that caused the injury."

The vice in all this argument, as we think, consists in the attempted separation into two distinct causes (remote and proximate) of what in reality was one continuous cause. It leaves out of view the action of the driver of the street car as to whether he was or was not negligent, provided the jury should say the accident would not have happened if the gates had not been improperly lowered. That is, although the jury should find that the act of the driver was negligent, and by reason of that negligence his car was placed in such a position that the negligent lowering of the gates concurred with his action in producing the injury, the street car company must be absolved, if the jury should be able to say that but for such negligent lowering of the gates (which the driver of the horse car had no reason to foresee) the accident would not have happened. This is an attempt to separate that which upon the facts in this case ought not to be separated. The so called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence on the part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction, and it would be improper to attempt a separation in the manner asked for by the counsel for the horse car company.

In this connection the court did charge the jury as follows:

"It is claimed by the counsel for the Washington and Georgetown Railroad Company that there was ample time for its cars to pass over the track of the Baltimore and Potomac Railroad Company before the train of the latter would reach the point of intersection of the two tracks, and that as the car of the former company approached the track of the latter the gates were up, and that the horses drawing the car had reached the steam car track when the gatekeeper suddenly lowered the gates, and thereby produced whatever alarm or confusion the evidence shows ensued among the passengers, including the plaintiff, on the street car.

"If you find the evidence establishes these facts, as thus claimed by the Washington and Georgetown Railroad Company, it would be entitled to your verdict in its favor."

The alleged negligence of the horse car driver consisted in endeavoring to cross at all, under the circumstances, until after the passage of the train on the steam railroad. Upon the evidence the jury would have been justified in finding that he had no right to indulge in any close calculation as to time in attempting to cross the steam car tracks before the train thereon reached the point of intersection; that it was a negligent act in making the attempt under a state of facts where the least interruption or delay in the crossing over by the horse car would probably lead to an accident. In this view of the evidence and finding, it was not material that the driver had no ground to expect the particular negligent act of lowering the gates and the consequent obstruction to his passage across the steam car tracks, or that he would have had time to cross if the delay thus occasioned had not occurred. The jury had the right to find it was negligent to cause his car to be so placed that any delay might bring on a collision. The apparent liability to accident, if any delay should occur from any cause whatever, was plain, and such fact would support a finding of negligence in attempting to cross before the steam car train had passed. In such case it would be no excuse that the particular cause of a possible or probable delay, viz., the lowering of the gates, was not anticipated. The important

fact was that there existed a possibility of delay, and, therefore, of very great danger, and that danger ought to have been anticipated and avoided. A delay might be occasioned at that time by an almost infinite number of causes; the horses might stumble, the harness might give way, the car might jump the track; a hundred different things might happen which would lead to a delay, and hence to the probability of an accident. It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of, and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gatekeeper in wrongfully lowering the gates. The act of the driver being a negligent act, and that act being in full force and in the very process of execution at the time the accident occurred, which accident would not have happened but for such negligent act, the fact that another negligent act of a third party contributed to the happening of the accident would not absolve the horse car company. The negligent act of the horse car driver joined with and became a part of the other act in wrongfully lowering the gates, as described, and both acts constituted but one cause for the commotion which naturally resulted therefrom, and on account of both of these acts, as parts of a whole transaction, the injury occurred.

In *Insurance Company* v. *Tweed*, 7 Wall. 44, which was an action upon a policy of insurance that contained an exception against fire that might happen "by means of an invasion, insurrection, riot or civil commotion, or any military or usurped power, *explosion*, earthquake or hurricane," the insurance company was held not liable, although the fire by which the premises insured were burned was not directly caused by the explosion. The explosion occurred in another warehouse, by reason of which a fire was started that caught in still another building, and the fire from that building was communicated to the premises which were insured, and which

were in that manner destroyed by the fire. The court held that, as the whole fire was continuous from the time of the explosion, and was under full headway in about a half an hour, the loss by fire was within the exception contained in the policy, and the insurers were not liable. In that case the question of proximate and remote causes was alluded to, and it was said, by Mr. Justice Miller, that "one of the most valuable of all the *criteria* furnished us by the authorities by which to distinguish the remote from the proximate cause of damage was to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." In one sense there was in that case a new cause existing in the fact that the explosion caused a fire in another building first, and that the fire was carried by the wind from that building to the building in question and not from the building in which the explosion occurred, and so it was claimed that the fire in the building covered by the policy was not directly caused by the explosion; but the court held that the distinction was not well founded, and that within the policy the insurers were not liable. The fire, in other words, occurred by means of the explosion, and no new cause could be said to have intervened simply because the premises insured were burned by the fire communicated from a third building.

The case of *Scheffer* v. *Railroad Company*, 105 U. S. 249, is an example of the other side. It was there held that where the passenger was injured by reason of a railway collision, and as a result of such injury he became disordered in mind and body, and some eight months after the collision committed suicide, his personal representatives could not maintain an action against the railway company for his death, as his own act was the proximate cause thereof. It was held that the relation of the negligence of the railroad company to the death of the passenger was too remote to be regarded as a cause of such death, or to justify a recovery against the company. Mr. Justice Miller, in delivering the opinion of the court, said:

"The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends.

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

"His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death."

So in *Carter* v. *Towne*, 103 Mass. 507, and *Davidson* v. *Nichols*, 11 Allen, 514, cited by counsel, the intervention of another and sufficient cause to produce the result is apparent.

In the first case whatever of fault there was in the sale of the gunpowder by the defendant to the boy became absolutely blotted out when, with the knowledge of his aunt, who had the charge of him and the house where he was living, it was placed in the cupboard, and a week afterwards his mother gave him some of the powder and he fired it off with her knowledge. The fact that some days later he took, with her knowledge, more of the powder and fired it off and was injured by the explosion, could not in any rational degree be said to be caused by the original wrongful sale of the powder.

In the other case the druggist sold an article harmless in itself, mistaking it for another article, also harmless in itself, but another person afterwards intermixed the article sold with another article, making thereby a dangerous explosive from which injury was suffered. It was held that there could be no recovery against the druggist, because the sale was not the proximate cause of the accident.

These are plain cases of the intervention of other and

sufficient causes for the injuries sustained and where the original actions were too remote to be regarded as causes of such injuries. The other cases cited by counsel are clearly distinguishable in principle from this one. It is unnecessary after what has been said to further comment on them.

We think there was no error in the refusal of the court to charge as requested, and the exceptions to such refusal are therefore untenable.

Another objection now urged by the counsel for the defendant railroads is to the charge of the learned judge on the subject of damages. In response to the request of counsel for plaintiffs the judge charged that —

"If the jury find from all the evidence that the plaintiffs are entitled to recover in this action, then they shall award such damages *within the limits of the sum claimed in the declaration* as will fairly and reasonably compensate the plaintiff Margaret for the pain and suffering caused to her by the injury which she sustained and for the injury to her bodily health and power of locomotion, if any such they find, which she has sustained in the past and will continue to sustain in the future as a natural consequence of said injury, and for such internal injuries and impairment to her physical health as they may find to be established by the evidence."

And the judge also charged:

"Your verdict, if you find for the plaintiff, must be a matter to be fixed by you in the exercise of a sound discretion, subject, of course, to the limits placed in the declaration of thirty thousand dollars."

The objection which the counsel makes to this charge is that it amounted to a direct intimation to the jury that the finding of a verdict for the sum named in the declaration would not be excessive, and that the jury were misled by it, for they brought in a verdict for the plaintiff for $12,000, which the court actually found to be excessive, and directed that the verdict should be set aside unless plaintiffs consented to remit $6000, which they did.

But we fail to find from the record that any exception was taken to the charge of the judge upon this subject of damages.

We do not intimate that an exception would have been good, if it had been taken; it is sufficient that no exception raises the question, and we do not therefore either discuss or decide it.

It is also objected that there is a variance between the declaration and the proof, and that the trial court did not try the issues formed by the pleadings, but went beyond them and made a new case for the plaintiffs.

The declaration alleges that the female plaintiff was pushed and shoved from her seat in the car and thrown violently to the ground and was injured in that way. The court charged the jury that if they should find from the evidence that the female plaintiff either jumped off the car in a reasonable effort to avoid injury from collision, or was pushed or thrown from the car by some other passenger or passengers endeavoring in a reasonable manner to avoid injury from such collision, and was thereby injured, then the plaintiffs were entitled to recover.

Upon this subject of variance it was said by Mr. Chief Justice Alvey, in delivering the opinion of the Court of Appeals in this case, that —

"Whether she [Mrs. Hickey] fell in consequence of a push received from some other terrified passenger, or in an attempt to save herself by jumping from the car, it would make no material difference in her right to recover. It is not so much the manner of leaving the car as it was the exciting cause that operated upon her, either directly and caused her to jump to save herself, or upon others whose actions were justifiably incited by the impending danger, and, by natural, impulsive movement, forced her from the car. In either case, her fall to the ground and injury were the direct consequences of the apparent and impending danger produced by the negligent conduct of the defendants' servants and employés. There is, therefore, no such variance as should defeat the plaintiffs' right to recover, if the facts were found to exist, as we must assume they were, according to the hypothesis of the instruction given by the court. It is said by the Supreme Court of the United States that no variance ought ever to be regarded as material where the allegation and proof substantially cor-

respond, or where the variance was not of a character which could have misled the defendant at the trial. *Nash* v. *Towne*, 5 Wall. 689, 697. Here the variance that is supposed to exist was mainly produced by the proof introduced on the part of the defendants, and therefore there was no surprise to them, and it is not pretended that they were, in any manner, injured by the supposed variance. There is in reality no substantial variance between the allegations and proof."

We think this is a correct statement, and nothing more need be said upon the subject.

These are all the questions raised by the counsel for the horse railroad company which we think it necessary to mention.

We have carefully examined the various points raised by the learned counsel for the steam railroad company, and are of opinion that they show the existence of no material errors in the conduct of the trial which could or in any way did prejudice the company. There was proper and sufficient evidence submitted to the jury on the question of the employment of the gateman by the steam railroad company. Although there was no direct evidence of an actual contract of employment entered into between the company and the gateman, yet there was ample evidence from which an inference of such employment might properly have been drawn by the jury. We also think the duties of a person so employed were correctly stated to the jury. The question whether the gateman neglected to properly discharge those duties was submitted to the jury in a manner to which no exception could be taken.

Upon an examination of the whole case, we find no error prejudicial to either company, and the judgment against both must be

*Affirmed.*

# MANSON *v.* DUNCANSON.

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

No. 127. Argued January 8, 11, 1897. — Decided April 19, 1897.

In the District of Columbia a non-resident minor, having an interest in real estate situated therein, may, by the appointment of a guardian *ad litem* by the proper court, and without service of personal process upon him, be subjected to a decree providing for the sale of the land for the payment of the debts of the decedent owner, and partitioning the surplus, if any, after such payment.

Such a decree, if made by a court with full jurisdiction of the subject-matter and having the proper parties before it, cannot be attacked by one of those parties in a collateral proceeding.

Whether the decedent owner in such case had any interest in the land petitioned to be sold was a question to be decided by the court in which the cause was pending, and if error was committed in its disposition of that question, the remedy was by appeal, or by a bill of review, if duly filed.

In condemnation proceedings instituted by the United States in the Supreme Court of the District of Columbia to obtain land for a post office site in the city of Washington, a treasury draft for the sum of $17,000 was paid by the United States into the registry of that court on October 9, 1891, as compensation to the owner of a parcel of land designated in the proceedings as parcel 15, in square 323. Frederick L. Manson and Charles C. Duncanson both claimed this fund, each as having been owner in fee simple of the said parcel 15 at the time of the condemnation, and on June 20, 1892, Manson filed his bill in equity in the said court against Duncanson, seeking to enjoin the defendant from receiving the fund, and asking for an order directing payment of the same to the complainant. The facts presented by the case which arose upon this bill are substantially as follows:

On August 2, 1862, James W. Barker, who then owned a part of lot 6 in the said square, which part included the land designated in the said proceedings as parcel 15, executed a deed, wherein his wife joined, conveying the property to

William R. Woodward, in trust. William L. Manson and Sarah Jane Manson, his wife, united with Barker and wife in the execution of this deed, and it was recited therein that Sarah Jane Manson was possessed of property separate from her husband, which she was desirous of having invested in the said premises, and that therefore William L. Manson, with her consent and concurrence, had entered into a contract with Barker for the purchase of the same, and for the purchase price thereof was to pay a certain amount in cash and give certain notes, the amount of one of which was to discharge a purchase money debt due by Barker. It was further recited that all of the notes had been executed by Manson and wife, and delivered. The deed provided that Woodward should hold in trust to secure the payment of the notes, and, until there should be some default in payment of the same, to permit Sarah Jane Manson to occupy and enjoy the premises, and receive the rents thereof for her separate use; and upon the full payment of all the notes, to make conveyance of the property upon the trusts and for the purposes expressed and declared for the benefit of Sarah Jane Manson in and by a certain other deed or declaration, bearing even date with the conveyance described.

The deed or declaration referred to was executed by Manson and his wife, and described the said Woodward and Erastus Poulson as parties thereto of the second and third part, respectively. It directed that, after payment of the notes, etc., Woodward should convey the premises to Poulson, who should thenceforth stand seized of the same upon the trusts following, viz.:

"In trust for the said Sarah Jane Manson for and during her life, and to permit her to occupy said premises and to receive the rents and profits thereof for her own sole and separate use, free from the interference of her present or any future husband, and without being liable for his debts or engagements, her receipt alone being a valid discharge for such rents and profits.

"And upon further trust that it shall be lawful for the said Sarah Jane Manson at any time, and from time to time dur-

ing her life, to dispose of the said premises, either by absolute sale or mortgage thereof, as she may think proper, in which the said party hereto of the third part, his heirs and assigns, shall join, such disposition to be made by deed or deeds to be executed and acknowledged by the said trustees, and by the said Sarah Jane Manson as if she were sole and unmarried. And in default of any such sale or mortgage, or so far as the same shall not extend, upon further trust for such person or persons and for such estate, and in such parts, shares and proportions as she, the said Sarah Jane Manson, shall or may, from time to time by any deed or instrument of writing, or by her last will and testament, under her hand and seal (and which she is hereby authorized to make), limit, direct or appoint, give or devise the same; and in default of any such limitation, direction and appointment, gift or devise, in trust for such child or children as she shall leave surviving her, and the issue of any deceased child or children equally share and share alike, such issue taking his, her or their parent's or parents' share; and for default of all such children or issue, then in trust for the right heirs of the said Sarah Jane Manson forever. And it is further declared that all moneys which shall or may be raised by sale or mortgage of the said premises, or any part thereof, shall be paid to the said Sarah Jane Manson, and be disposed of as she shall or may think best, her receipt being a valid discharge therefor; and the party paying the same not being bound to see to the application or disposition thereof."

On August 2, 1865, all of the notes then having been paid, Barker and Woodward, by deed of that date, released and conveyed the property to Poulson, in trust for the sole and separate use and benefit of Sarah Jane Manson, exclusive of her husband, and upon the trusts declared in the deed or declaration aforesaid.

Sarah Jane Manson died in Bucks County, Pennsylvania, on September 4, 1870, leaving a will, dated April 20, 1865, whereby she directed that her debts be paid, and then devised and bequeathed all her estate real and personal, as follows: Her husband, William L. Manson, to take and receive all the

rents and profits of her estate during his life and apply the same for his support and the support and education of her three children, namely, Frederick L. Manson, William H. Walters (a child of the testatrix by a former husband) and Cecelia M. Manson, and, on the death of her husband, all of her estate, real and personal, to be equally divided, share and share alike, among the said three children, when the youngest of them should reach the age of twenty-one years, and not before. This will was attested by only two witnesses, and was therefore not effectual to pass real estate in the District of Columbia, and was never admitted to probate therein. On September 12, 1870, it was duly admitted to probate in Philadelphia, and letters of administration, with the will annexed, were granted to William L. Manson, the surviving husband.

In her lifetime, Sarah Jane Manson sold a part of the property embraced in the said deeds, but made no sale or conveyance of the said parcel 15.

On June 18, 1874, William L. Manson filed a creditor's bill in the said court against Erastus Poulson, trustee; Frederick L. Manson, William H. Walters and Cecelia M. Manson, stating that all the parties were citizens of the State of Pennsylvania; that Poulson was sued as trustee by virtue of the deeds aforesaid, and the other defendants as heirs at law of Sarah Jane Manson, and that the defendants Frederick L. Manson and Cecelia M. Manson were minors. The bill alleged that Sarah Jane Manson, at the time of her death, was seized of the said parcel of land in her own right, and free from any right or claim of her husband, and died intestate as to the same; that the complainant settled her estate in Bucks County, Pennsylvania, by virtue of said letters of administration, a certified copy of which was filed as an exhibit; that her personal estate proved insufficient to pay her debts, and that the complainant made advances out of his own funds toward the payment of the same, and that such advances, together with the assets of the estate, paid in full all the just claims proven against the decedent; that the complainant paid out of his own funds on such account, over and above

the assets coming into his hands, the sum of $2051.26, which amount was justly due him; and that no funds remained from which he might be reimbursed, unless the said real estate should be sold and the proceeds thereof applied to the payment of his claim. The said deeds were referred to and made a part of the bill. The complainant prayed that a trustee might be appointed to sell and convey the property, and out of the proceeds arising from the sale pay the indebtedness due the complainant and distribute the balance; that guardians *ad litem* might be appointed to appear and defend the interests of each of the said infants; that writs of subpœna might be issued against each of the said defendants Erastus Poulson, trustee, Frederick L. Manson, William H. Walters and Cecelia M. Manson; and that the complainant might have such other and further relief as the nature of the case might require.

Process was issued against all of the defendants, and was returned by the marshal of the District of Columbia not found. Orders were thereupon entered appointing commissioners in Philadelphia and in Fort Clark, Texas, to appoint guardians *ad litem* to take the answers of the infant defendants Cecelia M. Manson and Frederick L. Manson. These commissions were duly executed, and answers of the said infant defendants, by guardian *ad litem*, were duly filed, whereby all interests and rights of the infants were claimed, but submitted to the court. Erastus Poulson, trustee, filed an answer, admitting the allegations of the bill, and submitting himself to the orders of the court. Walter, the other adult defendant, also filed an answer, wherein he claimed all such interest as he might be entitled to, and submitted his rights to the court.

The cause was heard upon the pleadings and upon a certified copy of the confirmed report of the auditor of the orphans' court of Philadelphia, and on March 18, 1875, a decree was entered whereby it was ordered and adjudged that the complainant's claim set forth in said creditor's bill be recognized as a valid lien against the property described therein, and that the property be sold, and the proceeds of sale be applied, first, in satisfaction of all proper taxes and assessments or other prior incumbrances due and unpaid upon

the property, and secondly, to the payment of the claim of the complainant; the balance, if any, to be distributed *pro rata* among the heirs of Sarah Jane Manson. A trustee was appointed, who, after having given notice by advertisement, was to proceed to make the sale as aforesaid, and thereafter to report the same to the court, and upon final ratification thereof to "convey to the purchaser or purchasers, by good and sufficient deed, all right, title and interest of said defendants or any of them, as of said complainant, in and to said property."

The sale, having been duly made and reported by the trustee, was finally ratified on May 18, 1875, and the trustee, W. P. Bell, subsequently conveyed the property to Frederick Volk, the purchaser. Volk afterwards conveyed the same to Louis Schmid, Edward Schmid and Alexander Schmid, and they, by deed dated June 21, 1890, conveyed to Charles C. Duncanson. The proceeds of sale were applied in accordance with the terms of the decree, but there does not appear to have been any balance for distribution among Sarah Jane Manson's heirs at law.

William L. Manson died in the year 1877.

The present suit was commenced, as aforesaid, by Frederick L. Manson, who filed his bill of complaint in the said court on June 20, 1892. The bill set out, in substance, the facts stated above, and alleged that, upon the death of Sarah Jane Manson, the complainant and Cecelia M. Manson and William H. Walters became the owners, by purchase, of the said parcel 15, by virtue of the aforesaid deeds of 1862 and 1865; that nothing set out in the said creditor's bill served to give the court jurisdiction of the subject-matter thereof, or of any person mentioned therein, and that the court had no jurisdiction to make any order in the said proceedings except an order dismissing the bill.

It was further alleged that in April, 1873, the complainant, while a minor, enlisted with the consent of his father in the Fourth United States Cavalry, and remained in the army until 1881, when he was honorably discharged; that during the intervening time he was stationed at military posts in Texas

and Kansas, and since his discharge had resided continuously in Illinois and Kansas; that until August 15, 1891, he had no knowledge of the said equity proceedings, or of the said answer or any answer filed or intended to be filed therein in his behalf, or of the existence of the said deeds of 1862 and 1865, or the interest they vested in him, or of the said condemnation proceedings; that shortly after learning of the existence of the deeds, and of the record in the said suit, he filed a petition in the condemnation proceedings, claiming the proceeds of parcel 15, but that, as he was informed, and believed, the court was of opinion that it had no jurisdiction in those proceedings to pass upon contested claims to the said proceeds. The complainant further alleged that his sister, Cecelia M. Manson, left home shortly after his enlistment in the army, and sought her own livelihood; that since the complainant was informed of the property interests in question he had made diligent inquiry concerning the whereabouts of his said sister and of his said brother, William H. Walters, and had been unable to learn anything concerning the whereabouts of his sister since 1880, or of his brother for several years prior thereto, and that therefore he believes them both to be dead, and to have died intestate, leaving the complainant their only heir at law.

The complainant prayed the court to declare that all decrees, orders and proceedings had in the said suit were null and void for want of jurisdiction; that the sale made and the deed executed by the trustee appointed in that suit, as well as all other deeds executed under the decree therein, were void and of no effect; and that the complainant was the legal and equitable owner of parcel 15 at the time of the condemnation of the same, and was entitled to the said fund. He further prayed that the defendant might be enjoined from receiving the fund.

The defendant filed his answer on September 6, 1892, insisting that the said court had before it, by due process of law, all the parties in interest, and therefore had jurisdiction to enter the said decree and to order the said sale, and that the defendant's title, acquired by conveyance under the decree,

Counsel for Appellant.

was valid. He denied the allegations of the complainant as to the time when he was first informed of the said suit, and alleged that it would be inequitable if the complainant should be allowed the benefit of any alleged defect in the said proceedings in view of the fact of his having waited until the expiration of fourteen years after the death of William L. Manson, who could have testified as to the complainant's knowledge of the proceedings, and until the expiration of sixteen years after the sale before setting up any claim to the property; that since the sale the respective holders of the property had been in the open, notorious and adverse possession thereof under the decree; that the complainant had been guilty of laches, and on that account was not entitled to relief. The defendant asked for strict proof of the alleged death and intestacy of the complainant's sister and brother, provided proof of the same should be material. He prayed that it might have the full benefit of all objections to the bill that could have been raised and availed of upon demurrer thereto.

Replication was entered and testimony taken, and on June 14, 1893, after final hearing, a decree was entered whereby, "it appearing to the court from an examination of the record in equity cause numbered 3796, referred to in this cause, that there was nothing set forth and contained therein to give the court jurisdiction to sell the real estate described therein," it was ordered and adjudged that the decree entered in the said cause was null and void; that the deeds made under that decree were void and passed no title; that the defendant had no title to parcel 15 at the time of the condemnation, and was not entitled to the proceeds thereof; that the defendant's plea of laches be not sustained; and that the fund in the registry of the court be paid to the complainant, his solicitor of record, or assigns.

Duncanson thereupon appealed to the Court of Appeals of the District of Columbia, where the decree of the court below was reversed. Manson then appealed to this court.

*Mr. Walter H. Smith* for appellant. *Mr. Charles H. Armes* was on his brief.

Opinion of the Court.

*Mr. William F. Mattingly* for appellee. *Mr. Henry Wise Garnett* was on his brief.

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

The only matter for our consideration relates to the validity of the decree of the Supreme Court of the District of Columbia of May 18, 1875, ratifying and confirming the sale of the property in dispute, and that depends upon the solution of the question whether that court had jurisdiction of the person of Frederick L. Manson and of the subject-matter of the suit in which the decree was entered.

There was no service of a subpœna upon Frederick L. Manson, but there was an appointment of a guardian *ad litem* by commissioners appointed by the court; and an answer was taken and filed by such guardian. Such a method of appointment of a guardian *ad litem* is spoken of in *United States Bank* v. *Ritchie*, 8 Pet. 128, as according to the most approved usage. A full discussion of this subject and of the law as it existed in Maryland prior to the erection of the District of Columbia will be found in the case of *Snowden* v. *Snowden*, 1 Bland, Ch. 550; and the case of *Hammond* v. *Hammond*, 2 Bland, Ch. 306, 350; and wherein the practice of bringing in a non-resident minor by the appointment of a guardian *ad litem*, and thus subjecting him to a decree for the partition of land, and for the sale of lands to pay the debts of a decedent, is recognized as usual and proper.

In the case of *Insurance Co.* v. *Bangs*, 103 U. S. 435, this court held that it was not competent for the Federal courts to appoint a guardian *ad litem* for a non-resident or absent infant, so as to subject him to a purely personal claim. But it was distinctly admitted that where the infant had an interest in real estate within the State or district, the rule was otherwise, and that the power to appoint a guardian *ad litem* in such a case was founded in the general powers of courts of equity. In this case it was said: "Our attention has been called to several cases in the state courts, in which it has been held that a

decree or judgment could not be collaterally attacked, though rendered in a case where a guardian *ad litem* had been appointed without service of process on the infant. Such are the cases of *Preston* v. *Dunn*, 25 Alabama, 507; *Robb* v. *Irwin*, 15 Ohio, 689; and *Gronfier* v. *Puymirol*, 19 California, 629. All of them are illustrative of the position we have stated; they all relate to the interest of the infant in real property in the State."

In the answer, which was sworn to by the guardian, Frederick L. Manson said that he was an infant under twenty-one years of age, that he claimed such interest in the premises as he was entitled to, and submitted such interest to the protection of the court. This answer was subscribed and sworn to on the first day of December, 1874. In his testimony, taken in the present case, Manson claims to have been past twenty-one years of age when that answer was made. If so, as the evidence is clear that he was present when the appointment of the guardian was made, he must be deemed to have regarded the answer as his own, and cannot be heard to repudiate it in a collateral proceeding.

Moreover, it may be claimed with some show of reason that if the trust deeds of 1862 and 1865 really vested the legal title to the land in question in Erastus Poulson, subject to the trusts set forth in those instruments, and such is the theory of the complainant's bill in the present suit, he, as trustee, represented all the parties beneficially interested, and they, even if not parties, are bound by the decree unless it is impeached for fraud or collusion between him and the adverse parties.

In *Shaw* v. *Norfolk County Railroad*, 5 Gray, 162, it was said:

"The rule of equity pleading that all persons interested in the subject-matter of the suit, and whose rights may be affected by a final decree, must be made parties to the bill, is subject to several exceptions, which are as well established as the rule itself. . . . It has been held that, where persons are made trustees for the payment of debts and legacies, a suit may be sustained in which the trustees only are either plaintiffs or defendants, without joining the creditors or legatees for whom

they are trustees, and whose rights and interests are directly involved in the case. *Fenn* v. *Craig*, 3 Y. & Col. Exch. 216.

"Upon this principle, it has been decided by this court that, in a bill concerning the title to the assets of an insolvent debtor, it is sufficient, without joining the creditors, to make the assignees parties, who alone have the right to claim the property, the legal title being in them; and who are authorized and empowered and whose duty it is, to represent the interests of and to act for all the creditors interested in the trust. *Stevenson* v. *Austin*, 3 Met. 724. In like manner it has been determined that a trustee, holding a mortgage in trust for several creditors, may maintain a bill in equity to foreclose, without joining his *cestuis que trustent* as parties."

See also *Winslow* v. *Minnesota & Pacific Railroad*, 4 Minnesota, 313, 317, where it is said: "The principle seems to be well settled that in an action by a creditor to reach trust property, in the hands of administrators or trustees who have the control of, and whose duty it is to protect the property, the *cestuis que trustent* need not be joined as parties. The defence of the trustees is their defence, and their presence in court is not necessary to the protection of their interests."

In the case of *Kerrison, Assignee*, v. *Stewart*, 93 U. S. 155, the question was whether the creditors of an insolvent firm, in whose favor a deed of trust had been executed by the firm, were bound by a decree against the trustee, and this court held that "where a trustee is invested with such powers that his beneficiaries are bound by what is done against him or by him, they are not necessary parties to a suit against him by a stranger to defeat the trust in whole or in part. In such case, he is in court on their behalf; and they, though not parties, are concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party."

With the proper parties before the court, the next question is whether the court had such jurisdiction over the subject-matter of the suit as to protect its decree from attack in a collateral proceeding.

That the bill in this case is collateral in its nature is obvious. It does not seek the correction of errors in the proceedings or

decree in the former case. Its avowed object is to have the former proceedings declared null and void, because taken in a court without jurisdiction of either person or subject-matter.

That the court had jurisdiction to decree the sale of real estate to pay the debts of a deceased debtor and owner is undeniable. The bill contained averments that the complainant was a creditor of the estate of Sarah J. Manson; that the decedent had died intestate as to her real estate situated in the city of Washington and District of Columbia; that the personal estate was inadequate to pay the debts of the decedent; that the decedent, at the time of her decease, was seized of described real estate. These are the usual and necessary allegations of a bill in such a case, and, if found to be true, plainly warranted a decree of sale.

It is true that Erastus Poulson, trustee, was made a party defendant, and that the several deeds of 1862 and 1865, creating and defining the trust, were referred to, and, in effect, made part of the bill, and also copies of the will of the decedent and of letters of administration thereon.

It is claimed, on behalf of the appellant, that the bill did not sufficiently allege the existence of unpaid debts. The allegation in question was as follows:

"Your complainant settled the estate of Sarah J. Manson, deceased, by virtue of certain letters of administration *c. t. a.* issued from the office of the register for the probate of wills and granting letters of administration, in and for the city of Philadelphia, a certified copy of which is hereto annexed and marked Complainant, Exhibit A, as part of this bill; and the personal estate of the said decedent has been fully and finally administered and the same would have proved insufficient and inadequate to pay the debts of the estate, but your complainant made advances out of his own fund to pay the indebtedness of said estate in full, and said advances, together with assets of the estate, paid in full all the just claims filed and proven against said decedent, and your complainant has paid out of his own funds, on said account, over and above assets coming into his hands, the sum of two thousand and fifty-one dollars, which amount is justly due him, and there

remains no fund from which to reimburse him, unless the real estate hereinbefore described be sold, and so much of the proceeds as may be necessary be applied to the payment of your complainant's claim."

We are unable to accept the appellant's contention that these allegations, taken to be true, do not disclose the existence of debts collectible by proceedings in the district court, and that an administrator with the will annexed cannot be reimbursed for advances made by him in the process of settling the estate.

At all events, even if the district court erred in holding that the allegations and proof were sufficient to establish the existence of a collectible debt, such an error did not invalidate the decree so as to subject it to attack by a collateral proceeding.

The next contention, and one that has been ably argued, is that the bill for a sale showed that the court had no jurisdiction of the subject-matter, because it showed that Sarah J. Manson, the decedent, had no interest in the realty at the time the bill was filed; that she had had a life estate only.

It must be conceded that if the property sold was not owned by the decedent, and was not subject to her debts, the decree of sale was void; and it must also be conceded that, by the allegations of the bill, the court was obliged to take notice of the contents and legal import of the deed creating and defining Poulson's estate as trustee.

It is admitted that the real estate in question was paid for by moneys belonging to Mrs. Manson; that, under the terms of the trust deeds, she had the right to occupy the premises, and to receive the rents and profits thereof for her sole and separate use, her receipt alone being a valid discharge for such rents and profits; that it should be lawful for her, at any time, and from time to time, during her life to dispose of said premises either by absolute sale or mortgage thereof as she might think proper; that, in default of any such sale or mortgage, or so far as the same shall not extend, upon further trust for such person or persons, and for such estate and in such parts, shares and proportions, as she, the said Sarah J.

Manson, should or might, from time to time, by any deed or instrument of writing, or by her last will and testament, under her hand and seal (which will she was authorized to make), limit, direct or appoint, give or devise the same; and in default of any such limitation, direction and appointment, gift or devise, in trust for such child or children as she should leave surviving her and the issue of any deceased child, such issue taking his, her or their parent's or parents' share; and for default of all such children or issue, then in trust for the right heirs of the said Sarah J. Manson forever; and that all money which should or might be raised by sale or mortgage of the said premises or any part thereof should be paid to the said Sarah J. Manson and be disposed of as she should or might think best, her receipt being a valid discharge therefor, the party paying the same not being bound to see to the application or disposition thereof.

The record does not inform us upon what view of the legal import of these provisions the district court proceeded in awarding the decree of sale. It may have been thought that such a trust did not protect the real estate described from the creditors of Sarah J. Manson, either during her life or at her death. *Nichols* v. *Eaton*, 91 U. S. 716. Or the court may have regarded the will of Sarah J. Manson, though not so executed as to permit it to be proven in the District of Columbia, as a sufficient exercise of the power of appointment, in which case, according to a rule well established in England and in this country, where a person has a general power of appointment, either by deed or will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. *Clapp* v. *Ingraham*, 126 Mass. 200; *Brandies* v. *Cochrane*, 112 U. S. 344.

We do not wish to be understood as intimating that either of such views would have been a sound construction of the trust deed; but we do say that these were questions before the district court for decision, and if any error was committed by that court the remedy was by appeal or by a bill of review if duly filed.

Opinion of the Court.

We adopt the language and reasoning of the Court of Appeals in this case:

"It is certainly the policy of the law to maintain judicial sales, and every reasonable inducement should be indulged to uphold them, otherwise the public would become distrustful, and fair prices for property sold under judicial authority would seldom be obtained. Purchasers, while they are required to take notice of the existence and terms of the decrees or judgments under which they purchase, and as to the parties bound thereby, cannot be required to become judicial critics, and to pass in review, at their peril, upon the correctness of the proceedings upon which the judgments or decrees may be founded. As was pertinently said by the Supreme Court of the United States, in the case of *Thompson* v. *Tolmie*, 2 Pet. 168: 'After a lapse of years, presumptions must be made in favor of what does not appear. If the purchaser was responsible for the mistakes of the court, in point of fact, after they had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser is not bound to see whether the court was mistaken in the facts of debts and children. The decree of the orphans' court in a case within its jurisdiction is reversible only on appeal, and not collaterally in another suit. When a court has jurisdiction it has a right to decide every question that may arise in the cause; and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court.'

"These principles apply in all respects and with special force in this case. It was for the court whose decree is attempted to be impeached, not only to decide on the facts before it, but upon the construction and legal effect of all deeds and muniments of title upon which the proceeding was based. The court having general jurisdiction over the subject-matter of decreeing the sale of real estate of a deceased debtor for the payment of debts, it had the right and was required to determine the question as to the liability of the property for the debts, and whether the case was within its jurisdiction; and though its decision may have been erroneous, it could only be reversed upon a direct appeal."

"It is of no avail," said this court in *Cooper* v. *Reynolds*, 10 Wall. 308, "to show that there are errors in the record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court and by all courts, and it takes rank as an axiom of the law."

And in *Cornett* v. *Williams*, 20 Wall. 226, it was declared that "the settled rule of law is that jurisdiction having attached in the original case everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

Having concluded that the district court had jurisdiction over the parties and the subject-matter, and that its decree cannot be successfully impeached in this collateral proceeding, it is unnecessary to consider other questions suggested in the record and discussed in the briefs of the counsel.

The decree of the Court of Appeals is

*Affirmed.*

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## *In re* LENNON.

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

No. 254. Submitted March 30, 1897. — Decided April 19, 1897.

Parties to collateral proceedings are bound by the jurisdictional averments in the record, and will not be permitted to dispute them except so far as they may have contained a false recital with respect to such parties.

Where the requisite citizenship appears on the face of a bill, the jurisdiction of the court cannot be attacked by evidence *dehors* the record, in a collateral proceeding by one who was not a party to the bill.

A bill brought solely to enforce compliance with the Interstate Commerce Act, and to compel railroad companies to comply with such act by offering proper and reasonable facilities for interchange of traffic with the company, complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any cars which might be tendered them, exhibits a case arising under the Constitution and laws of the United States of which a Circuit Court has jurisdiction.

Statement of the Case.

To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice.

THIS was a petition for a writ of *habeas corpus* originally filed in the Circuit Court for the Northern District of Ohio.

The petitioner alleged that he was a citizen of the State of Ohio, and was unlawfully restrained of his liberty by the marshal, under an order of the Circuit Court of the United States, made in a case pending in that court, wherein the Toledo, Ann Arbor and North Michigan Railway Company, a corporation of the State of Michigan, was complainant, and several railway companies, citizens of Ohio, as well as the Michigan Central Railroad Company, a citizen of Michigan, were defendants.

The bill in that case, which was annexed to the petition as an exhibit, averred the complainant to be the owner of a line of railroad from Toledo, Ohio, northwesterly through the State of Michigan; that a large part of its business consisted in the transportation of freight cars from points in the States of Michigan, Minnesota and Wisconsin to points in Ohio and other States east thereof, and that it was engaged as a common carrier in a large amount of interstate commerce, which was regulated and controlled by the Interstate Commerce Act of Congress. The bill further averred that the defendants' lines of railroad connected with those of complainant at or near Toledo, and that a large and important part of its business consisted in the interchange of freight cars between the defendant and complainant companies, and was subject to the provisions of the Interstate Commerce Act; that it was the duty of the defendant companies to afford reasonable and equal facilities for the interchange of traffic, and to receive, forward and deliver freight cars in the ordinary transaction of business, without any discrimination; that the defendant companies, and their employés, had given out and threatened that they would refuse to receive from complainant cars billed over its road for transportation by complainant to their destination, for the reason that the complainant had employed

as locomotive engineers in its service men who were not members of the Brotherhood of Locomotive Engineers, "an irresponsible voluntary association," and that the locomotive engineers in the employ of the defendant companies had refused to handle cars to be interchanged with the complainant's road; notwithstanding that they continued to afford the other railroad companies full and free facilities for the interchange of traffic, while refusing to transact such business with the complainant, thereby illegally discriminating against it.

Upon the filing of this bill, and upon the application of the complainant, the Circuit Court issued an injunction against the defendants, their officers, agents, servants and employés, enjoining them from refusing to afford and extend to the Toledo, Ann Arbor and North Michigan Railway Company the same facilities for an interchange of interstate business between the companies as were enjoyed by other railway companies, and from refusing to receive from the complainant company cars billed from points in one State to points in another State, which might be offered to the defendant companies by the complainant.

The injunction was served upon the Lake Shore and Michigan Southern Railway Company, one of the defendants, one of whose employés was the appellant, James Lennon, a locomotive engineer, who had received notice of the injunction, and, still continuing in the service of the company, had refused to obey it.

Thereupon the Lake Shore company applied to the court for an attachment against Lennon, and certain others of its engineers and firemen, setting forth that, with full knowledge of the injunction theretofore made, they had refused to obey the order of the court, and deserted their locomotives and engines in the yard of the company, for the reason that Ann Arbor cars of freight were in the trains of such company, and that they had refused to haul such cars and perform their service for that reason.

The persons named, including the petitioner Lennon, being served with an order to show cause, appeared in pursuance of

Statement of the Case.

such order in person and by counsel, and witnesses were examined as to their knowledge of, and as to their violation of, the order. The court found that Lennon was guilty of contempt in disobeying the order of injunction, and imposed a fine of fifty dollars and costs. *Toledo, Ann Arbor & North Michigan Railway Co.* v. *Pennsylvania Co.*, 54 Fed. Rep. 746.

Thereupon Lennon filed this petition, setting forth the above facts, and alleging that the Circuit Court had no jurisdiction or lawful authority to arrest or proceed against him in manner as aforesaid, and that its order and judgment — whereby he was committed to the custody of the marshal — were without authority of law and void: (1) that such order was issued in a suit whereof the Circuit Court had no jurisdiction, because the complainant and one of the defendants, namely, the Michigan Central Railroad Company, were, at the time of the filing of the bill, and ever since have been, citizens of the same State, and that said suit did not arise under the Constitution and laws of the United States; (2) that the Circuit Court had no jurisdiction of the person of the petitioner, because he was not a party to the suit, nor served with any subpœna notifying him of the same; had no notice of the application for the injunction, nor was served with a copy thereof; nor had any notice whatever of the issuing of such injunction; nor of its contents; (3) that the Circuit Court was also without jurisdiction to make the order, because it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service and to interfere, by mandatory injunction, with the contract between himself and the Lake Shore and Michigan Southern Railway Company.

Upon a hearing in the Circuit Court it was ordered that the petition be dismissed. Lennon, after appealing to this court, which held it had no jurisdiction and dismissed the appeal, 150 U. S. 393, thereupon appealed to the Circuit Court of Appeals for the Sixth Circuit, which affirmed the decree of the Circuit Court, *Lennon* v. *Lake Shore &c. Railway Co.*, 22 U. S. App. 561, whereupon petitioner applied for and obtained a writ of certiorari from this court.

*Mr. G. M. Barber*, *Mr. Walter H. Smith*, *Mr. Frank H. Hurd* and *Mr. James H. Southard* for Lennon.

*Mr. George C. Greene* for Lake Shore and Michigan Southern Railway Company.

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

The only question which can properly be raised upon this writ is whether the Circuit Court exceeded its jurisdiction in holding the petitioner for a contempt and in imposing upon him a fine therefor. We are not at liberty to consider the testimony, or to inquire whether the facts, as they appeared upon the hearing, justified the action of the Circuit Court. It is only upon the theory that the proceedings and judgment of the court were nullities that we are authorized to reverse its action. It has been too frequently decided, to be now open to question, that a writ of *habeas corpus* cannot be made use of to perform the functions of a writ of error or an appeal. *Ex parte Kearney*, 7 Wheat. 38, 43; *Ex parte Terry*, 128 U. S. 229; *Ex parte Cuddy*, 131 U. S. 280; *Nielsen, Petitioner*, 131 U. S. 176; *Ex parte Tyler*, 149 U. S. 164, 167; *United States* v. *Pridgeon*, 153 U. S. 48.

Acting upon this theory, the petitioner claims that the Circuit Court exceeded its jurisdiction in adjudging him guilty of contempt, for the reason that it had no jurisdiction of the original bill, because one of the defendants to such bill was a citizen of the same State with the complainant; because petitioner was not a party to the suit and was never served with a subpœna or the injunction; and, finally, because it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service.

1. The original bill averred the complainant — the Toledo, Ann Arbor and North Michigan Railway Company — to be a corporation and citizen of the State of Michigan, and the several railway companies defendant to be citizens either of Pennsylvania or Ohio; and there is nothing in the record of

that case to show that this averment was not true. It only appears to be otherwise by an allegation in the petition for the *habeas corpus;* and the question at once arises whether, where the requisite citizenship appears upon the face of the bill, the jurisdiction of the court can be attacked by evidence *dehors* the record in a collateral proceeding by one who was not a party to the bill. We know of no authority for such action. The general rule is that parties to collateral proceedings are bound by the jurisdictional averments in the record, and will not be permitted to dispute them except so far as they may have contained a false recital with respect to such parties. Doubtless the averments with regard to citizenship might have been directly attacked by any one who was a party to that suit. But this cannot be done upon *habeas corpus. Michaels* v. *Post*, 21 Wall. 398; *Hudson* v. *Guestier*, 6 Cranch, 281; *McCormick* v. *Sullivant*, 10 Wheat. 192, 199; *Thompson* v. *Tolmie*, 2 Pet. 157; *Ex parte Watkins*, 3 Pet. 193; *Grignon's Lessee* v. *Astor*, 2 How. 319; *United States* v. *Arredondo*, 6 Pet. 691, 709; *Florentine* v. *Barton*, 2 Wall. 210; *Comstock* v. *Crawford*, 3 Wall. 396; *Dyckman* v. *New York*, 5 N. Y. 434; *Jackson* v. *Crawford*, 12 Wend. 533; *Betts* v. *Bagley*, 12 Pick. 572; *Fisher* v. *Bassett*, 9 Leigh, 119, 131; *Dowell* v. *Applegate*, 152 U. S. 327.

Irrespective of this, however, we think the bill exhibited a case arising under the Constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the Interstate Commerce Act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any cars which might be tendered them. It has been frequently held by this court that a case arises under the Constitution and laws of the United States, whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him, and the correct decision of the case depends upon the construction of such laws. As was said in *Tennessee* v. *Davis*, 100 U. S. 257, 264:

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted." See also *Starin* v. *New York*, 115 U. S. 248, 257; *Kansas Pacific Railroad* v. *Atchison, Topeka &c. Railroad*, 112 U. S. 414; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Railroad Co.* v. *Mississippi*, 102 U. S. 135.

2. The facts that petitioner was not a party to such suit, nor served with process of subpœna, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. High on Injunctions, § 1444; *Mead* v. *Norris*, 21 Wisconsin, 310; *Wellesley* v. *Mornington*, 11 Beav. 181.

Conceding the question whether he had such notice in this case to be open to review here, we are of opinion that upon the facts appearing in this record this question must be answered, as it was answered in the court below, in the affirmative. The testimony upon this point is fully set forth in the opinion of the Circuit Court, 54 Fed. Rep. 746, 757, and it establishes beyond all controversy that Lennon had notice and knowledge of the injunction.

It appears that, immediately after the injunction order was granted and served upon the Lake Shore company, the company had copies of the order printed, and attached thereto a notice, signed by its superintendent, calling the attention of employés to the injunction; that printed copies of the injunction and notice were posted on all the bulletin boards at roundhouses where engineers took their engines, and that it was the duty of engineers to examine all notices so posted before starting on their runs. That on the morning of the 18th of March, Lennon was upon his engine at Alexis, mak-

ing a run with his train from Monroe to Toledo; that on his arrival at Alexis, and before he refused to receive and haul the Ann Arbor car, Mr. Chillcote, an agent of the Lake Shore Company, handed to him (Lennon) a printed copy of said injunction order, and the notice signed by the general superintendent, and he received and examined them.

Mr. Chillcote says: "I handed him these papers and he said he had seen the order; that it was posted somewhere; I think at the roundhouse, I think at Detroit. I wouldn't say positive as to that; but he said he had seen a copy of it. . . . I simply handed it to him, and he said, 'We understand the order,' or 'We have seen the order,' or words to that effect." Chillcote further says: "He stated when I handed him the order, before he read it, that he understood it."

Mr. Keegan testified that he was present when the copy of the order was handed to Lennon, and that he said, "I have seen it before." This occurred about 10 o'clock A.M., and Lennon, after having the copy of the order delivered to him and admitting that he had seen it before and understood it, refused to receive the Ann Arbor car until after 2.30 P.M., when he received a telegram from Mr. Watson, an officer of the Brotherhood of Locomotive Engineers, saying, "You can come along and handle Ann Arbor cars," and he then at once proceeded with his train to Toledo, receiving and hauling the Ann Arbor car.

3. To the objection that it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service, and to interfere by mandatory injunction with petitioner's contract with the railway company, it is sufficient to say that nothing of the kind was attempted. The petitioner, as one of the employés of the Lake Shore railway, was enjoined from refusing to extend to the Ann Arbor railway such facilities for the interchange of traffic on interstate commerce business between such railways as were enjoyed by other companies, and from refusing to receive from the Ann Arbor company cars billed from points in one State to points in other States. No attempt was made to interfere with peti-

tioner's contract with his own company, or to compel a continuance of his service in such company. There could be no doubt of the power of the court to grant this injunction, which bore solely upon the relations of the railway companies to each other. It was alleged in the bill to have been a part of the regular business of the defendant roads to interchange traffic with the Ann Arbor road, and the injunction was sought to prevent an arbitrary discontinuance of this custom. Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it. *Robinson* v. *Lord Byron*, 1 Bro. C. C. 588; *Hervey* v. *Smith*, 1 Kay & Johns. 389; *Beadel* v. *Perry*, L. R. 3 Eq. 465; *Whitecar* v. *Michenor*, 37 N. J. Eq. 6; *Broome* v. *New York & New Jersey Telephone Co.*, 42 N. J. Eq. 141.

It appears from the testimony in this case that Lennon was on his run as engineer from Detroit, Michigan, to Air Line Junction, near Toledo, with a train of forty-five cars. Having reached an intermediate station called Alexis, he was ordered to take on an empty car from the Ann Arbor road. He refused to take the car into the train and held the train there for five hours, and then proceeded on his run after receiving a dispatch from the chairman of a committee of the Engineer Brotherhood instructing him to "come along and handle Ann Arbor cars." When he first received the order at Alexis to take the Ann Arbor car he refused, and said, "I quit," but afterwards agreed with the superintendent of the division to take the train to its destination if the order to take the boycotted car was countermanded. Though he claimed to have quit at Alexis at about 10 o'clock he brought his train to its destination, and when told what his next run would be gave no notice of having quit or intending to quit.

It is not necessary for us to decide whether an engineer may

suddenly and without notice quit the service of a railway company at an intermediate station or between stations, though cases may be easily imagined where a sudden abandonment of a trainload of passengers in an unfrequented spot might imperil their safety and even their lives. It is sufficient, in the present case, to observe that the court found, upon the testimony, that the petitioner did not quit in good faith in the morning, but intended to continue in the company's service, and that his conduct was a trick and device to avoid obeying the order of the court.

The finding of the court in this particular is not open to review, and hence the question whether the court has power to compel the performance of a personal contract for service does not arise. It was a question for the court to determine whether the petitioner's action in delaying the train five hours at Alexis was taken in pursuance of a determination to abandon the service of the company, or for the purpose of disobeying the lawful injunction of the court. The finding of the court was against the petitioner upon that point.

There was no error in the judgment of the Court of Appeals, and it is, therefore,

*Affirmed.*

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## CITY RAILWAY COMPANY *v.* CITIZENS' STREET RAILROAD COMPANY.

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

No. 214. Argued March 16, 17, 1897.—Decided April 19, 1897.

The Citizens' Street Railway Company of Indianapolis was organized in 1864 under an act of the legislature of Indiana of 1861, authorizing such a company to be "a body politic and corporation in perpetuity." January 18, 1864, the common council of that city passed an ordinance authorizing the company to lay tracks upon designated streets, and providing that "the right to operate said railway shall extend to the full time of thirty years," during which time the city authorities were not to extend to other companies privileges which would impair or destroy the rights

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so granted. In April, 1880, the common council amended the original grant "so as to read thirty-seven years where the same now reads thirty years." The company, desiring to issue bonds to run for a longer period than the thirty years, had, for that purpose, petitioned the common council for an extension to forty-five years. The city government was willing to extend to thirty-seven years, and this was accepted by the company as a compromise. On the 23d of April, 1888, the road and franchises were sold and conveyed to the Citizens' Street Railroad Company, which sale and transfer were duly approved by the city government. December 18, 1889, a further ordinance authorized the use of electric power by the company, and provided how it should be applied. In accordance with its provisions the company, at great expense, built a power house, and changed its plant to an electric system. In April, 1893, the city council, claiming that the rights of the company would expire in thirty years from January 18, 1864, granted to another corporation called the City Railway Company the right to lay tracks to be operated by electricity in a large number of streets then occupied by the tracks of the Citizens' Street Railroad Company, whereupon a bill was filed in the Circuit Court of the United States by the Street Railroad Company against the City Railway Company, to enjoin it from interrupting or disturbing the railroad company in the maintenance and operation of its car system, alleging that the action of the city council sought to impair, annul and destroy the obligation of the city's contract with the plaintiff. *Held*,

(1) That the Circuit Court had jurisdiction, although both parties were corporations and citizens of Indiana;

(2) That the right of repeal reserved to the legislature in the act of 1861 was not delegated to the city government;

(3) That the circumstances connected with the passage of the amended ordinance of April 7, 1880, operated to estop the city from denying that the charter was extended to thirty-seven years;

(4) That the continued operation of the road was a sufficient consideration for the extension of the franchise;

(5) That the Citizens' company had a valid contract with the city which would not expire until January 18, 1901, and that the contract of April 24, 1893, with the City Railway Company was invalid;

(6) But no opinion was expressed whether complainant was entitled to a perpetual franchise from the city.

This was a bill in equity by the Citizens' Street Railroad Company to enjoin the appellant from interrupting or disturbing complainant in the construction, operation and maintenance of its street car system in the city of Indianapolis, and for the establishment of complainant's rights and the quieting of its title in that connection.

The facts of the case are substantially as follows: In 1861,

the general assembly of the State of Indiana passed an act authorizing the incorporation of street railway companies, the second section of which act provided that the stockholders in such companies, and their successors, should be "a body politic and corporate *in perpetuity*, by the name stated in the articles of association"; and the eleventh and twelfth sections of which were as follows:

"SEC. 11. This act may be amended or repealed at the discretion of the legislature.

"SEC. 12. Nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities; and all street railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common council to the location, survey and construction of any street railroad through or across the public streets of any city before the construction of the same shall be commenced."

Pursuant to this act, the Citizens' Street Railway Company was organized January 15, 1864, and on January 18, 1864, the common council of Indianapolis passed an ordinance, the first, third and fifteenth sections of which contained the following:

"SECTION 1. *Be it ordained by the common council of the city of Indianapolis*, That under and by virtue of an act of the general assembly of the State of Indiana, entitled, 'An act to provide for the incorporation of street railroad companies,' approved June 4, 1861; and by virtue of the powers and authority of the common council otherwise by law vested, consent, permission and authority are hereby given, granted and duly vested unto the company organized with R. B. Catherwood as president, a body politic and corporate by the name of the Citizens' Street Railway Company of Indianapolis, and their successors, to lay a single or double track for passenger railway lines, with all the necessary and convenient tracks for turnouts, side tracks and switches, in, upon and along the course of the streets and alleys of the city of Indianapolis hereinafter mentioned; and to keep, maintain, use

and operate thereon railway cars and carriages in the manner and for the *time* and upon the conditions hereinafter prescribed."

"SEC. 3. The cars to be used on such tracks shall be operated with animal power only. . . ."

"SEC. 15. The right to operate said railway shall extend to the full time of thirty years from the passage hereof; and the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein granted to the said company. . . ."

The second section of this ordinance named certain streets upon which the company was authorized to lay its tracks, and in the following year (1865) a supplemental ordinance was passed giving to the company the right to lay its tracks upon all the streets or roads within the corporate limits of the city, and providing, in section 4, "that in laying, constructing and operating" the same, the company should be governed by the provisions of the ordinance of January 18, 1864.

The Citizens' Street Rail*way* Company constructed and operated its plant until April 23, 1888, when it was sold and conveyed to the complainant, the Citizens' Street Rail*road* Company.

On April 7, 1880, the common council passed another ordinance supplemental to that of 1864, providing that section 15 of that ordinance should be amended so as "to read thirty-seven years, where the same now reads thirty."

On April 23, 1888, an ordinance was passed approving the sale and transfer of the railway company to the railroad company, and on December 18, 1889, a further ordinance was passed, supplementary to that of January 18, 1864, authorizing the use of electric power, and providing the manner in which it should be applied. This ordinance was formally accepted by the railroad company on January 4, 1890. The company thereupon proceeded at very great expense to build a power house and change its plant to an electric system.

In 1893 a dispute arose between the board of public works

of the city and the president and directors of the complainant over the question whether complainant's franchise would expire on January 18, 1894, thirty years from its date.

On February 6, 1893, a further ordinance was passed declaring it to be unlawful for any person or corporation to cut or dig into a paved street without first obtaining from the board of public works a written permit so to do.

On April 24, 1893, pursuant to an act of the general assembly of the State quoted in the opinion, the city, through its board of public works, entered into a contract with the defendant — the City Railway Company — giving it permission to lay its tracks for street railway lines to be operated by electricity, or other improved power, through a large number of streets, most of which were already occupied by the lines of the complainant company. This contract was approved upon the same day by the common council, and was accepted by the defendant.

The bill averred that it was impossible that electric cars, other than complainant's, could be operated on such streets without their practical destruction as thoroughfares for public travel. It further set forth certain acts on the part of the city, which are alleged to be part of a plan of the city authorities, in combination with the defendant, to prevent it from making extensions and improvements and from operating its lines of railway; and that they, the city and the defendant, were asserting the right of the city to disregard and set aside, by the exercise of the legislative power conferred upon its common council by the legislature of the State in the charter of 1891, a contract duly entered into and existing between the State and the complainant under its charter, and between the city and the complainant, thereby seeking to impair, annul and destroy the obligation of such contracts in violation of the Constitution of the United States. This bill was filed on May 11, 1893, within a month after the contract and ordinance of April 24.

A motion was made to dismiss the bill upon the ground of the want of jurisdiction in the Circuit Court, which was denied. 56 Fed. Rep. 746. The bill was subsequently amended, and

the case being put at issue upon an answer and replication, came on to be heard upon the pleadings and proofs, and resulted in a decree, in accordance with the prayer of the bill and the opinion of the presiding judge, forever enjoining the defendant from disturbing the complainant in the enjoyment of its rights to the streets, occupied by it at the time of the commencement of the suit, and declaring the contract and ordinance of April 24, 1893, to be void, in so far as they attempted to confer upon the defendant company any right to the streets occupied by the complainant at the commencement of the suit. 64 Fed. Rep. 647. From this decree an appeal was taken to this court.

*Mr. Addison C. Harris* for appellant.

*Mr. P. C. Knox* and *Mr. Benjamin Harrison* for appellee. *Mr. W. H. H. Miller*, *Mr. F. Winter* and *Mr. John B. Elam* were on their brief.

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

This case involves the right of the Citizens' Street Railroad Company of Indianapolis to operate a street railroad upon the streets upon which it had constructed its tracks at the commencement of this suit, as well as the validity of a certain contract, and ordinance ratifying the same, between the city and the City Railway Company, in so far as the city attempted to confer upon that company a right to lay its tracks upon the streets already occupied by the complainant, or to abridge its rights in the use of such streets.

1. There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the general assembly of

1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. Conceding that the legislature of the State alone had the right to make such grant, "it may," as was observed in *Wright* v. *Nagle*, 101 U. S. 791, 794, "exercise its authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is directly or indirectly the act of the State. The easement is a legislative grant, whether made directly by the legislature itself or by any one of its properly constituted instrumentalities." "The complainants claim," as in the case under consideration, "they have such a grant through the agency of the inferior court, acting under the authority of the legislature." See, also, *Saginaw Gas-Light Co.* v. *Saginaw City*, 28 Fed. Rep. 529; *Weston* v. *Charleston*, 2 Pet. 462; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674.

That the complainant had a contract with the city is entirely clear. It was so held by the Supreme Court of Indiana in the *Western Paving & Supply Co.* v. *Citizens' Street Railroad Co.*, 128 Indiana, 525, in which the liability of the company for certain street improvements was discussed and passed upon. It is true that, by section eleven of the original act of 1861, a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street railway companies; but that was a right reserved to the general assembly itself and was never delegated, if in fact it could be delegated, to the common council of the city.

That the city did attempt to impair this contract by the

agreement of April 24, 1893, with the City Railway Company, and its ordinance ratifying the same, is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the general assembly of March 6, 1891, known as the City Charter, the fifty-ninth section of which enacted that "the board of public works shall have power . . . to authorize and empower by contract telephone, telegraph, electric light, gas, water, steam, or street car or railroad companies to use any street, alley or other public place in such city; . . . provided, that such contracts shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect." This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the act of 1861, and the ordinance of January 18, 1864, without coming in conflict with that provision of the Constitution which forbids States from enacting laws impairing the obligation of contracts. Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Water Co.*, 142 U. S. 79, 88.

Even if the charter were held to have expired on January 18, 1894, — thirty years from its date, — it would not have necessarily affected the jurisdiction of the court to entertain this bill, since it was filed eight months before that time, although it might have affected the right of the complainant to a decree.

Did the act of 1891, known as the new charter, repeal the act of 1861 authorizing the incorporation of railway companies? In other words, should it be construed as an exercise of the power, reserved to the State in the eleventh section of the act of 1861, to amend or repeal that act at the discretion of the legislature? As the act of 1891 practically established a new system and vested the whole power of the legislature

over street railway companies in the board of public works of the several cities therein named, subject to the approval of the common council of such cities, perhaps it might be construed to repeal the former, so far as there was a conflict between the two acts; but it certainly should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction. While it was doubtless intended to authorize the board of public works of the cities covered by the act to contract for the use of their streets by railway companies, there is nothing from which can be inferred a power to disturb or interfere with contracts already existing — indeed, it is highly improbable that it would ever have delegated such a power to a subordinate body. There is always a presumption that statutes are intended to operate prospectively only, *Shreveport* v. *Cole*, 129 U. S. 39, and we see nothing in this statute to rebut such presumption.

2. In arguing the case upon the merits, complainant insisted with great earnestness that inasmuch as the act of 1861, providing for the incorporation of street railway companies, had declared, in section two, that the stockholders in the companies organized under that act, and their successors, should be "a body politic and corporate in perpetuity, by the name stated in the articles of association," the common council of Indianapolis, which by section twelve must have given its consent "to the location, survey and construction" of any street railway before the construction of the same could be commenced, had no power in its ordinance of January 18, 1864, to limit the right of the complainant to operate its railway to the term of thirty years; and that such ordinance, though valid, in so far as it gave consent to build and operate the railway, was invalid, in so far as it attempted to abridge the franchise granted by the general assembly, which existed in perpetuity. We do not, however, find it necessary to express an opinion upon this question, in view of the conclusion we have reached upon the legality of the ordinance of April 7, 1880, amending section fifteen of the original ordinance by extending complainant's franchise from thirty to thirty-seven years.

No question was made respecting the validity of the original ordinance, but the amended ordinance of April 7, 1880, was attacked, principally upon the ground of a want of consideration for the extension of the franchise for seven years. The facts connected with this amendment were substantially as follows: The railway being mortgaged for $200,000, in first mortgage bonds and $100,000 in second mortgage bonds at seven per cent interest, at the time of the purchase by the railroad company, the company was desirous of paying them off, as they were at liberty to do under the mortgages, and of renewing the loan in one mortgage at a lower rate of interest. In negotiating with the proposed purchasers of the bonds it was insisted that the contract with the city ought to be extended, as the proposed new issue of bonds would run beyond the time fixed for the termination of the contract. The manager of the road thereupon applied to the common council for an ordinance amending section fifteen of the original ordinance, by making it read forty-five years instead of thirty years. The committee declined to agree to this, but recommended as a compromise an ordinance fixing the term of the original ordinance at thirty-seven years instead of forty-five years. To this the company finally agreed. Thereupon the common council adopted the ordinance in question.

While this transaction cannot properly be termed a legal consideration for the ordinance, since the negotiation of the new loan was neither a benefit to the city nor a detriment to the railway company, yet we think that the subsequent negotiation of the loan operates against the city by way of estoppel. All that is necessary to create an estoppel *in pais* is to show that, upon the faith of a certain action on the part of the city, which it had power to take, the company incurred a new liability; as, for example, by the negotiation of a new loan, and the issue of a new bond and mortgage to secure the same. Under such circumstances, justice to the bondholders, who have in good faith invested their money in reliance upon the validity of such action, demands that the city shall be held to its contract, notwithstanding there may have been originally no consideration to support it. The consequences

of a different ruling would not only destroy the credit of the company, but might be disastrous to the bondholders, the value of whose investment would depend very largely upon the length of time the bonds were to run. Experience shows that the value of bonds or debentures depends not only upon the sufficiency of the security and the rate of interest, but upon the length of time they have to run and the certainty that they will not, before the expiration of such time, be called in for redemption.

But however this may be, it seems to us that the continued operation of the road may itself be regarded a sufficient consideration for the extension of the franchise. This extension was not a mere gratuity or bounty within the case of *Grand Lodge* v. *City of New Orleans*, 166 U. S. 143, recently decided, but was an agreement to prolong the privilege of occupying the streets of the city, in consideration that the company should continue the facilities already afforded to its citizens. The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose. But this is practically such a case, since it makes no difference in principle whether the road passes into the hands of a new company or is retained by the old one, or whether the extension is granted at the time of or before the original franchise expired. In either case the consideration, viz., the continued operation of the road, is the same. If, instead of extending the original ordinance this ordinance had been surrendered by the com-

pany, and a new one had been enacted by which the franchise was extended, it would hardly be contended that the continued operation of the road would not be a sufficient consideration for the new ordinance. This was, in reality, part of the consideration upon which the original franchise was granted, and is, we think, a valuable consideration within the meaning of the law, and sufficient to support the extension.

This ordinance is also attacked upon the ground that it was never formally accepted by the company. There is really nothing in this contention. No formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the amendment were accepted. There are two circumstances in this case, either of which is sufficient to constitute an acceptance.

Mr. Johnson, the manager of the road, who desired the extension of the charter, applied for an amendment making the original section fifteen read forty-five years instead of thirty years, and in that connection says: "After a good deal of argument I was finally forced to concede to the wishes of the committee, and they recommended to the council an ordinance making it read 'thirty-seven years,' instead of the 'forty-five' we applied for. This ordinance we consented to in committee, and afterwards agreed to with the council, as the best we could do under the circumstances." This was sufficient, as it is universally held that a previous request for an ordinance obviates the necessity of a subsequent acceptance. *Atlanta* v. *Gate City Gas-Light Co.*, 71 Georgia, 106; 1 Morawetz on Corporations, § 23; *Illinois River Railroad Co.* v. *Zimmer*, 20 Illinois, 654; *Lincoln & Kennebec Bank* v. *Richardson*, 1 Maine, 79; *State* v. *Dawson*, 22 Indiana, 272; *Newton* v. *Carbery*, 5 Cranch C. C. 632; *Perkins* v. *Sanders*, 56 Mississippi, 733, 739.

We are also of opinion that an acceptance may be presumed from the fact that the amendment was beneficial to the corporation, *United States* v. *Dandridge*, 12 Wheat. 64, 70; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344; *Commonwealth* v. *Cullen*, 13 Penn. St. 133, 140; *Bangor, Old Town & Milford Railroad* v. *Smith*, 47 Maine, 34, and from the further

fact that it issued its bonds, as was contemplated when the ordinance was applied for, and made them fall due at the expiration of the enlarged franchise.

There is nothing in the so-called electrical ordinance which affects this question. It seems that in December, 1889, the common council adopted an ordinance amendatory of the original ordinance of January 18, 1864, to the effect that "the cars to be used on such tracks shall be operated with animal or electrical power only." The ordinance further provided that "nothing herein contained shall be construed so as to lengthen the term of the franchise, enlarge or in any other way change or affect the rights of the Citizens' Street Railroad Company of the city of Indianapolis, under said ordinance of January 18, 1864, except to authorize the use of electrical as well as animal power."

It was also provided that the appellee should signify its acceptance by writing, within sixty days, filed with the city clerk, which was done.

At this time there was no law of the State permitting electricity to be used, and it is now claimed that the common council exceeded its powers in authorizing this change to be made.

But it seems that on March 3, 1891, a law was enacted by the general assembly, declaring "that any street or horse railroad heretofore or hereafter organized . . . may, with consent of the common council of the city . . . use electricity for motive power." Conceding, although not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity, in the absence of legislative authority so to do, we think the act of 1891 should be construed, not only as conferring a new authority upon the city, but as a ratification of what the city had already done in that direction. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter.

The fact that the ordinance declared that it should not be

so construed as to lengthen the term of the franchise under the ordinance of January 18, 1864, is wholly immaterial, since the ordinance had been amended, changing the original limitation of time from thirty to thirty-seven years. In fact, the ordinance had but a single object, which was to permit the substitution of electric for animal power, and it is scarcely possible that, if either party had understood that the franchise was to expire in January, 1894, four years from the time the electric ordinance was adopted, the complainant company would have entered upon the work of changing its entire system of street railway into an electrical system, and incurred the very large expense necessary for that purpose, knowing that before it could reap any substantial return from such an investment its rights in the streets of the city would expire by limitation. The improbability becomes the more apparent when it is considered that it was under no compulsion to make the change, and might, at its option, have continued the use of horse power until the original franchise had expired.

We are, therefore, of opinion that the complainant company had a valid contract with the city, under the original ordinance of January 18, 1864, as amended by the ordinance of April 7, 1880, which will not expire until January 18, 1901, and that the contract and ordinance of April 24, 1893, with the defendant company is invalid, in so far as it may be construed to interfere with the complainant in the construction, operation and maintenance of its street car system in the city of Indianapolis. But as we are not called upon to express an opinion whether complainant is entitled to a perpetual franchise from the city,

*The decree of the court below must be modified by striking out from the second paragraph the words "without regard to any limitation of time mentioned in any ordinance of the city," and, also, the word "forever," and as so modified it is affirmed.*

Mr. Justice Gray and Mr. Justice White concurred in the result.

Syllabus.

MR. JUSTICE SHIRAS was of opinion that the decree should be affirmed without modification.

MR. JUSTICE HARLAN did not hear the argument or participate in the decision of this case.

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## MOSES *v.* UNITED STATES.

ERROR TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 135. Argued March 24, 25, 1897. — Decided April 19, 1897.

A bond to the United States, conditioned that a property and disbursing officer of the War Department shall faithfully discharge his duties, and faithfully account for public money and property committed to his charge, takes effect on the day when it is accepted by the Government, and is to be regarded as of that date.

When it appears that such a bond, duly signed by sureties, had been offered to the government official, and rejected by him as not bearing seals, and that it was taken away by the property and disbursing officer, the principal, and returned with proper seals, it will be presumed, in the absence of proof to the contrary, that the seals were attached with the consent of the sureties.

The order of the Secretary of War directing the execution of such a bond was one which he had power to make, and, being made, the disbursing officer was bound to have it executed and filed.

The Chief Signal Officer had the right to designate one of the officers under him as a property and disbursing officer to whom should belong the custody of all government property and funds pertaining to the office of the Chief Signal Officer, and he further had the power, under the general direction of the Secretary of War, to provide that such officer should be responsible for the due execution of his official duties ; and, a bond having been given for such faithful performance, and such officer having been guilty of the forgery of vouchers and the embezzling of public moneys officially received by him, such conduct was a plain violation of his duty as such officer, and the condition of the bond, as it plainly covered such conduct, was violated thereby.

A certificate given to such disbursing officer before the discovery of his fraud that his accounts had been examined, found correct and were closed, did not operate to release him or his sureties from liability on the bond.

There was no delay in the commencement of the proceedings against the disbursing officer, which injured the sureties, or operated to release the latter from their liability under the bond.

The transcripts from the books and proceedings of the Treasury Department

Statement of the Case.

were admissible in evidence as sufficient transcripts within Rev. Stat. § 886, and the certificate which certified that the papers annexed thereto were true copies of the originals on file, and of the whole of such originals, was a full compliance with the law.

Under circumstances like those disclosed in this case the account between the Government and its officer may be restated, and the sums allowed him on fraudulent vouchers disallowed.

The judgment recovered against the officer was admissible in evidence in an action against the surety on his bond, although the latter was no party to it.

On the 7th day of December, 1880, First Lieutenant H. W. Howgate, Acting Signal Officer, U. S. Army, sent in his resignation to the Adjutant General, at Washington, through the Acting Chief Signal Officer. At that time there was in existence paragraph 2394, United States Army Regulations, which provided that "An officer retiring from service shall before final payment produce certificates from the several accounting officers of non-indebtedness to the United States, and make an affidavit upon the final voucher, stating in addition the correctness of its several items, the place of his residence, and that he is not indebted to the United States on any account whatever." These certificates were obtained by Lieutenant Howgate, and his resignation was accepted by the President to take effect December 18, 1880. On the 27th of April, 1881, a final payment was made to him of $104, being the balance due him for salary, etc., and his accounts as then appearing on the books of the Government stood balanced. Soon after the date of this final payment it became evident, from examinations made in the books of the Government and by investigations from other sources, that Lieutenant Howgate had perpetrated gross frauds upon the Government by means of fraudulent and forged vouchers, which had been accepted by the Government as genuine, and upon which his certificates for settlements had been made. Upon a restatement being had, in which these false and fraudulent vouchers were omitted from the credits which had been thereby given to him, it appeared that he was a defaulter in the sum of over $133,000. On the 24th of August, 1881, an action was commenced by the Government against him to recover over one hundred

thousand dollars, being the amount of moneys unlawfully drawn on, and obtained by him from the United States Treasury, a list of which was set forth in the "particulars of demand" accompanying the declaration.

Upon affidavits setting up certain facts showing the false and forged character of the vouchers an attachment was issued in the action, and certain property of his was attached.

The defendant appeared by attorney, and finally on the 24th day of May, 1883, upon motion of the district attorney, judgment in favor of the United States against the defendant for want of a plea was granted, and judgment entered in favor of the plaintiff against the defendant for $101,257.08, with interest thereon from August 24, 1881.

By virtue of this judgment the property which had been seized by virtue of the attachment issued in the action was sold, and the sum of $28,000 was realized upon such sale, and the amount thereof credited upon the judgment.

This present action was commenced on the 29th of September, 1884, on a bond alleged to have been executed by the defendants named in the action, being Henry W. Howgate, William B. Moses and Lebbeus H. Rogers. Of these defendants Mr. Moses was the only one served with process.

The original declaration contained but one count, and alleged that the defendants "on the 2d day of April, in the year of our Lord one thousand eight hundred and seventy-eight, at the district aforesaid, by their certain writing obligatory, of that date, sealed with their seals, and now here in court produced, jointly and severally bound and acknowledged themselves to be indebted to the plaintiff in the sum of twelve thousand dollars, to be paid to plaintiff on demand, yet though requested, the said defendants have never paid the same to plaintiff, but have wholly neglected and refused, and still do neglect and refuse, so to do." Judgment for the sum was then demanded.

The bond sued on was introduced in evidence upon the trial, and reads as follows:

"Know all men by these presents, that we, Henry W. Howgate, 1st lieut. 20th U. S. Infantry, William B. Moses,

Washington, D. C., and Lebbeus H. Rogers, New York City, New York, are held and firmly bound unto the United States of America in the sum of ($12,000) twelve thousand dollars, lawful money of the United States, to be paid to the United States; for which payment well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, for and in the whole, jointly and severally, firmly by these presents.

"Sealed with our seals. Dated the — day of March, in the year of our Lord one thousand eight hundred and seventy-eight, and of the independence of said States the one hundred and second.

"The condition of this obligation is such that whereas the above-bounden First Lieut. Henry W. Howgate, 20th Inf't'y, has been assigned to duty as a property and disbursing officer, Signal Service, U. S. A., ——— has accepted said assignment:

"Now, if the said 1st Lieut. Henry W. Howgate, 20th Infantry, shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of Signal Service, U. S. Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue.

"Henry W. Howgate. [Seal.]
Lebbeus H. Rogers. [Seal.]
W. B. Moses. [Seal.]

"Signed and delivered in presence of —
"James A. Swift,
Anson Maltby,
*Witnesses as to Lebbeus H. Rogers.*
James A. Swift,
*Witness as to W. B. Moses.*"

The bond contained also the justification of Mr. Rogers, as surety, and purported to have been sworn to in the city of

New York on the 13th day of March, 1878. It also contained the justification of Mr. Moses, as surety, and purported to have been sworn to by him on the 14th day of March, 1878, at Washington, D. C. The bond also contained the indorsement of Chief Justice Cartter of the Supreme Court of the District of Columbia, certifying that satisfactory evidence of the sufficiency of the sureties to the bond had been given and that he approved the same.

A second count to this declaration was subsequently added, in which the appointment of the defendant Howgate to the Signal Office at Washington, his assignment to duty there as property and disbursing officer, the execution of the bond bearing date the — day of March, 1878, its delivery and the condition contained in such bond, the receipt of a large amount of public moneys, and the failure to expend and honestly account for the sum of one hundred and thirty-three thousand and odd dollars, were all set forth at length and in detail.

The defendant Moses filed several pleas, setting forth substantially the defences: (1) that the alleged writing was not his bond; (2) that it was extorted from Howgate without any authority of law; (3) that there was no such office created by law as was mentioned in the bond, and no duties pertaining to the office prescribed by law or by any regulation or order of any department or officer, and that the alleged bond was void for uncertainty; (4) that the accounting officer of the Treasury had duly settled the accounts of Howgate and issued to him a certificate of non-indebtedness to the United States, of which the defendant Moses had notice, which discharged him from liability as surety on the bond; (5) that Howgate had kept and performed the condition of the bond.

Prior to the trial and on the 2d of May, 1892, Moses died, and the suit was continued against his administrators. The trial commenced on the 22d of March, 1893. To maintain its case the Government gave evidence as to the organization of the Signal Service. It then offered in evidence a duly certified copy of the order, dated April 18, 1868, from the Adjutant General's Office, directing Lieutenant Howgate to report

for duty to the Chief Signal Officer of the Army. Also a duly certified copy of the order from the office of the Chief Signal Officer of the Army, dated Washington, July 25, 1876, stating that "First Lieutenant H. W. Howgate, 20th Infantry, Brevet Captain, U. S. A., Acting Signal Officer's assistant, is hereby assigned to duty 'as property and disbursing officer' at this office, together with such other duties as may be assigned to him." Also copy of a letter of Howgate's, dated Washington, March 26, 1878, addressed to the Secretary of War, in which he said: "In compliance with what I understand to be the wishes of the department, I have the honor to enclose herewith a bond similar in amount and form to that given by a captain of the commissary department."

It appears from the record that this bond was referred by the War Department on the 27th of March, 1878, to the Judge Advocate General for an opinion as to its sufficiency and form; that on the same day it was returned to the Secretary of War by the Judge Advocate General, with a communication that the bond was in due form, "except in that it wants the formal seals required to be affixed to the signatures of the obligor and sureties, by standing order of the War Department of June 11, 1869." Whereupon on the 29th of March, 1878, the bond was returned to Lieutenant Howgate, by order of the Secretary of War, "to have the proper seals affixed." On the 1st of April, 1878, the bond was returned to the War Department, accompanied by a written communication, signed by Lieutenant Howgate, in which he said that the bond was "respectfully returned to the Honorable Secretary of War with seals affixed as per instructions." Thereupon, and on the 2d day of April, 1878, the bond was approved. The Government then called the subscribing witness to the bond as to Howgate and Moses. The witness proved their signatures, and that they executed the bond at the Signal Office in Washington, March 14, 1878. The witness thought, though he was not positive, the seals were then on the bond. (In this he must have been mistaken, as the above statement substantially proves the contrary.) The bond was then offered and received in evidence under defend-

ants' objections. The Government then proceeded to give evidence to show the breach of the condition of the bond by producing transcripts of books and proceedings of the Treasury Department, which it claimed were properly certified under section 886 of the Revised Statutes of the United States, and by producing witnesses upon the question of the forgery of the vouchers by Howgate.

Various other questions arose upon the trial in regard to requests to charge which are sufficiently referred to in the opinion.

The jury found a verdict for $12,000 with interest from September 29, 1884, and the defendants, the administrators, having filed an admission of sufficient assets when administered to satisfy the recovery, judgment was, on the 1st day of April, 1893, entered upon the verdict.

The defendants' motion for a new trial, for errors in law and upon exceptions taken, was denied, and upon appeal to the Court of Appeals the judgment was affirmed, and the defendants now seek a review of that judgment by this court.

*Mr. William F. Mattingly* and *Mr. W. L. Cole* for plaintiffs in error.

*Mr. Solicitor General* for defendants in error. *Mr. Andrew B. Duvall* filed a brief for same.

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

Various errors are assigned in this court, the first two of which allege that error was committed: First, in admitting the alleged bond in evidence, there being a material variance in date between the instrument offered and the one described in the declaration; Second, in admitting the alleged bond in evidence when there was no evidence tending to prove that it was sealed by W. B. Moses.

(1). We think there was no material variance as claimed by the defendants. The first count in the declaration states the date of the bond as the 2d of April, 1878. The bond as offered in evidence is dated the — day of March, 1878. In

the second count of the declaration, the bond sued on was alleged to have been dated the — day of March, 1878. The bond was offered in evidence, while that count stood, and as it showed no variance when compared with the second count, the defendants' counsel said that they were justified in making no objection to its admission at that time on that ground. When in the course of the trial the second count was withdrawn, by leave of the court, it left but the original first count in the declaration, and, thereupon, the defendants moved to strike out the bond that had been admitted in evidence, upon the ground that the bond declared upon in the first count of the declaration is described as a bond bearing date on the 2d day of April, 1878, and the bond which was theretofore offered in evidence by counsel for complainant purports to bear date on the — day of March, 1878. The motion was overruled, and defendants' counsel excepted, and it is that exception upon which defendants' counsel now claim a reversal of the judgment.

It is seen by reference to the foregoing statement of facts that the bond was finally sent back by Howgate to the Secretary of War, with seals attached, in a letter dated April 1, 1878, and that it was approved, that is, accepted, April 2, 1878. It is settled that a bond of that character takes effect on the date of acceptance, and it is from that time that it speaks. *United States* v. *Le Baron*, 19 How. 73; same case, on another review, 4 Wall. 642, 647.

There is no claim made that there ever was any other bond than the one put in evidence, nor that the defendants were surprised or in any way misled by the difference in the date of the bond from the date alleged in the declaration. The objection is one of the most extreme technicality, and does not in any way reach the merits of the case.

The case of *Cooke* v. *Graham's Administrator*, 3 Cranch, 229, is cited by the defendants' counsel as authority for the claim that this variance is fatal. The question there arose upon a demurrer, and the decision is based upon the old and highly technical rules of pleading. Marshall, Chief Justice, said that the plaintiff having declared upon a bond, dated the

3d of October, and oyer being prayed, the bond appeared to bear date of the 3d of January preceding. By the oyer the bond was made a part of the declaration. He said there were several pleadings, and among the rest a bad declaration, a bad rejoinder, and a special demurrer by the plaintiff to this bad rejoinder. He then said the variance between the date of the bond declared upon and that of the oyer is fatal. But the principle of that case has nothing to do with that involved in the case at bar. The question here does not arise on demurrer, but in the course of a trial upon the merits. The bond having been declared upon as dated the 2d of April, 1878, is produced, and is shown to bear date the — day of March, 1878. Otherwise it is the same bond in description as that declared on, with no claim of there being any other bond, and with the proof that the bond in question, although dated on the — day of March was not accepted by the War Department until the 2d day of April, 1878, at which time it became a completed instrument, and from which time it took effect. It is plain to be seen that no possible harm or injury could occur to the defendants from disregarding this variance.

In *Nash* v. *Towne*, 5 Wall. 689, 698, Mr. Justice Clifford, in delivering the opinion of the court upon a question of variance, said: "Formerly the rule in that respect was applied with great strictness, but the modern decisions are more liberal and reasonable. Decided cases may be found, unquestionably, where it has been held that very slight differences were sufficient to constitute a fatal variance. Just demands were often defeated by such rulings until Parliament interfered, in the parent country, to prevent such flagrant injustice. Federal courts have possessed the power from their organization to the present time to amend such imperfections in the pleadings, except in cases of special demurrer set down for hearing, and are directed to give judgment according to law and the right of the cause. Recent statutes in the States also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have superinduced in the course of judicial decision, may be said to have established the general rule in the state tribunals that

no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defence on the merits. Irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond." We think this exception is without merit.

(2). We are also of opinion that there was no error in admitting the bond in evidence, under the objection that at the time it was admitted there was no evidence tending to prove that it was sealed by Mr. Moses. Passing the objection raised by the defendants in error as to the form of pleadings, and, referring to the foregoing statement of facts, it appears that at the time the bond was first tendered to the War Department it had been signed and acknowledged by the principal and his sureties, and the latter had each made an affidavit justifying as to his financial ability to become such surety, and that Howgate had presented the bond (without seals) to the Secretary of War, as in compliance with the directions of the War Department.

The instrument being incomplete when first sent to the department, there was no acceptance of the same at that time. Its return by the department with the objection stated did not in any sense make Howgate the agent of the Government to procure seals to the instrument; the Government undertook no such mission, and it was not under any obligation so to do. It stood indifferent whether Howgate procured those seals or not; he was under obligation to present a proper bond to the department, and if he did not do so, the department would take its own measures consequent upon that failure.

We have a case, therefore, where the proof is full as to the original signing of the bond by the sureties; no pretence of any forgery or any irregularity in that respect, the only defect being the lack of seals. This defect was pointed out by the officer of the Government, and Howgate took back the bond to have the seals put on, and in due time he returned it with the seals upon it. There is no direct evidence as to when or where the seals were put on or as to the actual consent of the

sureties. Under these circumstances, and with the proof in the condition thus stated, we think the presumption is with the Government, that the seals were placed upon the instrument with the consent of the parties, and if there were no such consent, that is matter of defence to be affirmatively established. The inference is very strong that consent was given. It has been held that proof of the execution of a bond, taken with the fact of possession by the proper party, was sufficient to found a presumption of proper delivery of the bond. *Edelin* v. *Sanders*, 8 Maryland, 118. In this case the evidence clearly forbids the supposition that the principal or the sureties contemplated a fraud upon the Government, or intended to present to it an incomplete instrument. The latter had already consented to act as sureties, had signed the paper, acknowledged their signatures, and justified as to their financial ability. The Government was asking no favor of them or of Howgate; it had simply declined to receive as a good bond the instrument they had executed for the very purpose of being accepted by the Government. No change of circumstances is shown between the original execution of the bond and its return with the seals attached to it by Howgate. The sureties were not in the position of having secured what they wanted by the execution of the instrument in the manner originally shown; nor was the Government in the attitude of asking something more of these sureties after they had secured the benefit for which the paper had been executed. As the matter stood, when the bond was returned to Howgate, he was under the same obligation to furnish a proper instrument that he had ever been, and for all that appears, precisely the same reasons for signing the instrument originally still existed with the sureties at the time when the seals were placed upon the bond. The evidence is strong enough upon which to base the presumption that under these circumstances the seals were placed upon the bond with the consent of the sureties, and the bond returned to the War Department properly executed. At least a *prima facie* presumption to this effect ought to be indulged in in cases such as this where bonds are furnished the Government

to secure the proper performance of duty by the obligors in such bonds. This principle we think is illustrated in the cases of *Dair* v. *United States*, 16 Wall. 1, and *Butler* v. *United States*, 21 Wall. 272.

When the officers of the Government received this bond for the second time, and the seals were then found upon it, there was nothing to attract their suspicion that the bond was not a proper instrument, executed in due form by all the obligors. The fact that it had once been presented without seals, and then when the objection was taken to that defect and the instrument returned to Howgate on that account, it was thereafter again sent in by Howgate, one of the obligors, with the seals affixed thereon, was not a circumstance of suspicion nor one to raise any doubt as to the consent of the other obligors to the placing of the seals upon the instrument signed by them. Being originally signed by them for the purpose of acceptance by the Government, there is no fact upon which a presumption could be based that they would refuse to make the instrument complete by adding their seals when it was found that they had been theretofore omitted.

The cases cited by counsel for the defendants do not impair the strength of this principle, nor do away with the presumption. Among the cases cited are *Follett's Heirs* v. *Rose*, 3 McLean, 332. The case involved but a question of fact, which was submitted to a jury, whether an instrument that was produced on the trial and had no seals attached to it, had had them attached when the instrument was originally executed many years prior thereto. *Edelin* v. *Sanders*, 8 Maryland, 118, 129, contains nothing inconsistent with the presumption that the seals in this case were affixed with the consent of the obligors.

In *State* v. *Humbird*, 54 Maryland, 327, the bond sued on had no seal opposite the name of one of the obligors, and there was no evidence that he had adopted the seal of any of the other parties to the instrument. It was held that the instrument was not his bond, because, in fact, there was no evidence of any seal belonging to him ever having been affixed, and no such seal was on the instrument when it was produced on the trial.

Opinion of the Court.

In *Chilton* v. *People*, 66 Illinois, 501, a *bond* was sued on, while the instrument produced had no seal. It was held that the fact that the instrument contained the statement "sealed with my seal," when there was no seal or scroll, did not supply the defect of its absence.

In *Barnet* v. *Abbott*, 53 Vermont, 120, the instrument when executed had no seal, but when delivered to the selectmen it was sealed. The evidence showed that the sureties did not affix the seals themselves, and in fact authorized no one to affix them to the instrument. The court held that it was defectively executed. (No evidence of this nature is to be found in the case at bar.)

In *United States* v. *Linn*, 15 Pet. 290, 311, the second and third counts of the declaration were upon "an instrument in writing." It was not averred that it was under seal. The instrument was executed under an act of Congress providing for the execution of a bond. The defendant demurred to the two counts and the question was certified to this court upon a certificate of a division of opinion: (1) as to whether the obligation set out in the declaration, being without seal, was a bond within the act of Congress; and (2) whether such instrument was good at common law. It was held that the instrument was not a bond within the act, but that it was good at common law. The case went down for further proceedings, during which a trial was had and the case came again before this court on writ of error, and it is reported in 1 How. 104. It seems that after the case went down the pleadings in the case were altered, and finally a plea was filed on the part of the defendants alleging merely that seals were affixed to the bond without the consent of the defendants, without alleging that it was done with the knowledge or by the authority or direction of the plaintiffs. It was held in the court below that the special demurrer to the plea was bad and the court gave judgment for the defendant, adjudging that the plea was sufficient in law. This court held otherwise, and it was upon the principle that the placing of the seals thereon after the execution of the instrument was a material alteration of it, but if done by a stranger and the instrument was valid without the seals and

was declared on as such an instrument, the action upon it could be maintained.

In *United States* v. *Nelson*, 2 Brock. 64, the parties to the bond were sureties, and signed in blank before the principal, but with full knowledge of the purpose for which the bond was to be executed. The blanks were afterwards filled up in their absence without express authority from them, and given to the officers of the United States, who accepted it. It was held by Marshall, Chief Justice, "with much doubt and with a strong belief that this judgment will be reversed," that the law is for defendants. Under the cases of *Dair*, 16 Wall. 1, and *Butler*, 21 Wall. 272, it would seem as if the doubts of the great Chief Justice were not entirely misplaced.

Not one of these cases lays down any principle which shows the ruling of the court below in this case to have been erroneous.

We come back, then, to a case where the proof was uncontradicted of a signing of an instrument, reciting that it was sealed (when in fact it was not) and that when sent to the obligee it was returned in order that seals might be affixed. It will, in the absence of evidence to the contrary, be presumed, when the bond is again presented with seals, that they had been inadvertently omitted, and that the sureties had consented to their being placed upon the instrument in order to make it effective, a purpose which they must have originally intended when they executed it. Any other presumption would tend to show that the sureties, when signing the instrument, intended an idle thing; that is, to sign a paper which would not answer the purpose for which it was then executed, or else they intended a fraud upon and to act dishonestly towards, the Government. Neither presumption should be indulged in. The presumption called for under the circumstances is the one which is based upon the view that the principal and the sureties intended to act honestly and to execute an instrument which would be accepted by the Government.

Upon the case as it stood there was no question to be submitted to the jury upon this bond. The presumption of a

final due execution arose from the evidence given on the part of the plaintiffs, and as none was given in explanation or in contradiction of it, the presumption was sufficient in law to base a finding of that fact thereon. We think that no sufficient objection in regard to the sealing of the bond was shown, and that this assignment of error is, therefore, not made good.

(3). Another objection to the validity of the bond is taken by the defendants, which is, that the bond was extorted *colore officii*, and is void for that reason. The defendants allege that there was no statute or regulation directing or permitting the exaction of a bond from an officer of the Army assigned to duty in the Signal Service at Washington and discharging the duties of "property and disbursing officer," and that, therefore, the bond exacted from Lieutenant Howgate was void. Defendants' counsel offered to prove that some time after he had been assigned to his position the Secretary of War, through his chief clerk, directed that Lieutenant Howgate, before receiving moneys upon requisitions made by him, should file a bond as particularly stated, and if he failed to file such bond that he should be relieved from duty as disbursing officer; that Lieutenant Howgate protested against this requirement for various reasons which he stated to the chief clerk, who informed him that the Secretary of War had made his decision upon the question involved after due deliberation, and had directed that unless he filed the required bond he should be relieved from duty as disbursing officer; that after receiving this information from the chief clerk, Lieutenant Howgate forwarded to the War Department the bond upon which this suit is brought. The evidence was rejected and exception taken by counsel for the defendant. It is now urged that such evidence was material; that it showed that the bond was improperly and illegally extorted from Lieutenant Howgate under fear of losing his position as property and disbursing officer, and that the bond is therefore void.

We think the evidence was properly excluded, although there was no statute specially providing for the execution of a bond by one occupying the position of Lieutenant Howgate.

The order of the War Department that a bond should be executed was one which the Secretary of War had power to make.

It was held in the case of *United States* v. *Tingey*, 5 Pet. 115, that the United States had a right to take a bond to insure the faithful performance of duty on the part of an individual or officer where such bond was voluntarily given, and was not in violation of any provision of law. The particular bond in that case was held void as being extorted under color of office because it was in plain violation of the statute in regard to giving such bond, and it was demanded of the party upon the peril of losing his office. The court said under those circumstances that the bond was an illegal instrument, "for no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law." The court also said however: "That a voluntary bond taken by authority of the proper officers of the Treasury Department, to whom the disbursement of the public moneys is entrusted, to secure the fidelity in official duties of a receiver or an agent for disbursery of public moneys, is a binding contract between him and his sureties and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is in our view an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view." See also *United States* v. *Maurice*, 2 Brock. 96; *Jessup* v. *United States*, 106 U. S. 147, where the same views are set forth.

The consideration or the condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se*. Otherwise and for all purposes of security, a bond may be valid though no statute directs its delivery.

We do not understand by the decision in Peters, above cited, that the meaning of the term "voluntary bond" is that the bond must have been offered and pressed upon the Government when never asked for or demanded by it. It is a voluntary

bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted in violation of any law or valid regulation of a department. Having the right to take a bond, the Government in a case like this has the right to demand it from the officer, and to say to him that if he do not give it he will not be continued as a "property and disbursing officer of the Signal Service." Such a demand when complied with does not amount to the illegal exaction or extortion of the bond. The case of a bond so procured differs radically from a case like that of Tingey (*supra*), inasmuch as the bond in the latter case was extorted from a reluctant officer with a condition therein contained different from that which the statute called for.

The power of the Government to take bonds in cases of this nature in the absence of any law or general regulation to that effect, but by direction of the head of a department, was recognized again in the case of the *United States* v. *Bradley*, 10 Pet. 343, 359. In that case the bond taken contained conditions beyond those provided for in the act of Congress, yet it was held that those conditions which were within the act were valid and could not be regarded as extorted from the obligor, although they were set forth in the same instrument which contained other and illegal conditions. The case of Tingey (*supra*) was cited by the court and approved as to the principle that the United States may take a bond as security, etc., when not in violation of any statute.

In this case we think the bond was a voluntary bond in the sense that it was not illegally extorted from the defendant Howgate, under color of office or by threats from a superior officer; that the United States through the Secretary of War had the right to demand a bond with conditions such as the bond in question contains, and that it did not cease to be a voluntary bond merely because Lieutenant Howgate did not gratuitously and without request proffer it and ask that it might be received, or because he was reluctant to give it, and only gave it upon the demand of the Secretary. Under the facts developed in this case, situated as Lieutenant Howgate was with respect to the public moneys, the United States,

having the right to take a bond, had the right to demand it under penalty of refusing to permit him to longer remain as a disbursing officer or to further receive public moneys for disbursement by him. An action brought in the Southern District of New York by the United States against Rogers, one of the sureties on this same bond, was decided in favor of the Government by the United States District Court, *United States* v. *Rogers*, 28 Fed. Rep. 607, and that judgment was affirmed by the United States Circuit Court in the Southern District of New York. *Rogers* v. *United States*, 32 Fed. Rep. 890. On writ of error to this court the judgment was affirmed, but not on any ground affecting the merits. Both the District and Circuit Courts held the bond was good, and adjudged accordingly.

We are, in view of all the facts, of opinion that the refusal to admit the evidence offered by defendants' counsel upon this issue did not constitute any error on the part of the learned trial court.

(4). Another objection taken by the defendants is that this bond is void for uncertainty, because there was no law creating any such position as that "of property and disbursing officer of the Signal Service, U. S. A.," nor any law or army regulation defining the duties of any such officer.

The Signal Service Corps as a branch of the Army was known during the war. After its close and as long ago as 1870, Congress, by a joint resolution approved on the 9th day of February of that year, authorized the Secretary of War to provide for the taking of meteorological observations at the military stations and other points in the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and course of storms. On the 28th of February, 1870, the Secretary of War addressed a written communication to Brigadier General Meyer, Chief Signal Officer of the Army, in which, after embodying the joint resolution, as above referred to, the Secretary of War continued: "In view of this enactment, I have to inform you that you as Chief Signal Officer of the Army are charged with the duties to arise under the provisions of the same, subject to the direction of the

Secretary of War." On the 10th of June, 1872, one of the appropriation bills was approved, in which was an appropriation of $250,000 to provide materials and to pay for telegraphing the weather reports under the authority and regulations of the Secretary of War; and on the 27th of June, 1872, the War Department directed, in a written communication addressed to the Chief of the United States Signal Corps, that such officer and all persons who had been or should be thereafter designated and employed by him for the taking of meteorological observations, etc., were thereby recognized and appointed as agents of the War Department for those purposes. By the army appropriation act of 1874, 18 Stat. 72, it was enacted that the Signal Service should be maintained as then organized under the authority of the Secretary of War. Thereafter and on the 25th of July, 1876, Lieutenant Howgate, then acting Signal Officer and assistant at Washington, was duly assigned by the Chief Signal Officer to duty as "property and disbursing officer" at the Signal Office at Washington, with such other duties as might be assigned to him. Appropriations of a similar nature to that above-mentioned act for the signal service have been constantly made by Congress ever since.

The Revised Statutes also authorized, § 161, "The head of each department to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, and distribution and performance of its business, and the custody and use and preservation of the records, papers and property pertaining to it." Section 1094 of the Revised Statutes recognized the existence of the Chief Signal Officer of the Army of the United States, and section 1195 gave to that officer the rank of colonel of cavalry, and directed that under the direction of the Secretary of War he should have charge of all signal duty and of all books, papers and apparatus connected therewith.

Upon this evidence we think it apparent that in the proper conduct of his office the Chief Signal Officer had the right to designate one of the officers detailed for service under him as a "property and disbursing officer," to whom should belong,

as provided for in the order of such chief, the custody of all government property and funds pertaining to the office of the Chief Signal Officer, and that such Chief Signal Officer had the power, under the general direction of the Secretary of War, to provide that the property and disbursing officer should be responsible for the due execution of his duties as such. The Secretary, among other ways, recognized and approved the appointment of Howgate as a disbursing officer by directing him to give a bond as such officer, and he thereby recognized, and, in effect, provided, that there should be such an office. Among the duties of such an office it is plain was that of receiving and disbursing those moneys which had been appropriated by Congress for the Signal Service, and which came to him by reason of his designation as the property and disbursing officer of that branch of the service at Washington. If all the duties of such officer were not clearly specified and defined by law or the regulations of the department in which he was serving, it was at least clearly apparent that the public moneys which he received he was bound to honestly disburse and to account for to the proper officers of the Government. As a security for the honest discharge of such duties the bond in question was given, and one of the conditions of the bond was that he should "faithfully expend all public moneys and honestly account for the same, and for all public property which shall or may come into his hands on account of the Signal Service of the United States Army without fraud or delay." When he was guilty of the forgery of vouchers and the embezzling of the public moneys received by him as said officer, there can be no doubt or uncertainty that such conduct was a plain violation of his duty as an officer, and that the condition of the bond certainly and plainly covered such conduct, and was violated thereby.

The principle decided in *United States* v. *Bradley*, 10 Pet. 343, that bonds and other deeds may be, and in many cases are, good in part and void for the residue, where the residue is founded in illegality but not *malum in se*, may be invoked in this case. The two conditions of the bond were, (1) that Lieutenant Howgate should carefully discharge the duties of

property and disbursing officer of the Signal Service; and (2) that he should faithfully expend all public moneys, and honestly account, etc., as already stated. The condition that he should carefully discharge the duties of the office might, perhaps, be regarded as somewhat vague, on account of the uncertainty as to what constituted all of those duties, but there is neither vagueness nor uncertainty in the other condition, above stated. If the first condition were to be held void for uncertainty, there is no valid reason for holding that the second condition is also void, although not at all uncertain. When the cause of action consists in a breach of that particular condition of the bond which is plain, definite and certain, there is no reason for denying a recovery because of the uncertainty of another condition which need not be referred to in order to sustain the action.

Counsel for defendants ask "what proof was there that it was the duty of Howgate, under a bond with a penalty of $12,000, to receive and disburse the enormous sums charged against him in the 'consolidated transcript,' aggregating the sum of $1,132,742.32, in the brief period of about two years?" The attention of the War Department had been called to the Signal Service Office at Washington by reason of a requisition for fifty thousand dollars, in February, 1878, to be paid to Lieutenant Howgate as disbursing officer of the Signal Service. The answer to such requisition given from the War Department, among other things, was that "requisitions for advances should be for a less amount than fifty thousand dollars, or should not exceed twenty-five thousand dollars at any one time." The acts of Congress making appropriations for the Signal Service also show that a large amount of public moneys would be disbursed in the course of each year through the office of the Chief Signal Officer of the Army. How much that sum would reach it was not necessary to know accurately. A bond exacted for the sum of $12,000 was very likely demanded in view of the fact that frequent settlements were customary between the officer and the Treasury Department, and that requisitions were not to be made for any enormous sum at any one time. With such checks

upon the receipt and disbursement of public moneys, it might well have been thought that the amount demanded was sufficient. Reference was also had in the letter from the War Department to the amount of the bond demanded of a commissary of subsistence, having the same rank, though in a different branch of the service, and also charged with the receipt and disbursement of large amounts of public moneys. A bond in the same penalty as that given by such an officer was evidently supposed to offer sufficient security for the Government. Although when the bond was executed it might not have been supposed that the officer would have such large sums to disburse, that fact forms no defence to an action on the bond, which was conditioned for the honest disbursement of the public moneys, whatever might be their amount.

So far as this cause of action is concerned, the bond is not void for uncertainty, and the exception of the defendants is unsustained.

(5). The defendants also claim the existence of error in the decision of the court below, that the settlement of Howgate's accounts was not a bar to the action. The evidence shows that his accounts had been regularly stated and passed by the accounting officers of the Treasury, and a certificate given him of non-indebtedness. These facts the defendants say were matters of record in the Treasury Department, and they urged that the plaintiff should therefore be estopped from maintaining this action.

To the same effect is the objection that the Government is estopped from maintaining this suit by the inequitable representations and conduct of their agents which misled the surety Moses, to his prejudice.

It is necessary to see what this alleged settlement was that is set up by the defendants as a bar to the maintenance of this action. It is seen by reference to paragraph 2394 of the army regulations, which is set forth in the statement of facts, that it was necessary to obtain certificates of non-indebtedness before an officer retiring from the service could obtain final payment of his salary. Immediately upon his resignation being offered, December 7, 1880, Lieutenant Howgate pro-

ceeded to obtain the necessary certificates. He procured from the Third Auditor of the Treasury Department various certificates under dates of October 1, December 10 and 23, 1880, January 6 and April 26, 1881. These certificates were for different quarters for the years 1879 and 1880, and certified that the auditor had examined and adjusted the account of H. W. Howgate, Lieutenant, 20th Infantry, A. S. O., and found the same balanced, "as appears from the statement and vouchers herewith transmitted for decision and certification."

The last certificate, signed by the Third Auditor, reads as follows:

"*Certificate of Non-indebtedness.*

"TREASURY DEPARTMENT,

"THIRD AUDITOR'S OFFICE, *April* 26, 1881.

"It is hereby certified that the accounts and returns of H. W. Howgate, Lt. 20th inf., late acting signal officer, U. S. A., have been examined, found correct and are closed.

"This certificate is granted to satisfy the pay department that the above-named officer is not indebted to the United States on the books of this office at the date hereof."

Certificates similar in their nature were obtained from the offices of the Chief of Engineers, the Quartermaster, the Ordnance Department, Second Auditor's Office, the Paymaster's and the Commissary General's Departments. Each certified substantially that Howgate "was not charged on the books of that office as a debtor to the United States," or "that his returns had been received, examined and found correct," or "that there were no charges remaining against him on the books of the office."

There is no proof that any one of these certificates was ever seen by the sureties or was known by them to exist, nor is there evidence that a settlement of any nature had ever been made between the principal and his sureties based upon or by reason of the certificates, nor that the condition of the sureties had been at all changed because of the existence of the certificates or any one of them. The certificates were, of course, based only upon what appeared after an examination

of the books in each department. Undoubtedly they were *prima facie* evidence of the facts they certified to, and in the absence of any evidence of mistake or of fraud attacking the integrity of the items, or any of them, appearing on the books and upon which the certificates were based, they would be conclusive in favor of the officer in any action against him. *Soule* v. *United States*, 100 U. S. 8, 11; *United States* v. *Bell*, 111 U. S. 477; *Ex parte Randolph*, 2 Brock. 447, 475; *United States* v. *Eckford*, 1 How. 250, 263; *United States* v. *Hunt*, 105 U. S. 183, 187. They would not, however, be conclusive as against evidence of the forgery of any vouchers upon which the accounts had been founded and the settlement arrived at; this is too plain for argument.

It is urged, however, that even if the certificates and books upon which they were based would ordinarily be open to explanation and would not be regarded by the courts as conclusive, the rule is nevertheless changed in this case by the action of the officers of the Government, by reason of which the Government is estopped from showing the falsity of the certificates and the forgery of the vouchers. The Government is charged with laches in failing to take proper means of enforcing its demands against Howgate, and in failing to promptly notify the sureties of the fact of his defalcation and of their liability to respond on that account to the extent of the penalty of the bond.

As late as April 26, 1881, the Government was ignorant of any cause of suspicion against Lieutenant Howgate, for on that date the Third Auditor of the Treasury Department certified to the correctness of Howgate's accounts and returns. Between that time and the 24th of August, 1881, the suspicions of the officers of the Government were aroused, an examination of the books was made, other investigations were entered upon, and the facts of the defalcation discovered, and on the last-named day a suit was commenced against Howgate for the purpose of recovering the sum of $101,257.08. The "particulars of demand," accompanying the declaration, showed that the suit was commenced to recover money unlawfully drawn and obtained by Howgate from the Treasury of the United States

on checks drawn by him on the Treasurer for the amount stated, aggregating the amount sued for in the action. The defendant appeared in the action by attorney, and finally judgment for want of an answer was entered on the 24th of May, 1883, and $28,000, subsequently realized on the sale of the defendant's property, was credited on the judgment.

The suit had been commenced in the Supreme Court of the District of Columbia, and Howgate, the defendant, and Moses, one of the sureties on his bond, were residents of the city of Washington in that District, and had been for many years. It is impossible to suppose that the fact of the alleged defalcation of Howgate was unknown to Moses. The record shows that a personal service upon Howgate was not obtained for the commencement of the action against him, which would imply an inability to discover him within the District or else his absence therefrom. The affidavit used upon obtaining the attachment showed that Howgate was aware of the investigation going on in relation to his accounts, and that with such knowledge he suddenly, and without declaring any other business or reason for leaving, left the District without indicating how long he would remain or when, if ever, he would return. The presumption is very strong from all these circumstances that Moses, after Howgate's departure from Washington, knew of the alleged defalcation and of the suit brought by the Government against Howgate. There can be no well-founded claim that such suit was not commenced promptly and there is no evidence that it was not prosecuted with due diligence, even though no answer had been put in up to the time when the judgment was taken. Various reasons might have existed for the delay between the commencement of the action and the entry of judgment, which cannot be said to have been unusual. There is nothing in the fact that the Government sued Howgate alone, without calling upon the sureties in the bond which would operate to the injury of the sureties. And there is no evidence that the sureties suffered any damage by reason of any action or lack of action on the part of the Government.

As to the certificates of non-indebtedness, there is no legal

presumption that the sureties had any knowledge that these certificates had ever been given to Howgate either at the time of or soon after his resignation, or at all. The case of *United States* v. *Alexander*, 110 U. S. 325, does not hold that there is any such presumption. In that case the Secretary of the Treasury having abated taxes against the defendant, under an act of Congress, the Commissioner of Internal Revenue gave notice of the fact to the principals in the bond, who then gave the same notice to their sureties, and the case was not decided on the ground of any presumption of knowledge on the part of the sureties as to the abatement.

We have looked at the cases cited by the counsel for the defendants upon this branch of the case. They all show either the giving of notice to the sureties of payment of the debt for which they were originally liable, or an admission of payment of the debt by the holder thereof, or a declaration of the holder of the security that he would exonerate the surety, or else a reliance by the sureties upon some conduct of the holder of the security towards them, and a necessary injury to them if the holder should be permitted to subsequently assume a different attitude. The cases referred to are placed in the margin.[1]

The case here is entirely barren of evidence that the sureties had knowledge of any fact going towards their exoneration, or that they acted or failed to act in any particular with reference to their principal by reason of the conduct of the government officials or the existence of the certificates mentioned. We are of opinion also that no such exonerating fact existed.

We are, therefore, unable to find either in the certificates alluded to or in the action of the officials connected with the Government anything precluding the inquiry as to the actual and true state of the accounts upon which the judgment in

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[1] *United States* v. *Alexander*, 110 U. S. 325; *Harris* v. *Brooks*, 21 Pick. 195; *Carpenter* v. *King*, 9 Met. 511; *Baker* v. *Briggs*, 8 Pick. 121; *Taylor* v. *Lohman*, 74 Indiana, 418; *Thornburgh* v. *Madren*, 33 Iowa, 380; *Chambers* v. *Cochran*, 18 Iowa, 159; *Gordon* v. *McCarty*, 3 Wharton, 407; *Brooking* v. *Farmers' Bank*, 83 Kentucky, 431; *Aaron* v. *Mendel*, 78 Kentucky, 427; 1 Greenl. Ev. § 207.

this case rests. The exception of the defendants upon this ground cannot prevail.

(6). The defendants also took exception to the decision of the court below in permitting plaintiff to introduce certain transcripts of the books and proceedings of the Treasury Department for the purpose of proving the actual state of the accounts between the Government and Howgate. These transcripts were objected to on two grounds: (1) that they showed on their face that they were mere statements of balances and not the entire account between the parties; (2) that they showed that the government officers had made a restatement of Howgate's account after he ceased to be property and disbursing officer, and that there was no authority for making such restatement, and that it was not evidence against the defendants. We think that neither objection is well founded.

The transcripts were received under section 886 of the Revised Statutes of the United States, and were certified to under the hand of the Secretary of the Treasury and the seal of the Treasury Department, on the 19th of November, 1884. There was also a certificate from the Third Auditor of the Treasury Department attached to the papers and certifying that they were transcripts from the books and proceedings of the Treasury Department, and that the papers annexed thereto were true copies of the originals on file and of the whole of said originals. Then followed a copy of the bond, and then another certificate from the Third Auditor that he had "examined and adjusted the account of H. W. Howgate, Lieutenant, 20th Infantry, property and disbursing officer, Signal Service, U. S. Army, from April, 1878, to September, 1880, and found the balance as follows" (giving the balance for each fiscal year for the years 1879, 1880 and 1881, and resulting in a balance due the United States of $133,255.22). This last certificate thus made by the Third Auditor does not purport to certify to a copy of the whole account between the Government and Howgate. The account which first follows the certificate is termed a "consolidated settlement," and is simply a summary of the amount, giving only the total amount due the United States for each of the fiscal years stated. It does not purport

to be the full account between the parties. Following that summary or "consolidated account," however, are the transcripts from the books of the Treasury Department, containing the account of Howgate, "property and disbursing officer, Signal Service of the United States, with the United States," including items of credits and of disbursements. In other words, both sides of the account are given in these transcripts and also the items of difference; that is, those items of credit which had been originally claimed by and allowed to Howgate, but which were subsequently disallowed by the accounting officers of the Government on a restatement of the account, were given in full. This restatement had been made in 1884, on the ground that many of the vouchers for items that had been formerly allowed Howgate were forged or otherwise fraudulent. Copies of the alleged fraudulent vouchers are also set forth. If, therefore, the so called "consolidated settlement" were inadmissible, as not being a full account, it was wholly immaterial, because the same facts would appear from an examination of the account between Howgate and the United States, both sides of which were contained in the other transcripts accompanying that consolidated settlement.

We think the certificate as to those transcripts was entirely sufficient, and the transcripts themselves were admissible as sufficient transcripts from the books and proceedings of the Treasury Department within section 886, Revised Statutes, and that the certificate which certified that the papers annexed to the transcript were true copies of the originals on file, and of the whole of such originals, was a full compliance with law. *United States* v. *Pinson*, 102 U. S. 548; *United States* v. *Bell*, 111 U. S. 477.

As to the objection that the transcripts show on their face that the accounts therein referred to had been restated since the acceptance of the resignation of Lieutenant Howgate, and that there was no authority to make such restatement, we think the objection untenable. As has been heretofore stated, there had been no actual and formal settlement between the Government and Howgate, and no admission made by the Government for the purpose of discharging him and his sureties

from liability on the bond. Howgate, for the purpose of obtaining payment of his own salary, had procured certain statements from various departments, acknowledging that by the books of those departments he did not appear indebted to the Government, and by virtue of those certificates he had obtained final payment of his salary, but subsequently to that time, when other facts became known, causing an investigation into the state of the accounts, it became apparent that Lieutenant Howgate, at the time when he obtained these certificates of non-indebtedness, was in truth a defaulter, and that he owed the Government over a hundred thousand dollars. After the final payment of his salary, when these facts became known, the Acting Chief Signal Officer made up a statement of the account between Howgate and the Government, which showed in detail the vouchers and checks which were known to be fraudulent, with the names of witnesses, etc., which statement was sent to the Secretary of War, together with a report of the officer making up the account showing the true state of the account. After that time, and in compliance with the request of the Solicitor of the Treasury, the Secretary of War sent to the Second Comptroller of the Treasury this statement of the account, together with a copy of the report of the Acting Chief Signal Officer which accompanied it, and the Secretary stated that the papers were forwarded to the Second Comptroller with a view to a restatement of the accounts of Howgate for use in the suit on his bond of April 2, 1878.

It therefore appears that this so called restatement of the account was no mere gratuitous and unsolicited work on the part of the clerks of the Treasury Department, but that the restatement was made substantially by direction of the Secretary of War, under the supervision of the Second Comptroller of the Treasury, and asked for by the solicitor of that department, and it was all done that from the books and proceedings of the Treasury Department a transcript might be made that would show the actual state of the accounts between the Government and Howgate after excluding these false and forged vouchers upon which he had obtained credit and by means of which he

was enabled to procure the certificates of non-indebtedness above referred to. The idea that under circumstances like these there would be no power in the officers of the Government to restate an account between the Government and an officer by disallowing credits given him upon false and forged vouchers cannot be entertained for a moment. The cases already referred to in this opinion dispose of such a claim.

(7). One other objection was taken upon the trial, and that was to the admission of the judgment recovered against Howgate by the Government.

Neither surety was a party to that judgment which was solely against Howgate, and the record in that case was admitted in evidence under the objection and exception of the defendants. We are of opinion that the judgment was properly admitted in evidence against the surety. It proved, at least, *prima facie* a breach of the bond by showing the amount of public moneys which Howgate the principal had failed to faithfully expend and honestly account for. It was far beyond the penalty in the bond, and, unexplained, the judgment was sufficient evidence of the breach of condition. *Drummond* v. *Executors of Prestman*, 12 Wheat. 515; *United States* v. *Allsbury*, 4 Wall. 186; *McLaughlin* v. *Bank of Potomac*, 7 How. 220; *Stovall* v. *Banks*, 10 Wall. 583; *Washington Ice Co.* v. *Webster*, 125 U. S. 426.

This completes the examination of the various questions which were argued at the bar by counsel for the defendants. Other questions have been raised in the briefs and have received our careful attention. We find nothing in the record which justifies a reversal of the judgment, and the same is, therefore,

*Affirmed.*

# UNITED STATES *v.* GREATHOUSE.

APPEAL FROM THE COURT OF CLAIMS.

No. 234. Argued March 25, 1897. — Decided April 19, 1897.

The act of March 3, 1887, 24 Stat. 505, c. 359, providing for the bringing of suits against the Government, known as the Tucker act, did not repeal so much of section 1069 of the Revised Statutes as provides "that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

THE case is stated in the opinion.

*Mr. Assistant Attorney General Dodge* for appellants.

*Mr. John C. Fay* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the Court of Claims on the 24th day of April, 1894.

The claimant Greathouse was appointed Consul General of the United States at Kanagawa, Japan, and served in that capacity from August 1, 1886, to March 31, 1889. Since the last named date he has continuously resided in foreign countries, and had not when this cause was heard below returned to the United States.

During the above period he collected $1795 from sundry persons for certifying invoices of goods shipped through the United States in transit to foreign countries and $61 from other persons for certifying the value of Japanese currency attached to such invoices.

Under the rules and regulations of the State and Treasury Departments the fees so collected were "accounted for and

paid" to the United States, the first payment being made on January 27, 1887, and the last on July 18, 1889.

On the foregoing facts found by the Court of Claims, the majority of that court held as a conclusion of law that the claimant was entitled to recover from the United States $1856, which was the aggregate amount of the above payments to the United States.

As it is a condition or qualification of the right to a judgment against the United States in the Court of Claims that, except where the claimant labors under some one of the disabilities specified in the statute, the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement within six years after suit could be commenced thereon against the Government, *Finn* v. *United States*, 123 U. S. 227, 232, it is contended that the court below erred in not holding that all demands for sums paid by the claimant into the Treasury prior to April 24, 1888, were barred by limitation, and that judgment should not have been rendered for any sum in excess of the aggregate amount paid by claimant into the Treasury after that date.

By section 1069 of the Revised Statutes of the United States it is provided that "every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

Opinion of the Court.

It will be observed that by this section "persons beyond the seas" having claims against the United States cognizable by the Court of Claims were entitled to sue within three years after the disability of absence was removed. As Greathouse was beyond the seas during the whole period covered by his claim and up to the institution of this action, the limitation of six years would not apply to this case, if the exception made by the Revised Statutes of "persons beyond the seas" is still in force.

It is contended that since the passage of the act of March 3, 1887, 24 Stat. 505, c. 359, entitled "An act to provide for the bringing of suits against the Government of the United States," known as the Tucker act, the limitation of six years is applicable to *all* claims against the United States cognizable by any court, under whatever disability the claimant may have labored.

That act provides: "The Court of Claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely, by any court, department or commission authorized to hear and determine the same. Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United

States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

The District Courts of the United States were given by § 2 of the same act concurrent jurisdiction with the Court of Claims as to all matters named in the above section where the amount of the claim did not exceed one thousand dollars, the Circuit Courts of the United States to have such concurrent jurisdiction in all cases where the amount of the claim exceeds one thousand dollars and does not exceed ten thousand dollars.

It was further provided by § 4 that the jurisdiction of the respective courts of the United States proceeding under that act, including the right of exception and appeal, should be governed by the law then in force, in so far as the same was applicable and not inconsistent with the provisions of that act; and the course of procedure is to be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as they may adopt. § 4.

By the Tucker act, section 1079 of the Revised Statutes was expressly repealed, and it was declared that the provisions of section 1080 shall apply to cases under that act. § 8.

The ninth section of the act provides that "the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming an appeal or writ of error shall conform in all respects, as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes."

The act of March 3, 1887, it will be observed, expressly repealed only § 1079 of the Revised Statutes, and all laws and parts of laws that were inconsistent with that act.

In *United States* v. *Jones*, 131 U. S. 1, 16, it was held that the jurisdiction given to the Court of Claims by the act of 1887 was precisely the same as that given in the acts of 1855 and 1863, 10 Stat. 612, c. 122; 12 Stat. 765, c. 92, with the

addition that it was extended by the act of 1887 to damages, liquidated and unliquidated, "in cases not sounding in tort, and to claims for which redress may be had either in a court of law, equity or admiralty." But it does not follow that the proviso of section 1 of the act of 1887, declaring that "no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made," should be held to have displaced every part of section 1069 of the Revised Statutes. The act of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that if that act be literally construed, there is some ground for holding that Congress intended by the proviso of section 1 to cover the whole subject of the limitation of suits against the Government, in whatever court instituted. But we cannot suppose that it was intended to strike down the exceptions made in section 1069 of the Revised Statutes in favor of "the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued." Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie*, 157 U. S. 46, 58; *United States* v. *Healey*, 160 U. S. 136, 147.

In conformity with this principle we must adjudge that the above proviso of section 1069 of the Revised Statutes is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently, that the claim of a person who was beyond the seas at the time the claim accrued is not barred until three years shall have expired after such disability is removed without suit against the Government. Although the act of 1887 prescribes the limitation for suits "under this [that] act," without making any exception in favor of persons under disability, it should be

interpreted as if the proviso in section 1069 of the Revised Statutes were added to section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics and insane persons. We are unwilling to hold that Congress intended any such result. We may add that it was not contemplated that the limitation upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims.

It results that as the appellee was "beyond the seas" at the time his demand first accrued, and had not returned to this country prior to the institution of this suit, his claim was not barred by limitation. The judgment of the Court of Claims — which is not disputed upon any ground affecting the merits of the claim in suit — is therefore

*Affirmed.*

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## TEXAS AND PACIFIC RAILWAY COMPANY *v.* CODY.

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

No. 246. Argued and submitted March 29, 1897. — Decided April 19, 1897.

The plaintiff in his declaration described himself as a resident in Texas, and the defendant as a railway company created and existing under the laws of Texas. The railway company was in fact a corporation organized under and by virtue of acts of Congress, and in a petition for the removal of the action from a state court of Texas to the Federal court, set that forth as a ground for removal, and the petition was granted, and the case was removed to the Circuit Court of the United States, and tried and decided there. *Held*, that the Circuit Court properly entertained jurisdiction.

In an action against a railroad company to recover damages for injuries received by a person travelling on a highway, by a collision at a crossing of the railroad by the highway at grade, an instruction to the jury that the obligations, rights and duties of railroads and travellers upon highways crossing them are mutual and reciprocal, and that no greater care is re-

quired of the one than of the other is substantially correct. *Continental Improvement Co.* v. *Stead*, 95 U. S. 161, followed.

The instructions as to damages were not incorrect. If the company desired particular instructions, it should have asked for them.

This was an action commenced by Henry D. Cody against the Texas and Pacific Railway Company in the District Court of Tarrant County, Texas, and removed by defendant to the Circuit Court of the United States for the Northern District of Texas.

Plaintiff alleged in his petition that on March 4, 1892, he was injured at the crossing of the track of the defendant company over Jennings Avenue in the city of Fort Worth, Texas, by the carelessness and negligence of the defendant and its agents and servants. Defendant demurred generally and pleaded the general issue, and, in special pleas, alleged the contributory negligence of plaintiff and his failure to exercise due care under the circumstances. The issues were submitted to a jury, which found a verdict in favor of plaintiff for the sum of $7500, on which judgment was rendered. The case was taken to the Circuit Court of Appeals for the Fifth Circuit and the judgment affirmed, 30 U. S. App. 183, whereupon it was brought to this court by writ of error.

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

*Mr. Ernest B. Kruttschmitt*, *Mr. Edgar H. Farrar*, *Mr. Benjamin F. Jonas*, *Mr. Hewes T. Gurley* and *Mr. Thomas F. West*, for defendant in error, submitted on their brief.

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

The railway company raises a preliminary question of jurisdiction. Plaintiff below described himself in his petition as a resident of Tarrant County, Texas, and alleged the Texas and Pacific Railway Company to be "a private corporation, created and existing under the laws of the State of Texas," and that "the defendant owns and operates a line of railway

extending into and running through said Tarrant County, and into and through the city of Fort Worth, Tarrant County, Texas, and has for the purpose of conducting and carrying on its business in the management and operation of said line of railway an office and agency, and an agent and representative in the city of Fort Worth, in said Tarrant County, upon whom citation may be served in this case, the name of the said agent being J. T. Clements."

The defendant company filed its petition for removal in due time, which, in addition to other necessary averments, stated "that at the commencement of this suit plaintiff was then and still is a citizen and resident of the State of Texas, and that your petitioner was then and still is a corporation organized under and by virtue of certain acts of Congress of the United States, to wit: an act entitled 'An act to incorporate the Texas and Pacific Railway Company and to aid in the construction of its road and other purposes,' approved March 3, 1871; and an act supplementary thereto approved March 2, 1872; and that this is a suit arising under the laws of the United States within the meaning of the 2d section of an act of March 3, 1875, as amended by the acts of March 3, 1887, and August 13, 1888."

Bond was tendered and approved and the case removed accordingly. There is no controversy over the fact that the defendant corporation owed its existence to acts of Congress, and was entitled to remove the cause as one arising under the laws of the United States in accordance with the decision of this court in *Pacific Railroad Removal cases*, 115 U. S. 1; but the railway company expresses apprehension lest we may hold that jurisdiction was not maintainable within the rule laid down in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, and other cases, because plaintiff below did not allege that defendant was a Federal corporation, but rather the contrary.

The rule thus referred to, and reiterated in *Chappell* v. *Waterworth*, 155 U. S. 102; *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482; and *Oregon Short Line &c. Railway* v. *Skottowe*, 162 U. S. 490, is that under the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, a case not depending on the citi-

zenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

By the acts of Congress of 1887 and 1888, the jurisdiction of the Circuit Court on removal by defendant (and defendants alone can remove) is limited to such suits as might have been originally brought in that court; and it is essential if the jurisdiction is invoked on the ground that the cause of action arises under the Constitution, laws or treaties of the United States that this should be asserted. If recovery directly depends upon a right claimed under the Constitution, laws or treaties, plaintiff's statement of his case must necessarily disclose the fact, and if the action is brought in the state court, defendant can remove it. If, however, plaintiff asserts no such right, and defendant puts his defence on the possession of such right, or its denial to plaintiff, though essential to his recovery, then defendant is remitted to his writ of error from this court to the state court to test the Federal questions thus raised.

It is obvious that in the instance of diverse citizenship a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds, but he cannot cut off defendant's constitutional right as a citizen of a different State than the plaintiff, to choose a Federal forum, by omitting to aver, or mistakenly, or falsely, stating, the citizenship of the parties.

And this must be so also as to Federal railroad corporations. It was held in the *Pacific Railroad Removal cases* that as all the faculties and capacities possessed by such corporations were derived from their acts of incorporation by Congress, all their doings arose out of those laws, and, therefore, suits by and against them were "suits arising under the laws of the United States." Conceding this, the principle applicable to diverse citizenship may reasonably be applied to them.

If in this case plaintiff had simply described defendant by its name, without more, there would seem to be no question that, as the corporation was judicially known to be a Federal corporation, defendant would be entitled to remove the case on proper allegations in its petition; and we think this necessarily follows, where, by some mistake, or otherwise, the defendant is erroneously stated to be created under state laws. Here defendant was described as "a private corporation, created and existing under the laws of the State of Texas," and this was repeated in an amended petition, filed in the Circuit Court; but no motion to remand was made, nor was the propriety of the removal questioned in any way. Possibly the pleader did not intend to deny the Federal character of the company, but whether so or not, no issue was or could be made as to the source of its corporate existence.

*Oregon Short Line &c. Railway* v. *Skottowe*, 162 U. S. 490, is in harmony with these views. That was an action brought in a court of the State of Oregon to recover for personal injuries alleged to have been caused, in Oregon, by the negligence of the defendant company. A petition for removal was filed and denied, and this denial was approved by the Supreme Court of Oregon. Defendant was described in the complaint as "a corporation duly organized, existing and doing business in the State of Oregon." In the removal petition the defendant was alleged to be a consolidated company, composed of several railway corporations severally organized and created under the laws of the Territories of Utah and Wyoming and of the State of Nevada, and under an act of Congress, approved August 2, 1882, c. 372, 22 Stat. 185, entitled "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho and Wyoming, and for other purposes"; and an act of Congress, approved June 20, 1878, c. 352, 20 Stat. 241, making the Utah and Northern Railway Company a railway corporation in the Territories of Utah, Idaho and Montana.

This court held that, so far as appeared, the defendant company existed and was doing business in the State of Oregon solely under the authority of that State, whether express

or permissive; that the acts of Congress referred to did not disclose any intention on the part of Congress to confer powers or rights to be exercised outside of the Territories named therein, and that the Supreme Court of Oregon committed no error in affirming the action of the trial court denying the petition for removal.

We are of opinion that the Circuit Court properly entertained jurisdiction.

Turning to the case on the merits, we find no reason for disturbing the judgment of the Circuit Court of Appeals. Fourteen errors were assigned in that court to the judgment of the Circuit Court, which were reduced to six in this court, of which the first was merely that the Court of Appeals erred in affirming the judgment. The five specific grounds of error assigned are that the Circuit Court erred in refusing to give each of the following instructions asked for by defendant:

"1. The defendant asks the court to instruct the jury to return a verdict in this case for the defendant."

"3. You are instructed that it was the duty of plaintiff upon approaching the railroad track on Jennings Avenue crossing, if he was hurt on said crossing, to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing, and if you believe from the evidence that he failed to stop and look and listen and that in consequence of such failure he was injured, you will find for defendant, even though you should believe from the evidence that the defendant was negligent either in respect to not furnishing a light at said crossing or in respect to not giving signals of the approach of the train or was negligent in respect to both of such matters."

"7. You are instructed that the rights of the railway company and of the public are not equal, but that the right of the company is superior to the right of the travelling public on all parts of its track, even at crossings."

And that there was error in that portion of the charge relating to the right of a person crossing a railroad track to expect the railroad company to give the signals required by law; and in that relating to the damages.

There was evidence tending to show that on March 4, 1892, on a very dark night, plaintiff was walking along Jennings Avenue, in Fort Worth, and towards the track of defendant, which he approached from the south and which crossed Jefferson Avenue at right angles; that as he approached he slackened his pace, walked slowly, listened, looked and saw and heard no train; that there was no light on the crossing, no bell ringing, no blowing of a whistle and no light indicating the approach of a train; and that, as he passed over the track, he was struck by a train backing over the crossing, knocked down and severely injured. The evidence was conflicting on the questions of negligence and contributory negligence, and the Circuit Court did not err in refusing to peremptorily instruct the jury in defendant's favor.

So far as the refusal of defendant's instructions, numbered "3" and "7" is concerned, the charge must be considered as a whole, as however correct either of them might be, the court was not obliged to use the language of counsel, and if the jury were otherwise properly advised on these points that was sufficient.

And this observation is applicable also to the exception to the reference to the giving of signals. That cannot be passed on as an isolated proposition.

After giving certain instructions requested by defendant, the court instructed the jury as follows:

"In this case the jury are instructed that plaintiff sues the defendant for the sum of $10,000, which he says he is entitled to by reason of injuries inflicted on him by defendant company in crushing his leg and causing its amputation, by serious injuries to his head, and by the bodily and mental pain incident and resulting from said injuries, as also from his diminished capacity to earn a living. He also alleges that he has incurred liabilities for nursing, lodging, attention and physician, in the sum of $700.

"2d. If you believe from the evidence that plaintiff was injured on defendant's track east of Jennings Avenue, then you will find for the defendant.

"3d. If, however, the jury find from the evidence that the

plaintiff was injured by the defendant on its track on the crossing of Jennings Avenue in Fort Worth, then you are instructed that the statutes of the State of Texas provide 'that each locomotive engine shall have on it a bell or a steam whistle, and that the bell shall be rung or the whistle blown at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street or stopped.'

"4th. The plaintiff, if he was injured on Jennings Avenue while attempting to cross defendant's track, was required to use due care himself to avoid danger. The care which a person who crosses a railroad track on a street in a city is required to use is a question of fact for the jury. It varies with the surrounding circumstances. Such person is required to use due care to avoid danger; should he not do so, and his own negligence is the proximate cause of his injuries, he cannot recover, although the railroad company may not have given the signals which the law requires to indicate the approach of the train.

"5th. Should you believe from the evidence that the plaintiff knew, or by the use of reasonable diligence might have known, of the approach of defendant's train, and thereby have avoided the danger, then you will find for the defendant.

"6th. If, on the other hand, you believe from the evidence that the plaintiff's negligence was not the proximate cause of his injuries and that plaintiff, without fault on his part, was injured by defendant at Jennings Avenue crossing through want of proper care on the part of the defendant, then you will find for plaintiff, in any sum not to exceed $10,000.

"A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault and such neglect on the part of the road results in his injury, then he can recover.

"7th. The degree of care that was proper care on the part of the plaintiff and defendant must fit and grow out of the time, the occasion and circumstances. If the night was dark and misty and no arc light or other light lit up the crossing at Jennings Avenue, then to the extent that such facts, if at all,

increased the danger at the crossing of Jennings Avenue, then to that extent was greater care and prudence required of both plaintiff and defendant at said crossing.

"8th. The care to be exercised is such as an ordinary prudent man would exercise under similar circumstances. This is the true rule whether applied to the alleged negligence of the railroad company or the alleged contributory negligence of the plaintiff, and what is due care under a given state of facts must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence.

"9th. If plaintiff was injured at the crossing of Jennings Avenue over defendant's track and his failure to use the care that a person of ordinary prudence would have used under the circumstances was the proximate cause of his injuries then he cannot recover although defendant may have also been guilty of negligence in the matter of failing to ring the bell on the engine or in some other matter."

We think that this gave the law to the jury with substantial correctness and fully covered all that the company had the right to demand.

The Circuit Court applied the settled rule as expounded by Mr. Justice Bradley in *Continental Improvement Company* v. *Stead*, 95 U. S. 161. That was the case of a collision of a special railroad train with a wagon. There was evidence tending to show that the plaintiff, who was driving the wagon, looked to the southward, from which direction the next regular train was to come, and did not look northwardly from which this train came; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired; and that he did not stop before attempting to cross the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed at which the train was running at the time. The counsel for the railroad company requested the court to give certain specific instructions, to the general effect that

the plaintiff should have looked out for the train, and was chargeable with negligence in not having done so; and that it is the duty of those crossing a railroad to listen and look both ways along the railroad before going on it, and to ascertain whether a train is approaching or not. The trial judge refused to adopt the instructions framed by counsel, and charged that both parties were bound to exercise such care as under ordinary circumstances would avoid danger; such care as men of common prudence and intelligence would ordinarily use under like circumstances; that the amount of care required depended upon the risk of danger; and explained the circumstances which bore on that question. He charged, in short, that the obligations, rights and duties of railroads and travellers upon highways crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other.

Mr. Justice Bradley said: "If a railroad crosses a common road on the same level, those travelling on either have a legal right to pass over the point of crossing, and to require due care on the part of those travelling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. . . . On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. . . . We think the judge was perfectly right, therefore, in holding that the obligations, rights and duties of railroads and travellers upon intersecting highways

are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of precedence in crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with a mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. . . . The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railway companies have to run trains on the railroads."

The case was reaffirmed, quoted from and followed in *Baltimore & Ohio Railroad Company* v. *Griffith*, 159 U. S. 603.

Tested by these principles, the Circuit Court did not err in the matters complained of.

Nor was there error in respect of the question of damages. What the trial judge said on that subject, taken together, was not incorrect, and if the railway company had desired particular instructions in reference to the measure of damages, it should have requested them, which it did not do. *Texas & Pacific Railway* v. *Volk*, 151 U. S. 73.

*Judgment affirmed.*

# TEXAS AND PACIFIC RAILWAY COMPANY *v.* BARRETT.

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

No. 247. Argued and submitted March 29, 1897. — Decided April 19, 1897.

A railway company is bound to use ordinary care to furnish safe machinery and appliances for the use of its employés, and the neglect of its agents in that regard is its neglect; and if injury happens to one of its employés by reason of the explosion of a boiler which was defective and unfit for use, and the defect and unfitness were known or by reasonable care might have been known to the servants of the company whose duty it was to keep such machinery in repair, their negligence is imputable to the company; but in an action against the company by the injured employé, the burden of proof is on the plaintiff to show that the exploded boiler and engine were improper appliances to be used on the railroad, and that the boiler exploded by reason of the particular defects insisted on by plaintiff.

The case is stated in the opinion.

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

*Mr. A. H. Garland* and *Mr. R. C. Garland*, for defendant in error, submitted on their brief.

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

This was an action to recover for personal injuries, brought by Barrett, in the District Court of Tarrant County, Texas, against the Texas and Pacific Railway Company, and removed on the application of the company to the Circuit Court of the United States for the Northern District of Texas. Plaintiff obtained a verdict and judgment, and defendant thereupon carried the case on writ of error to the Circuit Court of Appeals for the Fifth Circuit, by which the judgment was affirmed. 30 U. S. App. 196.

Plaintiff's complaint averred that he "is a resident of said Tarrant County and that defendant is a railway corporation,

duly incorporated." The petition for removal was sufficient, and as the company was created by act of Congress the Circuit Court properly entertained jurisdiction. *Texas & Pacific Railway* v. *Cody*, 166 U. S. 606.

On the trial there was evidence tending to show that Barrett, while in the employment of the company as foreman in charge of a switch engine, and at work in the company's yard, was injured by the explosion of another engine, with which he had nothing, and was not required to have anything, to do, and which had been placed by the foreman of the round house on a track in the yard, with steam up, to take out a train; that the boiler of the locomotive at the time it exploded, and for a considerable time before that, was, and had been, in a weak and unsafe state by reason of the condition of the stay bolts, many of which had been broken before the explosion, and some of them for a long time before; that there were well-known methods of testing the condition of stay bolts in a boiler engine; and that if any of these tests had been properly applied to this boiler within a reasonable time before the explosion, the true condition of the stay bolts would have been discovered.

The Circuit Court instructed the jury, at defendant's request, "that the master is not the insurer of the safety of its engines but is required to exercise only ordinary care to keep such engines in good repair, and if he has used such ordinary care he is not liable for any injury resulting to the servant from a defect therein not discoverable by such ordinary care"; "that the mere fact that an injury is received by a servant in consequence of an explosion, will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonably safe repair"; and "that a railway company is not required to adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable and customary; but that it fulfils its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances."

Opinion of the Court.

And thereupon further charged that a railway company is bound to use ordinary care to furnish safe machinery and appliances for the use of its employés, and the neglect of its agents in that regard is its neglect; that it is not bound to insure the absolute safety thereof, nor to supply the best and safest and newest of such mechanical appliances, but is bound to use all reasonable care and prudence in providing machinery reasonably safe and suitable for use, and in keeping the same in repair; that "by ordinary care is meant such as a prudent man would use under the same circumstances; it must be measured by the character and risks of such business; and where such persons, whose duty it is to repair the appliances of the business, know, or ought to know by the exercise of reasonable care, of the defects in the machinery, the company is responsible for their neglect." That: "If the jury believe from the evidence under the foregoing instructions, that the boiler which exploded and injured the plaintiff was defective and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant, and if said boiler exploded by reason of said defects and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries." But that "the burden of the proof is on the plaintiff throughout this case to show that the boiler and engine that exploded were improper appliances to be used on its railroad by defendant; that by reason of the particular defects pointed out and insisted on by plaintiff the boiler exploded and injured plaintiff. The burden is also on plaintiff throughout to show you the extent and character of his sufferings and the damages he has suffered by reason thereof. You must also be satisfied that plaintiff was ignorant of the defects in the boiler that caused its explosion, if the evidence convinces you that such was the case; and that he did not by his negligence contribute to his own injury."

We think that these instructions laid down the applicable

rules with sufficient accuracy and in substantial conformity with the views of this court as expressed in *Hough* v. *Railway Company*, 100 U. S. 213; *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554; *Union Pacific Railway* v. *Daniels*, 152 U. S. 684, 688; *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190, and other cases.

Exceptions were preserved to portions of the charge, and to the refusal of the Circuit Court to give certain instructions requested by defendant, but, taking the charge as a whole, we are of opinion that the Circuit Court of Appeals rightly held that no reversible error was committed. These matters fully appear in the report of the case in that court, and we do not feel called upon to restate them here in detail.

*Judgment affirmed.*

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## NORTHERN PACIFIC RAILROAD COMPANY *v.* SANDERS.

ERROR TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 12. Argued March 12, 1897. — Decided April 19, 1897.

Lands were expressly excepted from the grant made in 1864 for the benefit of the Northern Pacific Railroad, which were not free from preëmption "or other claims or rights" at the time the line of the road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. The general route of the railroad was fixed February 21, 1872, and its line of definite location on the 6th of July, 1882. After the company filed a map of general route, the Commissioner of the General Land Office, under the directions of the Secretary of the Interior, April 22, 1872, transmitted a diagram of that route to the register and receiver of the land office at Helena, Montana, with a letter of instructions directing the withdrawal from sale or location, preëmption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on that map. The lands in dispute are within the exterior lines of both the general and definite routes of the railroad. Prior to such definite location certain persons, qualified to purchase mineral lands under the laws of the United States, entered upon the possession of

Counsel for Parties.

these lands, and did "file upon" them "as mineral lands," applying for patents, and conforming in all respects to the provisions of Chapter 6 of the Revised Statutes of the United States, Title XXXII, relating to "Mineral Lands and Mining Resources." The company filed a protest against the perfection of any entry of the lands as mineral lands upon the ground that they were not mineral lands nor commercially valuable for any gold or other precious metals therein contained. At the time of the definite location of the Northern Pacific Railroad and of the filing of the plat and map thereof in the General Land Office, the applications for these lands as mineral lands were pending and undetermined, the applicants claiming, before the proper office, that they were mineral lands of the United States to which they were entitled under their respective applications, and not lands in quality such as was described in the grant to the Northern Pacific Railroad Company. On the 4th day of August, 1887, the company presented to the register and receiver of the proper land office for approval, a list of lands selected by it as having been granted by the act of Congress, to the end that such lands (the list including the lands here in dispute) might be patented to it; but that officer refused to approve such list because of the existence, on the 6th day of July, 1882, of the above claims to the lands as mineral lands. It did not appear from the record what became of the several applications set out in the answer to purchase these lands as mineral lands, nor whether the railroad company appealed from the decision made in 1887 by the local land office at Helena refusing to approve the list presented of lands claimed by it under the act of Congress. *Held*, That the above applications were "claims" within the meaning of the act of July 2, 1864, granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route, and excepting therefrom lands not "free from preemption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office"; consequently, the lands embraced by those applications did not pass to the railroad company under the grant made by the above act.

THE case is stated in the opinion.

*Mr. A. B. Browne* for plaintiff in error. *Mr. A. T. Britton* was on his brief.

*Mr. John C. Spooner* and *Mr. C. W. Bunn* filed a brief for plaintiff in error.

*Mr. W. F. Sanders* and *Mr. S. S. Burdett* for defendants in error.

*Mr. Solicitor General* filed a brief on behalf of the United States.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought by the Northern Pacific Railroad Company to recover from the defendants in error, the original defendants, the possession of section twenty-one, township ten north of range three west in the county of Lewis and Clarke in the State of Montana.

The railroad company claims title under the act of Congress of July 2, 1864, 13 Stat. 365, c. 217, granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast, by the northern route.

The defendants do not assert title in themselves, but resist the claim of the railroad company upon the ground that, at the time of the definite location of the Northern Pacific Railroad and of the filing of the plat thereof in the office of the Commissioner of the General Land Office, such "claims" were made of record upon the lands in dispute as excluded them from the grant to the Northern Pacific Railroad Company.

Congress granted to the Northern Pacific Railroad Company 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 the railroad line, as the company might adopt, through the Territories of the United States, and ten alternate sections per mile on each side of the railroad whenever it passed through any State, "and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and *free* from preemption, *or other claims* or rights *at the time the line of said road is definitely fixed*, and 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 parts 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, under

the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . . *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron and coal." § 3.

The sixth section directed the lands to be surveyed for forty miles in width on both sides of the entire line of the road after the general route was fixed and as fast as was required by the construction of the railroad, and provided that "the odd sections of land hereby granted shall not be liable to sale, or entry or preëmption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale." § 6.

The amended complaint alleged that the railroad company duly accepted the terms and conditions of the act of Congress; that the general route of the railroad extending through the State of Montana was duly fixed February 21, 1872; that the land in dispute was on and within forty miles of such general route, and at that date was "public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights"; that at the date of the passage of the act of 1864, as well as when said general route was fixed, no part of the land in controversy was "known mineral land," and

"was not mineral land, nor was any part of said last-described land within any exceptions from said grant"; that on July 6, 1882, the railroad company definitely fixed the line of its railroad, extending opposite to and past said section 21, township 10 north, range 3 west, and filed a plat thereof in the office of the Commissioner of the General Land Office; that "said land is on and within forty miles of said line of railroad so definitely fixed"; that thereafter the company duly constructed and completed that portion of its railroad and telegraph line extending over and along its line of definite location, whereupon the President of the United States appointed three commissioners to examine the same, who reported that that portion of the line had been completed in a good, substantial and workmanlike manner; that the President of the United States duly accepted said line of road and telegraph so constructed and completed; that at the date of so definitely locating the line of railroad, and at the time of the filing of the plat thereof in the office of the Commissioner of the General Land Office, as above stated, the land in dispute was "not known" to be mineral land, but was agricultural land to which "the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights."

The defendants, in their answer, "*confessing* that said premises did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor, nevertheless say, *as to the northeast quarter of section* 21, that heretofore, to wit, on the second day of August, 1880, Theodore H. Kleinschmidt, Edward W. Knight, Henry M. Parchen, Charles K. Wells, George P. Reeves, David H. Cuthbert, Cornelius Hedges and Stephen E. Atkinson, each being then and there a citizen of the United States, and each having theretofore filed upon a certain separate twenty acres on the northeast quarter of said section according to the laws of the Territory of Montana, and the mining usages and customs then in force in the unorganized mining district in which said land was situated, and being then in all respects qualified to enter mineral land under

the laws of the United States, did enter into the possession of, and did enter in the United States land office, and did file upon the said quarter of said section in the land office of the United States, at Helena, Montana, in which district said land was situate, as mineral land, and did apply for a patent therefor, and did then and there and in due form file an application to purchase said premises as such mineral land, and did then and there make oath before the register and receiver of said land office that they had discovered mineral thereon and had located the said quarter section as mineral land and claimed the same as such for the valuable mineral deposits therein, and that they had complied with chapter 6 of title XXXII of the Revised Statutes of the United States, which said application was so filed in the land office at Helena, Montana, under the oath of the said applicants, showing that they had complied with the law aforesaid, and describing the same by legal subdivisions, and they did then and there prior to filing said application post in a conspicuous place, on the claim embraced therein, a copy of said application and notice hereinafter mentioned, which said notice did then and there remain conspicuously posted, on said premises during the period of publication hereafter mentioned, and they did then and there file with their said application in said land office, an affidavit of two persons that such notice had been so duly posted, and did then and there file a copy of said notice in the land office with the register and receiver thereof, and by said application they requested to be permitted to purchase the same as mineral land, and they then and there undertook and offered to maintain by proof that the said premises were valuable for the gold contained therein and were mineral lands of the United States, to which they were entitled under the laws thereof, and that they had done the requisite amount of work thereon, to wit, work of the value of five hundred dollars, and were entitled to a patent therefor, which said application and affidavit and notice were then and there entered of record in said United States land office by the register and receiver thereof, and the said application was set for a hearing upon their said proofs to be produced, and notice of such hearing in

due form of law was given by the register and receiver in the proper newspaper designated for that purpose, and was duly published therein, which said entry, application, affidavits and notice were in all respects formal according to law, and the said application was set down for a hearing in said land office by the register and receiver thereof at the expiration of the period of time prescribed in said notice and at the date at which the same was so set, the said plaintiff having theretofore filed a protest against the perfection of the said entry, for the reason, as claimed by said plaintiff, that the same were not mineral land or commercially valuable for the gold or other precious metals therein contained; that said application was continued thereafter by the consent of parties or otherwise, from time to time, and was asserted and remained pending on the 6th day of July, 1882, and thereafter the said applicants on the 6th day of July, 1882, and thereafter as theretofore, averring their ability to prove that the said land was commercially valuable for the gold therein contained, and was mineral land within the definition of that phrase contained in the act granting lands to said plaintiff mentioned in said amended complaint, and the said applicants were on the date last aforesaid claiming, affirming and undertaking to maintain on their application for said premises in said land office, that the same was mineral land of the United States, to which they were entitled thereunder, and was not land in quality such as was described in the grant to the said plaintiff."

The answer alleged like filings, applications, etc., under the mining laws of the United States, as follows: By George P. Reeves, Helen H. Reeves, Laura C. Ballou, John W. Eddy, Evelyn M. Eddy, Edward W. Knight, Theodosia M. Knight and Anna Natolia King, August 12, 1880, upon twenty acres in the *northwest quarter* of said section 21; by Theodore Kleinschmidt, Henry M. Parchen, David H. Cuthbert, Stephen E. Atkinson, Lucius I. Rosecrans, Emma M. Parchen, Mary M. Kleinschmidt and Annie E. Cuthbert, February 19, 1881, upon twenty acres in the *southwest quarter* of the same section; and by Cornelius Hedges, Thomas A. H. Hay, Mary L. Guthrie, Patrick Quinn, Louis A. Walker, William D. Wheeler, Edna L.

Hedges and George E. Carpenter, March 13, 1880, upon twenty acres of the *southeast quarter* of the same section.

Referring to the proceedings in the office of the county clerk and recorder of the county of Lewis and Clarke, Montana, in which county the premises are situate, and in the United States land office at Helena, the answer stated that they were in the form prescribed by law for the claim and entry of placer mining claims, and that thereafter, on the 4th day of August, 1887, the plaintiff presented to the said register and receiver a list of lands selected by it as having been granted by the act aforementioned, "to be approved to the end that the said premises in said list described might [be] certified to it for patent, which list includes said section twenty-one, but to approve said list or certify said lands to said company the said register and receiver and the Land Department of the United States refused because of the existence on the 6th day of July, 1882, of the foregoing claims to the same as mineral lands"; that on the 21st day of February, 1872, the plaintiff filed a map of the general route of its road in the office of the Commissioner of the General Land Office; that thereafter the Commissioner, under the directions of the Secretary of the Interior, duly prepared a plat showing that portion of the preliminary or general route of the Northern Pacific Railroad extending through the United States land district of Helena, and designated thereon lines showing the limits of the land grant to the plaintiff, for forty miles in width on each side of said line of general route; that on April 22, 1872, the Commissioner of the General Land Office, under the directions of the Secretary of the Interior, duly transmitted said diagram to the register and receiver of the United States district land office at Helena, with instructions "to withdraw from sale or location, preëmption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated on this map"; and that the said letter of instructions and diagram were received at the United States district land office at Helena, May 6, 1872.

The plaintiff demurred to the answer and the demurrer

was overruled. 46 Fed. Rep. 239. A rehearing having been granted, and the cause finally heard upon the amended complaint, the answer and the demurrer to the answer, a judgment was rendered for the defendants. 47 Fed. Rep. 604. That judgment was affirmed in the Circuit Court of Appeals. 7 U. S. App. 47.

It appears from the above statement of the case:

That lands were expressly excepted from the grant made for the benefit of the Northern Pacific Railroad that were not free from preëmption "or other claims or rights" at the time the line of the road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office;

That the general route of the Northern Pacific Railroad was fixed February 21, 1872, and its line of definite location was established and a plat thereof filed on the 6th day of July, 1882;

That after the railroad company filed its map of general route showing the limits of such route for forty miles in width on each side of its line, the Commissioner of the General Land Office, under the directions of the Secretary of the Interior, April 22, 1872, transmitted a diagram of such route to the register and receiver of the land office at Helena, Montana, with a letter of instructions, directing the withdrawal from sale or location, preëmption or homestead entry, of all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on that map;

That the lands in dispute are within the exterior lines of both the general and definite routes of the railroad;

That prior to such definite location certain persons, qualified to enter mineral lands under the laws of the United States, entered upon the possession of the lands in dispute, and did "file upon" them "as mineral lands," applying for patents therefor, and conforming in all respects to the provisions of Chapter 6 of the Revised Statutes of the United States, Title XXXII, relating to "Mineral Lands and Mining Resources";

That the railroad company filed in the proper office a protest against the perfection of any entry of these lands as

mineral lands upon the ground that they were not mineral lands nor commercially valuable for any gold or other precious metals therein contained;

That at the time of the definite location of the Northern Pacific Railroad, and of the filing of the plat and map thereof in the General Land Office, on the 6th day of July, 1882, the applications for these lands as mineral lands were pending and undetermined, the applicants claiming, affirming and undertaking to maintain before the proper office, that they were mineral lands of the United States to which they were entitled under their respective applications, and not lands in quality such as were described in the grant to the Northern Pacific Railroad Company; and,

That on the 4th day of August, 1887, the railroad company presented to the register and receiver of the proper land office, for approval, a list of lands selected under the above act of Congress, to the end that they might be patented to it; but that officer refused to approve such list (which included the lands here in dispute) because of the existence, on the 6th day of July, 1882, of the above claims to the lands as mineral lands.

It does not appear from the record what became of the several applications set out in the answer to purchase these lands as mineral lands, nor whether the railroad company appealed from the decision made in 1887 by the local land office at Helena refusing to approve the list presented of lands claimed by it under the act of Congress.

We have seen that the act of July 2, 1864, under which the railroad company claims title, excluded from the grant made by it all lands that were not, *at the time the line of the road was definitely fixed*, free from preëmption "*or other claims* or rights"; and the demurrer to the answer admits that at that time there were claims pending in the land office, undetermined, to purchase these lands as mineral lands, and such applications conformed in all respects to the laws of the United States then in force relating to mineral lands.

But it is said that no account is to be taken of those applications, for the reason that the present defendants, who had

nothing to do with them, and had no interest in them, confess, in their answer, that the lands in question "did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor"; that the lands are, therefore, to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of the general route in 1872 and by their withdrawal in that year by the General Land Office "from sale or location, preëmption or homestead entry." This view overlooks the fact that the express declaration of Congress was that no public lands should pass to the company to which, at the time of the definite location of the road, the United States did not have title free from preëmption "or other claims or rights." If the applications made in 1880 and 1881, to purchase different parts of the section in question, and which were pending and undisposed of in 1882 when the company filed its map of definite location, constituted "claims," within the meaning of the act of 1864, then it was not competent for the defendants, by any admission *they* might make, for whatever purpose made, as to the quality of these lands, whether mineral or not, to eliminate from the case the essential fact that these "claims" existed of record when the line of the road was definitely located. Indeed, if it now appeared that the land office finally adjudged, after the definite location of the road, that the lands embraced by those applications were not mineral, they could not be held to have passed to the railroad company under the act of 1864, for the reason that they were not, at the time of such definite location, free from preëmption or "other claims or rights."

Any other interpretation would defeat the evident purpose of Congress in excepting from railroad grants lands upon which claims existed of record at the time the road to be aided was definitely located. What that purpose was has been frequently adverted to by this court. In *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, 639, 640, 641, 644, which case involved the construction of an act of Congress exclud-

ing from a railroad grant public lands sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may have attached at the time the line of its road was definitely fixed, this court said: "It is argued by the company, that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company — that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception. . . . This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or preëmption claim had attached to any of them. In regard to all such sections they were not granted." Again: "The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became absolute. The preëmptor had similar duties to perform in regard to cultivation, residence, etc., for a shorter period, and then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations. The reasonable purpose of the Government

undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a preëmption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this statute. Such is the clear and necessary meaning of the words that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that, if such rights have attached, they are not granted." Finally, and as showing the meaning of the word "attached," the court said: "In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant. . . . The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

In *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, 366, after an extended reference to the authorities and to the uniform practice of the Land Department, the court concluded: "For the foregoing reasons we concur with the court below that Turner's homestead entry excepted the land from the operation of the railroad grant; and that upon the cancellation of that entry the tract in question did not inure to the benefit of the company, but reverted to the Government and became a part of the public domain, subject to appropriation by the first legal applicant."

In *Whitney* v. *Taylor*, 158 U. S. 85, 92–93, where the contest was between a railroad grant of public lands and a homestead entry of record at the time of the filing of the company's map of definite location, the question now before us was again fully considered, and this principle deduced from the former cases: "Although these cases are none of them

exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or preëmption law, which has been recognized by the officers of the Government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard."

Other cases are to the same effect as those to which we have above referred. *Sioux City &c. Land Co.* v. *Griffey*, 143 U. S. 32, 34; *Shiver* v. *United States*, 159 U. S. 491, 494.

The principles announced in these cases fully sustain the proposition that if the above applications, of record, to purchase these lands as mineral lands were "claims" within the meaning of the act of July 2, 1864, then the lands were excepted from the operation of that act, and could not have come under the grant to the railroad company even if, subsequently to the definite location of the road, the applications for them were finally rejected because of the fact that they were ascertained not to be mineral lands.

It is necessary now to inquire whether the applications in 1880 and 1881 to purchase these lands as mineral lands were "claims" within the meaning of the act of 1864.

Here we are met with the suggestion that when that act was passed no statute of the United States provided for the purchase of lands as mineral lands, and that when the railroad company filed its map of general route in 1872, and when the surveyed or unsurveyed odd-numbered sections within the exterior lines of that route were withdrawn by the land

office from "sale or location, preëmption or homestead entry," no application was on file to purchase these lands as mineral lands.

It is quite true that at the time of the passage of the act of 1864 there was no act of Congress under which a right or claim could be initiated to mineral lands. But as said by Mr. Justice Field in *Jennison* v. *Kirk*, 98 U. S. 453, 458, "for eighteen years — from 1848 to 1866 — the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the States, constituted the law governing property in mines and in water on the public mineral lands." And on July 26, 1866, before the general route of the Northern Pacific Railroad was fixed, Congress passed an act looking to a sale of the mineral lands of the United States, and declared them to be "free and open to exploration and occupation by citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law and the local customs or rules of miners in the several mining districts so far as the same were not in conflict with the laws of the United States." 14 Stat. 251, c. 262. But prior to the passage of that act certain important rights of miners had been recognized. In *Broder* v. *Water Co.*, 101 U. S. 274, 276, it was said to be the established doctrine of this court that the rights of miners, who had taken possession of mines and worked and developed them, were rights which the Government had by its conduct recognized and encouraged, and was bound to protect, before the passage of the act of 1866. The act of 1866 was held to be a statutory recognition of the right to explore for mineral lands. That right was in nowise impaired, in respect of the lands in question, by the subsequent acceptance from the Northern Pacific Railroad Company of its map of general route. And that act was supplemented by the act of May 10, 1872, c. 152. 17 Stat. 91. The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite

location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper. Provision for the indemnification of the company in such an emergency was made by a clause in the act of 1864, providing that wherever, prior to the date of definite location, "any of said sections or parts 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, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of such alternate sections." 13 Stat. 368. Hence it was said in *Barden* v. *Northern Pacific Railroad Company*, 154 U. S. 288, 320, in which case the act of 1864 was construed, that the privilege of exploring for mineral lands was in full force at the time of the location of the definite line of road, and was a right reserved and excepted out of the grant at that time.

In this view — of the soundness of which we entertain no doubt — it would seem to be clear that the formal applications made in 1880 and 1881, under the statutes then and still in force, to purchase these lands as mineral lands, were "claims" within the meaning of the third section of the act of 1864. It was admitted by the demurrer that applicants made oath, before the proper officer, that they had discovered mineral thereon and had located the said quarter section as mineral land, and claimed the same as having valuable mineral deposits thereon. Upon the present record it cannot be said that those applications were not made in good faith. Whether the lands sought to be purchased as mineral lands were of that character was a matter for the determination, in the first instance, of the Land Department; and there was jurisdiction in that department to pass upon every question arising upon applications to purchase them as mineral lands. How then can it be said that such applications, filed and of record before the definite location of the road, were not "claims" within the meaning of the act of 1864? As the lands in question were not free from those claims at the time the plaintiff definitely located its line of road, it is of no consequence what

disposition was or has been made of the claims subsequent to that date.

The only ground upon which a contrary view can be rested is the provision in the sixth section of the act of 1864, that "the odd sections of land hereby granted shall not be liable to sale or entry or preëmption before or after they are surveyed, except by said company, as provided by this act." But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section three, which manifestly contemplated that rights of preëmption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from section six would tie the hands of the Government so that even it could not sell any of the odd-numbered sections of the lands after the general route was fixed — an interpretation wholly inadmissible in view of the provisions in the third section. The third and sixth sections must be taken together, and so taken it must be adjudged that nothing in the sixth section prevented the Government from disposing of any of the lands prior to the fixing of the line of definite location, or, for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands.

Much was said at the bar as to the decision of this court in *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55. On one side it is said that that case construes the sixth section of the act of 1864 as excluding the possibility of *any* right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side it is contended that the only point necessary to be determined and the only one judicially determined in that case was that the defendant could not initiate a preëmption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that

the *Buttz case* involved no inquiry as to the respective rights of the railroad company under the act of 1864, and of parties making applications in due form prior to the definite location of its road to purchase lands as mineral lands that were within the exterior lines of its general route. Mr. Justice Field delivered the opinion in the *Buttz case*, and, speaking for the court in *Barden* v. *Northern Pacific Railroad Company*, above cited, stated that the grant in that act excepted the privilege of exploring for mineral lands.

For the reasons stated, we adjudge that the lands in question were excluded from the grant of 1864 by reason of the pendency of record, at the time of the definite location of the plaintiff's road, of applications to purchase them as mineral lands, such applications being in the form prescribed by the acts of Congress that related to such lands, and undetermined when the company filed its map of definite location.

The judgment below is

*Affirmed.*

## WHITNEY *v.* FOX.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 68. Argued March 3, 5, 1897. — Decided April 19, 1897.

It is the ordinary rule to accept the interpretation given to a statute by the courts of the country by which it was originally adopted; but the rule is not an absolute one to be followed under all circumstances. In this case the court accepts the construction given by the Supreme Court of the Territory of Utah to a statute of that Territory disqualifying certain persons as witnesses, rather than the construction placed upon a like statute by the Supreme Court of California, although the Utah statute was apparently taken from the statute of California.

Equity will sometimes refuse relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. It ought always to do so where, as in this case, the delay in the assertion of rights is not adequately explained, and such circumstances have intervened in the condition of the adverse party as to render it unjust to him or to his estate that a court of equity should assist the plaintiff. In this case the plaintiff, seeking the aid of equity, forbore for an unreasonably long time

Statement of the Case.

to assert his rights, and made no demand upon his adversary until disease had so far deprived the latter of his reason and faculties that he could not comprehend any matter of business submitted to him. His right to ask the aid of a court of equity was held to have been lost under the peculiar circumstances of the case.

This is an appeal from a judgment of the Supreme Court of the Territory of Utah, affirming a judgment in favor of the defendant in an action brought in the year 1889 in the District Court of the Third District of that Territory by the appellant Whitney against the executors of Joab Lawrence, deceased.

The object of the suit was to establish the existence of a trust in his favor in certain real estate and stock, and to have an accounting in respect of the accumulations or profits of such property.

The case made by the findings of fact is substantially as follows:

On and prior to October 7, 1872, the plaintiff was the owner of 250 shares, and Joab Lawrence, deceased, was the owner of more than 1500 shares, of the capital stock of the Eureka Mining Company of Utah. Prior to that date the plaintiff delivered to Lawrence certificates representing his 250 shares of stock, to be disposed of by Lawrence together with the latter's own stock for their joint benefit.

At the above date Lawrence sold and disposed of to E. B. Ward of Detroit 1500 shares of his own stock and the plaintiff's 250 shares, together with 250 shares belonging to W. H. Wood. In part consideration for the sale, Lawrence received real estate in Detroit consisting of three city lots, and a building thereon, commonly known as the Mansion House, and took a deed therefor in his individual name. He also received in consideration of such sale a large amount of cash in hand, besides other property. Of the cash so received, $23,587.50 was applied by him in taking up an indebtedness against the Eureka Mining Company. The plaintiff being the owner of one eighth of the total number of shares of stock sold to Ward by Lawrence, the latter received the above real estate and the $23,587.50 in trust for the plaintiff to the extent of an undivided one eighth interest. The balance of the consideration received

by Lawrence from the sale of the stock was distributed immediately after such sale among himself, plaintiff and Wood, according to their respective interests.

In recognition of the above trust Lawrence executed and delivered to the plaintiff the declaration of trust described in the complaint, which was in these words:

"SALT LAKE CITY, *Nov. 9th*, 1872.

"J. N. WHITNEY:

"This is to certify that you are entitled to one-eighth interest in the real estate, mining and rolling-mill stocks, and in the $23,587.50 of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7th, less the farm of 160 acres, which was given to A. A. Griffith. I have also received of you 20 shares of Eureka stock, your one-eighth of the 160 shares which was given to Messrs. Griffith and Mayhue.

"JOAB LAWRENCE."

On November 9, 1872, the Eureka Mining Company of Utah executed to Theodore M. Tracy, trustee, a mortgage to secure the payment of $43,587.50, Tracy taking and holding the mortgage as trustee for Lawrence, $23,587.50 of that sum representing the indebtedness of the Eureka Mining Company of Utah taken up by Lawrence, as above stated, with a portion of the proceeds of the sale of stock made to Ward, the remaining $20,000 representing an indebtedness due from the Eureka Mining Company of Utah to Lawrence individually. The mortgage was not to secure in whole or in part any indebtedness due from the company to the plaintiff or to Wood on account of services rendered by them or either of them to it. Afterwards, and prior to August 26, 1874, the mortgage was assigned by Tracy to Lawrence.

Subsequently Lawrence instituted proceedings to foreclose the mortgage, and did foreclose the equity of redemption on the property therein described, which included the mining property of the Eureka Mining Company of Utah. The decree of foreclosure was entered on July 27, 1876, and there-

after a deed of the property was duly executed to Lawrence by the United States marshal.

At the time of the foreclosure a new corporation, called the Eureka Hill Mining Company, with a capital stock of 10,000 shares, had been organized under and by virtue of the laws of the Territory of Utah, and had succeeded to the Eureka Mining Company of Utah.

On March 13, 1877, Lawrence sold and conveyed to the Eureka Hill Mining Company all his right, title and interest in and to the premises and all that he had acquired under the above mortgage and foreclosure, and in part consideration therefor received 30 per cent of the capital stock of that company, amounting to 3000 shares. He took these shares in his own name individually, and so held and retained them until his death, which took place December 28, 1888, claiming and receiving the dividends thereon, and in all respects holding and treating both the stock and dividends as his own property; nor did he at any time recognize any right or interest of the plaintiff in and to the same. The amount of dividends received on the stock at the commencement of this action amounted to $94 per share, and at the time of the hearing of the case to $124 per share.

On September 27, 1875, Lawrence wrote to Wood the following letter:

"Wm. H. Wood, Esq. — Dear Sir: I am in receipt of yours. Hempstead advises me that the foreclosure suit will come up probably in October term, say about the last of the month. Your interest in the mortgage is one-eighth of $25,000, $3125. The administrators in the Ward estate have given Mr. Romeyn notice of the intention to amend their complaint, notwithstanding the demurrer to the complaint was sustained and the injunction was removed as against me. I have been spending a great deal of money and time in endeavoring to protect the Detroit property. I now intend going to Salt Lake early in the month. I wish you would at once inform me when you will probably be ready to go West, or will be in Salt Lake.

"Yours, &c., Joab Lawrence."

And on December 26, 1875, Lawrence also wrote Wood as follows:

"Mr. Romeyn informs me under date of the 16th inst. that the suit of Ward against Lawrence, Whitney and Wood has been discontinued, the receiver discharged and the property placed in my possession. The entire rents have been used up, only $317 to balance, which was paid to Romeyn.

"Yours, &c., LAWRENCE."

After December 26, 1875, and until April 6, 1888, the plaintiff at no time claimed or demanded of Lawrence any portion of the mortgage property or its proceeds, or any dividends received upon it, and Lawrence never recognized or admitted that he had any interest in the same.

On July 18, 1876, Wood wrote the plaintiff a letter, in which, among other things, he said: "When in Boston I go to the 'Silver Islet' office, and found the reports from the mine good, but no sales of any account. I will keep you posted on it, and if a chance does come will get you out and myself. I met Hill (of the Winnemucca) in Phil'd. How are things in Utah? and does Lawrence and you get along? You know you and myself have about $17,000 of our money in the mortgage, beside our portion of the Detroit R. E., and if necessary, have some money left to present my claim in court for a fair and honest adjustment. It seems to me that we should commence and claim our rights very soon, by suit, if in no other way — all I wish is what is justly due me."

On March 1, 1880, Wood also wrote Whitney as follows:

"SAN FRANCISCO, *March* 1, 1880.

"MR. JOHN N. WHITNEY.

"Dear Sir: Yours came to hand some time since and fully noted. What course is the best to take with Lawrence to bring him to a settlement? Will the law work in this case this late day? Our claim may be good upon the Eureka in case he should wish to sell, as I have his letter saying I was interested one-eighth in the mortgage and in the Detroit prop-

erty. I think it is time something should be done, and done promptly and fearlessly, and a full exposure made if necessary. I am satisfied the mine cannot be sold if our claim is put in the right shape. I think any one can see it and think we can claim our portion of his receipts in law. Drop me a line at once, as I now intend to start for the East and home in about two weeks, and shall stop at Salt Lake City if it may be best; find out what he intends to do. I mean Lawrence. No other way but to take the bull by the horns; I fear him not. I have closed in one to-day and he gave down his milk and came to time.

"Yours in haste, WM. H. WOOD."

This letter was received by Whitney in due course of mail, and was produced by him at the trial in pursuance of a notice. The plaintiff had actual knowledge of the conveyance to the Eureka Hill Mining Company at the time it was made, as well as of the terms on which it was made, and knew as early as March, 1880, that Lawrence denied and repudiated any alleged interest or claim of his in or to any part of the 3000 shares of stock, or in the dividends that had been declared and paid upon such stock, or in any of the property mentioned in the complaint. Lawrence had received in part consideration of the conveyance to the Eureka Hill Mining Company, under date of March 13, 1877, in addition to the 3000 shares of stock, a quartz mill, and as early as the summer of 1877 the plaintiff knew that he had sold and disposed of the machinery of the mill, and was informed of the sale by Lawrence in person, but plaintiff did not then nor afterwards make any demand upon Lawrence or his representatives for any part or portion of the proceeds of that sale, nor make any inquiry as to the amount realized by him therefrom, although ignorant of its terms.

As early as 1881 the plaintiff knew that the Eureka Hill Mining Company had declared and paid a dividend of one dollar per share upon all of its capital stock, and as early as November, 1885, he had actual knowledge that that company had theretofore declared and paid dividends upon its capital stock aggregating $54 per share, and that Lawrence had received

in dividends that amount per share on each and all of the 3000 shares of stock; but he never at any time prior to April 6, 1888, made any demand upon or request of Lawrence for any part or portion of the proceeds of such dividend.

From April, 1877, until some time in 1885 Lawrence resided in Salt Lake City continuously, and was rarely absent therefrom, and when absent it was only for brief periods. He returned to that city in October, 1885, and remained there until February 10, 1886. On November 1, 1886, he returned again, remaining continuously in the city until January 25, 1887. Almost weekly during the years 1877, 1878, 1879, 1880, 1881 and 1882 the plaintiff met Lawrence in that city and conversed with him, and also met him there frequently in 1883 and 1884; and in November or December, 1885, after he had received actual knowledge of the receipt by Lawrence of the dividend of $54 per share on the 3000 shares of stock, he met and conversed with Lawrence in Salt Lake City, but made no demand on or request of him for any part of such dividend.

During the latter part of the year 1887 the mind and memory of Lawrence became so impaired by disease that it was not possible for him to attend to ordinary business matters, and from that time to his death this impairment of his faculties daily increased, so that from the first of the year 1888 until his decease he was unable to comprehend any matter of business submitted to him.

On April 6, 1888, the plaintiff, knowing that for many months prior to that date Lawrence had been deprived of his reason and mental faculties, made for the first time a formal demand on him for an accounting as to his alleged interest in the stock, real estate and rents described in his complaint.

As conclusions of law from the foregoing facts the court found and decided:

That Lawrence was at the time of his death the owner, free from any and all trusts in favor of the plaintiff, of the property, both real and personal, described in the complaint;

That so far as it was sought to establish a trust in favor of the plaintiff in the real estate mentioned in the complaint, and to obtain an accounting of the rents, issues and profits thereof,

the cause of action was barred by the provisions of section 180 of the Code of Civil Procedure of Utah Territory;

That the action, so far as it sought to establish a trust in favor of plaintiff in any portion of the 3000 shares of the capital stock of the Eureka Hill Mining Company, and to obtain a judgment decreeing plaintiff to be the equitable owner of part of those shares, or to any portions of the dividends declared and paid thereon, was barred by the provisions of section 201 of the Code of Civil Procedure of Utah Territory;

That the plaintiff had by his laches and inexcusable neglect and delay barred and precluded himself of and from any relief; and

That the plaintiff should have or take nothing by his suit, and the defendants should have and recover of and from the plaintiff their costs to be taxed.

In accordance with these conclusions of law, it was adjudged that the plaintiff take nothing by his suit.

*Mr. Arthur Brown* for appellant. *Mr. J. G. Sutherland* was on his brief.

*Mr. Jeremiah M. Wilson*, for appellee. *Mr. A. A. Hoehling, Jr.*, was on his brief.

Mr. Justice Harlan, after stating the facts, delivered the opinion of the court.

At the hearing of this cause in the inferior territorial court, the first testimony offered in plaintiff's behalf was his own deposition, taken in a suit in the Supreme Court of New York, wherein he and Wood were plaintiffs and Joab Lawrence, then living, was the defendant — that case being substantially for the same cause of action presented in this case. The court ruled that Whitney's deposition could not be received except for the purpose of impeaching him, nor was his evidence in the former action admissible, he being present in court and orally testifying in this suit. This action of the court is

assigned for error. But as the deposition was not made a part of and is not in the record, we cannot say that its exclusion was prejudicial to the rights of the plaintiff. Amendment of 21st Rule, 14 Wall. xii; *Buckstaff* v. *Russell*, 151 U. S. 626, 636; *Shauer* v. *Alterton*, 151 U. S. 607.

Whitney testified in this action on his own behalf, but the court ruled that his testimony as to any matter of fact occurring before the death of Lawrence and equally within the knowledge of both could not be received in his own behalf. Was this error? Among those who are disqualified by the statutes of Utah from being witnesses are "parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person, and equally within the knowledge of both the witness and the deceased person." 2 Compiled Laws, Utah, 1888, Title X, c. 2, p. 427. The Supreme Court of Utah held that, under this statute, Whitney was incompetent to testify as to any fact equally within the knowledge of himself and Lawrence. It is said that the Utah statute was copied substantially from a statute of California, which declared incompetent as witnesses, "parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person as to any matter of fact occurring before the death of such deceased person." Deering's Code Civ. Proced. § 1880. The contention is that the interpretation placed by the Supreme Court of California upon the statute of that State should be followed in this case. We are referred to *Myers* v. *Reinstein*, 67 California, 89, in which case the plaintiff sought a decree establishing a trust in his favor in a certain piece of land. The alleged trustee was dead when the case was heard. The court said: "We are of opinion that the witness was competent. The action was not on a claim or demand against the estate of Reinstein. The plaintiff asserted that the interest in the land sued for constituted no part of

Reinstein's estate, but was held in trust by Reinstein for Collins or his assigns, and after his death by the defendants, his devisees and successors. The defendants asserted that no such trust existed, but that Reinstein, their devisor, held the lands as his own estate, and that they had succeeded to his right. The very question to be determined here was whether the interest sought to be recovered was a part of Reinstein's estate or not. If it was a part of his estate, then no trust existed; he held it in trust in his lifetime, and the interest passed to his successors to the legal title, clothed with the trust. To hold that the claim or demand here attempted to be enforced was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question to be determined on the trial of the action. By so holding we would assume the very question to be tried and settled by the contestation between the parties. This we are not allowed to do."

The Supreme Court of Utah evidently entertained a different view of the Utah statute; for the claim asserted by Whitney in this case was, in the judgment of that court, "not only a claim against an estate, but one for many thousands." The relief sought was a decree declaring Whitney to be the equitable owner of one eighth of the Mansion House in Detroit, and entitled to the rents, issues and profits thereof, as well as to part of the 3000 shares of the stock of the Eureka Hill Mining Company, and the dividends that had theretofore been declared thereon; and that the executors of Lawrence be required, not only to account to the plaintiff for all of the said rents, issues, profits and dividends, but to convey to him an undivided one eighth interest in the real property, and assign to him a like proportion of such stock. It was also asked that a receiver be appointed to receive the dividends on the stock, and the rents, issues and profits of the realty. We cannot doubt that the claims asserted in this suit by Whitney are, within the meaning of the Utah statute, claims or demands against the estate of a deceased person, and, consequently, Lawrence being dead, Whitney was incompetent to testify to any fact touching said claims or demands that occurred be-

fore Lawrence's death, and were equally within the knowledge of both Whitney and Lawrence. The Supreme Court of Utah properly rejected the suggestion that such claim or demand was not against the estate of Lawrence. To say that the only issue here was whether the real property and stock described in the petition constituted a part of Lawrence's estate, and that no claim or demand was asserted against the estate, would be to defeat what, it seems to us, was the manifest object of the statute. While, as said by this court in *Coulam* v. *Doull*, 133 U. S. 216, 233, it is the ordinary rule to accept the interpretation given to a statute by the courts of the country by which it was originally adopted, the rule is not an absolute one, to be followed under all circumstances. We concur in the interpretation placed upon the Utah statute by the Supreme Court of Utah, as one required by the obvious meaning of its provisions, and we do not feel obliged, by the above rule, to reject that interpretation because apparently the highest court of the State from which the statute was taken has, in a single decision, taken a different view. We, therefore, hold that to the extent indicated by the court below Whitney was an incompetent witness as to any fact occurring before the death of Lawrence and equally within the knowledge of both.

It remains to inquire whether the judgment was right upon the merits. The Supreme Court of the Territory held that the suit was barred upon the grounds both of laches and of the statute of limitations of Utah. The undisputed facts make a case of such gross laches upon the part of Whitney as to forfeit all right to the aid of a court of equity. Equity will sometimes refuse relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. It ought always to do so where, as in this case, the delay in the assertion of rights is not adequately explained, and such circumstances have intervened in the condition of the adverse party as render it unjust to him or to his estate that a court of equity should assist the plaintiff. It is impossible to doubt that Whitney knew, for many years, while Lawrence was in proper mental condition, that the latter did not admit,

but denied, that the former had any just demand against him. But Whitney forbore to assert the rights which he now asserts, and although having abundant opportunity to do so, and having, if his present claims are just, every reason for promptness and diligence, he nevertheless slept upon his rights and made no demand upon Lawrence until disease had so far deprived the latter of his reason and faculties that he could not sufficiently comprehend any matter of business submitted to him. Under the peculiar circumstances of this case, the court below rightly held that the plaintiff's laches cut him off from any relief in equity. *Badger* v. *Badger*, 2 Wall. 87, 95; *Hayward* v. *National Bank*, 96 U. S. 611, 617; *Godden* v. *Kimmell*, 99 U. S. 201; *Landsdale* v. *Smith*, 106 U. S. 391; *Speidel* v. *Henrici*, 120 U. S. 377; *Richards* v. *Mackall*, 124 U. S. 183, 188; *Mackall* v. *Casilear*, 137 U. S. 556, 566; *Hammond* v. *Hopkins*, 143 U. S. 224, 250, 274. In this view, it is unnecessary to consider whether the plaintiff's causes of action were barred by the statute of limitation.

The judgment is *Affirmed.*

The case of *Wood* v. *Fox, Surviving Executor of Lawrence*, No. 56, on appeal from the Supreme Court of the Territory of Utah, was argued with No. 68 by the same counsel, and depends upon the same facts as appear in the above case, and for the reasons stated in the opinion in that case the judgment is

*Affirmed.*

## OXLEY STAVE COMPANY *v.* BUTLER COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 221. Argued March 19, 1897. — Decided April 19, 1897.

This court cannot review the final judgment of the highest court of a State even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as be-

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longing to such party under the Constitution or some treaty, statute, commission or authority of the United States. Rev. Stat. § 709.

The words "specially set up or claimed" in that section imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare, "specially," that is, unmistakably, this court is without authority to reëxamine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.

THE case is stated in the opinion.

*Mr. Isaac H. Lionberger* for plaintiffs in error.

*Mr. John F. Dillon* and *Mr. Frank M. Estes* for defendant in error. *Mr. Winslow S. Pierce*, *Mr. Harry Hubbard* and *Mr. Henry N. Phillips* were on their briefs.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a final judgment of the Supreme Court of Missouri reversing a judgment of the Circuit Court of the city of St. Louis, Missouri, setting aside and declaring to be null and void certain conveyances of lands in Butler County, Missouri, and quieting the title thereto of the present plaintiffs in error.

It is contended on behalf of the defendants in error, who were defendants below, that, under the statutes regulating the jurisdiction of this court, we have no authority to reëxamine that judgment.

It appears from the petition that the lands in controversy were part of the lands granted to Missouri by the swamp-land act of September 28, 1850, 9 Stat. 519, c. 84, and were subsequently, in 1857, patented by the State to the Cairo and Fulton Railroad Company, a Missouri corporation, in payment of a subscription to the capital stock of that company by the county of Butler, Missouri, which subscription was made under the authority of the State; that in payment of certain bonds

issued by it, the railroad company, on the 23d of May, 1857, conveyed the lands in question, with other lands, to John Moore, John Wilson and A. G. Waterman, as trustees; that in 1871 Chouteau, having become the owner of the greater portion of such bonds, brought suit in the Circuit Court of Mississippi County, Missouri, for the foreclosure of the above deed of trust, in which suit there was a decree for the defendants; that such decree was reversed by the Supreme Court of Missouri, and a decree of foreclosure directed to be entered; that the lands were accordingly sold by a commissioner, Chouteau becoming the purchaser; and that afterwards, on the 19th day of November, 1886, Chouteau conveyed the same, with other lands, to the plaintiffs in error.

The petition also alleged that the county of Butler, November 7, 1866, filed in the Circuit Court of Butler County its petition against the Cairo and Fulton Railroad Company and Moore, Wilson and Waterman, trustees as aforesaid, for the purpose of cancelling and setting aside the patent from the State to the Cairo and Fulton Railroad Company, as well as the deed of trust from the railroad company to Moore, Wilson and Waterman, trustees; that in that suit "service was attempted to be had by publication, the plaintiffs in said cause alleging that the said Moore, Waterman and Wilson were nonresidents of the State of Missouri; that in the said proceeding the said Cairo and Fulton Railroad Company were brought in, as was pretended, by personal service; but your complainants herein here aver, charge and show the fact to be that the service in said cause, the pretended appearance of the defendants by their attorney and in their own proper persons, was, in fact, a fraud and deception imposed upon the Circuit Court trying said cause; that in truth and in fact the said Waterman, previous to the bringing of said action in said Circuit Court, and said Moore, soon after the bringing of said action and before service upon him therein had been obtained, had departed this life, and their successors in said trust and as trustees had been appointed in pursuance to the provisions of the said deed of trust; that in consequence of their said deaths and the appointment of their successors as such trustees, as aforesaid, no service

was had in said cause, the new trustees were not made parties, were not served with process and had no notice of proceedings, although necessary and proper parties. The other defendant in said cause, viz., the said Cairo and Fulton Railroad Company, was not a necessary or proper party, as by the foreclosure of the state lien on said railroad under what is known as the sell-out act and the purchase of said railroad under said sale the said company, before the commencement of said suit, was dissolved and had ceased to exist and could not legally be made a party to said proceedings; that the only party defendant to said proceedings that was in fact present or pretending to make a defence in said action was Green L. Poplin, who had at one time been the president of the said railroad company, but long previous to the bringing of said suit had ceased to be connected with the said Cairo and Fulton Railroad Company in any capacity whatever, but was in fact acting in collusion with the attorneys and agents of said Butler County to aid said Butler County and its attorneys to avoid and disregard their said contract with the Cairo and Fulton Railroad Company. And these complainants aver and charge the fact to be that notwithstanding the fact that the said Circuit Court proceeded to find the issues in said case for the said county of Butler, and to decree that the said deed from the State of Missouri to the Cairo and Fulton Railroad Company and the deed of trust from said railroad company to the said Moore, Waterman and Wilson be cancelled, set aside and for naught held, and that the interest of the defendants therein be divested out of them and invested in said county of Butler, that all said pretended proceedings were null, void and of no effect whatever on account of the collusion of the parties thereto, and because the parties holding the title under said deed of trust in trust for the holders of the bonds of the said Cairo and Fulton Railroad Company were not parties to said suit and did not appear thereto, either in person or by attorneys. And because neither the said bondholders nor their assigns were in court by service of process or otherwise."

It was further alleged that in the year 1863 a number of judgments were obtained in the Circuit Courts of Mississippi

County, Missouri, against the railroad company, and part of the lands in controversy were sold under execution, various persons becoming the purchasers and receiving conveyances. The petition sets out various sales of lands embraced in the above deed of trust, and makes defendants numerous parties who were in possession claiming title, including the St. Louis, Iron Mountain and Southern Railroad Company. The petition avers that in the several suits in the Butler Circuit Court the railroad company "was the only defendant; neither said trustee or the bondholders were made parties to said suits, neither did they in any way have notice thereof or appear therein by attorney or otherwise, and whatever rights said judgment creditors acquired by reason of their said several judgments, and whatever title the said purchaser at said sheriff's sale made under said judgments acquired, were subject and subservient to the said first deed and the rights of the bondholders of said Cairo and Fulton Railroad Company. The purchasers at said foreclosure proceeding under the decree of the Supreme Court took a paramount and superior title to all said parties and purchasers at said sheriff's sale; that the said sheriff's deeds made to the purchasers at said execution sales conveyed no title to the said purchaser as against the prior lien of the said trustees under said trust deed," etc.

In the court of original jurisdiction the issues were found for the plaintiffs. Some of the defendants moved to set aside the finding and judgment upon these general grounds: Because the court erred in admitting improper, illegal, irrelevant and incompetent evidence and in rejecting proper, legal, relevant and competent evidence; in refusing to sustain defendants' demurrer to the plaintiffs' evidence offered at the close of plaintiffs' case; in finding the issues in favor of the plaintiffs and in rendering a decree in their favor; and because the decree was against the weight of the evidence. The motion for a new trial was overruled, and the cause was carried to the Supreme Court of Missouri upon the appeal of the county of Butler and others. By the latter court the judgment was reversed, and the cause remanded to the Circuit Court of the city of St.

Louis with instructions to enter a final decree dismissing the bill.

The opinion of the Supreme Court of Missouri is reported in 121 Missouri, 614.

We have made a full statement of the case because of the earnest contention of the plaintiffs in error that this court has authority to reëxamine the final judgment of the Supreme Court of Missouri.

This court may reëxamine the final judgment of the highest court of a State when the validity of a treaty or statute of or an authority exercised under the United States is "drawn in question" and the decision is against its validity, or when the validity of a statute of or an authority exercised under any State is "drawn in question" on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party, under the Constitution or some treaty, statute, commission or authority of the United States. Rev. Stat. § 709.

Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question.

The Supreme Court of Missouri properly said that only two questions were presented by the record for its determination: "First. Were the subscriptions by the county courts (county and district) of Butler County to the stock of the Cairo and Fulton Railroad Company, and the conveyance of the swamp lands of that county to said railroad in satisfaction of said

subscriptions, authorized by law? Second. Ought the decree of the Circuit Court of Butler County annulling the conveyance of said lands to be set aside for the reasons urged by the plaintiffs, to wit, first, because procured by fraud, and, second, because two of the defendants named in it were dead at the time of its rendition, and the railroad company a dissolved corporation?"

Whether the subscriptions by the county court of Butler County to the stock of the railroad company and the conveyance to that company were valid, and whether the decree which the plaintiffs sought to have declared void was obtained by fraud, were questions of local law or practice in respect of which the judgment of the state court was final.

The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be reëxamined here if it denies some title, right, privilege or immunity "specially set up or claimed" under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler County Circuit Court in the suit instituted by the county of Butler was not consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed the protection of that amendment against the operation of that decree by simply averring — without referring to the Constitution or even adopting its phraseology — that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

This question must receive a negative answer, if due effect be given to the words "specially set up or claimed" in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court

should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this court is without authority to reëxamine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular State does not import that he is a citizen of that State. *Brown* v. *Keene*, 8 Pet. 112, 115; *Robertson* v. *Cease*, 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to reëxamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

As the argument at the bar indicated some misapprehension as to our decisions upon this subject, it will be appropriate to refer to some of them.

In *Maxwell* v. *Newbold*, 18 How. 511, 516, which was a writ of error to the Supreme Court of Michigan, this court, speaking by Chief Justice Taney, and referring to the twenty-fifth section of the Judiciary Act of 1789, and the interpretation placed upon it in *Crowell* v. *Randell*, 10 Pet. 368, said: "Applying this principle to the case before us, the writ of error cannot be maintained. The questions raised and decided in the state circuit court point altogether for their solution to the laws of the State, and make no reference whatever to the

Constitution or laws of the United States. Undoubtedly, this did not preclude the plaintiffs in error from raising the point in the Supreme Court of the State, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not, depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refer in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the act of Congress, or the decisions of this court. It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the state court? Under what clause of the Constitution did he make his claim? And what right did he claim under an act of Congress? And under what act, in the wide range of our statutes, did he claim it? The record does not show; nor can this court undertake to determine that the question as to the faith and credit due to the record and judicial proceedings in Ohio was made or determined in the state court, or that that court ever gave any opinion on the question. For aught that appears in the record, some other clause in the Constitution, or some law of Congress may have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court." After stating the grounds upon which the decision in *Lawler* v. *Walker*, 14 How. 149, was placed, the court proceeded: "So in the case before us, the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the state court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court."

In *Hoyt* v. *Shelden*, 1 Black, 518, 521, a writ of error to review the final judgment of a New York court, it was contended that full faith and credit were not given by that court, to certain legislative enactments and judicial proceedings in the courts of New Jersey, as required by the Constitution of

the United States. This court, again speaking by Chief Justice Taney, said: "But, in order to give this court the power to revise the judgment of the state court on that ground, it must appear upon the transcript, filed by the plaintiff in error, that the point on which he relies was made in the New York court, and decided against him; and that this section of the Constitution was brought to the notice of the state court, and the right which he now claims here claimed under it. The rule upon this subject is clearly and fully stated in 18 How. 511, 515, *Maxwell* v. *Newbold*, as well as in many other cases to which it is unnecessary to refer. This provision of the Constitution is not referred to in the plaintiff's bill of complaint in the state court, nor in any of the proceedings there had. It is true, he set out the act of the legislature of New Jersey, the proceedings and decree of the chancery court of that State under it, and the sale of the property in dispute by the authority of the court, which, he alleges, transferred the title to the vendee, under whom he claims, and charges that the assignment set up by the defendants was fraudulent and void, for the reasons stated in his bill. But all of the matters put in issue by the bill and answers, and decided by the state court, were questions which depended for their decision upon principles of law and equity, as recognized and administered in the State of New York, and without reference to the construction or effect of any provision in the Constitution, or any act of Congress. This court has no appellate power over the judgment of a state court pronounced in such a controversy, and this writ of error must, therefore, be dismissed for want of jurisdiction."

If there has been any modification of the views expressed in the two cases just cited, it has been only in the particular that it is not always necessary to refer to the precise words or to the particular section of the Constitution, under which some right, title, privilege or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States.

The question was again examined in *Sayward* v. *Denny*, 158 U. S. 180, 183, 184, 186. It was stated in that case, the Chief Justice delivering the opinion of the court, that certain propositions must be regarded as settled, among which were that "the title, right, privilege or immunity must be specially set up and claimed at the proper time and in the proper way," and that "the right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed" — citing in support of the first of these propositions *Miller* v. *Texas*, 153 U. S. 535, and *Morrison* v. *Watson*, 154 U. S. 111, 115, and in support of the second proposition the above cases of *Hoyt* v. *Shelden* and *Maxwell* v. *Newbold*. The Chief Justice said: "The contention is that the result of the rulings and decisions of the trial court in these respects, as affirmed by the Supreme Court, was to hold plaintiff in error conclusively bound by the judgment rendered against Crawford in an action 'in which he was not a party and of which he had no notice'; and that this was in effect to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege or immunity of plaintiff in error under the Constitution of being protected from such deprivation or denial. But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the Supreme Court in disposing of the rulings below. . . . We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument."

In harmony with these views we said at the present term in *Chicago & Northwestern Railway Co.* v. *Chicago*, 164 U. S.

454, 457: "It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts or either of them any right under the Constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any Federal right was specially set up or claimed in the Supreme Court of the State."

Our attention is called by the plaintiffs in error to *Armstrong* v. *Athens County Treasurer*, 16 Pet. 281; *Bridge Proprietors* v. *Hoboken*, 1 Wall. 116, 140; *Chicago Ins. Co.* v. *Needles*, 113 U. S. 574, and *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, as establishing the jurisdiction of this court in the present case. Interpreting the general language in the opinions in some of these cases in the light of the facts presented by them, it is clear that no one of them supports our jurisdiction to reëxamine the judgment now before us.

In *Armstrong* v. *Treasurer* our jurisdiction was maintained upon the ground that the state court certified "on the record" that the validity of a statute of Ohio was drawn in question, on the ground of its repugnancy to the Constitution of the United States, and that the decision was against the validity of the statute. In *Bridge Proprietors* v. *Hoboken Co.* the court said that the true and rational rule was that "the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." It was held in that case that as the record showed that the state court had upheld a statute of New Jersey whose validity had been questioned as impairing the obligation of a contract, and that as, under the pleadings, it could not have made the final judgment complained of

without sustaining the validity of that act, this court had jurisdiction to reëxamine that judgment. In *Chicago Life Ins. Co.* v. *Needles* it was said that, while the Supreme Court of Illinois did not, in terms, pass upon the claim that the statutes there in question were in derogation of rights and privileges secured by the Constitution of the United States, our jurisdiction could not be doubted, for the reason that the final judgment necessarily involved an adjudication of that claim. That language was used in a case in which it appeared from the record that the Federal right was specially set up and claimed in the inferior state court and reasserted in the Supreme Court of the State. In *Des Moines Navigation Co.* v. *Iowa Homestead Co.* the Federal right was specially set up, because it was claimed under a decree or judgment of a court of the United States, the validity of which was disputed on the ground that the courts of the United States had no jurisdiction of the suit in which it was rendered, and, therefore, no legal power or authority in the premises. It is manifest that none of these cases conflict with the views herein expressed.

Without further references to adjudged cases, we are of opinion that the general allegation or claim, in different forms, that the decree of the Butler County Circuit Court was passed against some persons who were at the time dead, and against others who were necessary parties but who had no notice of the proceedings, does not, within the meaning of section 709 of the Revised Statutes, specially set up a right or immunity under the Fourteenth Amendment of the Constitution of the United States, forbidding a State to deprive any person of his property without due process of law. If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained. But it does not so appear.

We are of opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Missouri.

*Writ of error dismissed.*

# *In re* CHAPMAN, Petitioner.

ORIGINAL.

No. 11. Original. Argued March 24, 1897. — Decided April 19, 1897.

The legislation contained in sections 102 and 104 of the Revised Statutes was originally enacted "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony"; and, when reasonably construed, is not open to the objection that it conflicts with the provisions of the Constitution.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and avoid, if possible, an unjust or absurd conclusion.

*Runkle* v. *United States*, 122 U. S. 543, again questioned, as it has not been approved in subsequent decisions.

Congress possesses the constitutional power to enact a statute to enforce the attendance of witnesses, and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legislative functions.

While Congress cannot divest itself or either of its Houses of the inherent power to punish for contempt, it may provide that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States.

THIS is a petition for a writ of *habeas corpus*, filed on leave, and a rule thereon entered, to which return was duly made.

The petition alleges as follows: That petitioner is a citizen of the United States and a resident of the city of New York, in the State of New York, and that he is now restrained of his liberty by the marshal of the United States for the District of Columbia. That on the first of October, 1894, in the Supreme Court of the District of Columbia, holding a criminal term, the grand jury empanelled in said court at said term thereof found an indictment against petitioner based on section 102 of the Revised Statutes of the United States, to which petitioner filed a demurrer alleging, among other objections, the unconstitutionality of the acts of Congress on which the indictment was based; that the demurrer was overruled and petitioner ordered to plead thereto; that the Court of Appeals

for the District of Columbia allowed an appeal from the order overruling the demurrer and subsequently affirmed it, *Chapman* v. *United States*, 5 D. C. App. 122, whereupon petitioner applied to this court for leave to file a petition for a writ of *habeas corpus*, which application was denied. *In re Chapman, Petitioner*, 156 U. S. 211. That thereafter petitioner filed a petition in the Court of Appeals for a writ of prohibition to prevent the trial court from unlawfully assuming jurisdiction to try petitioner on said indictment, which petition was denied, and thereupon petitioner duly prosecuted an appeal and writ of error to this court from such order denying said petition, which are still pending, this court having refused to advance the cause; and having also declined to stay the proceedings below. That, thereupon, the trial of petitioner under the indictment was proceeded with and a verdict of guilty returned; motions in arrest of judgment and for new trial were made and overruled; and on February 1, 1896, the trial court entered its judgment and sentence on said verdict, that petitioner be imprisoned in the jail of the District of Columbia for the period of one month from date of arrival, and to pay a fine of one hundred dollars, from which judgment and sentence petitioner prosecuted an appeal to the Court of Appeals; that court affirmed the judgment and sentence of the trial court, *Chapman* v. *United States*, 8 D. C. App. 302, but allowed a writ of error to remove the cause to this court for review, which writ was dismissed for want of jurisdiction. *Chapman* v. *United States*, 164 U. S. 436.

That petitioner was then surrendered in open court by his bondsmen and committed into the custody of the United States marshal for the District, who now holds and confines him and deprives him of his liberty.

The petition further alleged that the act of Congress under which petitioner was prosecuted was unconstitutional, and the imprisonment of petitioner unlawful, on various grounds set forth at length.

Petitioner attached duly certified copies of the record and proceedings, judgment and sentence, under the aforesaid in-

dictment against him, and prayed that the same be considered in connection with the petition; and also referred to the record in the matter of the application of petitioner for a writ of prohibition.

The indictment averred that the House of Representatives had passed a certain tariff bill, which was pending in the Senate, with a very large number of proposed amendments thereto, during the months thereafter mentioned, and, among them, certain amendments providing for duties on sugar different from the provisions of the bill as it had been sent to the Senate, the adoption or rejection of which by the Senate would materially affect the market value of the stock of the American Sugar Refining Company. That the Senate adopted a preamble and resolutions raising a special committee and clothing it with full power of investigation into certain charges, made in designated newspapers, that members of the Senate were yielding to corrupt influences in the consideration of said legislation. That the investigation was commenced, and, in the course of it, petitioner, being a member of a firm of stock brokers in the city of New York, dealing in the stock of the American Sugar Refining Company, appeared as a witness, and was asked whether the firm of which the witness was a member had bought or sold what were known as sugar stocks during the month of February, 1894, and after the first day of that month, for or in the interest, directly or indirectly, of any United States Senator; had the firm, during the month of March, 1894, bought or sold any stocks or securities, known as sugar stocks, for or in the interest, directly or indirectly, of any United States Senator; had the said firm during the month of April done so; had the said firm during the month of May done so; was the said firm at that time carrying any sugar stock for the benefit of or in the interest, directly or indirectly, of any United States Senator. But petitioner then and there wilfully refused to answer each of the questions so propounded, all of which were pertinent to the inquiry then and there being made by the said committee under the resolutions aforesaid.

*Mr. George F. Edmunds* and *Mr. A. J. Dittenhoefer* for petitioner. *Mr. Jeremiah M. Wilson* was on their brief.

*Mr. Solicitor General*, for the United States, opposing.

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

It is insisted that the Supreme Court of the District of Columbia, sitting as a criminal court, had no jurisdiction; that the questions were not authorized under the Constitution; and that the act of Congress under which petitioner was indicted and tried is unconstitutional.

Sections 102, 103 and 104, and section 859, of the Revised Statutes, are as follows:

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

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

"Sec. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

"SEC. 859. No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

These sections were derived from an act of January 24, 1857, entitled "An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony," 11 Stat. 155, c. 19,[1] as amended by an act entitled "An act amending the provi-

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[1] "That any person summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter before either House, or any committee of either House of Congress, who shall wilfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry in consideration before the House or committee by which he shall be examined, shall in addition to the pains and penalties now existing, be liable to indictment as and for a misdemeanor, in any court of the United States having jurisdiction thereof, and on conviction, shall pay a fine not exceeding one thousand dollars and not less than one hundred dollars, and suffer imprisonment in the common jail not less than one month nor more than twelve months.

"SEC. 2. That no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee of either House as to which he shall have testified whether before or after the date of this act, and that no statement made or paper produced by any witness before either House of Congress or before any committee of either House, shall be competent testimony in any criminal proceeding against such witness in any court of justice; and no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact or the production of such paper may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.

"SEC. 3. That when a witness shall fail to testify, as provided in the previous sections of this act, and the facts shall be reported to the House, it shall be the duty of the Speaker of the House or the President of the Senate to certify the fact under the seal of the House or Senate to the

sions of the second section of the act of January twenty-fourth, eighteen hundred and fifty-seven, enforcing the attendance of witnesses before committees of either House of Congress," approved January 24, 1862, 12 Stat. 333, c. 11;[1] both of which are given in the margin.

From the record of the proceedings on the trial, accompanying and made part of the petition, it appears that petitioner, in declining to answer the questions propounded, expressly stated that he did not do so on the ground that to answer might expose him, or tend to expose him, to criminal prosecution; nor did he object that his answers might tend to disgrace him. Section 103 had, in fact, no bearing on the controversy in regard to this witness, and it is difficult to see how he can properly raise the question as to its constitutionality, notwithstanding section 859. And we cannot concur in the view that sections 102 and 103 are so inseparably connected that it can be reasonably concluded that if section 103 were not sustainable, section 102 would, therefore, be invalid. In other words, we do not think that there is ground for the belief that Congress would not have enacted section 102, if it had been supposed that a particular class of witnesses, to which petitioner did not belong, if they refused to answer by reason of constitutional privilege, could not be deprived of that privilege by section 103.

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district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

[1] "That the testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness in any court of justice: *Provided, however*, That no official paper or record, produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so as to protect such witness from any criminal proceeding as aforesaid; and no witness shall hereafter be allowed to refuse to testify to any fact, or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact, or the production of such paper, may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid."

Laying section 103 out of view, we are of opinion that sections 102 and 104 were intended, in the language of the title of the original act of January 24, 1857, "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony." To secure this result it was provided that when a person summoned as a witness by either House to give testimony or produce papers, upon any matter under inquiry before either House, or any committee of either House, wilfully fails to appear, or, appearing, refuses to answer "any question pertinent to the question under inquiry," he shall be deemed guilty of a misdemeanor and punished accordingly. And it was also provided that when, under such circumstances, the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, that the matter may be brought before the grand jury for their action.

It is true that the reference is to "any" matter under inquiry, and so on, and it is suggested that this is fatally defective because too broad and unlimited in its extent; but nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion, *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; and we think that the word "any," as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon. When the facts are reported to the particular House, the question or questions may undoubtedly be withdrawn or modified, or the presiding officer directed not to certify; but if such a contingency occurs, or if no report is made or certificate issued, that would be matter of defence, and the facts of report and certificate need not be set out in an indictment under the statute. In this case, we must assume that there was such report and certificate, and indeed we do not understand this to be controverted, as it could not well be in view

of the Senate proceedings as disclosed by its journal and otherwise. Senate Journal, 53d Cong., 2d Sess. p. 238; Senate Rep. No. 477, Ib.; Cong. Rec., Ib. p. 6143.

Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, returns and qualifications of its own members; to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member; and it necessarily possesses the inherent power of self-protection.

According to the preamble and resolutions, the integrity and purity of members of the Senate had been questioned in a manner calculated to destroy public confidence in the body, and in such respects as might subject members to censure or expulsion. The Senate, by the action taken, signifying its judgment that it was called upon to vindicate itself from aspersion and to deal with such of its members as might have been guilty of misbehavior and brought reproach upon it, obviously had jurisdiction of the subject-matter of the inquiry it directed, and power to compel the attendance of witnesses, and to require them to answer any question pertinent thereto. And the pursuit of such inquiry by the questions propounded in this instance was not, in our judgment, in violation of the security against unreasonable searches and seizures protected by the Fourth Amendment.

In *Kilbourn* v. *Thompson*, 103 U. S. 168, among other important rulings, it was held that there existed no general power in Congress, or in either House, to make inquiry into the private affairs of a citizen; that neither House could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern; and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. Specific charges publicly made against Senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate

was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any Senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they cannot be defeated on purely sentimental grounds.

The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.

Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a mem-

ber. 1 Story on Const. § 838. Reference is there made to the case of William Blount, who was expelled from the Senate in July, 1797, for "a high misdemeanor entirely inconsistent with his public trust and duty as a Senator." The offence charged against him, said Mr. Justice Story, was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British government among the Indians. It was not a statutable offence nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government.

Commenting on this case, Mr. Sergeant says in his work on Constitutional Law, 2d ed. p. 302: "In the resolution, the Senate declared him guilty of a high misdemeanor, though no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case. And, it seems no law existed, to authorize such prosecution."

The two Houses of Congress have several times acted upon this rule of law, and the cases may be found, together with debates on the general subject, in both Houses, of great value, in Smith's Digest of Decisions and Precedents, Senate Doc. No. 278, 53d Cong., 2d Session. The reasons for maintaining the right inviolate are eloquently presented in the report of the committee in the case of John Smith, accused in 1807 of participating in the imputed treason of Aaron Burr. 1 Hall's Am. L. Journal, 459; Smith's Digest, p. 23.

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.

Doubtless certain general principles announced in *Runkle* v. *United States*, 122 U. S. 543, 555, cited by petitioner's counsel as conclusive, were correctly set forth, but that case has not been approved in subsequent decisions on the same

subject, and the presumptions in favor of official action have been held to preclude collateral attack on the sentences of courts-martial, though courts of special and limited jurisdiction. *United States* v. *Fletcher*, 148 U. S. 84; *Swaim* v. *United States*, 165 U. S. 553.

Counsel contend with great ability that the law under consideration is necessarily subject to being impaled on one or the other of two horns of a dilemma, either inflicting a fatal wound. The one alternative is that the law delegates to the District of Columbia Criminal Court the exclusive jurisdiction and power to punish as contempt the acts denounced, and thus deprives the Houses of Congress of their constitutional functions in the particular class of cases. The other alternative is that if the law should be interpreted as leaving in the Houses the power to punish such acts, and vesting in addition jurisdiction in the District Criminal Court to punish the same acts as misdemeanors, then the law is invalid because subjecting recalcitrant witnesses to be twice put in jeopardy for the same offence contrary to the Fifth Amendment.

The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that body, and by the statute this is also made an offence against the United States.

The history of Congressional investigations demonstrates the difficulties under which the two Houses have labored, respectively, in compelling unwilling witnesses to disclose facts deemed essential to taking definitive action, and we quite agree with Chief Justice Alvey, delivering the opinion of the Court of Appeals, "that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions"; and that it was to effect this that the act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof. We grant that Congress could not divest itself, or either of its Houses, of the

essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account.

Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught. It is improbable that in any case cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting the answers desired, but it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together. *General Houston's case*, Attorney General Butler, 2 Ops. Attys. Gen. 655; *Rex* v. *Lord Ossulston*, 2 Strange, 1107; *Cross* v. *North Carolina*, 132 U. S. 131; *In re Debs, Petitioner*, 158 U. S. 564; *State* v. *Woodfin*, 5 Iredell, 199; *Yates* v. *Lansing*, 9 Johns. 395; *State* v. *Williams*, 2 Speers, (Law,) 26; *Foster* v. *Commonwealth*, 8 W. & S. 77.

In our opinion the law is not open to constitutional objection, and the record does not exhibit a case in which, on any ground, it can be held that the Supreme Court of the District, sitting as a criminal court, had no jurisdiction to render judgment.

*Writ denied.*

Mr. Justice Harlan concurred in the result.

# BALTIMORE *v.* BALTIMORE TRUST AND GUARANTEE COMPANY.

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

No. 209. Argued March 11, 12, 1897. — Decided April 26, 1897.

The direction of the municipal authorities of Baltimore to the street railroad company to maintain but one track through Lexington street from and to the points named, instead of a double track as originally granted to the company, did not substantially change the terms of the contract (if there was one) between the city and the railroad as expressed in the original grant, and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of the street by the railroad company.

THE appellee, being the plaintiff below, brought this action in the Circuit Court of the United States for the district of Maryland, for the purpose of enjoining the city authorities from tearing up or interfering with the railroad track laid down by the Lake Roland Elevated Railroad Company on Lexington street, in the city of Baltimore. The bill and the answer were duly filed in April, 1893, and the following are substantially the facts upon which the case was heard and determined by the court below:

The plaintiff sued as trustee and mortgagee named in a mortgage executed by the Lake Roland Company to secure the payment of certain bonds issued and to be issued by the company for the purpose of raising funds to construct its road. The mortgage was upon all the property of the company, its railroad, plant, tracks, etc., and was executed on the 1st day of September in the year 1892. The amount of the bonds which the mortgage so secured was a million dollars, the principal payable on the 1st of September in the year 1942. It was on the ground that the proposed action, hereafter mentioned, on the part of the city authorities would result in a most material impairment of the security of the mortgage that this suit was brought by the trustee and mortgagee for the purpose of restraining such action.

The Lake Roland Company was the result of a consolidation

of two railway companies, one of which, called the North Avenue Railway Company of Baltimore city, had the franchise to construct and operate a passenger railway in the city of Baltimore, the whole line of which road was to be located in that city. The Lake Roland Company succeeded to all the rights acquired by the North Avenue Railway Company. The legislature of Maryland, by the act of the Laws of 1890, c. 370, among other things enacted that "the mayor and city council of Baltimore shall have the power to regulate the use of the streets, lanes and alleys in said city by railway or other tracks," etc. On the 8th of April, 1891, the common council of Baltimore passed what is termed ordinance No. 23, by which it authorized the North Avenue Railway Company of Baltimore city, in connection with its tracks in other streets mentioned in the ordinance, "to lay down and construct double iron railway tracks for the purposes of its business, . . . on Lexington street westwardly to Charles street from North street." This is a distance of about eleven hundred feet. The right was also given to the company to operate its road by electricity supplied from overhead wires, and the tracks, wires and poles were to be laid and constructed under the supervision and direction of the city commissioner. Various other conditions and regulations were contained in the ordinance, all of which the railroad company accepted. As a portion of the road to be constructed consisted of an elevated road, it became necessary to obtain the sanction of the legislature before the company undertook the execution of the work. Accordingly chapter 112 of the Laws of 1892 was passed, the first section of which ratified and confirmed ordinance No. 23, with "the same effect as if the mayor and city council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the general assembly to pass said ordinance, and to grant each and all of the powers and privileges therein contained; the said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general powers."

Subsequently to the passage of this act of 1892, the Lake

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Roland Company, in the summer and fall of 1892, commenced to lay its tracks in the city and to build a portion of its elevated road. Prior to the laying down of any tracks on Lexington street, between North and Calvert streets, the latter being a street which crosses Lexington street between North and Charles streets at a distance of between three and four hundred feet west from North street, it became known to the railroad company that the mayor and some of the city authorities were opposed to the laying of double tracks in that street between those points. This was a short time prior to the 7th day of November, 1892. On that day the mayor wrote a letter to the president of the railway company, in which he stated that he had noticed the company had commenced laying double tracks on Lexington street, between North and Calvert streets, and that the public interest in his judgment required that no more than a single track should be laid on Lexington street at that point, and that the law officers of the city had informed him that it was competent for the city council to prohibit the laying of double tracks there. The mayor also stated that at the next session of the council an ordinance would be introduced prohibiting the company from laying double tracks on the portion of Lexington street above described. He ended by saying: "I write you this to prevent you from going to the unnecessary expense of laying a system of double tracks and afterwards being required to remove them." On the same day the president of the railroad company received from the city solicitor a notice that he was, at the request of the mayor, preparing an ordinance to prohibit the railroad company from laying more than a single track on Lexington street, between North and Calvert, and he offered to permit the president of the railroad company to see the proposed ordinance before it was sent to the council. It is stated, however, on the part of the railroad company that at no time prior to the 12th day of November, 1892, two days prior to the passage of the ordinance hereafter spoken of, was there any intimation given to the officers of the company that there was any opposition to the laying of the company's double tracks on Lexington street, between

Calvert and Charles streets, which was a distance of between seven and eight hundred feet immediately west of Calvert street, and the portion of Lexington street, between Calvert and North streets, was immediately east from Calvert street. It is asserted on the part of the company that it laid the double tracks on Lexington street, between Calvert and Charles streets, without opposition on the part of any one so far as it knew, but it admits that it did lay the double tracks between North and Calvert streets, notwithstanding the receipt of the letters mentioned and in spite of the known opposition of the mayor. This work was done, between North and Calvert streets, during the night and on election day, so that before the 14th of November, 1892, the work of laying the double tracks on Lexington street had been substantially completed the whole distance between North and Charles streets. The common council of the city met on the day last named, and passed "An ordinance to regulate the use of Lexington street between North street and Charles street, by railway tracks, and to prohibit the laying or maintaining or using by North Avenue Railway Company, or any other person or corporation, of more than a single iron railway track upon said portion of Lexington street." The first section of this ordinance reads as follows:

"SECTION 1. *Be it enacted and ordained by the mayor and city council of Baltimore*, That the first section of ordinance No. 23, approved April 8, 1891, so far as the same authorized and empowered the North Avenue Railway Company to lay double iron railway tracks upon the portion of East Lexington street between North street and Charles street, be, and hereby is, repealed, and that the authority and license given to said North Avenue Railway Company by said first section of said ordinance to lay such double iron railway tracks, be, and hereby is, revoked."

(It will be observed that this ordinance, instead of confining the single track to that portion only of Lexington street lying between North and *Calvert* streets, as spoken of by the mayor, included the whole of Lexington street between North and *Charles* streets.)

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The second section of the same ordinance prohibited any person or corporation from laying down railway tracks on Lexington street except as provided in the succeeding section of the ordinance, and directed that all tracks which had been theretofore placed on Lexington street should be removed by the persons who laid them, within ten days after they received notice to that effect from the city commissioner.

The third section authorized the railroad company to lay down and maintain one track and no more on Lexington street, "upon the same terms and subject to the same provisions and limitations as were provided by the city ordinance No. 23, of April 8, 1891, in respect to double iron railway tracks there authorized to be laid on said portion of Lexington street." The third section contained also the following proviso: "Provided, as a condition precedent to the right of the North Avenue Railway Company to exercise the authority or license in this section conferred upon it, the said North Avenue Railway Company shall within twenty days from the passage of this ordinance, at its own expense, remove the whole or such portion of the double iron railway tracks that it has caused to be laid on said portion of Lexington street, as the city commissioner shall designate, and shall also, at its own expense, replace the pavement on the said portion of East Lexington street in a manner satisfactory to the city commissioner."

After the passage of this ordinance and before the expiration of the twenty days mentioned in the proviso to the third section, the railroad company, not admitting the right of the city to pass such ordinance or to compel the company to take up one of its tracks, and yet being embarrassed by the proviso as to the necessity of taking up the tracks within twenty days, came to an understanding with the city authorities that, as both parties desired a speedy determination of the question of law, a case should be made which should raise that question, and it should be presented to the courts for their decision, and that in the meantime the provision limiting the time in which to take up the track would not be enforced. Accordingly a bill was filed in the city court of Baltimore by

the railroad company raising the question, and a demurrer on the part of the city was served and a decree taken against the company *pro forma* in that court. An appeal was then taken by the company to the Court of Appeals of Maryland, which court after full argument of the question decided the case on its merits, and affirmed the judgment of dismissal directed by the court below. *Lake Roland Elevated Railway* v. *Baltimore*, 77 Maryland, 352. This decision was rendered about the 16th of March, 1893.

Thereafter the railroad company took up one of its tracks on Lexington street and located the other under the direction of the city commissioner and proceeded with due diligence to lay down a single track on Lexington street and to restore the street to its proper condition.

While engaged in this work and on the 1st of April, 1893, the mayor notified the company by letter that he was advised that the company had no authority to lay its track on the bed of Lexington street between North and Charles streets, in the absence of an ordinance granting such a privilege from the mayor and city council. (This letter, it is supposed, was based upon the proposition that the company had not complied with the condition contained in the ordinance of November, 1892, already mentioned.) The mayor therefore advised the company that, in the opinion of the city law officers, the present single track of the company occupying the bed of the street was a violation of law. A suggestion was made by him that an application for an ordinance be at once made to the city council, and that there should be no delay in the matter, as the public convenience required Lexington street to be promptly made passable by repaving. The president of the company replied, declining, under the circumstances, to ask for the passage of another ordinance, because, as he was advised and believed, the company already had a clear right to lay down and maintain its tracks on Lexington street. The mayor, on April 5, 1893, then notified the company that on Wednesday, April 12, the commissioner would commence to take up the tracks on Lexington street, unless in the meantime the railroad company applied to the city council, which

would meet on April 10, for an ordinance giving it a right to keep its track on the street.

Soon afterwards, and on the 15th of April, 1893, this suit was commenced. In the bill it was alleged that if the city were permitted to take up the tracks it would be impossible for the company to reach its terminus at the corner of Charles and Lexington streets, and that as the entire railway system of the company was on the eve of completion and operation, it would suffer great damage by the removal of the tracks; the plaintiff also claimed that ordinance No. 23, having been accepted and acted upon by the railroad company, there was thereby constituted an irrepealable and inviolable contract between the municipal corporation and the railroad company, the terms of which could not be altered or impaired without the consent of both parties to the contract, and that, therefore, the subsequent ordinance purporting to change the terms of the original so as to deprive the railroad company of the right to reach its terminus with double tracks was in contravention of the tenth section of the first article of the Constitution of the United States, which prevents legislation which impairs the obligation of contracts, and for that reason the subsequent ordinance was void. It was also alleged that the proposed action of the city authorities was not only invalid, but that it tended directly to impair the value of the mortgage security held by the plaintiff trust company as trustee for the bondholders.

On the other side it was alleged on the part of the common council that the original ordinance was nothing but a revocable license, and that the existence of double tracks in that portion of Lexington street, lying between North and Charles streets, would be inconsistent with the reasonable use of the street at that point by the public and by other vehicles; that the street was so narrow as to leave but just sufficient room between the curb and the railroad tracks for ordinary vehicles to pass, and that those which were of extra width could not meet or pass a car on the same side of the street; that the street was one of the main thoroughfares running east and west in the city of Baltimore; that at certain portions of the day it was crowded with vehicles of all descriptions, and

that to permit the use of the street at the point in question by this company, with its electric cars running at a comparatively high rate of speed and with double tracks laid in the street, would prevent the reasonable use of the same by the public, and would be dangerous in the extreme and directly tend to loss of life and injury to property.

As to the matter of convenience to the public and of necessity to the company, the latter asserted it would, in fact, accommodate the public more to have double tracks than a single one, while it was a real necessity to the company in order that it might, by giving accommodation to the public, impossible with a single track, successfully compete with rival roads running through adjacent streets for a fair share of patronage; that it could not do so, if it had but a single track for eleven hundred feet on Lexington street.

Upon these facts the case was heard in the court below, and that court held that ordinance No. 23, upon its acceptance by the railroad company, became a contract between the city and the railroad company, which could not be substantially modified without the consent of both parties, and that the subsequent ordinance was a violation of that contract and therefore invalid, and a judgment was ordered enjoining the city authorities from interfering with the railroad company in the construction and maintenance of two parallel tracks on Lexington street, and from interfering in any manner with the company in the operation of its electric cars over and upon such tracks, provided the two tracks are laid and maintained and the cars operated in conformity with the provisions of ordinance No. 23, and in conformity with the general regulations of the mayor and common council of Baltimore relating to the construction and operation of such street railways, not inconsistent with the provisions of ordinance No. 23, above mentioned. From this decree, Judge Morris, District Judge in the district of Maryland, dissented. 64 Fed. Rep. 153. An appeal having been taken by the city of Baltimore, the case was brought here for review.

*Mr. Thomas G. Hayes* for appellant. *Mr. Thomas Ireland Elliott* was on his brief.

Opinion of the Court.

*Mr. Francis K. Carey* and *Mr. E. J. D. Cross* for appellee. *Mr. John N. Steele* and *Mr. John E. Semmes* were on their brief.

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

The discussion on the argument of this case took quite a wide range, but in the view we take, we can dispose of this appeal without deciding whether the common council had or had not the power to make a contract for the perpetual use of its streets by the railroad company, upon the terms and conditions which might be agreed upon between the common council and the railroad company, and which when once agreed upon should not be thereafter subject to repeal or material alteration by the common council. It is sufficient for the decision of this case to hold that the direction to lay but one track through Lexington street, between the points mentioned, did not substantially change the terms of the contract, and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of that street by the railroad company and that the original contract (assuming that one existed) was entered into subject to the right of the city to adopt such a regulation.

Chapter 370 of the act of 1890, referred to in the foregoing statement of facts, distinctly granted to the mayor and city council of Baltimore the power to regulate the use of the streets by railway companies. In the absence of any such positive legislation, we think there could be no well founded doubt of this power, and that any contract entered into by the city with a railroad company would be subject to its exercise, so long as it did not materially modify or impair the rights granted by the contract. Indeed, no question is made of the existence of a power of regulation by any party to this suit. It was not denied by the court below. The only dispute on this branch of the case between the parties is in regard to the question whether the direction to lay but a single track on Lexington street, between the points men-

tioned, is or is not a reasonable regulation of the use of that street to which the contract was subjected, as above stated.

We are not now concerned with the question of the right of the common council absolutely or unconditionally to repeal ordinance No. 23, but simply as to whether the passage of the subsequent ordinance amounted to a valid regulation of the use of the street by the railroad company. We think that the later ordinance, although the word "repeal" was used in its first section, was in substance a regulation of the use of the street which the city had the power to enact. The effect of the whole ordinance was simply to change the right of the company to operate its road on Lexington street for eleven hundred feet, so that instead of using double tracks it should have in that street but a single track.

There is sufficient in the case before us from which it may be seen that the laying down of double tracks in some portion of the street in question was done with the knowledge that it was against the wishes of the mayor and the city authorities, and in spite of the notification by them to the company that immediate measures would be taken to have ordinance No. 23 so altered by the common council at its first session as to provide for the laying of but one track instead of double tracks between North and Calvert streets on Lexington street. Notwithstanding such notice the company proceeded by working night and day to lay down the double tracks in Lexington street between the points last named. In looking at the question, therefore, of the reasonableness of the ordinance which made no provision for payment by the city of the expense of taking up one track and relocating the other along Lexington street, but which on the contrary provided that it should be done at the expense of the railroad company, it is proper that we should view the case as if the proposed regulation had been passed before the company had laid any track on Lexington street, between North and Calvert streets, and before it had been put to any expense on account of such double track. We cannot say the regulation was unreasonable simply on the ground that it did not provide for paying the expense of taking up one track already laid in the street between Calvert

and Charles streets (a distance of a few hundred feet), to the laying of which the city had not, at the time, objected. Having at one time granted the right to the company to lay double tracks through certain named streets of the city of Baltimore, was it a reasonable regulation of the use of one of those streets to thereafter, and before the completion and operation of the road therein, provide that but a single track in that street should be used instead of the double tracks which had been first provided for?

Upon the facts already set forth a sufficient foundation was laid for the exercise of a fair and reasonable legislative discretion in determining the question whether the portion of the street mentioned should be occupied by a single or double track of the railway company. A regulation of that portion of the street by subjecting it to the use of but one instead of double railway tracks did not (in our judgment) thereby materially modify nor did it, in effect, prohibit the exercise of the privileges previously granted by the city to the railroad company, nor did it impair the obligation of the contract or destroy vested rights, nor was this regulation substantially inconsistent with the terms of ordinance No. 23. While that ordinance provided generally for double tracks through the streets mentioned therein, the reduction of the right to use two tracks and the granting of the right to use but one for such a comparatively short distance in one particularly crowded and narrow thoroughfare was not a regulation inconsistent with the terms of the original ordinance. It would, we think, be unreasonable to hold that the least limitation of the power to operate double tracks was an infringement and impairment of the contract as set forth in the ordinance. In our opinion, the ordinance does not give any such cast iron right or one which shall be beyond any reasonable limitation and supervision by the city. It granted the use of the streets for double tracks for many miles, and the subsequent limitation of that use to one track related to but a few hundred feet where peculiar and exceptional conditions existed, where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thoroughfare was very

great, and where it might fairly be decided by the common council that double tracks at that point would be an unreasonable and dangerous use of the street by the company and directly tend to prevent its reasonable and safe use and enjoyment by the public at large.

In *St. Louis* v. *Western Union Telegraph Co.*, 149 U. S. 465, 469, Mr. Justice Brewer, in delivering the opinion of the court in regard to the power of regulation of the streets of a city, said:

"It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been put to in opening and improving the street."

To same effect, see *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203: "The power to *regulate* commerce," says Mr. Justice Field, speaking for this court, "is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted."

If it be said in this case that the city had already regulated the use by prescribing that there should be two tracks, the answer is that this power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised

as often as and whenever the common council may think proper; the use of the street may be subjected to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672; *N. Y. & N. E. Railroad* v. *Bristol*, 151 U. S. 556, 567.

The effect of the third section of the latter ordinance was to leave with the railroad company the power to lay down and maintain and use one track instead of double tracks on Lexington street between the streets named. It is true the city assumed to attach a condition to the exercise of this right, which was that the railroad company should within twenty days remove the double tracks and replace the pavement. In view of all the facts, we should incline to regard this as in the nature of a penalty to secure obedience of the company to the regulation, and in any event, in the light of the conduct of the parties in relation to the litigation in the state court, we think the railroad company has not lost the right to maintain one track in the street in question as it now exists, without the adoption of any further ordinance on the subject.

On the ground which we have stated, we think the decree of the Circuit Court wrong, and for that reason it must be

*Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.*

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## LONG ISLAND WATER SUPPLY COMPANY *v.* BROOKLYN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No 216. Argued March 17, 18, 1897. — Decided April 16, 1897.

In cases brought here from state courts their decisions are final in matters of procedure, and on alleged conflicts between the statutes of the State and its constitution.

Statement of the Case.

An existing system of water supply in a municipality which is the property of private individuals and is operated under a contract with the municipal corporation for furnishing it with a portion of its needed supply of water under rates fixed by the contract, is private property which may be acquired by the public, in the exercise of the power of eminent domain, on the payment of a just compensation, including compensation for the termination of the contract.

In condemnation proceedings for that purpose, the assessment of damages may be made by commissioners where the statutes so provide, and there is no denial of due process of law in making their findings final as to the facts, leaving open to the courts the inquiry whether there was any erroneous basis adopted by the commissioners in their appraisal, or other errors in their proceedings.

There was nothing in the statute under which the Long Island Water Supply Company was organized, nor in its contract with the town of New Lots for the supply of water, nor in the act of annexation to Brooklyn, which gave to that company rights exclusive and beyond the reach of such legislative action.

Under authority of chap. 737 of the laws of New York for 1873, (Laws N. Y. 1873, p. 1100), as amended in 1881 (Laws N. Y. 1881, chap. 321, p. 443), the plaintiff in error was organized as a water company. On September 15, 1881, it entered into a contract with the town of New Lots, by which it agreed to lay water pipes and mains in the streets of New Lots, and supply the town with water. The town, on the other hand, agreed to pay for hydrants to be furnished and supplied, as provided in the contract, at a specified rate per hydrant, the number of hydrants to be not less than 200. The term of the contract was twenty-five years. This contract was modified on July 2, 1885, but the modification contains nothing material to this controversy.

In 1886, by chap. 335 (Laws N. Y. 1886, p. 540), the town of New Lots was annexed to and merged in the city of Brooklyn, to be known thereafter as the 26th ward of said city.

The fourth section of this act provided, among other things, that "the amount annually payable by said town for water supplied to it under existing contracts between it and the Long Island Water Supply Company, shall, after this act takes effect, during the terms of said contract, or until said city shall purchase or acquire the property of said water company, as in the next section provided, be levied and collected

from the property situated and taxable within the territory hereby annexed, and such amount shall be paid to the said water company by said city as it falls due from time to time under said contracts, and the said city of Brooklyn shall not distribute or furnish water for consumption or use within said territory, or lay any pipes or mains for the distribution or supply of water within said territory, until the expiration of the charter of said company or until the said city shall purchase or acquire the property of said company as in the next section provided."

By section 5 the city was given power to purchase or condemn the property of the company within two years, but did neither. In 1892 the legislature passed another act (Laws 1892, chap. 481, p. 960), authorizing the city of Brooklyn to condemn the property of the company, the first section of which is as follows:

"SECTION 1. The public interest requires the acquisition, by the city of Brooklyn, for the public use of the reservoir, wells, machinery, pipes, franchises and all other property of the Long Island Water Supply Company, and the said city of Brooklyn is hereby authorized to acquire the same for such use by condemnation, free of all liens and incumbrances whatsoever, provided that the proceedings herein, hereinafter and hereby authorized, shall be commenced within one year after the passage of this act."

Subsequent sections prescribed the procedure. Proceedings were had under this act. The commissioners appointed, as provided therein, valued the property of the company at $570,000, of which $370,000 was named as the value of the tangible property, and $200,000 that of the franchises, contracts and all other rights and property of whatsoever nature or kind of the company, including therein the contract between the town of New Lots and the company. The special term of the Supreme Court, on June 29, 1893, made an order vacating and setting aside this report and appointing new commissioners. The city of Brooklyn appealed to the general term of that court, which, on December 1, 1893, reversed the order of the special term and confirmed the report of the com-

missioners. The company then took an appeal to the Court of Appeals. That court affirmed the decision of the general term, 143 N. Y. 596, and remitted the record to the Supreme Court, which court, on December 4, 1894, entered final judgment in favor of the city of Brooklyn, and thereupon this writ of error was sued out.

*Mr. John F. Dillon* and *Mr. Benjamin F. Tracy* for plaintiff in error. *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on their brief.

*Mr. George G. Reynolds* and *Mr. Albert G. McDonald* for defendant in error.

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

So far as respects any mere matter of procedure, or of conflict between the statute authorizing the condemnation or the proceedings had thereunder and the constitution of the State, the decision of the Court of Appeals is conclusive. *West River Bridge Company* v. *Dix*, 6 How. 507; *Bucher* v. *Cheshire Railroad*, 125 U. S. 555; *Adams Express Company* v. *Ohio*, 165 U. S. 194. Our inquiry must be directed to the question whether any rights of the water supply company secured by the Constitution of the United States have been violated. The contention of plaintiff in error is that the proceedings had under the statute which resulted in the judgment of condemnation violate section 10, article 1, of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of contracts, and were not "due process of law," as required by the Fourteenth Amendment.

With reference to the first part of this contention it is said that in 1881 the town of New Lots made a contract with the water supply company by which for each and every year during the term of twenty-five years it covenanted to pay to the company so much per hydrant for hydrants furnished and supplied by it; that the act of annexation continued the burden

of this obligation upon the territory within the limits of the town, although thereafter the town as a separate municipality ceased to exist, and the territory became simply a ward of the city of Brooklyn; that the condemnation proceedings destroyed this contract and released the territory from any obligation to pay the stipulated hydrant rental; that a State or municipality cannot do indirectly what it cannot do directly; that as the municipality could not by any direct act release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation. We cannot yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guarantee of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it — all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the water works might be taken by condemnation. And so the contention is practically that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and, therefore, operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it. Such a decision would be far reaching in its effects. There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located,

and a ruling that all those properties are beyond the reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction. The fact that this particular contract is for the payment of money for hydrant rental is not vital. Every contract is equally within the protecting reach of the prohibitory clause of the Constitution. The charter of a corporation is a contract, and its obligations cannot be impaired. So it would seem to follow, if plaintiff in error's contention is sound, that the franchises of a corporation could not be taken by condemnation, because thereby the contract created by the charter is impaired. The privileges granted to the corporation are taken away, and the obligation of the corporation to perform is also destroyed.

The vice of this argument is twofold. First, it ignores the fact that the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public uses, is condemned. And while the company, by being deprived of its tangible property, is unable to perform its part of the contract, and therefore can make no demands upon the town for performance on its part, it still is true that the contract is not the thing which is sought to be condemned, and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property. Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 673. Its condemnation is of course subject to the rule of just compensation, and that is all that is implied in the decisions such as *Hall* v. *Wisconsin*, 103 U. S. 5, cited by counsel. In that case it appeared that Hall had a contract with the State for services entered into in pursuance of a statute, that he performed the services, but that before finishing his work the legislature repealed the statute authorizing the contract. It was held that he was nevertheless entitled to his stipulated compensation. The act of the legislature in the repeal was not one providing for condemnation, and in so far as it partook of the

nature of a condemnation it ignored the obligation of just compensation, and was therefore void; but it was not held that, if just compensation had been provided and a public use required, the contract might not have been condemned.

The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses. The statute under which these proceedings were had declares the necessity of the acquisition "for the public use of the reservoir as well as machinery, pipes, franchises and all other property" of the company, and the application for the appointment of commissioners not only described the tangible property but also added "all franchises, contracts, more particularly a certain contract dated the 15th day of September, 1881, between the town of New Lots and the said Long Island Water Supply Company, and referred to in chap. 335, Laws of 1886, and all other rights and property of whatsoever nature or kind as the same may so appear." The commissioners, after a hearing, valued first the tangible property at $370,000 and the franchises, contracts and all other rights and property, including this particular contract, at $200,000. In other words, the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value. The case of *West River Bridge Co.* v. *Dix*, 6 How. 507, is in point. The bridge company had a charter from the State of Vermont creating it a corporation and investing it with the exclusive privilege of erecting a bridge over West River within four miles of its mouth and with the right of taking tolls for passing the same. Under that authority it had erected its bridge and was in the enjoyment of the franchise. During the life of the charter, and under authority of an act of the legislature, condemnation proceedings were taken for the purpose of condemning the bridge and extinguishing the charter; converting the former into a free public highway. These proceedings culminated in an award of compensation and a judgment of condemnation. The Supreme Court of the State having sustained the proceedings they were brought to this court on error, and there as here the

contention was that the proceedings were in violation of the tenth section of the first article of the Constitution. This contention was overruled, and in the course of the opinion it was observed:

"No State, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. . . . Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right

does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. . . . A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction, thus attempted, we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, c. 3, p. 20, of the Rights of Things." See also *The Richmond &c. Railroad Company* v. *The Louisa Railroad Company*, 13 How. 71, 83; *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1, 35, 36.

The views thus expressed have never been overruled, and we think are controlling of this case. Counsel seek to distinguish that case from this in that here, as they say, there is an executory contract for 25 years, whereas in that case there was only incorporeal property, the result of an executed grant; here the use of the water works property is not changed, whereas there the bridge was converted from a toll into a free bridge, and they quote some remarks made by Mr. Justice McLean, in a concurring opinion in respect to this matter, p. 537, as follows:

"No State could resume a charter, under the power of appropriation, and carry on the functions of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the State, and kept up by it, as a toll bridge. This could not be called an appropriation of private

property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised *bona fide* by a State, but the property, not its product, must be applied to public use. . . . The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation. But it was a toll bridge, and by the act it is made free. The use, therefore, is not the same. The tax assessed on the citizens of the town, to keep up and pay for the bridge, may be impolitic or unjust; but that is not a matter for the consideration of this court."

We do not think the differences between the cases such as to affect the right of condemnation. A charter is not simply an executed grant but a continuing contract. There is a duty of performance by the recipients of the grant which continues during the life of the charter. Neither can the power of the State to condemn a water works system depend upon the question whether it makes the supply of water absolutely free to all individuals who desire to use it. The State, which, in the first place, has the power to construct a water supply system and charge individuals for the use of the water, may condemn a system already constructed, and continue to make such charge. This is not turning property from one private corporation to another, but taking property from a private corporation and vesting the title in some municipal corporation for the public use. It is not essential to a public use that it be absolutely free and without any charge to any one. The State may build a railroad and charge tolls for passengers and freight. It is, nevertheless, a public function which it is exercising, and the property is devoted to public uses. And so wherever there is cost in continuing a public work the State has a right to demand compensation for any individual use and personal benefit therefrom.

Neither can it be said that there was not "due process of law" in these condemnation proceedings. It is not essential that the assessment of damages be made by a jury. Such award may be made by commissioners, at least where there is

provision for a review of their proceedings in the courts. *Central Branch Union Pacific Railroad* v. *Atchison, Topeka & Santa Fé Railroad*, 28 Kansas, 453, 463; Cooley on Const. Lim. 563. And sections 9 and 10 of the act of 1892, under which these proceedings were had, require that the commissioners make and file a report of their proceedings and determination in the Supreme Court of the county of Kings, and that application must be made to that court for a confirmation of the report; that notice of such application must be given; and that "upon such application the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award, in part or in whole, is excessive, or is insufficient;" and appeal was allowed from the decision of that court to a higher. We do not question the proposition that form is not the only thing essential to due process. We said in the recent case of *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

It may be true, as contended, that, as construed by the Court of Appeals, the determination of the commissioners is conclusive as to the mere value of the property, but there is no denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings.

The error charged against the commissioners in respect to their basis of valuation is that they failed to regard the company as possessed of exclusive rights. It is said by counsel in their brief that the company had, by virtue of its contract and the act of annexation, "two vested rights as against the city of Brooklyn: 1st. A vested right resting in contract to continue to supply water under and pursuant to the said contracts with the town of New Lots 'during the term of said

contracts'; that is, for the unexpired period of said contracts — about fourteen years. 2d. A further vested right resting in contract and valid legislative enactment to enjoy its franchises until the expiration of its charter, protected from any rivalry on the part of the city of Brooklyn."

The view taken by the majority of the commissioners is thus stated in their report:

"To recapitulate what has just been said, we have valued the franchise upon the assumptions (1) that at present the water company alone has the right publicly to purvey water in the Twenty-sixth ward; (2) that the exclusiveness now incident to its right may at any time be taken from it by the legislature, or by local authorities acting under legislation; but (3) that neither the legislature nor local authorities would, in determining whether to take from the company the exclusiveness of its right, fail to have such due regard as is demanded by ample and fair public policy, to the past investment, risks and services of the company and to the reasonably just expectations which those who have invested money in its work had in mind when so investing."

The Court of Appeals held that neither the statute under which the company was organized, nor the contract, nor the act of annexation, gave to the company rights exclusive and beyond the reach of legislative action. These conclusions of the Court of Appeals are vigorously challenged in the argument, but we are of opinion that they are correct. The statute simply provided for the organization of water companies. The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals. But grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege. *Charles River Bridge Co.* v. *Warren Bridge*, 11 Pet. 420; *Turnpike Co.* v. *State*, 3 Wall. 210; *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258; *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167. Nor is there anything in the act

of annexation which made a contract or created a right beyond the power of the legislature to change. It gave the city the right to purchase or condemn at any time within two years, but this specification of time did not operate to prevent the legislature from enlarging the time, or from granting at any subsequent period during the life of the contract a further right of purchase or condemnation. No consent was asked of the town company in the act of annexation; it entered into no new contract; nothing was done to enlarge the rights which it had against the public. The act was simply one of legislative discretion in respect to municipal organization, and, like any other such act, subject to future modification by the legislature.

Neither can the act of 1892 be adjudged in conflict with the Federal Constitution because it fails expressly and in detail to prescribe the uses to which the property shall be put by the city of Brooklyn after the condemnation. The property condemned was not vacant land susceptible to a multitude of uses. The character of its use had already been determined by the action of the company. It was already used for public purposes, and the condemnation simply took the title away from the private corporation and vested it in the municipality. And the statute cannot be adjudged unconstitutional because it did not in terms declare that the city of Brooklyn should continue the same use or appropriate the property to some other equally public purpose.

These are the vital questions in the case. We see no error in the judgment, and it is, therefore,

*Affirmed.*

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

# SENTELL *v.* NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS FOR THE PARISH OF ORLEANS, IN THE STATE OF LOUISIANA.

No. 232. Submitted March 25, 1897. — Decided April 26, 1897.

A state statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that in a civil action for killing a dog the owner cannot recover beyond the value fixed by himself in the last assessment preceding the killing, is within the police power of the State.

This was an action originally instituted by Sentell in the civil district court for the Parish of Orleans, to recover the value of a Newfoundland bitch, known as "Countess Lona," alleged to have been negligently killed by the railroad company.

The company answered, denying the allegation of negligence, and set up as a separate defence that plaintiff had not complied either with the requirements of the state law, or of the city ordinances, with respect to the keeping of dogs, and was, therefore, not entitled to recover. The law of the State was as follows:

"Section 1. *Be it enacted by the General Assembly of the State of Louisiana*, That sec. (1201) twelve hundred and one of the Revised Statutes of Louisiana be amended and re-enacted so as to read as follows: From and after the passage of this act dogs owned by citizens of this State are hereby declared to be personal property of such citizens, and shall be placed on the same guarantees of law as other personal property; provided, such dogs are given in by the owner thereof to the assessor.

"Sec. 2. *Be it further enacted, etc.*, That no dog shall be entitled to the protection of the law unless the same shall have been placed upon the assessment rolls.

Counsel for Plaintiff in Error.

"SEC. 3. *Be it further enacted, etc.*, That in civil actions for the killing of or for injuries done to dogs, the owner cannot recover beyond the amount of the value of such dog or dogs, as fixed by himself in the last assessment preceding the killing or injuries complained of.

"SEC. 4. *Be it further enacted, etc.*, That all laws in conflict with this act be repealed.

"Approved July 5, 1882." Laws of 1882, p. 160.

By the city ordinance, adopted July 1, 1890, No. 4613, "no dog shall be permitted to run or be at large upon any street, alley, highway, common or public square within the limits of the city of New Orleans; provided that this section shall not apply to any dog to which a tag, obtained from the treasurer, is attached." By section 8 the treasurer was directed to furnish metal dog tags to all persons applying for the same at the rate of two dollars each, available only for the year in which they were issued.

Plaintiff denied the constitutionality of the state act; and the court charged the jury that the fact that the dog was not tagged, as required by the city ordinances, could not affect the right of the plaintiff to recover; that the above act of the legislature was unconstitutional as destructive of the right of property; and that a dog, being property, a law which requires that property should not be protected unless listed for taxation, was in conflict with the Constitution of the United States, providing that no person shall be deprived of his life, liberty or property without due process of law. The jury returned a verdict in favor of the plaintiff for $250, upon which judgment was entered.

The case was carried to the Court of Appeals, which reversed the judgment of the trial court, and entered judgment in favor of the defendant, holding that plaintiff should have shown a compliance with the law of the State and the ordinances of the city as a condition precedent to recover. Whereupon plaintiff sued out a writ of error from this court.

*Mr. George Denègre* and *Mr. Omer Villeré* for plaintiff in error.

*Mr. Henry P. Dart* for defendant in error.

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

This case turns upon the constitutionality of a law of the State of Louisiana requiring dogs to be placed upon the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation.

The dog in question was a valuable Newfoundland bitch, registered in the American Kennel's stud-book, and was kept by her owner for breeding purposes. It seems that while following him in a walk upon the streets, she stopped on the track of the railroad company, and, being otherwise engaged for the moment, failed to notice the approach of an electric car which was coming toward her at great speed; and, being moreover heavy with young, and not possessed of her usual agility, she was caught by the car and instantly killed. The Court of Appeals was evidently of opinion that her owner, knowing of her condition, should not have taken her upon a public thoroughfare without exercising the greatest care and vigilance, and that the accident was largely due to a want of prudence upon his part. The facts, however, were not properly before the court, and the opinion was put upon the ground that the state law was constitutional and valid as a police regulation to prevent the indiscriminate owning and breeding of worthless dogs. The judges also annexed a certificate that the decision was reversed upon the ground that the law was constitutional, and that no other point was passed upon.

By the common law, as well as by the law of most, if not all, the States, dogs are so far recognized as property that an action will lie for their conversion or injury, 2 Bl. Com. 393; *Cummings* v. *Perham*, 1 Met. 555; *Kinsman* v. *State*, 77 Indiana, 132; *State* v. *McDuffie*, 34 N. H. 523; *Parker* v. *Mise*, 27 Alabama, 480; *Wheatley* v. *Harris*, 4 Sneed, 468; *Dodson* v. *Mock*, 4 Dev. & Bat. 146; *Perry* v. *Phipps*, 10 Ired. Law, 259; *Lentz* v. *Stroh*, 6 S. & R. 33; although, in the absence of a statute, they are not regarded as the subjects of

larceny. 2 Bish. New Crim. Law, § 773; *Case of Swans*, 7 Coke, 86, 91; *Norton* v. *Ladd*, 5 N. H. 204; *Findlay* v. *Bear*, 8 S. & R. 571; *People* v. *Campbell*, 4 Parker C. C. 386; *State* v. *Doe*, 79 Indiana, 9; *Ward* v. *State*, 48 Alabama, 161; *State* v. *Lymus*, 26 Ohio St. 400; *State* v. *Holder*, 81 N. C. 527.

The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ* in which, until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete. They are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds and similar animals kept for pleasure, curiosity or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.

As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified prop-

erty in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several States. Laws for the protection of domestic animals are regarded as having but a limited application to dogs and cats; and, regardless of statute, a ferocious dog is looked upon as *hostis humani generis*, and as having no right to his life which man is bound to respect. *Putnam* v. *Payne*, 13 Johns. 312; *Hinckley* v. *Emerson*, 4 Cow. 351; *Brown* v. *Carpenter*, 26 Vermont, 638; *Woolf* v. *Chalker*, 31 Connecticut, 121; *Brent* v. *Kimball*, 60 Illinois, 211; *Maxwell* v. *Palmerton*, 21 Wend. 407.

Statutes of the general character of the one in question have been enacted in many of the States, and their constitutionality, though often attacked, has been generally, if not universally, upheld. Thus in *Tower* v. *Tower*, 18 Pick. 262, an act which authorized "any person to kill any dog or dogs found, and being without a collar," was construed to authorize the killing of a dog out of the enclosure of his owner, although he was under his immediate care, and this was known to the person killing the dog.

In *Morey* v. *Brown*, 42 N. H. 373, a statute providing that no person should be liable for killing a dog found without a collar with the name of the owner engraved thereon, was held to justify the killing, although the defendant had actual notice of the ownership of the dog found without such collar. Plaintiff claimed that the act was unconstitutional, but the court held that it was not an act to take private property for public use, or to deprive parties of their property in dogs; but merely to regulate the use and keeping of such property in a manner which seemed to the legislature reasonable and expedient. "It is a mere police regulation, such as we think the legislature might constitutionally establish." To the same effect are *Carter* v. *Dow*, 16 Wisconsin, 317; *Mitchell* v. *Williams*, 27 Indiana, 62; *Haller* v. *Sheridan*, 27 Indiana, 494.

The statutes of Massachusetts, from the earliest colonial

period to the present day, are reviewed in an elaborate opinion in *Blair* v. *Forehand*, 100 Mass. 136, and laws are shown to have existed, sometimes for the killing of "unruly and ravenous dogs"; sometimes, as in Nantucket in 1743, for the killing of "any dog or bitch whatsoever that shall at any time be found there"; and sometimes for the killing of dogs "strolling out of the enclosure or immediate care of the owner," or going at large without a collar. In the particular case it was held that a statute declaring that any person might, and every police officer and constable should, kill or cause to be killed, all dogs, whenever or wherever found, not licensed and collared according to other provisions of the statute, was within the constitutional limits of the authority of the legislature. Such acts appear to have been very frequent in that State, and their constitutionality generally acquiesced in.

In the more recent case of *Morewood* v. *Wakefield*, 133 Mass. 240, the same statute was construed as authorizing any person to kill a dog which was licensed, but had no collar on, provided that he could do so without committing a trespass, although no warrant for the killing of dogs had been issued. The constitutional objection against general warrants, which was the occasion of so much controversy in that State in its colonial days, was held not to apply to dogs, and a warrant was sufficient which ordered the killing of all dogs, living in a town, not duly licensed and collared.

In *Ex parte Cooper*, 3 Tex. App. 489, it was held that dogs were not property within the tax clause of the constitution, and that a tax upon dogs was a police regulation and a legitimate exercise of the police power. The point was made that dogs, being property, should, under the constitution, be taxed *ad valorem* as other property was. But it was held that the law was not a tax law in its ordinary sense, but a police regulation.

So in *Tenney* v. *Lenz*, 16 Wisconsin, 566, it was held that it was a legitimate exercise of the police power "to regulate and license the keeping of dogs," and that the exercise of that power was based upon the idea that the business licensed, or

kind of property regulated, is liable to work mischief, and therefore needs restraints which shall operate as a protection to the public.

In *Jenkins* v. *Ballantyne*, 8 Utah, 245, the constitutional question is considered at great length, and the provisions of a city charter authorizing the city to tax, regulate or prohibit the keeping of dogs, and to authorize the destruction of the same, when at large, contrary to the ordinance, and the issuance of a certificate of registration, requiring the wearing of a collar by the dog with his registered number thereon, and providing that all dogs not so registered and collared should be liable to be killed by any person, were valid and were not in violation of the Fifth Amendment to the Constitution.

The only case to the contrary, to which our attention has been called, is that of *Mayor &c.* v. *Meigs*, 1 MacArth. 53, in which a city ordinance of Washington, requiring the owner of dogs to obtain a license for the keeping of the same, was held to be illegal. The substance of the opinion seems to be that if the dog be a species of property, which was conceded, it was entitled to the protection of other property, and the owner should not be required to obtain a license for keeping the same.

Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the State, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens. That a State, in a *bona fide* exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits and vegetables do not cease to become private property by their decay; but it is clearly within the power of the State to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than

one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass. *Bowditch* v. *Boston*, 101 U. S. 16; *Mouse's case*, 12 Coke, 63; *Governor &c.* v. *Meredith*, 4 T. R. 794, 797; *Stone* v. *The Mayor &c.*, 25 Wend. 157; *Russell* v. *The Mayor &c.*, 2 Denio, 461.

Other instances of this are found in the power to kill diseased cattle, to destroy obscene books or pictures, or gambling instruments; and, in *Lawton* v. *Steele*, 152 U. S. 133, it was held to be within the power of a State to order the summary destruction of fishing nets, the use of which was likely to result in the extinction of valuable fisheries within the waters of the State.

It is true that under the Fourteenth Amendment no State can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction. As was said in *Jenkins* v. *Ballantyne*, 8 Utah, 245, 247, "The emergency may be such as not to admit of the delay essential to judicial inquiry and consideration, or the subject of such action and process may be of such a nature, or the conditions and circumstances in which the act must be performed to effect the protection and give effect to the law may be such as to render judicial inquiry and consideration impracticable."

Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the

liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the State. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon.

In Louisiana there is only a conditional property in dogs. If they are given in by the owner to the assessor, and placed upon the assessment rolls, they are entitled to the same legal guaranties as other personal property, though in actions for their death or injury the owner is limited in the amount of his recovery to the value fixed by himself in the last assessment. It is only under these restrictions that dogs are recognized as property. In addition to this, dogs are required by the municipal ordinance of New Orleans to be provided with a tag, obtained from the treasurer, for which the owner pays a license tax of two dollars. While these regulations are more than ordinarily stringent, and might be declared to be unconstitutional, if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain. It is purely within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets. The statute really puts a premium upon valuable dogs, by giving them a recognized position, and by permitting the owner to put his own estimate upon them.

There is nothing in this law that is not within the police power, or of which the plaintiff has a right to complain, and the judgment of the Court of Appeals is, therefore,

*Affirmed.*

## SPRINGVILLE *v.* THOMAS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 103. Argued and submitted October 29, 1896. — Decided April 26, 1897.

## SALT LAKE CITY BREWING COMPANY *v.* FRED. W. WOLF COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 153. Submitted January 14, 1897. — Decided April 26, 1897.

## SALT LAKE CITY *v.* TUCKER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 199. Submitted January 29, 1897. — Decided April 26, 1897.

The judgments in these cases are reversed on the authority of *American Publishing Co.* v. *Fisher*, *ante*, 464.

THE case is stated in the opinion.

*Mr. J. L. Rawlins* for plaintiff in error in No. 103.

*Mr. Parley L. Williams* for defendants in error in No. 103.

*Mr. William C. Hall* for plaintiff in error in No. 153.

*Mr. Parley L. Williams*, *Mr. Frank Pierce* and *Mr. Frank H. Scott* for defendant in error in No. 153.

*Mr. William McKay* and *Mr. D. B. Hempstead* for plaintiff in error in No. 199.

*Mr. William T. S. Curtis* for defendants in error in No. 199.

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

In these three cases judgments were entered on verdicts returned by less than the whole number of jurors, by which they

were tried. It has been decided by this court that the territorial act of March 10, 1892, permitting this to be done, Laws Utah, 1892, p. 46, was invalid, because in contravention of the Seventh Amendment to the Constitution and the act of Congress of April 7, 1874, 18 Stat. 27, c. 80. *American Publishing Co.* v. *Fisher*, *ante*, 464.

Exceptions to the course pursued were sufficiently preserved and the judgments must be reversed if this court has jurisdiction.

The amounts in controversy in each instance were not sufficient to give jurisdiction, and the inquiry is whether the validity of any statute of, or authority exercised under, the United States was drawn in question before the courts below. Act March 3, 1885, 23 Stat. 443, c. 355, § 2.

The Supreme Court of the Territory held in *Hess* v. *White*, 9 Utah, 61 (and the decision was followed in these cases), that the act of Congress of September 9, 1850, 9 Stat. 453, c. 51, § 6, the organic act of the Territory, vested in the territorial legislature such unlimited legislative power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. But defendants contended that the act of Congress as thus interpreted was in violation of the Seventh Amendment and the validity of the act was in that way drawn in question. In the view which the Supreme Court took of the act it was obliged to subject it to the test of the Constitution, and accordingly in deciding that the Seventh Amendment did not require unanimity of action, the court held in effect that the act of Congress was constitutional although it empowered the territorial legislature to provide for verdicts by less than the whole number of jurors. The question involved was not matter of construction of the territorial act, but the court discussed its validity, and this depended on the validity of the act of Congress giving it the scope which the court attributed to it.

In this there was error. In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of

Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.

These cases are exceptional, and, under the peculiar circumstances, we think jurisdiction may be maintained.

*Judgments reversed, and cases remanded to the Supreme Court of the State for further proceedings.*

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## LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* LOUISVILLE.

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

No. 261. Argued April 1, 1897. — Decided April 26, 1897.

After the trial court and the Superior Court had disposed of this case without any Federal question having been raised, the railroad company moved to set the judgment aside and transfer the case to the Court of Appeals on the ground that the statutes, as construed by the state court in its opinion, were invalid and in violation of the Constitution. This motion being denied an appeal was granted to the Court of Appeals where it was claimed in argument that the state statute as construed impaired the obligation created by the charter of the company, and denied the equal protection of the laws, in contravention of the Fourteenth Amendment. *Held*, that the record did not show that a Federal question had been raised below in time and in a way to give this court jurisdiction.

This was a case instituted in the Louisville Chancery Court by the Louisville and Nashville Railroad Company against the city of Louisville by the filing of an agreed case under the following provisions of the Civil Code of Practice of the State of Kentucky:

"Sec. 637. Parties to a question which might be the subject of a civil action may, without action, state the question and the facts upon which it depends, and present a submission thereof to any court which would have jurisdiction, if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good

faith, to determine the rights of the parties. The court shall, thereupon, hear and determine the case, and render judgment as if an action were pending.

"SEC. 638. The case, the submission and the judgment shall constitute the record.

"SEC. 639. The judgment shall be with costs, and may be enforced, and shall be subject to reversal, in the same manner as if it had been rendered in an action, unless otherwise provided in the submission."

The agreed case commenced as follows: "The Louisville and Nashville Railroad Company and the city of Louisville hereby state to the court the facts hereinafter presented and submit to the court for decision the question hereinafter stated." Then followed a statement of facts, and the stipulation thus proceeded:

"Upon the foregoing facts, was the Louisville and Nashville Railroad Company entitled to a discount — and, if so, then to what discount — upon the tax bills mentioned herein on February 4, 1892, when it offered to pay said bills less a discount, or on February 6, 1892, when it paid the amount of said bills under protest?

"If the court shall be of the opinion that the railroad company at the time of the said tender or payment was entitled to a discount upon the amount of said tax bills, then judgment may be entered for the amount of such discount, with interest from February 6, 1892, until paid, in favor of the Louisville and Nashville Railroad Company against the city of Louisville for the amount of such discount and the costs of this proceeding; but if the court shall be of the opinion that said railroad company was not entitled to any discount on said bills on said day of tender or payment, then judgment may be entered dismissing the case and giving judgment for costs of this proceeding in favor of the city of Louisville against the Louisville and Nashville Railroad Company. The right of appeal from the judgment of the Louisville Chancery Court is not waived."

The case was heard, and the chancellor entered the following judgment:

Statement of the Case.

"This agreed case having been submitted in chief, and the court being sufficiently advised, delivered a written opinion, which is now filed, and in accordance therewith it is considered by the court that plaintiff, the Louisville and Nashville Railroad Company, had no right to any discount on its tax bill when it paid or tendered payment of same, as shown in said agreed case, and that this said action be, and it is therefore, dismissed, and that defendant recover of plaintiff its costs herein expended."

The plaintiff excepted and carried the case by appeal to the Superior Court of Kentucky and the judgment of the chancellor was affirmed.

Opinions were delivered by the chancellor and by the Superior Court.

After the judgment of affirmance the railroad company "moved the court to set aside the submission and judgment and transfer this case to the Court of Appeals or to grant an appeal to the Court of Appeals"; on these grounds:

"This day came appellant, by counsel, and stated to the court that it believes the statutes involved in this action, as to the taxation of railroad property in the city of Louisville, as construed by the court in its opinion lately delivered herein, to be invalid and to be in violation of the constitutions of the State of Kentucky and of the United States, and that it desired to be heard on the question of the validity of said statutes, and thereupon moved the court to set aside its judgment and the order of submission herein and to transfer this action to the Court of Appeals; and came appellant further, by counsel, and moved the court to grant it an appeal from its judgment herein to the Court of Appeals in the event the court should overrule the preceding motions above set forth."

The Superior Court overruled the motion to set aside the judgment and submission, and transfer the cause, but granted the appeal to the Court of Appeals, which, being duly prosecuted, the judgment was again affirmed. 29 S. W. Rep. 865.

A writ of error was allowed from this court by the Chief Justice of the Court of Appeals.

The assignment of errors in the brief of counsel is as follows:

"1st. That the statutes involved, according to the construction put upon them by the Court of Appeals of Kentucky, do, in substance and effect, impose a different rate of taxation upon the property of the Louisville and Nashville Railroad Company from that which is imposed upon other property, either real or personal, in the city of Louisville; and,

"2d. That this violates the obligation of the contract contained in the charter of the Louisville and Nashville Railroad Company, whereby it was agreed that its property should not be assessed higher than other real property; thus conflicting with the provision of the Constitution of the United States which forbids any State to pass a law impairing the obligation of a contract; and,

"3d. That, independently of the question of contract, these statutes, as construed by the Court of Appeals, impose a different rate of taxation upon the property of railroad companies from that which is imposed upon property of the same kind, in the same place and under the same circumstances, when owned by any other class of persons than railroad companies; and that, therefore, it comes within the inhibition of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws."

*Mr. Helm Bruce* for plaintiff in error. *Mr. James P. Helm* and *Mr. H. W. Bruce* were on his brief.

*Mr. Henry L. Stone* for defendant in error.

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

By the terms of the agreed case the only questions submitted to the Chancery Court of Louisville were whether the railroad company was entitled to a discount on certain tax bills, and if so, what discount; and it was stipulated that if the court should be of opinion that the company was not entitled to any

discount, then judgment should be entered dismissing the case with costs. The chancellor in his opinion pointed out that the act of the general assembly of Kentucky, entitled "An act to revise and amend the tax laws of the city of Louisville," approved May 12, 1884, provided for a discount of three per cent on taxes paid in January; of two per cent on those paid in February; and of one per cent on those paid in March, but that the assessments for taxation, to which the act related, did not in terms include railroad property, the assessment of which was provided for by chapter 92 of the General Statutes of Kentucky. This chapter provided for the assessment of railroad property by state authority for state, county, city and town purposes; for enforcement of payment by penalties on its chief officer; and required payment by a named day, but it nowhere in terms or by implication allowed any deduction for prompt payment of state, county, city or town taxes; and it forbade assessments or collections of such taxes in any mode other than that therein designated.

The chancellor held that such a deduction was *pro tanto* in the nature of an exemption, and that exemptions were not allowable except where express authority affirmatively appeared therefor, and that no such authority appeared here; and he then said: "The ground of inequality in taxation, so much relied on by plaintiff's counsel, is not entitled to much weight, for the principle, if such there be, is misapplied. Taxes are imposed in this State on corporations by classes. No member of a class can complain if he is treated like all in the same class. If it be wrong not to allow deductions to banks, railroads, gas companies, etc., for prompt payment of taxes, then the legislature can remedy the wrong. In the present condition of the statute the courts cannot."

And the court being of opinion that the company was not entitled to any discount, entered judgment strictly in accordance with the stipulation of the parties. There was no intimation in the agreed case that any constitutional question was submitted for determination, and no such question was propounded. The matter was one of construction merely.

The Superior Court had no appellate jurisdiction of an

appeal involving the validity of a statute (Kentucky Codes, 1895, p. 472), as was conceded at the bar, and yet plaintiff in error prosecuted its appeal to that court. After the Superior Court had gone to judgment, the railroad company made its motion to set the judgment aside and transfer the case to the Court of Appeals on the ground that it believed the statutes, "as construed by the court in its opinion lately delivered herein, to be invalid and to be in violation of the constitutions of the State of Kentucky and of the United States." Even then, the company did not indicate in any way in what particulars the statutes were in contravention of either of those instruments. This motion was overruled, and an appeal allowed to the Court of Appeals. The Court of Appeals arrived at the same conclusion as the other courts, and rejected the claim for a discount as not permitted by the statute. The court closed its opinion thus:

"The city is not allowed to fix any value on appellant's property. The penalty on its failing to pay taxes to the city is not made to apply to the appellant, and it is plain, we think, that the charter provision or the law in regard to the assessment, collection and payment of the taxes of the citizens within the municipality does not include railroads or such corporate property, and equally apparent that the legislature, in regard to these corporations, can enact a different system or mode of assessment and collection from that under which taxes are ordinarily collected; and the discount allowed the citizen to encourage the prompt payment of taxes is not a discrimination in his favor as against appellant, nor is it open to constitutional objection. *Kentucky Railroad Tax cases*, 115 U. S. 321."

The record does not disclose that any Federal question was specifically raised in the Court of Appeals, and the sole reference in the opinion to constitutional objection is in the language above quoted. Doubtless that reference was by way of answer to the contention that the statute might fail altogether unless construed to include railroad companies.

In *Powell* v. *Brunswick County*, 150 U. S. 433, 439, we said: "As many times reiterated, it is essential to the maintenance

of jurisdiction upon the ground of erroneous decision as to the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the Constitution and that the decision sustained its validity, or that the right was specially set up or claimed and denied. If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered. A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a Federal question by its decision."

And see *Oxley Stave Co.* v. *Butler County*, *ante*, 648, in which this subject is largely considered and the authorities cited.

The agreed case presented no issue as to the validity of the statute, but simply the question of its construction. The company did not sue to recover back the taxes it had paid on the ground of the invalidity of the laws under which they were levied, but to recover the discount allowed to taxpayers by a particular statute. The Chancery Court was shut up by the agreement to determine whether the company was or was not entitled to that discount. The construction by the Chancery Court was concurred in by the Superior Court and by the Court of Appeals, and the judgment of the Chancery Court, rendered as stipulated, was affirmed. It is now said that as the proper construction of the statute was definitively settled by the Court of Appeals, this court can take jurisdiction at that stage of the case, because as thus construed the statute impaired the obligation of a contract created by the charter of the company (which was not mentioned in the agreed

case), and because it denied the equal protection of the laws in contravention of the Fourteenth Amendment, although no definite issue in either respect was tendered throughout the proceedings unless the mention of the Constitution of the United States on the motion to set aside may be so regarded. We do not think that was sufficient.

*Writ of error dismissed.*

# DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

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No. 149. PATTON *v.* TEXAS & PACIFIC RAILWAY CO. Error to the United States Circuit Court of Appeals for the Fifth Circuit. Argued January 13, 1897. Decided March 8, 1897. *Per Curiam.* Dismissed for want of jurisdiction because the judgment is not final. *Mr. Millard Patterson* and *Mr. Leigh Clark* for plaintiff in error. *Mr. D. D. Duncan*, *Mr. John F. Dillon* and *Mr. W. S. Pierce* for defendant in error.

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No. 626. SMITH, SECRETARY, &c. *v.* RAYNOLDS. Appeal from the Court of Appeals of the District of Columbia. Argued March 10, 1897. Decided March 15, 1897. *Per Curiam.* Decree reversed on the authority of *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, each party to pay their own costs in this court, and cause remanded to the said Court of Appeals with directions to reverse the decree of the Supreme Court of the District of Columbia and remand the cause to that court with directions to dismiss the bill, with costs, for want of proper parties. *Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* for appellants. *Mr. Alphonso Hart* for appellee.

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No. 345. BAKER *v.* BRICKELL. Error to the Supreme Court of the State of California. Submitted March 8, 1897. Decided March 15, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *San Francisco* v. *Itsell*, 133 U. S. 65; *Bacon* v. *Texas*, 163 U. S. 207, and cases cited. *Mr. S. W. Holladay* and *Mr. E. Burke Holladay* for motion to dismiss. *Mr. Charles N. Fox* opposing.

Decisions announced without Opinions.

No. 346. WHEELAN, ADMINISTRATOR, v. BRICKELL. Error to the Supreme Court of the State of California. Submitted March 8, 1897. Decided March 15, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *California* v. *Holladay*, 159 U. S. 415; *Bacon* v. *Texas*, 163 U. S. 207, and cases cited. *Mr. S. W. Holladay* and *Mr. E. Burke Holladay* for motion to dismiss. *Mr. Charles N. Fox* opposing.

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No. 681. BROOKLYN & NEW YORK FERRY CO. *v.* MACMAHON, ADMINISTRATRIX. Error to the Supreme Court of the State of New York. Submitted March 8, 1897. Decided March 15, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Missouri* v. *Andriano*, 138 U. S. 496. *Mr. Charles J. Patterson* for motions to dismiss or affirm. *Mr. James Troy* and *Mr. George Bethune Adams* opposing.

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No. 537. GOODSELL *v.* DELTA & PINE LAND CO. Error to the Supreme Court of the State of Mississippi. Submitted March 15, 1897. Decided March 22, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Bacon* v. *Texas*, 163 U. S. 207; *Railway Co.* v. *Chicago*, 164 U. S. 454; *Missouri* v. *Andriano*, 138 U. S. 496; *Railroad Co.* v. *Plainview*, 143 U. S. 371; *Evers* v. *Watson*, 156 U. S. 527, and other cases. *Mr. Frank Johnston* for motion to dismiss. *Mr. T. B. Catron* opposing.

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No. 228. AMERICAN HARROW CO. *v.* SHAFFER, COMMISSIONER, &c. Appeal from the Circuit Court of the United States for the Western District of Virginia. Argued March 23 and 24, 1897. Decided March 29, 1897. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. F. S. Blair* for appellant. *Mr. R. Taylor Scott* for appellees.

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No. 245. PARSONS *v.* STATE OF MISSOURI. Error to the Supreme Court of the State of Missouri. Submitted March 29,

1897. Decided April 5, 1897. *Per Curiam.* Judgment affirmed with costs on the authority of *Emert* v. *Missouri*, 156 U. S. 296. *Mr. John E. Craig* for plaintiff in error. No brief filed for defendant in error.

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No. 672. Omaha & Council Bluffs Railway & Bridge Co. of Nebraska *v.* Smith. Error to the Supreme Court of the State of Iowa. Submitted April 5, 1897. Decided April 12, 1897. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Winfield S. Strawn* for motion to dismiss. *Mr. John N. Baldwin* opposing.

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No. 720. Murphy *v.* Colorado Paving Co. Appeal from the Circuit Court of the United States for the District of Colorado. Submitted April 12, 1897. Decided April 19, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Smith* v. *McKay*, 161 U. S. 355; *Carey* v. *Railway Co.*, 161 U. S. 115 (see *Colorado Paving Co.* v. *Murphy*, 78 Fed. Rep. 28). *Mr. C. S. Thomas* and *Mr. W. H. Bryant* for appellant. *Mr. James H. Brown* for appellee.

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No. 613. Agricultural Ditch Co. *v.* Farmers' Independent Ditch Co. Error to the Supreme Court of the State of Colorado. Submitted April 26, 1897. Decided April 30, 1897. *Per Curiam.* Dismissed for the want of jurisdiction for the want of a final judgment. *Mr. C. S. Thomas* and *Mr. W. H. Bryant* for motion to dismiss. No brief filed in opposition.

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## *Decisions on Petitions for Writs of Certiorari.*

No. 696. Illinois Central Railroad Co. *v.* Davidson. Seventh Circuit. Denied March 8, 1897. *Mr. James Fentress* and *Mr. William E. Mason* for petitioner. *Mr. Edward Ryan Woodle* opposing.

Decisions announced without Opinions.

No. 703. RYAN *v.* STAPLES. Eighth Circuit. Denied March 8, 1897. *Mr. C. S. Thomas* and *Mr. W. H. Bryant* for petitioner. *Mr. Hugh Butler* opposing.

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No. 698. ST. LOUIS CAR COUPLER CO. *v.* SHICKLE, HARRISON & HOWARD IRON CO. Eighth Circuit. Denied March 8, 1897. *Mr. Frederic D. McKenney* and *Mr. Chester H. Krum* for petitioner. *Mr. George H. Knight* and *Mr. Melville Church* opposing.

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No. 724. UNITED STATES *v.* BUFFALO NATURAL GAS FUEL CO. Second Circuit. Granted March 15, 1897. *Mr. Attorney General*, *Mr. Solicitor General* and *Mr. Assistant Attorney General Whitney* for petitioners. *Mr. Herbert P. Bissell* opposing.

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No. 728. MISSOURI, KANSAS & TEXAS TRUST CO. *v.* KRUMSEIG. Eighth Circuit. Granted March 15, 1897. *Mr. William C. White* for petitioner. *Mr. Page Morris* opposing.

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Nos. 747 and 748. GREEN *v.* FARMERS' LOAN & TRUST CO. Fifth Circuit. Denied March 22, 1897. *Mr. Charles W. Ogden* for petitioner.

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No. 750. REPUBLICAN MINING CO. *v.* TYLER MINING CO. Ninth Circuit. Denied March 29, 1897. *Mr. W. B. Heyburn* for petitioner.

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No. 755. RUSS *v.* TELFENER. Fifth Circuit. Denied March 29, 1897. *Mr. Joseph Wheeler* and *Mr. Clarence H. Miller* for petitioner. *Mr. J. L. Peeler* opposing.

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No. 754. VON SCHMIDT *v.* BOWERS. Ninth Circuit. Denied April 5, 1897. *Mr. M. A. Wheaton* and *Mr. F. J. Kierce* for petitioner. *Mr. John H. Miller* opposing.

Decisions announced without Opinions.

No. 763. CLAFLIN, AS EXECUTOR, *v.* TUTTLE, AS TRUSTEE. Second Circuit. Denied April 12, 1897. *Mr. Edmund Wetmore* and *Mr. C. W. Gould* for petitioner. *Mr. B. F. Lee* opposing.

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No. 461. AMERICAN BELL TELEPHONE CO. *v.* WESTERN UNION TELEGRAPH CO. First Circuit. Denied April 12, 1897. *Mr. John F. Dillon* and *Mr. J. H. Benton, Jr.*, for petitioner. *Mr. James J. Storrow* opposing.

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No. 667. BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD *v.* TOLEDO, DELPHOS & BURLINGTON RAILROAD CO. Seventh Circuit. Denied April 12, 1897. *Mr. John C. Coombs* and *Mr. Charles H. Hanson* for petitioners. *Mr. Clarence Brown* opposing.

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No. 769. DEIMEL *v.* STROHEIM. Seventh Circuit. Denied April 12, 1897. *Mr. Hiram T. Gilbert* for petitioner. *Mr. Levy Mayer* opposing.

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No. 749. CHAPMAN *v.* UNITED STATES. Court of Appeals of District of Columbia. Denied April 19, 1897. *Mr. George F. Edmunds*, *Mr. A. J. Dittenhoefer* and *Mr. J. M. Wilson* for petitioner.

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No. 766. MUTUAL LIFE INSURANCE CO. OF NEW YORK *v.* PHINNEY, EXECUTRIX. Ninth Circuit. Granted April 19, 1897. *Mr. Edward Lyman Short*, *Mr. Robert Sewell* and *Mr. John B. Allen* for petitioner. *Mr. S. Warburton* and *Mr. A. F. Burleigh* opposing.

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Nos. 725 and 726. NATIONAL FOUNDRY & PIPE WORKS, LIMITED *v.* ANDREWS, and SAME *v.* CITY OF OCONTO. Seventh Circuit. Denied April 26, 1897. *Mr. George H. Noyes* for petitioner. *Mr. W. H. Webster* opposing.

Decisions announced without Opinions.

No. 780. Newark Electric Light & Power Co. *v.* Garden, Administrator. Third Circuit. Denied April 26, 1897. *Mr. Mahlon Pitney* and *Mr. John O. H. Pitney* for petitioner. *Mr. Henry M. Garden* opposing.

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No. 764. Anglo-Californian Bank *v.* Secretary of the Treasury. Ninth Circuit. Denied April 30, 1897. *Mr. J. F. Evans* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

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No. 787. Steamtug "Titan" *v.* Legg et al., Administrators. Second Circuit. Denied April 30, 1897. *Mr. Henry W. Goodrich* and *Mr. John A. Deady* for petitioner. *Mr. Henry Galbraith Ward* opposing.

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No. 790. National Machine Co. *v.* Wheeler & Wilson Manufacturing Co. Second Circuit. Denied April 30, 1897. *Mr. Edwin H. Brown* for petitioner. *Mr. Livingston Gifford* opposing.

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No. 793. Einstein, Wolff & Co. *v.* United States. Second Circuit. Denied April 30, 1897. *Mr. Charles Curie, Mr. W. Wickham Smith* and *Mr. David Ives Mackie* for petitioners.

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No. 794. United States *v.* Roessler & Hasslacher Chemical Co. Second Circuit. Granted April 30, 1897. *Mr. Attorney General, Mr. Solicitor General* and *Mr. Assistant Attorney General Whitney* for petitioners. *Mr. Albert Comstock* opposing.

# INDEX.

## CASES DISTINGUISHED.

The case of *Burgess* v. *Seligman*, 107 U. S. 20, distinguished from this case. *Forsyth* v. *Hammond*, 506.

## CASES QUESTIONED.

*Runkle* v. *United States*, 122 U. S. 543, again questioned, as it has not been approved in subsequent decisions. *In re Chapman*, 661.

## CERTIORARI.

1. So long as the transcript of the record in the Circuit Court is in the Circuit Court of Appeals, the fact that a mandate from it has gone down to the Circuit Court, affirming its decree, does not affect the right of this court to issue a writ of certiorari to the Court of Appeals, to bring the record here. *The Conqueror*, 110.
2. An application for a writ of certiorari to bring here for review a record and judgment entered after the final adjournment of this court, made at the next term and within a year after the original decree, is made within time. *Ib.*

*See* JURISDICTION, B, 2, 7, 8, 9.

## CLAIMS AGAINST THE UNITED STATES.

*See* INTERNAL REVENUE TAXES; SIGNAL SERVICE.

## COMMON CARRIER.

*See* RAILROAD, 8.

## CONSTITUTIONAL LAW.

1. After a person had been convicted in a state court of murder, he sued out a writ of error from the Supreme Court of the State. On the day assigned for its hearing it appeared from affidavits that the accused had escaped from jail, and was at that time a fugitive from justice. The court thereupon ordered the writ of error dismissed, unless he should within sixty days surrender himself or be recaptured, and when that time passed without either happening, the writ was dismissed. He was afterwards recaptured, and resentenced to death,

## CONTRACT.



## CONTRACTS IN RESTRAINT OF TRADE AND COMMERCE.



## CONTUMACY.



## CORPORATION.



## COURT AND JURY.



## CRIMINAL LAW.



## CUSTOMS DUTIES.

## EJECTMENT.



## EQUITY.



## ESTOPPEL.



## EVIDENCE.

## INJUNCTION.

To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. *In re Lennon*, 548.

## INSURERS.

*See* INTERNAL REVENUE TAXES.

## INTERNAL REVENUE TAXES.

The tobacco company purchased from an internal revenue officer of the United States revenue stamps to the amount of $4100.10, to be put upon its tobacco as manufactured. April 2, 1893, its factory in New York and all the contents were destroyed by fire. Among the contents were the stamps so purchased. Of these, stamps to the value of $1356.63 had not been used, and stamps to the value of $2743.47 had been put upon packages of tobacco which were still in the factory, unsold. The property was insured. In settling with the insurers the latter paid the tobacco company the value of the destroyed stamps, and it was understood that the insurers were entitled to whatever might be received or recovered from the Government under the provisions of the statute amending the laws relating to internal revenue. Act of March 1, 1879, c. 125. The company under the provisions of that act applied to the Treasury Department for the return of the destroyed stamps. The rules of the department required the applicant for such repayment to make oath that he had not theretofore presented a claim for the refunding of the amount asked for, and that its amount or any part thereof had not been received by him. Instead thereof the company filed an oath that the amount had not been claimed of the Government, and that no portion of it had been received from the Government. The department having refused payment, the company thereupon brought this action in the Court of Claims. *Held*, (1) That the action was properly brought in the name of the insured for the use of the insurers; (2) That payment by the insurer to the company did not bar the right of the latter to recover from the United States; (3) That by recovering from the United States the company would become the trustee of the insurers, who were its equitable assignees; (4) That upon the facts found by the Court of Claims the action could be maintained, as the payment by the insurers constituted no bar; (5) That there was a substantial compliance with the Treasury regulation concerning the oath when the oath was filed on the part of the company of the fact of the destruction, and that no claim for refunding had been presented to the Government, and no portion of the claim had been paid by it;

(6) That the company had an insurable interest in the stamps destroyed; (7) That it was too late to set up for the first time in this court that the Government had the election to reimburse the claimant by giving stamps instead of by payment in cash. *United States* v. *American Tobacco Company*, 468.

## INTERSTATE COMMERCE.

1. The provisions respecting contracts, combinations and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property. *United States* v. *Trans-Missouri Freight Association*, 290.
2. The act of February 4, 1887, c. 104, "to regulate commerce," is not inconsistent with the act of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit. *Ib.*
3. The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable. *Ib.*
4. In order to maintain this suit the Government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect. *Ib.*
5. This agreement, though legal when made, became illegal on the passage of the act of July 2, 1890, and acts done under it after that statute became operative were done in violation of it. *Ib.*
6. The fourth section of the act invests the Government with full power and authority to bring such a suit as this; and, if the facts alleged are proved, an injunction should issue. *Ib.*

*See* JURISDICTION, C, 5;
TAX AND TAXATION, 1, 8.

## JURISDICTION.

### A. GENERALLY.

1. When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the courts of the United States in determining the

granted to the company, did not substantially change the terms of the contract (if there was one), between the city and the railroad as expressed in the original grant and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of the street by the railroad company. *Baltimore* v. *Baltimore Trust & Guarantee Co.*, 673.

2. An existing system of water supply in a municipality which is the property of private individuals and is operated under a contract with the municipal corporation for furnishing it with a portion of its needed supply of water under rates fixed by the contract, is private property which may be acquired by the public, in the exercise of the power of eminent domain, on the payment of a just compensation, including compensation for the termination of the contract. *Long Island Water Supply Co.* v. *Brooklyn*, 685.
3. In condemnation proceedings for that purpose, the assessment of damages may be made by commissioners where the statutes so provide, and there is no denial of due process of law in making their findings final as to the facts, leaving open to the courts the inquiry whether there was any erroneous basis adopted by the commissioners in their appraisal, or other errors in their proceedings. *Ib.*
4. There was nothing in the statute under which the Long Island Water Supply Company was organized, nor in its contract with the town of New Lots for the supply of water, nor in the act of annexation to Brooklyn, which gave to that company rights exclusive and beyond the reach of such legislative action. *Ib.*

*See* CONSTITUTIONAL LAW, 13.

## NAVIGABLE WATERS.

*See* RIPARIAN OWNERSHIP.

## NEUTRALITY.

1. Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties: but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency; and, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention. *The Three Friends*, 1.
2. The word "people," as used in Rev. Stat. § 5283, forbidding the fitting out or arming of vessels with intent that they shall be employed in the service of any foreign people, or to cruise or commit hostilities against

## PROHIBITION, WRIT OF.



## PUBLIC LAND.

## RAILROAD.

3. The railroad having laid its tracks within the limits of the city must be deemed to have done so subject to the condition — not, it is true, expressed, but necessarily implied — that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute. *Ib.*
4. When a city seeks by condemnation proceedings to open a street across the tracks of a railroad within its corporate limits, it is not bound to obtain and pay for the fee in the land over which the street is opened, leaving untouched the right of the company to cross the street with its tracks, nor is it bound to pay the expenses that will be incurred by the railroad company in the way of constructing gates, placing flagmen, etc., caused by the opening of the street across its tracks. *Ib.*
5. All property, whether owned by private persons or by corporations, is held subject to the power of the State to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people. *Ib.*
6. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing and maintaining flagmen, in order that its road may be safely operated — if all that should be required — necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State, and must be borne by the company. *Ib.*
7. The plaintiff in error was in the employment of the defendant in error as a common laborer. While on a hand car on the road, proceeding to his place of work, he was run into by a train, and seriously injured. It was claimed that the collision was caused by carelessness and negligence on the part of other employés of the company, roadmaster, foreman of the gang of laborers, conductor, etc. *Held*, that the coemployés whose negligence was alleged to have caused the injury were fellow-servants of the plaintiff, and hence that the defendant was not liable for the injuries caused by that negligence. *Martin* v. *Atchison, Topeka & Santa Fé Railroad*, 399.
8. A car upon a street horse railroad in Washington, arriving at a point where the street crossed a steam railroad at grade, found the gate bars lowered. A train on the steam railroad was seen to be approaching. Before it arrived at the crossing the bars were raised. The driver of the horse car attempted to cross, notwithstanding the approaching train. The gate bars were lowered again and the horse car was caught upon the track. It was filled with passengers, among

whom was Mrs. H., one of the defendants in error, sitting upon an open outer seat. The frightened passengers rushed precipitately from the car. Their doing this caused Mrs. H. to be thrown from the car, whereby she was seriously injured. The railroad train was stopped just before reaching the horse car. The bars were again raised, and the horse car went off the railroad track uninjured. Mrs. H. and her husband sued both railroad companies to recover damages; alleging that she was pushed and shoved from her seat and thrown violently to the ground; claiming that the steam railroad company was liable by reason of the negligence of its servant in managing the gates, and that the horse railroad company was liable by reason of the negligence of its driver in not waiting till the train should have passed; and demanding a recovery of thirty thousand dollars as damages. The court charged the jury that if they should find from all the evidence that the plaintiffs were entitled to recover, they might award damages within the limits claimed in the declaration. The jury returned a verdict for twelve thousand dollars. The court thought this to be excessive. With the plaintiffs' consent it was reduced to six thousand dollars, and judgment entered for that amount. *Held*, (1) That the driver of the horse car was guilty of negligence in attempting to cross the track of the steam railroad under the circumstances; (2) That there was evidence to warrant the jury to find that the gateman was the servant of the steam railroad company, and that that company was responsible for the results of his negligence; (3) That as there was no exception to the charge respecting damages, no question about it was before the court; (4) That whether Mrs. H. was injured by falling from the car or from being pushed from it was immaterial, in view of the causes of the injury. *Washington & Georgetown Railroad* v. *Hickey*, 521.

9. The Citizens' Street Railway Company of Indianapolis was organized in 1864 under an act of the legislature of Indiana of 1861, authorizing such a company to be "a body politic and corporation in perpetuity." January 18, 1864, the common council of that city passed an ordinance authorizing the company to lay tracks upon designated streets, and providing that "the right to operate said railway shall extend to the full time of thirty years," during which time the city authorities were not to extend to other companies privileges which would impair or destroy the rights so granted. In April, 1880, the common council amended the original grant "so as to read thirty-seven years where the same now reads thirty years." The company, desiring to issue bonds to run for a longer period than the thirty years, had, for that purpose, petitioned the common council for an extension to forty-five years. The city government was willing to extend to thirty-seven years, and this was accepted by the company as a compromise. On the 23d of April, 1888, the road and franchises were sold and conveyed to the Citizens' Street Railroad Company, which sale and trans-

## STATUTE.

### A. Construction of Statutes.

## TAX AND TAXATION.

1. The Henderson Bridge Company was a corporation created by the Commonwealth of Kentucky for the purpose of erecting and operating a railroad bridge, with its approaches, over the Ohio River between the city of Henderson, in Kentucky, and the Indiana shore. It owned 9.46 miles of railroad and .65 of a mile of siding, making its railroad connections in Indiana, which property was assessed for taxation in that State, at $627,660. The length of the bridge in the two States, measured by feet, was one third in Indiana and two thirds in Kentucky. The tangible property of the company was assessed in Henderson County, Kentucky, at $649,735.54. From the evidence before them, the Board of Valuation and Assessment placed the value of the company's entire property at $2,900,000 and deducted therefrom $627,660 for the tangible property assessed in Indiana, which left